DECISIONS

OF THE DEPARTMENT OF THE INTERIOR AND THE GENERAL LAND OFFICE

IN

CASES RELATING TO THE PUBLIC LANDS

EDITED BY S. V. PROUDFIT AND GEORGE J. HESSELMAN

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DECISIONS

RELATING TO

THE PUBLIC LANDS.

SALINE LANDS—SECTION 3, ACT OF JUNE 21, 1898.

TERRITORY OF NEW MEXICO.

The grant to the Territory of New Mexico, for the benefit of its university, by section 3 of the act of June 21, 1898, of "all saline lands in said Territory," includes only such lands as contain common salt (sodium chloride), in its various forms of existence or deposit, and in commercially valuable quantities.

Acting Secretary Ryan to the Commissioner of the General Land Office, July 10, 1906.

(F. L. C.) (F. H. B.)

September 9, 1902, the Territory of New Mexico filed list (No. 3, University) of selections, under section 3 of the act of June 21, 1898 (30 Stat., 484), of certain lands therein described, embracing 79,493.61 acres, and which, in an appended affidavit by the selecting agent for the Territory, were stated to be "essentially saline" lands.

Thereafter, including an additional showing on behalf of the Territory, a joint examination in the field and report thereof by two agents of your office, and a protest by the Milner Mines Development Company as claimant of certain of the selected lands (by it alleged to be chiefly valuable for deposits of gypsum) under divers placer locations, such proceedings were had as resulted in a hearing, June 13 and 14, 1904, before the United States Court Commissioner for the third judicial district, New Mexico, at which appearance was made and testimony submitted on behalf of the Territory and the Government, certain of the testimony apparently having been submitted on behalf of the protestant company, by leave of your office.

Shortly thereafter the President of the Board of Regents of the University of New Mexico, appearing as a representative of the Territory, filed in the local office, Las Cruces, an application for leave, and for sixty days further time within which, to present additional evidence on behalf of the Territory, the application being accompanied by his affidavit in which he averred, in substance and effect,

that the first information the Board had in regard to the lands in question "was something more than four years ago," from the then President of the University, "who made an extended and careful examination of these lands and others" and upon whose representations the selections were made, at the expense of the Board; that affiant had expected to have made, by the former in company with the present President of the University, a further examination of the lands in question and submit the result at the hearing, but was disappointed by reason of the inability of the former President to visit the land at all and the illness of the present President, and the former had no record of the details of his previous examination; that in affiant's opinion the interests of the Territory and of the University required, and it was the intention to have immediately made, a full and detailed examination, similar to the former, which, including field notes and laboratory work, he was informed and believed would consume a number of weeks; and that he was unable so to foresee the results of the proposed examination as to be able to state the facts to which the examiners would testify, but confidently expected to show by their evidence, in great detail, that all the lands in question are saline in character within the meaning of the granting act. The application and affidavit were forwarded by the local officers to your office for instructions. Your office denied the application, August 26, 1904, stating that it did not appear to be based upon the ground of newly-discovered evidence, but that the proposed evidence would be merely cumulative, and that the remedy of a party who is not ready for trial is by way of a motion for continuance, which was not made in this case.

October 13, 1904, the local officers, upon a brief review of the earlier legislation and citing the Century Dictionary definitions of "salt" and "saline" and the Department's expression in the case of The State of Alabama (21 L. D., 320) commencing at the foot of page 321, held that by the term "saline lands," employed in the act of 1898, is meant those lands chiefly valuable for deposits of chloride of sodium, or common salt, and found in substance that the evidence adduced at the hearing failed to establish the existence in the selected lands of deposits of such salt in sufficient quantities to render them chiefly valuable therefor, but that the evidence established the existence of large deposits of gypsum, with chloride of sodium in conjunction; and they recommended that the selection list be canceled.

The Territory appealed to your office, where by decision of January 13, 1905, the findings and conclusions of the local officers were sustained. In the course of the decision your office reviewed at some length the various acts of Congress containing provisions with respect to "salt springs" and "salines" and, in that connection, the

departmental decisions in which the restrictions imposed in regard to those substances are considered, in contrast with those decisions which hold lands chiefly valuable for gypsum, alkaline deposits, carbonates of sodium, and kindred substances subject to appropriation under the mining laws. The selection list was held for cancellation.

The Territory has appealed to the Department, and contends, in substance, that your office erred in holding that the grant of "saline lands" by the act of 1898 includes only lands upon which chloride of sodium is found and which are chiefly valuable therefor, and in refusing to grant the application of the Territory for an opportunity to present further evidence as set out in the above mentioned affidavit.

As first above stated, the selections in question were made pursuant to the third section of the act of 1898, whereby there was granted to the Territory, for the establishment and benefit of its University, in addition to certain other lands—

> sixty-five thousand acres of non-mineral, unappropriated and unoccupied public land, to be selected and located, as hereinafter provided, together with all saline lands in said Territory.

"It is to be noted," say counsel for the Territory in their brief accompanying the appeal, "that this phrase, 'saline lands,' makes its first appearance in the legislation of Congress in the act of 1898, donating lands to the Territory of New Mexico." Urging that "it ought not to be doubted that Congress was legislating in view of the physical conditions existing in New Mexico, where, as is well known, especially to the scientific world, there exist many saline deposits of greatly varied and diversified character, embracing many other kinds than chloride of sodium, some of which can reasonably be expected to have much greater value than common table salt," counsel add:

> The line of argument by which the General Land Office seeks to support its decision as to the meaning of "saline lands" is that earlier acts of Congress referred to "salt springs" in donations to Indiana, Illinois and Alabama, and it is assumed that that earlier language meant only chloride of sodium, and, therefore, when different language is used in the act of 1898, it must be held that that different language means the same thing as the language contained in the earlier acts. We submit that there is no good foundation for this conclusion.

Even if it be conceded, they urge, that those early grants of "salt springs did not include mineral springs containing other salts than chloride of sodium, it does not follow that we should restrict the meaning of so broad a phrase as 'saline lands' to lands containing only chloride of sodium." In this connection counsel cite an expression by the Department in the case of Southwestern Mining Company (14 L. D., 597, 603), "that all mineral springs, salt springs, salt beds and salt rock, are covered by the general term 'salines.'"

The statement by counsel that the phrase "saline lands" makes its first appearance in the act of 1898 is not essentially correct. The act of January 12, 1877 (19 Stat., 221), entitled "An act providing for the sale of saline lands," made it the duty of the register and receiver of each land office to take testimony in reference to such lands within their district as should appear to be "saline in character" and of the Commissioner of the General Land Office to offer for sale by public auction, etc., such lands as he should find, from the testimony so taken, to be "saline and incapable of being purchased under any of the laws of the United States relative to the public domain," with the proviso that those enactments should not apply to any State or Territory which had not had a "grant of salines by act of Congress," nor to any State having "such a grant" which had not been satisfied and whose right of selection thereunder had not expired by efflux of time. In the title, therefore, the identical phrase appears, and in the body of the act its full equivalent is employed. The proviso plainly discloses that within the contemplation of the act the saline lands thus to be offered for sale were such as should be found to be of the same character as those embraced in the grants theretofore made to certain States and Territories, and was added as a precaution against a total or partial defeat of existing or future grants of that character.

With the exception of the act of March 3, 1829 (4 Stat., 364), which authorized the President "to cause the reserved salt springs and contiguous lands, in the State of Missouri, . . . to be exposed to sale," the act of 1877 was the first to make provision for the general disposition, and marked the departure from the government's policy of reservation from sale, of lands containing salt springs and deposits. This was fully considered and discussed, and the grants to States of lands containing "salt springs" mentioned in that connection, by the Supreme Court in the case of Morton *v.* Nebraska (21 Wall., 660).

Many such grants had been made prior to the passage of the act of 1877. The act of April 30, 1802 (2 Stat., 173), providing for the admission of Ohio to the Union, granted to the State certain designated "salt springs." The acts of April 19, 1816 (3 Stat., 289), providing for the admission of Indiana, and March 2, 1819 (*Id.*, 489), for the admission of Alabama, granted in each case "all salt springs within the said territory," together with the lands "deemed necessary and proper for working the said salt springs." By the act of April 18, 1818 (*Id.*, 428), under which Illinois was admitted, "all salt springs within such State" were granted for its use. And under the acts providing for the admission of Missouri (*Id.*, 545), Arkansas (5 Stat., 58), Michigan (*Id.*, 59), Iowa and Florida (*Id.*, 789),

Wisconsin (9 Stat., 56), Minnesota (11 Stat., 166), Kansas (*Id.*, 269), Oregon (*Id.*, 383), Nebraska (13 Stat., 47), and Colorado (18 Stat., 474), each of those States received a grant of "all salt springs, not exceeding twelve in number, with six sections" of adjoining or contiguous land, to be selected within prescribed periods, the acts containing provisos "that no salt spring," or "no salt spring or land," wherein private rights had vested should be so granted.

The proviso to the act of 1877 considered, it is plain that the descriptive terms employed in those various acts were used interchangeably. Congress had granted to the States above mentioned all or a particular number of "salt springs," generally including a certain number of sections of adjoining or contiguous lands, and in most cases expressly excepted salt springs, or salt springs and lands, to which individual rights had attached. It can not be maintained that in withholding the provisions of the act of 1877 from any State or Territory which had not had a "grant of salines by act of Congress" and from any State having "such a grant" which had not been satisfied, etc., Congress meant to apply the term "salines" to any other character of substance than that which had been made the subject of those grants.

The nature of the saline substance which, with the lands containing it in whatever form found, was so long reserved from sale is also apparent from the association of terms in the act of May 18, 1796 (1 Stat., 464), which is the basis of the rectangular system of the public-land surveys, whereby every surveyor was required to "note in his field book the true situation of all mines, *salt licks*, *salt springs* and mill seats" which should come to his knowledge, and whereby a certain salt spring on the Sciota river and every other salt spring which should be discovered were reserved for future disposition by the United States, a reservation continued by later acts. A salt lick, as is well known, is a spot where the earth is impregnated with common salt, and is licked by the tongues of animals, wild as well as domestic; and as the licks would thus afford such animals as sought them the salt necessary to their nutrition, so the salt springs would most readily and easily yield the pioneers of the public domain the same commodity, equally essential to their health and comfort. It was these reserved "salt springs" which were granted to the States; and to those grants the proviso to the act of 1877 refers, as above pointed out, by the use of the term "salines." Again, in the act of August 7, 1882 (22 Stat., 349), entitled "An act for the manufacture of salt in the Indian Territory," Congress authorized the Cherokee Nation to lease a definite number of the "salines or salt deposits" within its territory with necessary appended lands and easements "to facilitate the manufacture of salt."

The convertible use of the terms was recognized and employed by the court in Morton *v.* Nebraska, *supra*, it being said in the course of the opinion in that case (p. 674):

> The salines in this case were not hidden as mines often are, but were so incrusted with salt that they resembled "snow-covered lakes" and were consequently not subject to pre-emption.

The nature and contemplated use of the substance mentioned in the various statutes was thus suggested by the Department in the case of The State of Alabama (21 L. D., 320, 321–2, 323):

> The condition of the country, the lack of means of transportation, and the necessities of the pioneers, constrained Congress to reserve and retain for its own disposal all salt springs and six hundred and forty acres around each spring, for the use and benefit of all the people, in order that salt might be as free as air and water, as far as possible. The policy thus inaugurated was steadfastly maintained, and extended to all the territories successively, in the acts passed for the sale of public lands therein.
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> After January 1, 1837, when steamboats and railroads had increased facilities for transportation, it became unprofitable to make salt by boiling salt water; and the salt springs of Alabama were not worked, and apparently were regarded of little value.

At the time of the passage of the act of 1877 the general mining law (May 10, 1872) had been in force nearly five years, and, notwithstanding that common salt belongs to the mineral kingdom, Congress thus made special provision for the sale of lands which were "saline in character." In the case of Salt Bluff Placer (7 L. D., 549) the Department held that land chiefly valuable for its salt deposits is not subject to placer entry, but that authority for disposal thereof exists only under the provisions of the act of 1877. After quoting the latter act the Department said (p. 552):

> It would seem from the language of the statute above quoted, that at the time of its enactment, Congress did not consider saline lands as subject to sale and entry, or capable "of being purchased under any of the (then existing) laws of the United States relative to the public domain;" and while the passage of said act is not expressly, it is virtually, a recognition on the part of Congress of the policy of the government theretofore existing, as shown, touching the reservation of saline lands, and manifestly shows a purpose to continue the same.

So, in the case of Southwestern Mining Company, *supra*, the Department held that deposits of rock salt are "saline" and not subject to entry under the mining laws. The case involved only such a deposit, embraced in a lode mining location; and the use of the term "mineral springs," in the expression in that decision referred to by counsel and hereinabove quoted, has not since been considered by the Department as having had reference to anything other than brines.

Since those decisions were rendered Congress passed the act of January 31, 1901 (31 Stat., 745), "extending the mining laws to saline lands," as follows:

> That all unoccupied public lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, are hereby declared to be subject to location and purchase under the provisions of the law relating to placer-mining claims: *Provided*, That the same person shall not locate or enter more than one claim hereunder.

Here again the term "saline lands" is employed in the title as embracing, and in the same sense as, the terms "salt springs" and "deposits of salt in any form," used in the body of the act; and in the body but one substance is mentioned—in the one case, "salt" contained in springs; in the other, not *salts* of every nature, but "salt" deposits in any form.

The only conclusion which the Department is able to draw from the legislation above reviewed, its purposes considered and its related provisions and terms compared, is that Congress had in contemplation throughout merely common salt, or chloride of sodium, in its various forms of existence or deposit; and that only lands containing commercially valuable quantities thereof are available under the grant of "saline lands" to the Territory.

From the evidence submitted at the hearing, which has been carefully examined, the Department is unable to find that any of the selected lands contain valuable quantities of such salt. Aside from the fact that the testimony was not directed to definite subdivisions—whilst it details the percentages of chloride of sodium resulting from analyses of samples taken from portions of the area involved—it conveys no adequate idea as to quantity and utility. The fair inference to be drawn from that testimony is that the lands, or some of them, contain deposits of gypsum of greater extent and value, and as well, perhaps, certain of the chemical salts, and that where chloride of sodium is found it is in conjunction with the other substances.

In denying the application on behalf of the Territory for additional time and for leave to submit further evidence, after the close of the hearing, at which no motion for continuance was presented, your office committed no error. However, since the pending appeal was taken, counsel have filed in the Department, for addition to the record in the case, a detailed report of an examination of the lands involved by the former President of the University, including topographical and geological features, surface indications, analyses of surface samples, and classification accordingly. This has been considered here.

The objections to the additional showing offered by the Territory are twofold. In the first place, the term "saline" is extended to

cover, in the words of the author of the report, " all lands which contain in their soils or in the waters therein the salts of sodium, potassium (including chlorides, carbonates, and sulphates of these, and the other so-called alkaline earths), and the associated gypsum minerals." As has been shown, there is no justification for the inclusion of anything except deposits of common salt under the head of " saline." The second objection is, that the commercial value of the deposits is in no case established. Apparently, the slightest trace of sodium chloride in the soil or water is depended upon as determining the fact that the land which contains it is " saline " in the legal sense of the term. If this extended use were permitted there is hardly a square mile in the United States west of the 100th meridian which could not with some justice be claimed as a " saline."

It would seem desirable that in every case direct evidence should be given, first, that the deposit of rock salt or of water carrying salt in solution exists on the land which is claimed as " saline," and, second, that it should be proven that the bed of rock salt is sufficiently thick and pure, or that the brine is sufficiently rich in salt, to make it of probable commercial value at the present time.

The decision of your office is affirmed.

FOREST RESERVES—ACT OF JUNE 4, 1897—SENATE RESOLUTION OF MARCH 19, 1906.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 5, 1906.

Registers and Receivers, United States Land Offices.

GENTLEMEN: Senate Resolution of March 19, 1906, is as follows:

Resolved, That the Secretary of the Interior be, and he is hereby, directed to furnish to the Senate, on the first Monday in December, nineteen hundred and six, the names of the persons, firms, and corporations who conveyed or relinquished to the Government of the United States lands within the limits of Government forest reserves, and who duly recorded the same in the proper county prior to the act of March third, nineteen hundred and five, and who had prior to said act failed to select other public lands in lieu of the lands so conveyed or relinquished, or who have failed, through no fault of their own, to obtain patents to lands selected by them in lieu of lands so conveyed or relinquished, as provided by the act of June fourth, eighteen hundred and ninety-seven, and who can not on account of said act of March third, nineteen hundred and five, make such selection, and also report the number of acres so conveyed or relinquished.

That in order to procure such information the Secretary of the Interior is hereby authorized and directed to require all such persons, firms, and corporations to file in the Land Department, within a time to be by him designated, such proofs of their conveyance or relinquishment as he may prescribe; and he is further authorized and directed to make such further orders, rules, and regulations as may be necessary to procure the information hereby required.

Pursuant to the provisions of the above resolution all persons, firms, and corporations who conveyed lands to the United States Government situate within the limits of established forest reserves by deeds duly executed, acknowledged, and recorded in the proper county offices prior to March 3, 1905, with a *bona fide* intention of thereafter selecting other public lands in lieu of the land so reconveyed or relinquished under the provisions of the act of June 4, 1897 (30 Stat., 36), and acts amendatory thereof, and who failed to make any selection in satisfaction of the lands by them so relinquished or whose selections under the provisions of the aforesaid act of June 4, 1897, have failed through no fault of the party making such relinquishment, and who by reason of the approval of the act of March 3, 1905, are now prevented from making any selections, are hereby directed to file in the office of the Commissioner of the General Land Office on or before October 1, 1906, an instrument in writing describing the land relinquished to the Government prior to March 3, 1905, and containing representations by the person or corporation who made the relinquishment, that no selection in lieu thereof has been made, or in case any selection was made and the selection has failed without fault of the party making the relinquishment, a reference to the selection or attempted selection, which will enable the Commissioner of the General Land Office to readily identify the same upon the records of his office, and that the land included in the relinquishment has not, since the deed of reliquishment was filed for record, been sold or in anywise encumbered by the person or corporation making the relinquishment to the Government.

This statement should be addressed to the Commissioner of the General Land Office, should be styled and briefed "Statement conformable to Senate Resolution, March 19, 1906," and must be accompanied by the deed of relinquishment to the Government of the United States, executed and recorded prior to March 3, 1905, and an abstract of title duly authenticated showing that at the date the deed of relinquishment was recorded the title to the land was in the person or corporation making the relinquishment. If the deed of relinquishment has been lost or for any reason can not be produced, a copy thereof properly certified by the Recorder of Deeds of the county in which the land is situate will be accepted.

Deeds and abstracts of title will, upon the request of the party filing the same, be returned after they have been examined and noted by the Commissioner of the General Land Office.

The persons, firms, and corporations interested herein are expressly hereby notified and warned that while the statements and accompanying papers herein described may be filed for transmission to the General Land Office, in the local land offices, and that while the data contained in all statements received in the General Land Office

at a time when its incorporation in the report to the Senate provided herein is practicable, will be included in such report, all responsibility for the filing of such statements and accompanying papers in the manner herein provided, rests with them, and that they are hereby directed to meet the requirement herein made at the earliest date possible.

If deeds of relinquishments and accompanying papers as provided herein, are filed in your offices, you will immediately transmit them to the General Land Office with special reference to these instructions.

Post these instructions in your offices, furnish copies thereof to the local postmaster, and county and municipal officers, with the request that they be posted in their offices if convenient. Furnish copies thereof to the local newspapers as news items, and give such other publicity thereto as you may be able without incurring expense.

Very respectfully,

G. F. POLLOCK, *Acting Commissioner.*

Approved, July 5, 1906:

THOS. RYAN, *Acting Secretary.*

NORTHERN PACIFIC GRANT—ADJUSTMENT—ACT OF MAY 17, 1906, EXTENDING ACTS OF JULY 1, 1898, AND MARCH 2, 1901.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 6, 1906.

The act of May 17, 1906 [Public, No. 172], reads as follows:

That the provisions of the act of July first, eighteen hundred and ninety-eight (Thirtieth Statutes, pages five hundred and ninety-seven and six hundred and twenty), which provided for the adjustment by the Land Department of conflicting claims to lands within the limits of the grant to the Northern Pacific Railroad Company, and also the provisions of the act of March second, nineteen hundred and one, entitled "An act for the relief of settlers under the public land laws to lands within the indemnity limits of the grant to the Northern Pacific Railroad Company," be, and they hereby are, extended to include any *bona fide* settlement or entry made subsequent to January first, eighteen hundred and ninety-eight, and prior to May thirty-first, nineteen hundred and five, in accordance with the erroneous decision of the Land Department respecting the withdrawal on general route of the Northern Pacific Railroad between Wallula, Washington, and Portland, Oregon, where the same has not since been abandoned: *Provided*, That all lieu selections made under this act shall be confined to lands within the State where the private holdings are situated.

SEC. 2. That this act shall become effective upon an acceptance thereof by the Northern Pacific Railway Company being filed with the Secretary of the Interior.

With the exception that the lieu selections made under its provisions are confined to lands within the State where the relinquished lands are situated, the act extends in terms the provisions of the acts

of July 1, 1898, and March 2, 1901, to include any *bona fide* settlement or entry made subsequent to January 1, 1898, and prior to May 31, 1905, in accordance with the decisions of this Department respecting lands within the withdrawal on general route under the map of August 13, 1870, for the Northern Pacific Railroad, now Railway, Company, and the limits on definite location of the company's branch-line grant near Wallula, Washington, and those of the main-line grant near Portland, Oregon.

The regulations issued under the acts of July 1, 1898, and March 2, 1901, *supra*, the former on February 14, and June 3, 1899 (28 L. D., 103, 470), and the latter on June 15, 1901 (30 L. D., 620), with the exception above noted, will be followed in the adjustment of claims under the new act.

Very respectfully,

G. F. POLLOCK, *Acting Commissioner.*

Approved, July 6, 1906:

THOS. RYAN, *Acting Secretary.*

WITHDRAWAL OF LANDS IN WAUSAU LAND DISTRICT, WISCONSIN—ACT OF JUNE 27, 1906.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 7, 1906.

Register and Receiver, Wausau, Wisconsin.

GENTLEMEN: By executive order of June 22, 1906, the President withdrew and suspended from entry, settlement, or other forms of appropriation under the public land laws, for the period of ninety days from that date, all of the unappropriated public lands in the Wausau land district north of township thirty-three.

This withdrawal was made in aid of Senate Bill 6462, which became the act of June 27, 1906 (Public, No. 304), directing the Secretary of the Interior to cause patents to be issued to the State of Wisconsin "for not more than twenty thousand acres of such unappropriated, unoccupied, non-mineral public lands of the United States north of the township line between townships thirty-three and thirty-four north, fourth principal meridian, as may be selected by and within said State for forestry purposes." June 21, 1906, this office, in anticipation of said withdrawal and legislation, directed you by wire "not to allow any entries, locations, or selections for any lands in your district situated north of township thirty-three, except such selections as may be made by the State."

In response to your communication of June 23, 1906, asking for more definite instructions in the premises, I have to advise you that this order embraces all of the lands in your district north of the townships mentioned which were not on June 22, 1906, settled upon, entered, or otherwise appropriated under the public land laws, and such other lands as may have been appropriated at that date, but which during the period of ninety days thereafter may have been released from such appropriation.

During the ninety-day period you may receive and suspend all applications under the public land laws for these lands without requiring a deposit of the usual fees and commissions. Such applications should be held subject to the right of the State to select the lands covered thereby, and if the State fail to select such lands, you should, after the expiration of the period mentioned, upon the payment of the required fees and commissions, allow the applications thus suspended, if there be no other reason for their rejection; but, if the State select any of the lands covered by any such application, the application should be rejected.

When an application to enter is presented by a person who submits therewith a satisfactory showing of settlement prior to June 22, 1906, such application may be allowed, but the State should have notice thereof, to the end that it may contest such claim, if it so desire.

Very respectfully,

G. F. POLLOCK, *Acting Commissioner.*

Approved July 7, 1906:

THOS. RYAN, *Acting Secretary.*

HOMESTEAD ENTRY—AMENDMENT TO CONFORM TO RESURVEY.

WILLIAM DOYLE.

Where prior to the submission of final proof and the issuance of final certificate upon a homestead entry, a resurvey of the land is made, the entry should be amended to conform to such resurvey, and the fact that the local officers accepted final proof and issued final certificate upon the entry without such amendment having been made, will not prevent the Department requiring the entry to be amended to conform to the lines as established by the resurvey at any time prior to the passing of the full legal title by the issuance of patent.

Acting Secretary Ryan to the Commissioner of the General Land Office, July 10, 1906.

(F. L. C.) (E. O. P.)

An appeal has been taken to the Department on behalf of William Doyle, claiming as transferee of Floyd F. Calhoun, from your office decisions of December 18, 1901, and May 10, 1905, respectively, requir-

ing that the original homestead entry of Calhoun, made September 22, 1898, be amended to conform to the lines of resurvey approved June, 1900.

The entry in question embraced the N. ½ SW. ¼, NW. ¼ SE. ¼, SW. ¼ NE. ¼, Sec. 17, T. 21 N., R. 36 W., 5th P. M., Broken Bow land district, Nebraska, and commutation proof was submitted in support thereof and final certificate issued thereon July 20, 1901. By the resurvey it was developed that a portion of the said SW. ¼ NE. ¼, Sec. 17, is embraced in the entry of Jesse C. Crossley, and by said resurvey the portion not embraced in the entry of Crossley, containing 26.71 acres, is described as lot 6. It was as to this particular tract the amendment of Calhoun's entry was requested, by your office letter of December 18, 1901.

Calhoun after submitting commutation proof and obtaining final certificate sold his interest in the land and the local officers were unable to serve him with notice of the action taken. By your office letter of May 10, 1905, the local officers were directed to notify Calhoun or the other parties in interest that no patent could issue on the land as described in the original entry of Calhoun and that in the event no appeal was taken from said decision the correction would be made by your office.

Counsel for Doyle contends that Calhoun, by virtue of his original entry made prior to the approval of the plat of resurvey, acquired a vested interest in the land covered thereby and that the Department is now without authority to demand an amendment of the original entry to conform to the lines of such resurvey. The only question involved is one touching the claimed vested right of Calhoun.

In this connection it is to be observed that the approval of the plat of resurvey was made more than a year prior to the issuance of final certificate. It does not appear from the record now before the Department, except inferentially, that the proof submitted has yet been acted upon by your office.

Counsel for claimant rely upon the decision of the supreme court in the case of Cragin *v.* Powell (128 U. S., 691) to sustain their contention made relative to the lack of authority in the Department to disturb vested rights, but nowhere in said decision is to be found any language which would bring the rights of Doyle, or his grantor Calhoun, within that class. The issuance of final certificate by the local officers does not of itself pass the complete equitable title to the land, but their action is subject to review by the Secretary of the Interior. This supervisory power carries with it the authority to correct or revise their action if found to be contrary to the proper administration of the law. In other words, it remains with the Secretary of the Interior, acting through the land department, to determine when the equitable title passes from the government, and the power there vested

in him is retained until the passing of the full legal title by the issuance of patent. This doctrine was announced by the supreme court in the cases of Orchard *v.* Alexander (157 U. S., 372, 383) and Brown *v.* Hitchcock (173 U. S., 473). In the case last cited it was held:

"The Government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. But this *does not* require that the hearing *must be* in the courts or forbid an *inquiry* and *determination* in the land department." Orchard *v.* Alexander, 157 U. S., 372, 383.

But what we do affirm and reiterate is that power is vested in the Department to determine all questions of *equitable* right or title, upon proper notice to the parties interested, and that the courts must be resorted to only *when the legal* title has passed from the government.

At the time of the approval of the plat of resurvey Calhoun had not submitted proof nor received final certificate. The equitable title had not then passed to him. Until then it was clearly within the power of the land department to require him to correct his entry to conform to the lines of the new plat of survey. The acceptance of the proof and issuance of final certificate by the local officers without requiring such correction, was erroneous, and added nothing to the right Calhoun already possessed, which was purely an inchoate one. Had the full equitable title passed prior to the approval of the plat of resurvey the claim of counsel touching the vested character of the right of Calhoun would be recognized. But a naked homestead entry in itself confers no such right as against the government, and until the inchoate right thus secured ripens into a vested equitable one, any errors made touching the same may be corrected by the land department (Cragin *v.* Powell, *supra*, p. 699; Michigan Land & Lumber Co. *v.* Rust, 168 U. S., 589, 594, and cases cited). The final certificate is only conclusive evidence of the equitable title when it has been issued in strict accordance with law, and this is a question proper for the land department to determine. The certificate in question could not have been properly issued. The amendment asked by your office should, perhaps, have been made by Calhoun at the time proof was offered but the fact that it was not so made will not prevent the Department requiring it at any time prior to the passing of the full legal title by the issuance of patent, and Doyle's position is no better in this respect than was that of his grantee. The Department is clearly of opinion the action taken by your office is in accord with the proper administration of the public land law and that at the time the plat of resurvey was approved, Calhoun, not then having submitted proof, had no such vested right in the land in question as would defeat such action. The decision appealed from is therefore hereby affirmed.

FINAL PROOF—DESERT-LAND ENTRY—CULTIVATION.

MARY MUNRO.

Where it appears from the final proof submitted on a desert land entry that there has not been actual tillage of one-eighth of the land, and it is not conclusively established that the climatic and physical conditions are such that crops other than native grass can not be successfully produced thereon, and the proof fails to show the quantity of hay per acre produced from native grass by irrigation, or whether it is of merchantable value, the showing is not such as will justify the land department excusing actual tillage of one-eighth of the land and accepting the proof as sufficient.

Acting Secretary Ryan to the Commissioner of the General Land Office, July 13, 1906.

(F. L. C.) (E. F. B.)

By decision of July 17, 1905, you rejected the final proof submitted by Mary Munro, September 14, 1904, upon her desert-land entry, made September 21, 1900, for the W. ½ SW. ¼, Sec. 22, the S. ½ NE. ¼, SW. ¼ NE. ¼, and NE. ¼ NW. ¼, Sec. 28, T. 2 N., R. 57 E., Miles City, Montana, embracing three hundred and twenty acres, and required her to make supplemental proof showing that one-eighth of the land embraced in her entry has been cultivated by tillage of the soil which may include hay "raised from domestic grass."

The proof shows that claimant has a water right to ten cubic feet of water from a tributary of Beaver Creek; that she has conducted water upon the land by means of dams and ditches, the main canal being four or five feet wide and eighteen inches deep, with laterals upon the different subdivisions equaling in value three dollars per acre; and that water has been distributed through such ditches on each legal subdivision for two seasons during the months of March, April, and May, sufficient to flood the land. For two seasons the water was not obtainable on account of drouth. It is also shown that about one hundred acres of the land has been reclaimed, and for the two seasons when the land was irrigated claimant cultivated about ten acres in corn and vegetables and raised a paying crop of hay.

Your office required claimant to show that the hay was raised from domestic grass upon a sufficient number of acres, which, added to the ten acres cultivated in corn and vegetables, would make one-eighth of the entire area of the entry. This was required as a compliance with that provision of the amendatory act of March 3, 1891 (26 Stat., 1095), "that proof be further required of the cultivation of one-eighth of the land."

Claimant appeals from your decision upon the ground that the raising of a crop of hay by irrigation, regardless of the particular kind, has heretofore been held sufficient under former decisions of the Department. She accompanies her appeal with her affidavit, corroborated by three other witnesses, stating that the water supply

in southeastern Montana is not sufficient for raising hay from domestic grasses; that the storage of water in the spring from usually dry streams or water-ways is necessary to secure sufficient water to produce a paying crop of native grasses, such as blue stem or wheat grass, which is the best paying crop that can be produced in that country, and does not require as much water as so-called domestic grasses; and that to require the raising of such crops in that country as need a great amount of irrigation would be prohibitory and work a great hardship on those who are endeavoring to comply with the law.

In transmitting claimant's appeal, the local officers have presented a very intelligent statement of the conditions existing in the country in which this claim is located, with a view to acquainting your office with the difficulties that must be encountered by desert-land entrymen in that locality, if the production of crops by actual tillage be required. They state that the breaking of the land and seeding it to alfalfa and other grasses involve an expense that the settler can not meet, because such crops do not respond profitably for two and sometimes three years, and the irrigation of newly-broken lands brings a crop of weeds that has to be worked out; so that the settler naturally turns to native hay for a crop. Their conclusion is, that the promotion and increase by irrigation of the natural growth of the grass found on the land is the most profitable crop, and furnishes the most practical evidence of reclamation.

The act of March 3, 1877 (19 Stat., 377), did not require cultivation as a condition to the perfecting of title to desert-lands. It simply required that water should be conducted upon the land by a claimant having a right to the use of such water, and provided that—

> upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre, . . . a patent for the same shall be issued to him.

While proof that water had been conducted to the land in sufficient quantity to irrigate and reclaim it was deemed such a compliance with the act of March 3, 1877, as to entitle the claimant to a patent, the question was still to be determined as to what constituted *satisfactory* proof that water in *sufficient* quantity had been carried to the land to effect its practical and permanent reclamation. While under that act the actual application of the water to the land and the raising of a crop were not a condition to the perfecting of the right to a patent, it was proof of that condition, and it was held to be the most satisfactory proof. (See George Ramsey, 5 L. D., 120; Charles H. Schick, Ib., 151.)

It is evident that the provision in the amendatory act requiring

proof of the cultivation of one-eighth of the land, was prompted by this view and was intended to impose as a condition to the perfecting of title actual tillage as proof of reclamation. Hence, the Department, in "Instructions" of February 17, 1904 (32 L. D., 456), said that it is not enough that the claimant has an absolute right to sufficient water to irrigate the land and has conducted it to and distributed it upon the land by a system of canals and ditches adequate for that purpose, but he must also show actual tillage of one-eighth of the land and that it has been actually irrigated for a sufficient period of time to demonstrate the sufficiency of the water supply and the effectiveness of the system.

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.

The final proof in this case only states that a "paying crop" of hay has been secured. No answer is made to the question in the final proof as to the quantity per acre of hay produced by irrigation; so that it is impossible for the Department to determine whether the conditions exist that would justify it in accepting the showing herein as excusing actual tillage of one-eighth of the land, it not being shown that the crop of hay secured is of merchantable value; nor can the general statements as to the conditions existing in this locality be accepted as conclusively establishing such climatic conditions that crops other than native grass can not be successfully produced.

Again, it appears from the final proof that only one hundred acres of the whole amount covered by the entry have been reclaimed, although it is shown by said proof that only "a small portion on the northwest side" is not susceptible of irrigation.

It may be that if a further opportunity were given to this claimant she might supplement her former proof by more definite evidence as to the actual condition of the soil found on the land covered by her entry with respect to tillable qualities, as well as a more satisfactory showing as to the value of the crops she secured through irrigation. She should also show by legal subdivisions the land she has actually reclaimed, and you are instructed to give her an opportunity to submit such supplemental proof, if she desires.

The decision of your office is accordingly modified.

CONTESTANT—PREFERENCE RIGHT.

GOTEBO TOWNSITE *v.* JONES ET AL.

Where a second contestant charges failure on the part of the entryman to comply with law and also collusion between the entryman and the first contestant, and the entry is canceled as the result of the first contest, the second contestant is not entitled to a preference right of entry, notwithstanding he establishes collusion as charged and the first contestant is held for that reason to have acquired no preference right.

Acting Secretary Ryan to the Commissioner of the General Land Office, July 14, 1906.

(F. L. C.) (P. E. W.)

August 6, 1901, Blanche Jones made homestead entry, No. 18, for the NW. ¼, Sec. 22, T. 7 N., R. 16 W., Elreno, Oklahoma Territory, and August 7, 1901, Bird Pyle filed his affidavit of contest against said entry charging that it was speculative and for the benefit of another party.

October 8, 1901, Z. L. Burton filed his affidavit of contest making a similar charge against said entry and also alleging that Pyle's contest was collusive and fraudulent.

A hearing was had, January 7, 1902, on Pyle's contest. The defendant failed to appear and upon the testimony submitted by Pyle the local officers recommended the cancellation of her said entry. Burton, who had been allowed to participate in the hearing as intervener, submitted testimony tending to show collusion between Pyle and Jones, but the local officers held thereon that Burton had been erroneously allowed to intervene and postponed any consideration of the evidence furnished by him until such time as it should be properly before them by reason of an attempt by Pyle to exercise his preference right of entry as a successful contestant.

By your office letter of October 17, 1903, the entry was canceled and the case closed as to Jones, and it was further held that the evidence submitted by Burton showed collusion between Pyle and Jones and that Burton was entitled to a preference right of entry. From that action Pyle appealed to the Department on December 8, 1903, prior to which date, on November 7, 1903, Burton made application to enter the described land as a homestead, and on November 20, 1903, eight other persons, as townsite occupants and claimants of the same, with other lands, filed their protest against the "allowance of an entry upon said tract of land by any persons other than said townsite claimants."

August 3, 1904, the Department, without knowledge of said townsite claim, rendered a decision (not reported) affirming your said office decision of October 17, 1903. Said departmental decision was subsequently recalled and held suspended until further direction,

attention having been drawn to the fact that said townsite claim was pending before your office.

January 22, 1904, notice was filed of intention to make townsite proof, and on March 5, 1904, such proof was submitted without any objection. July 22, 1904, the townsite claimants applied for permission to intervene in the case of Burton and Pyle versus Jones, and on August 29, 1904, the case was remanded to your office for action upon the application to make townsite entry for said land and to intervene in said case.

By departmental letter of February 21, 1905, your office was further advised that the suspension of the said departmental decision was intended to operate only to prevent Burton from making entry until the townsite applicants could be heard, and not to vacate the decision or reopen the controversy between Burton and Pyle. Your office was further directed to promulgate the said departmental decision, but to withhold action on Burton's application to enter said land, and to take the necessary action to determine the respective rights thereto of Burton and said townsite applicants. Such action was accordingly taken, and Pyle having taken no further action, the case was closed as to him. The respective rights of Burton and the townsite claimants were considered in your office decision of June 30, 1905, wherein it was held that Burton under the circumstances of the case had lost no rights and was not debarred from asserting his claim, by reason of his failure to appear and protest when the said townsite proof was submitted.

A hearing was thereupon ordered to determine how many people were residing on the land in question on November 8, 1903, the subdivisions actually occupied, and the improvements then on the same. Such hearing was had and the record was forwarded by the local officers without decision or recommendation thereon.

January 22, 1906, your office held that—

> the townsite people have the better claim to the land, being actual settlers thereon, as against him [Burton], a subsequent applicant.

The townsite entry was allowed, and from that action Burton has appealed to the Department. Pending consideration of the appeal there was filed, on June 9, 1906, the sworn statement of S. J. Lea, alleging that on November 4, 1905, placer mining claims were located by himself and W. S. Baxter on the SE. ¼ and SW. ¼, respectively, of the quarter section of land in controversy herein, and that the land in said subdivisions is of mineral character, and asking permission to intervene in the present case to prove their said mineral claims before a final decision herein. However, by the allowance of townsite entry and patent no injury can result to rights of *bona fide* mineral claimants existing at the date of the townsite entry (Sec. 16, act of March

3, 1891, 26 Stat., 1095, 1101; Nome & Sinook Co. *et al. v.* Townsite of Nome, 34 L. D., 102, 104); and in the absence of an application for mineral patent no occasion exists for a hearing upon the mineral question.

From the townsite proof submitted on March 5, 1904, it appears that the town of Gotebo was duly incorporated on January 7, 1904, with corporate limits including all of said NW. ¼, Sec. 22; that the land was surveyed on August 6, 1901, into lots, blocks, streets and alleys and all of the lots were taken; that prior to October 6, 1901, the date of Jones's entry, there were from six to fifteen residences erected on the land, worth, together with other improvements, $15,000, and there was then a population of sixty or more persons; and that on March 5, 1904, there were thirty-three residences, a church, a schoolhouse, the total improvements worth $25,000, and the population about 125 persons.

At the further hearing ordered by your office letter of June 30, 1905, it was stipulated in writing signed by counsel for the townsite claimants and for Burton that the following statement of facts should be the record evidence in the case between them:

> That on the sixth day of August, 1901, the Southwestern Mutual Townsite Company surveyed and platted the land in controversy as a part of the townsite of Harrison (now Gotebo) O. T. That on that day the said land began to be settled by persons holding lot certificates issued by said company and continued to be settled by such certificate holders and other persons until on the 8th day of November, 1903, the settlements and improvements thereon were as shown by the following statement.

The said statement specifies by name, and number in family, 141 persons then living on the land, and it is added that said townsite company long since became extinct.

The facts thus admitted leave for consideration simply whether the filing of Burton's affidavit of contest against the Jones entry on October 8, 1901, and his showing of the collusive nature of Pyle's contest gave him a preference right to enter this land when the Jones entry was canceled, notwithstanding the said townsite settlement and occupancy then existing on the same.

In its former decision herein, the Department, after holding that Pyle was eliminated from the controversy, said that "the only matter remaining in issue was between Burton and the townsite occupants as to the right to make entry of the land."

In view of the said agreed facts it is clear that at and prior to the date of Burton's homestead application, November 7, 1903, the land in question was actually occupied for townsite purposes and was not subject to homestead entry. The Department is further clearly of the opinion that, the Jones entry having been canceled as the result of the Pyle contest, Burton acquired no preference right of entry by reason of his contest, although he defeated the preference right of

Pyle. The act of May 14, 1880 (21 Stat., 140), bestowed the preference right of entry only upon the contestant who paid the contest fees and procured the cancellation of the entry. In the case of White *v.* Linnemann (23 L. D., 379) it was expressly held that the junior contestant was not entitled to notice of cancellation under the prior proceedings and that his application, filed with his contest, secured no right even if the successful contestant failed to exercise his preferred right. And, manifestly, his application subsequently filed, secures no right unless he is the first legal applicant after the cancellation of the former entry. The record evidence showing that his application was made in the face of an existing settlement and occupancy of the land for townsite purposes, it was properly held subsequent and subject thereto.

The townsite proof which was suspended to await the final outcome of the then pending contest of Pyle against Jones will be returned to the local office for examination and allowance, your said decision being hereby affirmed.

RAILROAD GRANT—SELECTION—ACT OF JUNE 22, 1874.

DRESSEL *v.* OREGON AND CALIFORNIA R. R. CO.

Selections by a railroad company in lieu of lands relinquished under the provisions of the act of June 22, 1874, may be made of lands in either odd- or even-numbered sections.

Acting Secretary Ryan to the Commissioner of the General Land Office, July 15, 1906.

(F. L. C.) (E. J. H.)

The above-entitled case is before the Department upon the appeal of George H. Dressel from your office decision of February 15, 1906, sustaining the action of the local officers in rejecting his homestead application, tendered April 18, 1905, for lots 3 and 4 and the E. ½ of SW. ¼ of Sec. 8, T. 1 S., R. 5 E., Portland, Oregon, land district, for conflict with the selection thereof by the Oregon and California Railroad Company on March 14, 1877, under the act of June 22, 1874 (18 Stat., 194), entitled, "An act for the relief of settlers on railroad lands."

It appears that Dressel tendered a similar application for the above-described tracts on July 18, 1901, which was rejected by the local officers, and their action was sustained by your office upon appeal thereto. No further appeal having been taken, the case was subsequently closed and the land patented to the railroad company on June 21, 1902.

The claim made on behalf of Dressel under his former application and in the present one is that the railroad company's selection of said tracts was invalid, because the same are a part of an even-

numbered section within the primary limits of its grant of July 25, 1866 (14 Stat., 239), and said contention seems to be based upon the understanding that the company's selection was made under the indemnity provisions of said grant.

The selection in question, however, was not an indemnity selection under that act, but a lieu land selection under the act of June 22, 1874, *supra*, wherein it is provided that if any of the lands granted to any railroad company or to the State for its benefit—

> be found in the possession of an actual settler whose entry or filing has been allowed under the preemption or homestead laws of the United States subsequent to the time at which, by the decision of the land office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted.

In the case of The Gulf and Ship Island R. R. Co. *v.* The United States (22 L. D., 560), it was held that "for the lands relinquished under the act of 1874, the company is entitled to select lieu lands from the odd or even sections anywhere within the primary or indemnity limits of the unforfeited portion of the grant."

The selection of the company was therefore proper and the land rightfully patented thereunder. Your office decision is accordingly affirmed.

MINING CLAIM—LODE LINE—END LINES.

BELLIGERENT AND OTHER LODE MINING CLAIMS.

There is no warrant in the mining laws for extending, arbitrarily and without any basis of fact therefor, the vein or lode line of a location in an irregular and zigzag manner for the purpose of controlling the length or situation of the exterior lines of the location to suit the convenience, real or imagined, of the locator.

The end lines of a lode location must be straight and parallel to each other, and when at right angles with the side lines may not exceed six hundred feet in length.

The mining laws contemplate that the end lines of a lode claim shall have substantial existence in fact, and in length shall reasonably comport with the width of the claim as located.

Acting Secretary Ryan to the Commissioner of the General Land Office, July 16, 1906.

(F. L. C.) (A. B. P.)

December 27, 1902, William Northey made entry for a group of contiguous lode mining claims, composed of the Belligerent, the Belligerent Fraction, the Belligerent No. 3, the Belligerent No. 4,

and the Bull Hill Fraction, survey No. 1673, Rapid City, South Dakota.

March 9, 1904, your office directed that the deputy mineral surveyor who made the survey be required to furnish an affidavit stating whether the Belligerent location actually embraces an apexing vein or lode with varying courses as shown on the official plat accompanying the entry papers; or if such vein or lode consists of what is known as a "blanket vein," to so state. Subsequently the surveyor-general forwarded to your office his certificate, stated to be based upon the sworn report of the deputy mineral surveyor, setting forth "that the surface of the claim is embraced within the flat formation and that the deposit is what is known as a 'blanket vein'."

By decision of April 17, 1905, your office, after observing that by the official plat the indicated lode line of the Belligerent location, instead of being straight, is represented by varying courses and in zigzag form, and that the westerly end line of the location is but two inches in length; and stating that the manifest purpose of so indicating the vein or lode line is to obtain more surface ground than is contemplated by the statute, held, in substance, that an amended survey of the claim would be required to represent the line of the vein or lode as running in a straight course and to show the side lines not more than six hundred feet apart at any place. Directions were given that the entryman be notified of the requirement and that in the event of default in respect thereof, and failure to appeal, his entry would be canceled without further notice.

The entryman has appealed. He alleges, in substance, that your office is without authority of law to require an amended survey for either of the purposes stated.

The question thus presented was considered and decided by the Department in the recent case of Jack Pot Lode Mining Claim (34 L. D., 470). In that case it appeared, as also appears in this, that the mineral deposit on account of which the claim was located was of the flat or blanket formation. There was extended on the official plat, as is likewise done here, an assumed vein or lode line of three courses and of zigzag form, apparently on the theory that a greater width of surface than six hundred feet could be thereby included within the side lines of the location. The contention by the mineral claimant was the same as the contention here, and was based upon the same authority, namely, the case of Homestake Mining Company (29 L. D., 689). In passing upon the question the Department said:

> The appellant contends, in substance, that the present survey accords in principle with the doctrine of the case of Homestake Mining Company (29 L. D., 689), and therefore should be accepted. In that case there were a number of exclusions from the claim applied for, leaving two small tracts widely separated from each other, for which entry had been allowed, though it appeared

that the point of principal discovery had gone with the exclusions. It was shown that the claim was located upon a horizontal or blanket lode which covered the entire area within the limits of the side and end lines, as well the said two small tracts as the point of principal discovery and other excluded portions of the claim. One of the questions was whether the locations could be sustained notwithstanding the loss of the point of original discovery. As the ore body was shown to extend uninterruptedly over the entire claim, including the two small tracts, the Department considered the apex of the lode as coextensive with the distance between the side lines of the location, and held that the loss of the original or principal discovery by its inclusion in some other mineral claim did not affect the validity of the location. The case goes no further, and is in no sense authority for the proceeding attempted in the case at bar. There is nothing in the principle to justify the extension of the lode line in the zigzag form here presented, whereby the distance between the side lines of the claim is made to exceed the maximum width of six hundred feet allowed by law in the location of vein or lode claims. (See 2320, Revised Statutes.)

The ruling in that case is decisive and controlling here, and in accordance therewith the decision of your office on the point stated is affirmed.

There are other objections to the entry, however, to which attention has not been called by your office. In addition to the fact that one of the indicated end lines of the Belligerent location is only two inches long, a matter which though mentioned was apparently not deemed material, the other end line is represented in the field notes and on the plat to be over nine hundred feet in length and as a consequence the location is of such irregular shape that at one point the distance between the side lines is approximately eleven hundred feet. And further, the northerly end line of the Belligerent No. 3 location, as represented in the field notes and on the official plat, is over eleven hundred feet in length, the supposed vein or lode line being indicated by varying courses in zigzag form and in such manner (presumably purposely so) that at no point would the distance from such vein or lode line to either of the side lines, if measured at right angles with the incident course of the vein or lode line, be over three hundred feet. And further still, the northerly end line of the Belligerent No. 4 location is represented as only two inches in length, whereas the average width of the location is approximately four hundred and fifty feet; and the northerly end line of the Bull Hill Fraction location is represented as only five feet in length, whereas the average width of that claim is approximately two hundred and fifty feet.

A situation of similar nature was also presented in the case of Jack Pot Lode Mining Claim, above referred to. One of the end lines of the claim there involved was less than three inches in length while the length of the other was over eight hundred feet. The Department held under the facts of that case that neither line could be accepted as an end line within the meaning of the law (sections

2320 and 2322, Revised Statutes); that under the restrictive provisions of the statute (Sec. 2320) vein or lode claims may not lawfully exceed six hundred feet in width, and therefore, especially in case of a location upon a horizontal or blanket vein, the end lines of the location may not exceed that distance in length unless there be some justifiable reason for it, which did not there appear; and that within the contemplation of the statute end lines, which are required to be parallel to each other and are important features of a vein or lode location, must have substantial existence in fact and length, and reasonably comport with the width of the location.

The principles of the decision in that case are equally applicable here and are decisive of the invalidity of the entry in question as to every location of the group except the Belligerent Fraction.

The northeasterly end line of the Belligerent and the northerly end line of the Belligerent No. 3 in their respective extensions beyond six hundred feet in length are without justification in the record and were apparently so extended for purposes not within the purview of the mining laws as applicable to vein or lode claims.

The southwesterly end line of the Belligerent and the northerly end lines of the Belligerent No. 4 and the Bull Fraction are severally obnoxious to the principle that end lines are required to be of a substantial nature. These are not end lines within the intendment of the law.

There is no warrant in the statute for extending, arbitrarily and without any basis of fact therefor, the vein or lode line of a location in an irregular and zigzag manner, such as here attempted, merely for the purpose of controlling the length or situation of the exterior lines of the location to suit the convenience, real or imagined, of the locator.

That the course of a vein or lode as actually found to exist in the earth, either by its outcrop at the surface or by exploration beneath the surface, may rightly control or determine the manner of the location, within the prescribed limitations as to length, width, and end lines, there can be no doubt; and in order to conform the location to the actual course of the vein or lode the side lines may be irregular, and the location is not required to be in any particular form except that the end lines must be straight and parallel to each other. But it does not follow that a locator upon what is known as a blanket vein, where the ore body covers the entire area within the limits of the side and end lines, and the apex of the vein is therefore to be regarded as co-extensive with the space between the side lines, and every part or point of such apex as much the middle of the vein as any other part (Homestake Mining Company, 29 L. D., 689), may assume, contrary to the fact, that an apexing vein exists in certain portions of his claim as distinguished from other portions,

and that the course of such vein runs in such irregular and zigzag manner as best to suit his purposes in laying the side and end lines of his location, whatever such purposes may be. To so hold would be to in effect say that a mineral locator may, for purposes of location, assume the existence of a thing which upon the accepted facts he is bound to recognize has no existence, a proposition obnoxious to every sense of right and wholly without warrant in any principle of the mining laws.

In this case the entryman has shown by the certificate of the surveyor-general, based on the sworn statement of the deputy mineral surveyor who surveyed the claim, that the ore deposit is of the flat formation and what is known as a blanket vein, and yet in the location and survey of the several claims of the group he has undertaken to assume that an apexing vein exists lengthwise with each location at or about the center and for the full length thereof, distinct from any other portion of the location, and that such vein extends in varying courses in zigzag form (resulting in the irregular shape of the locations and the improper and insufficient end lines, herein pointed out); and upon this arbitrary assumption, utterly at variance with the oath of the deputy mineral surveyor and the official certificate of the suveyor-general, he bases his claim of right to a patent for the entry as it stands.

The Department can not recognize such procedure as within the contemplation of the mining laws. As to all the locations except the Belligerent Fraction, the entry is clearly unlawful and with the exception of that claim must be canceled unless the survey shall be amended in such manner as will meet and overcome the objections here stated.

There can be no arbitrary or iron clad rule to govern the laying of end lines in all cases, other than this: They must be straight and parallel to each other (Sec. 2320, Revised Statutes; Walrath *v.* Champion Mining Company, 171 U. S., 293, 311), and when at right angles with the side lines they must not exceed six hundred feet in length. In other respects every case must more or less depend upon its own facts and the conditions and circumstances surrounding it. In this case it is sufficient to say, as already pointed out, that there is nothing to justify the length, over and above six hundred feet, of two of the end lines held to be objectionable, and that the others can not be regarded as end lines because not lines having any substantial existence in fact. Both classes are condemned by the principles applied in the case of Jack Pot Lode Mining Claim, *supra*.

It is settled law that the lines of a junior lode location may be laid within, upon or across the surface of a valid senior location for the purpose of securing and defining rights under the junior location not in conflict with any rights under the senior location, subject only to the qualification that no forcible entry is made (Del Monte Mining

Company *v.* Last Chance Mining Company, 171 U. S., 55, 59, 85); and the Department has held the principle to apply even where the senior location had been patented prior to making the junior location (Hidee Gold Mining Company, 30 L. D., 420). Assuming the group of claims here in question to be surrounded in part by other locations, as would seem to be the case from the official plat of survey, there is ample authority under the decisions referred to for laying the end lines of the several locations in such manner as to bring them within the principles herein expressed, there being nothing in the record to indicate that this may not be peaceably done.

The order for an amended survey will be enlarged so as to embrace all the locations except the Belligerent Fraction, and if not complied with the entry will be canceled to the extent here held to be invalid.

MINING CLAIM—PATENT PROCEEDINGS—DILIGENCE.

COPPER BULLION AND MORNING STAR LODE MINING CLAIMS.

The decisions of the Department holding that the provisions of the mining laws relating to the patenting of mining claims contemplate and require that an applicant for patent shall proceed with diligence to complete his patent proceedings, and that a failure to do so constitutes a waiver of all rights under such proceedings, are notice to the world and mineral applicants must govern themselves accordingly or suffer the consequences.

Acting Secretary Ryan to the Commissioner of the General Land Office, July 16, 1906.

(F. L. C.) (A. B. P.)

May 24, 1904, the Copper Bullion Mining Company (hereinafter called the company) made entry for the Copper Bullion and the Morning Star lode mining claims, survey No. 623, Spokane, Washington. The application for patent, upon which the entry was allowed, was filed November 5, 1901, and the publication of notice, which commenced November 9, 1901, was regularly continued for the required period of sixty days and no adverse claim was filed.

November 11, 1904, one Joseph Bierl filed a protest against the entry, alleging the re-location by himself, March 14, 1904, of the Copper Bullion claim on the stated ground of abandonment and failure to comply with the requisite conditions as to annual expenditure in labor and improvements as to that claim for the year 1903 and prior thereto.

By decision of February 11, 1905, your office, in view of said protest, and of the delay in the completion of the patent proceedings, directed that the company be allowed sixty days from notice within which to show cause why its entry should not be canceled as to the

Copper Bullion claim, in default whereof, and of appeal, it was stated the entry would be so canceled.

The company thereupon appealed. Since the appeal there has been filed here by Bierl a withdrawal of his said protest.

The record shows that over two years elapsed after the expiration of the period of publication of notice of the application for patent, before there was any effort by the company to complete the proceedings. It appears that on February 10, 1904, the local officers called upon the company to show cause why its application should not be rejected because entry had not been seasonably made, and it was in response to such notice that the company first applied to make entry.

The affidavit of the company's agent was filed stating in substance that entry had not been previously made because affiant had been absent in the East on business for the company during the greater part of the two years then last past; that the matter had escaped his attention at the only time it could have been attended to; and that the delay was due to circumstances over which he had no control. Certain affidavits to the effect that over $300 had been expended in work on the claims during each of the years 1902 and 1903 were also filed. It was upon this showing that the local officers allowed the entry.

The decision of your office rejects the showing as insufficient as to the Copper Bullion claim only, and this apparently because of the alleged re-location of that claim by the protestant Bierl.

The Department has held in numerous decisions that the provisions of the mining laws relating to the patenting of mining claims contemplate and require that an applicant for patent shall proceed with diligence to complete his patent proceedings, and that a failure to do so constitutes a waiver of all rights under such proceedings; also that the annual expenditure in labor and improvements on a mining claim is a matter committed exclusively to the courts for determination, and the land department can make no adjudication in respect thereto. (The Marburg Lode Mining Claim, 30 L. D., 202, and decisions cited; Cleveland *et al. v.* Eureka No. 1 Gold Mining and Milling Company, 31 L. D., 69; Lucky Find Placer Claim, 32 L. D., 200, and decisions cited; Ring *v.* Montana Loan and Realty Company, 33 L. D., 132.)

Under the principles thus repeatedly announced it is clear that the entry was improperly allowed by the local officers, and should not have been sustained by your office as to either of the claims. So far as the record shows, there was no obstacle or barrier to prevent the completion of the patent proceedings within the calendar year (1902) in which the publication of notice of the application for patent was completed, and no reason other than neglect or lack of attention is urged by the company as an excuse for its failure in this

respect. The affidavits filed on behalf of the company, in which it was sought to show that the required annual expenditure in labor and improvements had been made for the years 1902 and 1903, presented no matter for legitimate consideration by the land department, and were therefore without legal effect for any purpose.

The entry cannot be sustained as to either of the claims embraced in it, and the same is hereby canceled. The withdrawal by Bierl of his protest is wholly immaterial and does not affect the question in any manner. The company did not proceed as required by law to complete its patent proceedings and the result is due solely to its own neglect. The departmental decisions on the subject are notice to the world and have been ever since the decisions of 1899 in the cases of Cain *et al v.* Addenda Mining Company (29 L. D., 62), and P. Wolenberg *et al.* (Id., 302), and mineral applicants must govern themselves accordingly or suffer the consequences.

ARID LAND—HOMESTEAD ENTRY—RELINQUISHMENT—ACT OF JUNE 17, 1902.

INSTRUCTIONS.

The relinquishment of a homestead entry within the irrigable area of an irrigation project under the act of June 17, 1902, where the entryman is in default in the payment of any annual instalment, does not relieve the land of such charge, and a succeeding entryman takes it subject thereto.

Acting Secretary Ryan to the Director of the Geological Survey,
(F. L. C.) *July 16, 1906.* (E. F. B.)

Your letters of April 30, 1906, relative to the sale of relinquishments by persons who have made entries of lands within irrigation projects, were referred to the Commissioner of the General Land Office. A copy of the report thereon is transmitted herewith for your information.

You suggest that the successful operation of the Reclamation Act, in regard to the recovery of moneys expended in the construction of the works, is threatened with danger from the indiscriminate sale of relinquishments, and you submit two propositions which if adopted will in your judgment tend to abate the evil.

First, that upon the filing of a relinquishment for lands included within a reclamation project no entry shall be received thereon for a period of 60 days from the filing of the relinquishment in the local land office; that during said period of 60 days a notice of the filing of such relinquishment with a description of the land shall be conspicuously posted in the local land office; and that during said

period of 60 days the land shall be subject to settlement only and that the register and receiver shall forward with any entry made for such lands a certificate as to the posting of such notice.

Second, that after the relinquishment of an entry for lands within a reclamation project in connection with which a water right application had been filed, the succeeding entryman must file a water right application simultaneously with his entry, and the charges payable thereon shall become due at the beginning of the next irrigation season to be fixed definitely for each project.

The Commissioner of the General Land Office approves of the last proposition to make the charges payable at the beginning of the irrigation season, but urges as an objection to the first proposition that it would contravene the provision of the first section of the act of May 14, 1880 (21 Stat., 140), that upon the filing of a relinquishment in the local office "the land covered by such claim shall be open to settlement and entry without further action on the part of the Commissioner of the General Land Office."

The Department is not impressed with the necessity or practicability of either proposition, nor does it anticipate that the successful operation of the act will be jeopardized by the relinquishment of entries.

While the policy of the government is to discourage the sale of relinquishments, there is no moral or legal inhibition against it. In some cases the entryman may be compelled to abandon the land although entered in the utmost good faith. Under such circumstances he would be perfectly justified in obtaining whatever recompense he could for his improvements and forfeiture of his homestead right. The relinquishment neither conveys nor secures to the purchaser any interest in the land, but it inures solely to the benefit of the United States. Upon the filing of it in the local office, the entry is canceled and the land immediately becomes subject to settlement and entry, by the first legal applicant, without further action of the land department.

Upon the relinquishment of an entry of lands withdrawn for disposal under the Reclamation Act, the land takes the same status it had at the time the relinquished entry was made; that is, withdrawn "from entry except under the homestead laws."

Furthermore, if the relinquishment is intended to operate for the benefit of the person to whom it is sold, such purpose can not be defeated by withholding it from entry for sixty days and allowing it to be subject to settlement during that period, because a settlement could be made at the same time the relinquishment is executed and filed, and priority of settlement would secure a prior right to entry.

In your second letter you set forth very forcibly the reasons that

prompted the fixing of the maturity of the annual payments at the end instead of at the beginning of the irrigating season. Under the proposition submitted, if the entry has been relinquished, the succeeding entryman will be required to pay at the commencement of the season, thus discriminating between persons who make original entry of lands withdrawn for disposal under the Reclamation Act, and persons who subsequently enter the same land after it has been relinquished, requiring him to file a second water right application for the land simultaneously with his application for entry.

The annual charge is not a rental obligation due solely as a personal charge against the entryman nor does his right to the use of water depend upon his personal application. On the contrary, the right to the use of water under the provisions of the act attaches to the land covered by every entry by force of the statute itself, which expressly declares that such right "shall be appurtenant to the land irrigated." The right of entry and the right to the use of water are inseparable. It is not a privilege or right of the homesteader to take water or not, as he may wish, or in such quantities as he may wish to apply for, but he is chargeable with his equitable proportion of the water apportioned to the land entered. Every application to enter lands withdrawn for disposal under the Reclamation Act is an application for the water right appurtenant thereto, which attaches, by virtue of the statute, and he is bound to pay the annual instalments when due and to irrigate and reclaim one-half of the total area of his entry for agricultural purposes, and "a failure to make any two payments when due shall render the entry subject to cancelation, with the forfeiture of all rights under the act as well as of any moneys already paid thereon."

The cancelation of an entry, whether from relinquishment or otherwise, carries with it a forfeiture of the water right appurtenant to such land. When the land is reentered, the water right that attaches to the land by force of the statute inures to the second entryman, who obligates himself to pay the "charges apportioned against such tract."

The cost of construction is a charge upon the land irrigated from the waters of the project until the government has been reimbursed. If any instalment is not paid by an entryman and he forfeits his entry, it still remains a charge upon the land entered, and must be paid by a succeeding entryman before patent will be issued. The act expressly provides that the entryman "before receiving patent for the lands covered by his entry shall pay to the government the charges apportioned against such tract," as provided in section 4. While the Secretary of the Interior may extend the annual payments through a period not exceeding ten years from the date of every entry, an instalment due by a defaulting entryman is an obligation resting upon the

land to which the first or any subsequent entry is subject and which the government can always enforce by withholding patent until it is paid, and by canceling the entry if it is not paid.

If it is generally understood, as it should be, that a relinquishment of an entry where the entryman is in default as to the payment of any annual instalment does not relieve the land of such charge, and that a succeeding entryman takes it *cum onere*, it will either prompt the payment of such charges, or enter into the consideration in the purchase of the relinquishment.

MINING CLAIM—ADVERSE PROCEEDINGS—ACT OF MARCH 3, 1881.

BRIEN *v.* MOFFITT ET AL.

The final judgment of a court, in accordance with the provisions of the amendatory act of March 3, 1881, in an adverse suit pursuant to section 2326 of the Revised Statutes, to the effect that neither party litigant has established the right of possession of the ground in controversy, effectually terminates the patent proceedings out of which the controversy arose; and entry can not thereafter be lawfully allowed and patent issued except upon the prosecution, by a qualified claimant, of new patent proceedings.

Case of James D. Rankin *et al.*, 7 L. D., 411, overruled.

Acting Secretary Ryan to the Commissioner of the General Land Office, July 17, 1906.

(F. L. C.) (F. H. B.)

Under date of August 21, 1905, Daniel H. Brien, of Wallace, Idaho, addressed the Department as follows:

In the matter of mineral entry No. 421; patent No. 40,819, for the Leonard lode claim, Coeur d'Alene land district, Shoshone county, Idaho; patent issued April 3, 1905; a grave error has been committed through the means of a false certificate as to the court's record wherein it was certified that no action was pending involving the title to the Leonard lode claim, and further certified that the adverse suit brought by Daniel H. Brien in support of an adverse claim against an application for patent for the Leonard lode claim had been dismissed, and that no appeal had been taken from said order, when as a matter of fact the judgment of the court, a certified copy of which I herewith hand you, was that neither party were entitled to the ground in controversy, or to the patent.

It was not known until very recently that this fraud had been perpetrated or that the applicant for patent had proceeded under these false certificates to obtain a patent. There has been no record of the granting of the patent here, but by accident I learned that the patent had been issued and that the claim had been passed for patent, and on May 7, 1905, I asked the Honorable Commissioner of the General Land Office for certified copies of the papers filed in connection with this mineral entry, and on June 9th received the same, which was my first knowledge of the fact that the applicants were proceeding to patent, notwithstanding the verdict of the jury and the judgment of the court.

After the verdict of the jury, I fully complied with the law in regard to the mining claim in controversy and perfected my title thereto, and had been resting securely on the belief that the judgment of the court would protect me against any possibility of the opposing party proceeding to patent.

I most earnestly request that this matter be taken up for investigation. The facts upon which the fraudulent obtaining of this patent rests are matters of record in either your Department or the courts in which the case was tried, and in which it was held that neither party had established a right to the piece of ground in controversy, under the act of Congress of March 3, 1881, providing for such verdict.

Resting upon the assurance that your Honorable Department stands ready to prevent such fraud as was perpetrated in this case, I respectfully ask that steps may be taken for the annulment and setting aside of this patent, and further as may be right and equitable in the premises.

This communication and the accompanying copy of the judgment therein mentioned were referred to your office "for report, in duplicate, and return of papers."

In response, and on September 26, 1905, your office reported the substance of the case, the material facts whereof, as disclosed by the record (now before the Department), somewhat more particularly and fully stated, are as follows:

January 16, 1900, Edward H. Moffitt and his co-claimants, R. K. Neill and Charles J. Morse, filed application for patent to the Leonard lode mining claim, survey No. 1441, Coeur d'Alene, Idaho, land district, without exclusion or mention of any conflict, and embracing an area of 18.043 acres in accordance with the official survey.

During the ensuing period of publication and posting of notice of that application Brien, claiming to be the lawful owner and entitled to the possession of the conflict areas, filed two adverse claims, one on behalf of the Tamerlane Fraction lode claim, embracing an indicated conflict of 1.056 acres at the easterly end of the Leonard claim, and the other on behalf of the Nilus lode claim, embracing an indicated conflict of 13.523 acres to the west of the Leonard-Tamerlane conflict and including the greater portion of the Leonard claim. Each such conflict was particularly illustrated by a blue print diagram, attached to the appropriate adverse claim, under the certificate of a deputy mineral surveyor. Suit upon each adverse claim was seasonably commenced in the district court of the first judicial district of Idaho, in and for Shoshone county, and proceedings in the land office were stayed accordingly.

More than three years later local counsel for the Leonard applicants transmitted to the local office a "petition to proceed with application," bearing date December 31, 1903, in which, under the oath of Moffitt, including statements of further expenditures and disclosures of mineral and that "affiant and his co-owners have in all respects perfected their title to said lode mining claim, and have

remained in the continuous and exclusive possession" thereof, the conflict with the Tamerlane Fraction claim was expressly waived, followed by the statement "that there are no other existing adverse claims to any portion of said Leonard lode mining claim." There was also filed a certificate of the same date, under the signature of the clerk and seal of the above court, the material portion of which is as follows:

I, Stanley P. Fairweather, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, do hereby certify that there is no suit or action pending in said court involving the title or possession of the Leonard lode mining claim situated in Placer Center Mining District, County of Shoshone, State of Idaho, known as U. S. official survey No. 1441, mineral application No. 290, Edward H. Moffitt, Charles J. Morse and R. K. Neil, claimants, excepting that portion thereof described as follows, to wit:

The description which follows the last clause above quoted is of the conflict with the Tamerlane Fraction. In addition to the petition and certificate, and accompanying local counsel's letter of transmittal, were the usual proofs in completion of mineral patent proceedings, a tender of purchase price, and an application to make entry for the Leonard claim; and entry (No. 421) was allowed accordingly, January 5, 1904, excluding only the aforesaid Tamerlane Fraction conflict.

The record having been transmitted in usual course, your office thereafter, and on October 26, 1904, advised the local officers that, whilst the conflict with the Tamerlane Fraction had been expressly excluded from the Leonard entry, the record disclosed no disposition of the Nilus adverse, upon which, from a letter in the record, it appeared that suit had been duly instituted, resulting in a judgment; and it was further stated that if suit had been had and judgment rendered, as indicated, a certified copy of the judgment roll must be furnished; otherwise, the disposition of the Nilus adverse must be shown in accordance with paragraphs 86–88 of the mining regulations (31 L. D., 474, 488–9).

As the result thereof there was filed in the local office, and transmitted to your office, a further formal certificate by the clerk of the court, dated December 12, 1904, the body whereof is as follows:

I, Stanley P. Fairweather, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, do hereby certify that in the action of D. H. Brien against Edward H. Moffitt, Charles J. Morse and R. K. Neill in said court in support of an adverse claim of the Nilus lode against the Leonard lode application for patent the action of the plaintiff was, by an order dated November 7, 1900, dismissed; that no appeal was taken from said order, and that said action is not now pending.

With this additional showing patent issued, April 3, 1905, upon the Leonard entry as it stood, thus embracing the conflict between the Leonard and Nilus claims.

In conclusion of the report to the Department, in response to the aforesaid reference for that purpose, your office recommended, in view of the disclosure by the communication of Brien and the accompanying certified copy of the judgment, and citing in that connection the case of Newman *v.* Barnes (23 L. D., 257), that the patentees be called upon to surrender title, and that upon refusal to do so within sixty days from notice the case be submitted to the Attorney-General with the view to the institution of a suit looking to the cancellation of the outstanding patent.

Concurring in that recommendation, the Department directed your office to take action accordingly, an extension of ninety days being subsequently afforded the patentees upon their application therefor; and further directed that the entire record be submitted, at the expiration of the period and upon failure of the patentees to surrender the title under their patent, for further consideration and action by the Department.

On their part the patentees submitted a petition for reconsideration of the departmental action; and upon expiration of the allotted period your office transmitted the entire record to the Department. Inasmuch as the matters set forth and relied upon in the petition are covered by the more elaborate brief of resident counsel for the patentees, since filed here, the petition need not be further referred to.

In the introductory portion of the brief it is remarked that the "false certificate" to which Brien refers is that of December 31, 1903, the material part of which is quoted above. Adverting briefly to the judicial disposition of the suit upon the Nilus adverse claim, it is insisted that, whilst the appropriateness of the form of the certificate for the purpose for which it was used might be open to difference of opinion, it was in no material sense false or fraudulent, but that its affirmative declarations were true. Intentional deceit on the part of the Leonard applicants and their local counsel is earnestly disclaimed; and as negativing an assumption that the purpose of the certificate was to conceal the real disposition of the Nilus adverse suit reference is made to the aforesaid letter transmitting the certificate, etc., in the principal and concluding paragraph of which the local counsel said:

> Section 2326 of the Revised Statutes as amended by the act of Mar. 3, 1881 (1 Supp. Rev. Stat., 324), provides that where the verdict of the jury in an adverse suit is against both parties, the applicant shall not proceed with the patent proceedings until he shall have perfected his title. I cannot find that any regulation has been adopted by the department covering a case like this, but presume that the enclosed proof that we have perfected the title will be accepted as sufficient. In their application to purchase the applicants waive the alleged area in conflict with the Tamerlane Fraction, and this leaves no existing adverse claim against the Leonard, the verdict of the jury and judgment of the court having disposed of the Nilus adverse claim.

It is urged that, proceeding upon the theory that under the decision in the case of James D. Rankin *et al.* (7 L. D., 411) the Leonard patent application remained pending, notwithstanding the court's judgment upon the Nilus adverse, and subject to further prosecution by the applicants upon perfection of their title—"not the inception or initiation of title"—the certificate so framed and filed sufficiently advised the local officers of the termination of that litigation, whilst the above letter and enclosures fully advised those officers, and in turn your office, that the further proceedings were taken as a matter of right by virtue of the act of Congress pursuant to which the judgment was rendered.

In answer to this it may first be said that Brien's complaint, as first above set out, goes not only to the certificate of December 31, 1903, but embraces as well the further certificate of December 12, 1904, which resident counsel seem to have overlooked. Whatever may be said of the literal truth of the earlier certificate, or on behalf of the accompanying letter of the local counsel, there remains the later certificate in which it is affirmatively declared that in the matter of the suit upon the Nilus adverse claim, brought in the court by Brien against the Leonard applicants, "the action of the plaintiff was, by an order dated November 7, 1900, dismissed." The letter, which is undoubtedly that to which your office referred in your advice of October 26, 1904, to the local officers, contains no explicit statement of the result of that suit; and the official certificate thereafter submitted in response to the call by your office would naturally and rightfully be accepted as conclusive. Had that call been properly observed a copy of the judgment roll would have been furnished and the true situation disclosed. Without regard to any question of intent on the part of those who prepared and filed it, it must be said that the certificate did not correctly present the facts to the land department and could not but be misleading. Its terms import a termination of the suit adverse to the plaintiff, Brien, alone—that is, that the action begun by him had been "dismissed"—and admit of no other interpretation. It falls far short of a recital, or even suggestion, of a verdict and judgment adverse both to plaintiff and defendants. Had a copy of the judgment roll, instead, been filed the further proceedings by the applicants would not have been permitted.

No dispute need be raised upon the contention of counsel here, that in the event of such a judgment, in a suit pursuant to section 2326, Revised Statutes, neither party is thereupon under obligation to file in the land department a copy of the judgment roll; for neither could secure patent thereunder and neither is under obligation to make further effort to acquire title at all. In fact, the successful party in any such suit is under no obligation to file a copy of his judgment roll, if he does not choose to avail himself of his judgment. But if and

when occasion arises to denote the result for the information of the land department, as it does when patent is thereafter sought by any applicant, the one who undertakes it is under every obligation to disclose the true nature of the judgment.

As shown by the certified copy of the judgment roll, submitted by Brien, in the suit upon the Nilus adverse claim the jury returned a signed verdict, October 17, 1900, as follows:

> We, the jury empanelled in the above entitled cause, find that neither plaintiff nor defendants have established the right to the possession of the ground in controversy.

Upon this verdict the court entered the following judgment:

> Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that neither the plaintiff or the defendants are entitled to the right of possession of the ground and premises in controversy in this action, being the ground in conflict between the Nilus lode mining claim and the Leonard lode mining claim, or any part thereof, described in the complaint, and in the defendant's cross-bill or complaint in this action.
>
> It is further ordered, adjudged and decreed that the plaintiff take nothing by this action, and that the defendants take nothing by this action or their cross-complaint herein.
>
> It is further adjudged that costs shall not be allowed to either party to this action.
>
> Done in open court this 7th day of November, 1900.

The verdict and judgment, therefore, were returned and entered pursuant to the act of March 3 1881 (21 Stat., 505), whereby it is provided—

> That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title.

Upon the concluding clause of the act resident counsel base their contentions on behalf of the Leonard applicants and patentees. By virtue of its terms and notwithstanding or in view of the verdict and judgment, it is contended, the Leonard patent application remained pending and the applicants were entitled to proceed thereunder, without giving further notice, upon perfection of a possessory title.

Commenting upon the effect of the amendatory act of 1881, counsel argue that prior thereto, and under the provisions of section 2326, Revised Statutes, an applicant for patent was not put upon the defense of the validity of his own claim by the interposition of an adverse claim and suit thereunder; that that question remained, not in part but in whole, with the land department, provided only that his adversary failed to establish his claim of superior right; that the laboring oar was borne by the plaintiff (adverse claimant),

who succeeded, it at all, upon the strength of his own title and which alone was on trial; that if the plaintiff prevailed there would be an end of the case of the defendant (applicant for patent) both in the court and in the land department, and the former might avail himself of the judgment roll to secure patent; but that if the plaintiff failed to establish his adverse right the stay of proceedings in the land department would be removed and the applicant entitled to proceed as though no adverse claim had been interposed, and the adverse claimant would be eliminated as a factor in the case. No change in the status of the adverse claimant was wrought by, and in the event of a judgment pursuant to, the act of 1881, say counsel; but they earnestly insist that with the applicant for patent the case is different, in that by the concluding clause he, as the "claimant," is still recognized as such notwithstanding the verdict, and that with premeditation and purpose that clause deals with him as a continuing factor under his application and relegates his case to the land department, where he may pursue his claim upon submission of proof, not that he has originated a possessory title, but that he has "perfected" one theretofore asserted.

It is, as appears from what has been stated, the theory of counsel that the adverse claimant, Brien, was eliminated from the patent proceedings and concluded as to the premises in controversy as effectually as if he alone had suffered an adverse judgment in accordance with the provisions of section 2326, and that thereupon the stay of proceedings in the land department was lifted, and all further questions concerning the applicants' claim in and to the premises were remitted to that department, with the privilege on the part of the applicants of proceeding to entry and patent under their application merely upon submission of proof that they had "perfected" a possessory title in themselves. Or, as it is otherwise stated by counsel, when by publication and posting of notice of an application for mineral patent all those concerned have been invited to present their adverse claims, and when such as have been presented have been rejected upon trial in court, the question of the right of the applicant to his claim becomes and remains thenceforward one between himself and the government, to be determined in the land department and nowhere else; and what is conceived to be a recognition expressly accorded the "claimant," as meaning the applicant for patent, by the concluding clause of the act of 1881 is relied upon as supporting this view.

The view can not be accepted as tenable. Indeed, borrowing from the argument of counsel, that prior to the act of 1881 the asserted possessory title of the adverse claimant alone was tried in the action, it must equally be true that thereafter the claimed possessory title of

the applicant for patent would be tried in the same manner and under the same conditions, and would be exposed to the same consequences. This is obvious from the first portion of the act itself. In Lindley on Mines (2nd Ed., Vol. II, Sec. 763, pp. 1366–7), upon authority of cited cases, it is said:

> In the ordinary action of ejectment a defendant may rely upon the weakness of plaintiff's title; but in the proceeding contemplated by the Revised Statutes, in the light of the amendment of March 3, 1881, both parties are regarded as actors, and some of the rules pertaining to ordinary actions are necessarily modified in the trial of such causes.
>
> The plaintiff may be non-suited, but this will not avail the defendant unless he thereupon proceeds to establish his rights affirmatively and secures a judgment.

Speaking of the act, the Supreme Court, in the course of the opinion in Perego *v.* Dodge (163 U. S., 160, 167–8), said in part:

> Its manifest object was to provide for an adjudication, in the case supposed, that neither party was entitled to the property, so that the applicant could not go forward with his proceedings in the land office simply because the adverse claimant had failed to make out his case, if he had also failed. In other words, the duty was imposed on the court to enter such judgment or decree as would evidence that the applicant had not established the right of possession, and was for that reason not entitled to a patent. The whole proceeding is merely in aid of the land department, and the object of the amendment was to secure that aid as much in cases where both parties failed to establish title as where judgment was rendered in favor of either.

That the judgment entered in this case was conclusive upon the adverse claimant under the patent proceedings thitherto pending, as maintained by counsel, there can be no question. It was adjudged, upon the verdict, that he was not entitled to the right of possession of the premises in controversy and that he should take nothing by the action. But judgment in the same terms was entered against the applicants for patent; and, the character and purpose of the action considered, there would seem to be no ground for any distinction in respect of its effect as to them. Speaking, in Jackson *v.* Roby (109 U. S., 440, 444), of the finding below by the jury in that case that neither party litigant had proven title to the property in controversy, the Supreme Court said:

> The effect of this verdict was to leave the defendants, who had applied for a patent, without any right to it, so far as the premises in controversy were concerned, and to leave the plaintiff in no better situation.

And in Lindley on Mines (*supra*, p. 1370) it is further said:

> Where the judgment is, that neither party has established a right of possession, the presentation of the judgment roll to the land department effectually terminates the proceeding. It has performed its office. The land officers will not undertake to retry the issues submitted to the court; nor is the land department in any sense an appellate tribunal. It accepts the judgment as concluding

the present right of both contending parties. The effect of such a judgment is to prevent either party from proceeding further in the land office. The withdrawal of the land affected by the filing of the application is removed, and the tract in controversy becomes subject to new applications.

The prerequisite to the paramount title under the mining laws, and the basis of effective patent proceedings, is the right of possession which arises under and by virtue of a valid location; and "the question of the right of possession" as between contending claimants is committed exclusively to the courts and is determined by them in aid of the land department. Since patent proceedings can be lawfully commenced and prosecuted only by one who, "having claimed and located a piece of land . . . and complied with the terms of" the mining laws (Sec. 2325, R. S.), has thus acquired the possessory right, what jurisdiction remains to be exercised by the land department, but to reject the application for patent, when it has been affirmatively determined by a court of competent jurisdiction in an adverse proceeding that neither party has the right of possession?

The terms of the concluding clause of the act of 1881 do not justify the conclusion that, in the event of a judgment in accordance with the act, the applicant for patent may thereupon go forward, independently of the judgment, to complete the patent proceedings theretofore initiated by him and "without giving further notice," upon having "perfected his title."

There is nothing in the clause to indicate that the term "claimant" refers exclusively to the applicant for patent, and that he alone is authorized to perfect in himself a possessory title which, as judicially determined, neither party has then established. If it were otherwise the clause would be wholly at variance with the general purpose and provisions of the mining laws. The opponent who also asserts compliance with the mining laws and, as provided by section 2326, files an adverse claim is, obviously, in every sense a "claimant" of the tract in controversy as fully as the applicant for patent, and may profit by the latter's patent proceedings in the event of a favorable judgment. Upon what possible hypothesis, then, can it be maintained that the applicant for patent, who at the time of, and by virtue of, the judgment unfavorable to both stands in no better position than the adverse claimant, is alone privileged to perfect a possessory title in himself, and that the adverse claimant is barred from further effort in that direction?

Indeed, the clause in question plainly is not intended as a recognition of a right of appropriation in any particular person or persons, but is a prohibition purely. In making provision in the act for an adjudication adverse to both parties litigant in any given case, and dealing with them alone, it was but natural to add such a specific

prohibition, in order to avoid a second miscarriage, against a renewal of patent proceedings by either "until he shall have perfected his title."

It is not provided by the amendatory act that the proceedings had in the land department "shall be stayed," or further stayed, or that the applicant shall not prosecute *his patent proceedings further* in the land department, until title shall have been perfected, but that "the claimant *shall not proceed in the land department or be entitled to a patent* for the ground in controversy until he shall have perfected his title." The act provides for a judgment adverse to both parties, effectually terminating the patent proceedings, and leaving no question to be determined by the land department.

The final judgment thus entered in this case, that neither the plaintiff nor the defendants were entitled to the right of possession or should take anything by the action, was a conclusive determination that under the patent proceedings out of which the controversy arose neither party was entitled to a patent and that those proceedings were therefore without effect from the beginning. With the rendition of that judgment the patent application of the Leonard claimants fell.

In his communication first above set forth, Brien asserts that after the verdict he fully complied with the mining laws in regard to the tract in controversy and perfected a possessory title in the premises, and that he rested in the belief that the judgment would protect him against the issuance of patent to his adversaries. The opportunity which should have been afforded, as required by law, by prosecution of patent proceedings *de novo*, for a further adverse claim and suit thereon to determine any disputed question of the right of possession, if such right had then been acquired, was defeated by the course pursued by the Leonard applicants and which was made effective by the use of the inaccurate and misleading certificate before mentioned.

As above indicated, counsel cite and rely upon the case of James D. Rankin *et al.*, *supra*, with which they zealously endeavor to reconcile the later case of Newman *v.* Barnes, *supra*, in each of which judgment was rendered in accordance with the act of 1881 and entry thereafter made by the applicant for patent without proceeding *de novo*. The substance of their contention is that, in addition to the fact that the earlier case is not referred to in the later or elsewhere overruled, it would appear from the statement of the later case that the applicant for patent therein applied to enter without proffer of evidence of perfection of title, and that it was because of her reliance upon the same showing as to title which the court had rejected as insufficient that her entry was canceled by the departmental decision. Far from anything therein to sustain this conclu-

sion, the grounds upon which the entry was canceled were stated by the Department, after reciting the statute and the judgment which had been entered by court, as follows (pp. 258–9):

> In view of the plain and unmistakable language of the statute, together with the finding of the court, and the facts, it would seem to be idle to argue that the claimant had any right to make entry after the rendition of this judgment. The statute provides for the submission of controversies between rival mining claimants to a court of competent jurisdiction for the purpose of settling any dispute in regard to their possessory rights.
>
> It is also wisely provided that where neither party is entitled to judgment, the court shall so find. It would seem that the last paragraph of the act of March 3, 1881, *supra*, was sufficient in itself to preclude the local office from entertaining the application to enter the land after judgment had been rendered by the court. So far as the record before me shows the proceeding was regular in every way and there is no complaint made to the jurisdiction or otherwise, so far as the court proceeding is concerned. In view of this, it is difficult to conceive upon what hypothesis the claimant was allowed to make entry. In view of the judgment rendered, it became entirely immaterial whether the assessment work was done for the year 1893 under the former entry, or for any other year, as they had no right to the property.

The views thus expressed are wholly at variance with the position taken without argument upon the question in the Rankin case; and that case was therefore by the later case in clear effect, and it is hereby expressly, overruled.

Counsel also cite the following language used by the court in the case of Creede &c. Co. *v.* Uinta &c. Co. (196 U. S., 337, 354):

> It would seem, therefore, from this review of the authorities as well as from the foregoing considerations that, as between the Government and the locator, it is not a vital fact that there was a discovery of mineral before the commencement of any of the steps required to perfect a location, and that if at the time of the entry everything had been done which entitled the party to an entry, to wit, a discovery and a perfect location, the Government would not be justified in rejecting the application on the ground that the customary order of procedure had not been followed. In other words, the Government does not, by accepting the entry and confirming it by a patent, determine as to the order of proceedings prior to the entry, but only that all required by law have been taken.

This language is conceived by them to sustain the view that it was lawful and regular for the applicants for patent to proceed to entry under their application, following the judgment, upon performance of all acts in respect of their alleged location essential to the perfection of a possessory title in themselves; and that the validity of their entry was dependent only upon the performance of those acts prior to the time the entry was made, without prosecution of patent proceedings anew.

The case, however, is in no particular in point, and the language so used in the opinion does not even inferentially sanction the course pursued in the case at bar. That case, which arose between a lode

patentee and a tunnel claimant, was not an adverse proceeding pursuant to section 2326 and of course did not embrace a judgment in accordance with the act of 1881. The language above quoted is a portion of the argument in demonstration of the evidentiary character of an entry and patent, lawfully secured, with respect to the actual performance but not the order of performance of the acts requisite to a valid location, in general. The court does not intimate that proceedings taken without authority of law are cured by the issuance of patent.

In view of the judgment entered by the court the further proceedings so prosecuted by the Leonard applicants were unlawful, and the entry allowed thereunder and patent thereafter issued were so allowed and issued without authority of law. In the judgment of the Department the case presents clear grounds for the interposition of a court of equity, at the instance of the Government, looking to the cancellation of the erroneously issued Leonard patent, so obtained by misrepresentation, and the restoration of the lost jurisdiction of the land department, in order that, by a proper enforcement of the requirements of the mining laws, Brien may be afforded the opportunity which is due him, in view of his continued claim of right to the premises involved, to secure in the tribunal of exclusive jurisdiction a determination of the disputed question of the right of possession. See cases of Moore *v.* Robbins (96 U. S., 530, 533); McLaughlin *v.* United States (107 U. S., 526, 528); Western Pacific R. R. *v.* United States (108 U. S., 510, 513); United States *v.* Minor (114 U. S., 233, 240–4); Mullan *et al. v.* United States (118 U. S., 271, 278–9); United States *v.* San Jacinto Tin Co. (125 U. S., 273, 285–6); United States *v.* Beebe (127 U. S., 338, 342); United States *v.* Iron Silver Mining Co. (128 U. S., 673, 676); Williams *v.* United States (138 U. S., 514, 517); United States *v.* M., K. & T. Ry. Co. (141 U. S., 358, 380–2); San Pedro &c. Co. *v.* United States (146 U. S., 120, 132); Germania Iron Co. *v.* United States (165 U. S., 379, 383–4); United States *v.* American Bell Telephone Co. (167 U. S., 224, 239–40); Duluth & Iron Range R. R. Co. *v.* Roy (173 U. S., 587, 590).

The record is returned, with the direction that the patentees again be called upon to surrender the title under their patent and to reconvey by sufficient deed the patented premises to the United States, within thirty days from notice; and if at the end of that period they have not so complied with the demand, your office will forthwith prepare and transmit to the Department officially certified copies of the pertinent portions of the record, as herewith separately scheduled, with your report in the premises, upon receipt whereof the case will be submitted to the Department of Justice with recommendation that suit be immediately instituted to secure the vacation and cancellation of the outstanding patent.

ISOLATED TRACTS—SECTION 2455, R. S., AS AMENDED BY ACT OF JUNE 27, 1906.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 18, 1906.

REGISTERS AND RECEIVERS, *United States Land Offices.*

SIRS: Hereafter the sale of isolated tracts will be governed by the provisions of the act of June 27, 1906 (Public—No. 303), amending section 2455 of the Revised Statutes.

All such sales shall be made in the manner and form hereinafter provided, and all instructions in conflict herewith are superseded.

1. Applications to have isolated tracts ordered into market should be filed with the register and receiver of the local land office in the district wherein the lands are situated.

2. Applicants must show by their own affidavits, corroborated by two witnesses, the character of the land; that it contains no saline, stone, or other minerals; the amount, kind, and value of timber thereon, if any; whether the land is occupied, and, if so, the nature of the occupancy; for what purposes the land is chiefly valuable, and why it is desired that the same be sold.

3. The local officers will, upon the receipt of applications, enter them in pencil upon the tract books and immediately thereafter forward same to the General Land Office.

4. Registers and receivers must carefully examine their plats and records, and in transmitting applications report the status thereof and the existence of any objection to the offering of the lands for sale.

5. The filing of application does not affect the status of the land nor segregate the same prior to the approval thereof by the General Land Office, nor does it give applicants any preference right over others who may desire to purchase the land at any sale that may be had thereunder, as the land must be disposed of to the highest bidder.

6. If the land is ordered into market the local officers will be so advised and directed to give applicant notice thereof and allow him 30 days within which to deposit, with the receiver, an amount to cover the expense of such sale, including cost of publication of notice.

7. When lands are ordered to be exposed at public sale, the register and receiver will cause a notice to be published once a week for five consecutive weeks (or for thirty consecutive days if a daily paper), immediately preceding date of sale, in a newspaper to be designated by the register as published nearest the land described in the application, using the form hereinafter given. The register will also cause a similar notice to be posted in the local land office, such notice to

remain so posted during the entire period of publication. The applicant must furnish proof that publication was duly made.

8. At the time and place fixed for the sale the register and receiver will read the notice of such sale and allow all qualified persons present an opportunity to bid. After all bids have been offered the local officers will declare the sale closed and announce the name of the highest bidder, who will be declared the purchaser, and he must within ten days from such notice furnish evidence of his citizenship, nonmineral and nonsaline affidavit (Form 4–062), or nonsaline affidavit (Form 4–062a), as the case may require. Upon receipt of the proof and payment for the land, the local officers will issue the proper final papers.

9. No lands shall be sold at less than $1.25 per acre. Should any of the lands so offered be not sold the same will not be regarded as subject to private entry unless located in the State of Missouri (act March 2, 1889, 25 Stat., 854), but may again be offered for sale in the manner herein provided for.

10. Promptly after each sale the local officers will forward to the General Land Office a report showing the lands offered, indicating the sales, date thereof, number of certificates, and names of purchasers. Cash papers will be issued, as in ordinary cash entries, indorsed "Public Sale," and reported in your current monthly returns. With the entries must also be forwarded the affidavit of publisher showing due publication and the register's certificate of posting.

Very respectfully,

G. F. POLLOCK, *Acting Commissioner.*

Approved July 18, 1906:

THOS. RYAN, *Acting Secretary.*

[PUBLIC—No. 303.]

AN ACT to amend an Act entitled "An Act to amend section 2455 of the Revised Statutes of the United States," approved February 26, 1895.

That the Act of February twenty-sixth, eighteen hundred and ninety-five, entitled "An Act to amend section twenty-four hundred and fifty-five of the Revised Statutes of the United States," be, and the same is hereby, amended so as to read as follows:

"It shall be lawful for the Commissioner of the General Land Office to order into market and sell, at public auction at the Land Office of the district in which the land is situated, for not less than one dollar and twenty-five cents per acre, any isolated or disconnected tract or parcel of the public domain not exceeding one quarter section which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land officers of the district in which such land may be situated: *Provided*, That this Act shall not defeat any vested right which has already attached upon any pending entry or location."

Approved, June 27, 1906.

4–283 a.

NOTICE FOR PUBLICATION. (ISOLATED TRACT.)

PUBLIC LAND SALE.

——— LAND OFFICE, ———, *190—*.

Notice is hereby given, that as directed by the Commissioner of the General Land Office, under provisions of act of Congress approved June 27, 1906, Public—No. 303, we will offer at public sale, to the highest bidder, at —— o'clock —m., on the —— day of ——— next, at this office, the following tract of land, to wit:

——— ———.

Any persons claiming adversely the above-described lands are advised to file their claims, or objections, on or before the day above designated for sale.

———, *Register.*

———, *Receiver.*

NORTHERN PACIFIC GRANT—ADJUSTMENT—ACTS OF JULY 1, 1898, AND MAY 17, 1906.

STATE OF OREGON *v.* NORTHERN PACIFIC RY. CO.

A selection by a State under the provisions of the act of August 18, 1894, can not, prior to approval thereof, be considered an "entry," within the meaning of the act of May 17, 1906, extending the provisions of the act of July 1, 1898, and the conflicting claims of the State and the Northern Pacific Railway Company thereto are therefore not subject to adjustment under the provisions of said act.

The purpose of the act of May 17, 1906, is to extend relief in the same class of claims as provided for in the act of July 1, 1898, where the same were initiated, within the territory described, after January 1, 1898, and prior to May 31, 1905.

Acting Secretary Ryan to the Commissioner of the General Land Office, July 20, 1906.

(F. L. C.) (F. W. C.)

With your office letter of the 9th instant was transmitted a motion on behalf of the State of Oregon for review of departmental decision of June 8, last (not reported), in which you were directed to proceed with the adjudication of the claim of the Northern Pacific Railway Company to lots 1, 2, 3 and 4, and the N. ½ of SW. ¼, Sec. 11, T. 5 N., R. 28 E., La Grande land district, Oregon, under its grant, without regard to the claim of the State of Oregon resting upon a proffered list of selections filed November 16, 1901, under the act of August 18, 1894 (28 Stat., 372, 422), and approved by this Department July 18, 1905.

In the decision appealed from the facts with regard to the claim of the railway company under its grant and of the action upon the State's list of indemnity selections, are fully set forth. The motion alleges error in not taking into consideration the act of Congress

approved May 17, 1906 (Public, No. 172), the first section of which provides:

> That the provisions of the act of July first, eighteen hundred and ninety-eight (Thirtieth Statutes, pages five hundred and ninety-seven and six hundred and twenty), which provided for the adjustment by the Land Department of conflicting claims to lands within the limits of the grant to the Northern Pacific Railroad Company, and also the provisions of the act of March second, nineteen hundred and one, entitled "An act for the relief of settlers under the public land laws to lands within the indemnity limits of the grant to the Northern Pacific Railroad Company," be, and they hereby are, extended to include any *bona fide* settlement or entry made subsequent to January first, eighteen hundred and ninety-eight, and prior to May thirty-first, nineteen hundred and five, in accordance with the erroneous decision of the Land Department respecting the withdrawal on general route of the Northern Pacific Railroad between Wallula, Washington, and Portland, Oregon, where the same has not since been abandoned: *Provided*, That all lieu selections made under this act shall be confined to lands within the State where the private holdings are situated.

It is claimed that the State's selection should be considered an entry within the meaning of the provisions of this act and that adjustment of the conflicting claims should have been directed under its provisions.

It has been repeatedly held by this Department and the courts that there is in fact no selection, where approval of the Department is necessary to give the same validity, until such approval is given, and that all steps prior to such approval are but a proffer of a selection. Further, that while for administrative reasons the same segregative effect has been accorded a proffered indemnity selection prior to its approval as is accorded an entry of record, it has never been held to be, while awaiting departmental consideration, a technical entry.

Under the act of July 1, 1898, this Department has held that a homestead application pending on January 1, 1898, is not within the class of claims subject to adjustment under the provisions of the act of July 1, 1898. See Northern Pacific Railroad Co. *v.* Sherwood (28 L. D., 126). Had the selection in question been proffered prior to January 1, 1898, the claim would not have been subject to adjustment under the provisions of the act of July 1, 1898, and it was undoubtedly the purpose of the act of May 17, 1906, merely to extend relief to the same class of claims provided for in the act of July 1, 1898, where the same had been initiated, within the country described, after January 1, 1898, and prior to May 31, 1905.

The entire matter considered, it is the opinion of this Department that the claim of the State, resting upon its indemnity selection hereinbefore referred to, is not within the class of claims subject to adjustment, either under the provisions of the act of July 1, 1898, or the extension granted by the act of May 17, 1906. The motion is accordingly denied.

CONFIRMATION—HOMESTEAD—RAILROAD GRANT—SECTION 7, ACT OF MARCH 3, 1891.

TRAVERS *v.* JACOBSON.

Where final certificate is issued upon a homestead entry, subject to the claim of the Northern Pacific Railway Company under its grant, which claim is subsequently relinquished under the provisions of the act of July 1, 1898, the adverse claim of the company, while pending, is not a contest or protest against the validity of the entry, within the meaning of the proviso to section 7 of the act of March 3, 1891, such as would prevent confirmation thereof under said section.

Acting Secretary Ryan to the Commissioner of the General Land Office, July 20, 1906.

(F. L. C.) (J. L. McC.)

Charles Jacobson, on June 1, 1897, made homestead entry for the SE. ¼ of Sec. 33, T. 53 N., R. 12 W., Duluth land district, Minnesota.

On August 22, 1898, Jacobson having submitted commutation proof, the local officers issued final cash certificate (under departmental order of February 28, 1898), subject to any claim the Northern Pacific Railroad Company might have.

On October 17, 1905, the Department accepted relinquishment No. 6, supplement "A," executed September 23, 1905, under the act of July 1, 1898 (30 Stat., 597, 620), by the Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company—which relinquishment embraced the tract entered by said Jacobson. Thereupon your office, on November 1, 1905, advised the local officers that the final proof submitted by Jacobson would be examined with a view to patenting.

On November 7, 1905, James L. Travers filed affidavit of contest, alleging, in substance, failure to establish and maintain residence, and to cultivate and improve the land; and that his commutation proof was fraudulent. This application to contest was rejected by the local officers because more than two years had elapsed since the issue of final receipt and certificate.

The applicant appealed; and your office, on December 9, 1905, sustained the judgment of the local officers, and rejected the application to contest, on the ground that more than seven years had elapsed since the issue of final receipt and certificate, and hence the entry is confirmed by the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095).

The applicant has appealed to the Department, contending "that the adverse claim of the Northern Pacific Railway Company to the tract in question constituted a pending contest or proceeding against the validity of the entry."

The proviso to said section 7 reads 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 pre-emption 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.

But for the claim previously asserted to this land under the Northern Pacific land-grant there would be no question as to the application of the proviso to section 7 of the act of March 3, 1891, *supra*, before referred to. The conflicting claims of the railroad company and Jacobson to this land have been adjusted under the provisions of the act of July 1, 1898, *supra*, by the company relinquishing its claim to this land. The act of 1898 provides:

> and all right, title, and interest of said railroad grantee, or its successor in interest, in and to any of such tracts, which the said railroad grantee or its successor in interest may relinquish hereunder shall revert to the United States, and such tracts shall be treated under the laws thereof in the same manner as if no rights thereto had ever vested in the said railroad grantee, and all qualified persons who have occupied and may be on said lands as herein provided, or who have purchased said lands in good faith as aforesaid, their heirs and assigns, shall be permitted to prove their titles to said lands according to law, as if said grant had never been made.

This would seem to render proper the disposition of any land relinquished by the railroad company under the provisions of said act in the same manner as though the railroad grant had never embraced the same; and when thus considered it seems clear that Jacobson is entitled to the protection of the proviso to section 7 of the act of March 3, 1891, *supra*, and that contest of said entry can not now be accepted.

The decision appealed from is therefore affirmed and Travers's application to contest will stand rejected.

NORTHERN PACIFIC GRANT—ADJUSTMENT—ACT OF JULY 1, 1898.

NORTHERN PACIFIC RAILWAY COMPANY.

All the odd-numbered sections within the overlap of the grant eastward from Portland, Oregon, made to the Northern Pacific Railroad Company by the act of July 2, 1864, and the grant northward from said point made to said company by the joint resolution of May 31, 1870, were by virtue of the decision of the Department of July 18, 1895, in the case of Spaulding *v.* Northern Pacific Railroad Company, in dispute at the date of the passage of the act of July 1, 1898, and settlements made upon any portion of said lands subsequent to that decision and on or prior to January 1, 1898, were made under a ruling of the Interior Department, within the meaning of that act, even though upon lands theretofore patented to the company, and where such lands were not sold by the company prior to July 1, 1898, the conflicting claims of the settlers and the company thereto are subject to adjustment under the provisions of said act.

Acting Secretary Ryan to the Commissioner of the General Land Office, July 20, 1906.

(F. L. C.) (F. W. C.)

Under date of June 15, 1905, this Department approved a list of lands, No. 73, containing certain lands within the limits of the North-

ern Pacific land-grant in the State of Washington, included in individual claims, the claimants having elected to retain the lands under the provisions of the act of July 1, 1898 (30 Stat., 597, 620), and from your office letter of the 5th instant it appears that upon being advised thereof and furnished a copy of the list the Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, executed what is denominated as relinquishment No. 73, State of Washington, including a portion of said lands embraced in said list, which relinquishment you recommend be accepted.

The relinquishment being in conformity with the regulations issued under said act is herewith returned with the acceptance of the Department noted thereon and you will advise the company thereof and inform it that upon proper application selection of other lands will be permitted in accordance with the conditions and limitations of the act of July 1, 1898, *supra.*

With regard to the remainder of the lands included in said list not embraced in said relinquishment, the company furnishes evidence of sale of a portion thereof, only one tract of which, namely, the northwest quarter of the northwest quarter of Sec. 1, T. 3 N., R. 1 E., was sold prior to the passage of the act of 1898, to wit, September 16, 1891. This tract having been sold prior to the passage of the act does not seem to come within the provisions of the act, and I approve of your recommendation that the individual claimant thereto be advised thereof and permitted to transfer his claim to other lands, as provided for in the act, retain the remainder of the land, excluding said forty-acre tract, or to have his contest with the company decided on its merits.

With regard to the land included in the individual claims of Jacob B. Stauffer, August Sprick and John S. Behrens, it appears that these claimants made purchase of the lands involved from the Northern Pacific Railway Company, thus terminating their contest, and the lands included in their claims should be stricken from the list heretofore approved.

The individual claim of Charles Petersen covered the fractional N. ½ of SW. ¼ of Sec. 7, T. 4 N., R. 2 E., his election being filed in the local land office April 7, 1904, and the showing filed by the company evidences a sale by the railway company to Petersen of the NE. ¼ of SW. ¼ of said section 7, on June 25, 1904, and a sale made the same day to John Wampler of the fractional NW. ¼ of SW. ¼ of said section 7. The Department is inclined to the view that by Petersen's action in purchasing of the railway company he terminated his contest with the company and his land should also be stricken from the list heretofore approved.

No relinquishment is made of the lands included within the individual claims of J. B. Prutzman, Henry Groth, Arthur Whitney,

Frank J. Morgan, Ellen Kelly, Frank J. Spencer and Clark P. Wood, the reason given in letter from resident counsel forwarding their relinquishment, No. 73, and other showing, being that "the records of your office show that there were no contests pending against the company at the date of issuance of the patent [May 27, 1895], and same should therefore be eliminated from the demand." With regard to this class of claims your office letter reports:

> As the parties claiming these patented lands adverse to the railway company were asserting their claims January 1, 1898, in good faith under the ruling of the Department in the case of Spaulding *vs.* that company (21 L. D., 57), wherein it was held that lands similarly situated were excluded from the railway grant May 31, 1870, and were subject to disposal as forfeited lands under the provisions of the act of September 29, 1890, I am of opinion, in view of the decision of the Supreme Court in the case of Humbird *et al vs.* Avery *et al.* (195 U. S., 480), that these cases are clearly within the act of July 1, 1898, and submit the matter to the Department for instructions.

The decision of the supreme court in the case of Humbird *et al. v.* Avery *et al.*, *supra*, held that the act of 1898 was applicable to lands patented both before and after the passage of the act of 1898, provided they were in dispute and were of the character of lands defined in said act. It may be, as claimed, that these lands were not actually claimed adversely to the company at the time of the issue of the patent, May 27, 1895. It was held by this Department, however, in the case of Spaulding *v.* Northern Pacific Railroad Company, *supra*, which was decided July 18, 1895, that (syllabus):

> At Portland, Oregon, the Northern Pacific has two grants, the first for the line eastward, under the act of 1864, and the second northward, under the joint resolution of 1870, and, so far as the limits of the grant east of said city overlaps the subsequent grant, the latter must fail; and, as the road at such point eastward is unconstructed, and the grant therefor forfeited by the act of September 29, 1890, the lands so released from said grant, do not inure to the later grant, but are subject to disposal under the provisions of said forfeiture act.

This put in dispute all the lands within the overlap defined, whether patented or unpatented, and had the government's contention been finally maintained in the suit thereafter brought to test the rights of the company within said overlap, the patent issued for lands in said overlap to the grantee claimant would, undoubtedly, have been canceled and annulled. It can fairly be said, therefore, that after said decision all the odd-numbered sections within said overlap were in dispute and that settlements made upon any portion of these lands were made under ruling of the Interior Department as defined in the act of 1898. That a *bona fide* settlement could have been made upon said lands even though patented, after said decision, see decision of the supreme court in the case of Lake Superior etc. Co. *v.* Cunningham (155 U. S., 354, 384, 385).

It is the opinion of this Department that the question as to whether the title to the lands involved can be fairly considered as being "in dispute" at the date of the passage of the act and at the time the individual claim must have been initiated, to wit, January 1, 1898, determines the applicability of the act of July 1, 1898, rather than the basis of the railroad claim.

It is seriously contended in the brief herewith that the act does not apply where the railroad claim rests on a patent, but only to lands "to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection" before patent.

Any claim made under the grants of public lands in aid of the construction of railroads must attach, if at all, either by definite location, if within granted or place limits, or by selection, if within secondary or indemnity limits. No rights attach by the issue of patents. The patents are only the evidence of title or rights attached and fixed in the manner indicated.

The entire matter considered it must be held that the class of lands here considered were in dispute at the date of the passage of the act of 1898; that they were settled upon under the ruling of the Interior Department on or prior to January 1, 1898, and as the company does not report a sale of the lands prior to the passage of said act they are within the scope of the act of 1898, and I have to direct that the company be advised of this ruling and again invited to make relinquishment of the lands; failing in which you will report the matter to this Department for further action.

STATE SELECTION—WITHDRAWAL—FOREST RESERVE.

STATE OF IDAHO.

Where survey of a township is made upon application by a State under the act of August 18, 1894, but prior to the filing of the plat thereof the township is temporarily withdrawn with a view to its possible inclusion within a contemplated forest reserve, and the State is thereafter, within due time after the filing of the plat of survey, permitted to make selections of lands therein subject to final determination of the boundaries of the contemplated reserve, the land department has full authority, the establishment of the forest reserve embracing the lands in question being determined upon, to cancel such selections with a view to preserving the lands covered thereby to the reservation when created.

Acting Secretary Ryan to the Commissioner of the General Land Office, July 21, 1906.

(F. L. C.) (F. W. C.)

The Department has considered the appeal by the State of Idaho from your office decision of March 3, 1906, ordering the cancellation

of selections made of certain described tracts included in what is known as list No. 8, Lewiston, Idaho, land district, being in partial satisfaction of the grant made by the act of July 3, 1890 (26 Stat., 216).

From the facts set forth in the decision appealed from, the appeal being a mere formal appeal, the following appears:

August 20, 1900, the State applied for the survey of T. 26 N., R. 1 W., under the act of August 18, 1894 (28 Stat., 372), and upon said application the township was accordingly withdrawn from settlement and entry. The survey of the township was executed in the field during the months of June and July, 1901, the plat of survey was approved July 11, 1902, and filed in the district land office May 8, 1903. Prior to the filing of the plat of survey, to wit, on November 14, 1902, this township, with other lands, was temporarily withdrawn pending examination with a view to its possible inclusion within a forest reserve.

July 6, 1903, and within sixty days from the filing of the township plat of survey, the State filed the list of selections including the tracts here in question, which, it appears, was accepted subject to the final determination of the boundaries of the forest reserve to be thereafter created.

The creation of a reserve, including the land here in question, having been determined upon, your office orders the cancellation of the selections in question, from which action the State has appealed. As before stated, the appeal is merely formal, it being stated that argument will be submitted in due season. As the appeal was filed April 16, 1906, more than three months has since expired and no argument has been filed. It is therefore determined to dispose of the matter without longer awaiting the filing of a brief on behalf of the State.

In the case of the State of Utah (33 L. D., 283), the condition was presented of like selections, allowed under similar conditions, which your office failed to cancel prior to the creation of the forest reserve, and by the terms of the proclamation creating the same all lands were excepted therefrom which had been prior to the date thereof embraced in any legal entry or covered by any lawful filing duly of record in the proper land office, etc. Under these circumstances it was held that the State's selection was a valid selection and was saved by the exception in the proclamation creating the reserve. In said decision it was said:

> It is clear that your office might have, as soon as the reserve was determined upon, ordered the cancellation of the selections allowed subject to the creation of the forest reserve. In other words, your office could have, before submitting the proclamation creating the forest reserve to the President for his approval, cleared the record of all claims which were then subject to termination.

The purpose of the action taken by your office was to clear the record of these selections before the creation of the reserve, thus preserving the lands to the reservation to be hereafter created, and in the opinion of this Department there is full authority for the action taken.

The decision appealed from is accordingly affirmed.

MINING CLAIM—FORFEITURE PROCEEDINGS—CO-OWNER.

REPEATER AND OTHER LODE CLAIMS.

A stockholder in a corporation which is the owner, in whole or in part, of a mining claim has in himself no title in or to the claim separate and distinct from that of the corporation, and therefore is not a co-owner with the corporation or the other shareholders therein, or with other part owners of the claim, and is not qualified to take advantage of the forfeiture provisions of section 2324 of the Revised Statutes.

Acting Secretary Ryan to the Commissioner of the General Land Office, July 23, 1906.

(F. L. C.) (E. B. C.)

February 9, 1904, R. A. Wallace made entry for the Repeater, Telegraph, Duplex, and Telegram lode mining claims, survey No. 16,621, Leadville, Colorado, land district. The Telegram location is not involved, as the entryman has shown full ownership in himself by conveyances from the locator and his grantee, but as to the other claims named his ownership is claimed by reason of forfeiture proceedings instituted August 29, 1902, pursuant to section 2324 of the Revised Statutes.

December 2, 1904, your office directed that the entryman be required to show cause why the entry should not be canceled as to the three claims first named, for the reason that forfeiture proceedings under the statute could not be prosecuted by a stranger to the title, the same being available only in behalf of a co-owner. A showing was submitted, and, on April 21, 1905, your office decided that the same was insufficient and adhered to the decision of December 2, 1904. The entryman has appealed.

From the record it appears that by deeds dated March 3, 1896, the Mount Bross Gold and Silver Mining Company, an Iowa corporation (hereafter styled the company), obtained title to an undivided two-thirds interest in the three claims here in question, while G. W. Brunk owned a one-sixth interest and W. W. Porter the remaining one-sixth interest in said claims; and that from August 29, to November 28, 1902, the entryman caused to be published an alleged forfeiture notice, addressed to the company, G. W. Brunk, and eight others

(said W. W. Porter not being named therein), reciting, in substance, that he had expended, during the years 1900 and 1901, $200 in labor and improvements upon each of the three claims, in order to hold said claims under the provisions of said section 2324, and that if within ninety days after the publication the parties named failed or refused to contribute their proportion of such expenditures as co-owners, their interest in said claims would become the property of their co-owner, R. A. Wallace. Affidavit of publication of the notice was made and recorded. On October 26, 1903, R. A. Wallace executed and caused to be thereafter recorded, his affidavit, alleging that the parties named in the notice had wholly failed to pay their proportion of the expenditures mentioned therein.

On November 23, 1903, the application for patent herein was filed. In response to the requirement of your office there were filed on April 6, 1905, a supplemental abstract of title, copies of certain records of the company, certain affidavits, and an argument by counsel. Thereby it is made to appear that the company was incorporated in January, 1896, with a capital stock of $100,000, divided into shares of one dollar each; that on January 9, 1899, the entryman became the owner of 10,000 shares of said stock; that upon and after said date the company was without funds or means of any kind and failed and refused to expend any money upon the claims; that it was absolutely necessary that the annual labor be performed at the expense of the entryman, in order to protect his alleged interest and property in the claims; that the required annual labor was performed at the request and expense of the entryman and was paid for by him; and that the same was not performed at the expense of the company, as was erroneously stated in the affidavits of labor on record.

Counsel contends that the entryman, by reason of his ownership of stock of the company, had an interest in the property of the company, and by virtue thereof became a co-owner in the claims involved.

November 11, 1905, there was filed a quit-claim deed, executed June 10, 1905, by the company, and duly recorded, which purports to convey to the entryman all the rights, titles, and interests of the company in and to the claims in question.

The Department can not agree with the entryman's contention as to his ownership. A stockholder has no title, separate and distinct from that of the corporation, in or to the property and assets of the corporation, title being vested in the legal entity, designated as the corporation or company, which in contemplation of law exists separate and apart from the personality of the stockholders composing its membership, and a stockholder in a corporation is in no sense a co-owner with the corporation or with the other shareholders of the corporate property. (Humphreys *v.* McKissock, 140 U. S., 304;

28 Am. and Eng. Ency. of Law, 2nd Ed., 899, 900; Morawetz on Private Corporations, 2nd Ed., sections 233, 237.)

Section 2324 of the Revised Statutes, relating to forfeiture proceedings by a co-owner, provides a strict statutory and summary remedy, which, when the conditions are complied with, wholly divests the delinquent co-owner of his entire right and interest. Such a statute, creating as it does a forfeiture, must be strictly construed, and to be effective its terms must be fully complied with. (2 Lindley on Mines, 2nd Ed., p. 1214; The Golden and Cord Lode Mining Claims, 31 L. D., 178; Turner *v.* Sawyer, 150 U. S., 578.) One who has merely an inchoate title, as the holder of a sheriff's certificate of purchase under an execution sale and as the assignee of judgments, which are liens against the claims or interests therein, is not a co-owner within the meaning of the statute (Turner *v.* Sawyer, *supra*), and with stronger reason may it be said that one who has no title or ownership whatever is not a co-owner within the intendment of said statute.

The Department finds that, during the years covered by the alleged expenditures and during the time of the attempted forfeiture proceedings, R. A. Wallace was not a co-owner in the locations in question. Because he was not a co-owner, he, by said proceedings, did not and could not acquire any ownership in the premises. Furthermore, there is an outstanding one-sixth interest, which he does not even pretend to have acquired. To support the entry, the proofs must show that the full ownership is in the entryman. (The Golden and Cord Lode Mining Claims, *supra;* Thomas *et al. v.* Elling, 25 L. D., 495.)

Upon the record presented, it appears therefore that at the date of the filing of the application for patent herein the entryman had no ownership whatever to the three claims involved, upon which patent proceedings could be predicated. It follows that the entry as to such locations must be canceled.

The decision of your office is accordingly affirmed.

CROW INDIAN LANDS—PURCHASER OF IMPROVEMENTS—PREFERENCE RIGHT OF ENTRY.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 23, 1906.

Register and Receiver, Billings, Montana.

GENTLEMEN: The act of April 27, 1904, and the President's proclamation of May 24, 1906, provide that purchasers of certain Indian improvements have a preference right for thirty days after the land

is open to entry within which to make entry of the lands covered by said improvements, not exceeding one hundred and sixty acres.

You are advised that such preference right of entry is not defeated for the Indian allotments embraced within the withdrawals of May 21, 1906, and June 16, 1906, under the act of June 17, 1902 (32 Stat., 388), for reclamation purposes.

The purchaser of an Indian's improvements will acquire a preference right of entry only within the limits of such Indian's allotment, not exceeding one hundred and sixty acres, except that purchasers of improvements on an allotment containing less than one hundred and sixty acres will be allowed to make entry for additional contiguous land sufficient to make one hundred and sixty acres whether the additional land is within the withdrawal for reclamation purposes or outside thereof.

Very respectfully, G. F. POLLOCK,
Acting Commissioner.

Approved, July 23, 1906:
THOS. RYAN, *Acting Secretary.*

HOMESTEAD—SECOND ENTRY—ACT OF APRIL 28, 1904.

FRANK BEESON.

The right to make second entry accorded by the act of April 28, 1904, is limited to persons who prior to the passage of the act actually entered other lands under the homestead law.

There is no provision in the act of April 28, 1904, authorizing a second entry based upon settlement made prior to the passage of the act, where the original entry was not made until subsequent to that time.

Acting Secretary Ryan to the Commissioner of the General Land Office, July 24, 1906.
(F. L. C.) (E. O. P.)

Frank Beeson has filed motion for review of departmental decision of March 10, 1906, affirming the action of your office denying his application to make entry, under the provisions of section 2 of the act of April 28, 1904 (33 Stat., 547), of the NE. ¼ and the NW. ¼ SW. ¼, Sec. 15, T. 23 N., R. 53 W., Alliance land district, Nebraska, as additional to original entry made May 20, 1904, for the SE. ¼ of said section.

He asks also that he be allowed to show that he had actually settled and was residing upon the land covered by his original entry prior to the passage of said act (*supra*), and contends that his settlement right thus acquired extended to the tracts embraced in his rejected application and that such right should be protected.

Even conceding that this applicant did in fact establish settlement as alleged, a careful examination of the act in question, upon which the right to make second entry depends, fails to disclose any ground upon which the Department would be warranted in allowing a second entry based upon a settlement right acquired before the passage of the act, when the original entry was not made until afterwards. By the very terms of the act the right claimed by this applicant was conferred only upon those who had prior to its passage *actually entered* other lands under the homestead law.

Further, it is clear that the alleged settlement of Beeson only extended to the land already entered, and not to the tracts described in his rejected application. Manifestly, this was all he intended it should do, for at the time he initiated such settlement there was no law authorizing its extension beyond such limits. By his act in making entry for the tract settled upon after the passage of the act, he clearly evidenced the intention governing him at the time he made his settlement. At that time he never intended to claim a greater area than that entered. He can therefore claim no relief by amendment of his original application, and as he has no rights under section 2 of said act the departmental decision heretofore rendered must be adhered to.

This decision is without prejudice to any rights Beeson might obtain by virtue of the first proviso in section 3 of said act (*supra*), by the relinquishment of his former entry (David H. Briggs, 34 L. D., 60).

The motion for review is accordingly hereby denied.

HOLMAN *v.* CENTRAL MONTANA MINES COMPANY.

Motion for review of departmental decision of April 17, 1906, 34 L. D., 568, denied by Acting Secretary Ryan, July 24, 1906.

SWAMP LAND—ADJUSTMENT—CHARACTER OF LAND.

LAMPI *v.* STATE OF MINNESOTA.

Where a claim is asserted to public lands in the State of Minnesota based upon settlement made prior to survey, and the lands upon survey are returned as swamp and overflowed and are claimed by the State under its swamp-land grant, the settler will be accorded opportunity to show the true character of the lands by evidence other than the field notes of survey.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, July 26, 1906.* (G. B. G.)

This is the appeal of John Lampi from your office decision of October 18, 1905, denying his application to contest the swamp-land

claim of the State of Minnesota to the NW. ¼ of Sec. 24, T. 62 N., R. 19 W., Duluth land district.

Lampi alleges that he made homestead settlement on said land prior to the survey thereof in the field. The field-notes of the survey subsequently made show that the land is swamp and overflowed, and your office holds that, inasmuch as the alleged settlement was after the rule of adjustment of the State's swamp-land grant, adopted March 16, 1903 (32 L. D., 65, 88), the case must be decided upon the evidence of such field-notes, no hearing upon such a state of facts being permitted.

The application for the hearing is based upon the decision of this Department of July 13, 1905, in the case of Culligan *v.* State of Minnesota, on review (34 L. D., 22), wherein it was held that in the adjustment of all claims for public lands in the State of Minnesota initiated in accordance with law prior to the survey of the lands, in instances where selections thereof are made by the State under its swamp-land grant, and the field-notes of survey afford a sufficient basis for such selection, the land department will, by hearing or otherwise, determine the true character of the lands, notwithstanding the return of the field-notes of the survey of the township.

In the decision appealed from your office notes the decision in the Culligan case, but calls attention to the fact that by departmental decision of October 5, 1905, in the same case, on re-review (34 L. D., 151), the former decision in said case was modified in such way as to eliminate from the rule settlement claims initiated prior to survey.

While the Department went further in its said decision of July 13, 1905, than was warranted by the facts upon which it was predicated, there not being involved in that case a settlement claim, still it was not the intention of the Department upon the re-review of that case to decide that settlement claims initiated prior to survey were not entitled to the benefit of such rule. It is true that at page 153 of said case on re-review it was said that the rule formerly announced "would amount to a return to the departmental decision in the La Chance case (4 L. D., 479)." This was a mistaken view of the effect of the decision of July 13, 1905, because of the fact that under the La Chance decision the land department accorded hearings upon proper applications by persons asserting settlement claims to lands claimed by the State under its swamp-land grant, whether such settlement claims were made before or after the survey of the lands in the field.

Said departmental decision of July 13, 1905, the facts considered, held that in all instances where, prior to survey, claims had been initiated to alleged swamp-lands within the State of Minnesota under the act of June 4, 1897 (30 Stat., 11, 36), or by virtue of a selection by the Northern Pacific Railway Company under the act of March 2, 1899 (30 Stat., 993, 994), the parties asserting such claims would be

permitted to show the real character of such lands by evidence other than the field-notes of survey, and the Department upon a most careful consideration of the whole matter is of opinion that settlement claims initiated prior to survey are entitled to the protection of this rule as much as claims of the character involved in said decision. A settler who goes upon unsurveyed lands for the purpose of establishing a home, if such lands are in fact part of the unappropriated public domain, goes at the invitation of the public land laws. If the land has not been surveyed, he has no notice as to what the field-notes of a subsequent survey may recite. Unless he may be permitted to dispute such field-notes, he has no protection whatever against fraudulent or erroneous returns, although the fact may be, and presumably is, that the land upon which he settled is not swamp and overflowed land, but such as is desirable for a homestead. Of course, in instances where the survey has already been made, a person settling upon such surveyed lands is charged with notice of the surveyor's return, and ought not to be permitted to dispute such return, and thus hamper and delay the adjustment of the State's swamp-land grant, but in instances where such settlement is without notice other than such as he may get from an examination of the land, every intendment of the law is in his favor, and he should be permitted to show the real character of the land and thus secure to himself the fruits of his labor.

The decision appealed from is reversed, and your office is directed to order a hearing.

FORT RICE ABANDONED MILITARY RESERVATION—HOMESTEAD ENTRY.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 26, 1906.

Register and Receiver, Dickinson, North Dakota.

GENTLEMEN: Referring to instructions contained in letters "C" of April 30, and December 14, 1895, and April 25, 1901, for the disposal of the lands in the Fort Rice abandoned military reservation, North Dakota, I have to advise you that the act of June 30, 1906 (Public, No. 400), entitled, "An act to extend the public-land laws of the United States to the lands comprised within the limits of the abandoned Fort Crittenden military reservation in the State of Utah, and for other purposes," contains the following provision:

That all persons now having or who may hereafter file homestead applications upon any of the lands situate within the abandoned Fort Rice military reservation, in the State of North Dakota, shall be entitled to a patent to the land filed

upon by such person upon compliance with the provisions of the homestead law of the United States and proper proof thereof, and shall not be required to pay the appraised values of such lands in addition to such compliance with the said homestead law.

In accordance with said act you will no longer charge homesteaders for lands in said reservation the appraised price, but you will permit them to acquire title to the lands in accordance with the provisions of the homestead law of the United States without such payment.

In case of the commutation of an entry you will require the entryman to pay the price fixed by section 2301 of the Revised Statutes.

Very respectfully,

G. F. POLLOCK, *Acting Commissioner.*

Approved July 26, 1906:

THOS. RYAN, *Acting Secretary.*

CONTEST—BOUNTY LAND WARRANT—PREFERENCE RIGHT.

FRED W. NICHOLS.

An applicant to contest a military bounty land warrant location, who alleges nothing that calls for proof of any fact not apparent upon the face of the records of the land department, and who charges no fraud in the location, would not, if successful in procuring cancellation of the location, be entitled to a preference right of entry under the provisions of the act of May 14, 1880, and the land department is justified in refusing to order a hearing on his application to contest.

Acting Secretary Ryan to the Commissioner of the General Land Office, July 30, 1906.

(F. L. C.) (J. R. W.)

Fred W. Nichols appealed from your decision of November 8, 1905, rejecting his affidavit to contest the location of military bounty land warrant No. 17,158, forty acres, act of 1850, made at Sault Ste. Marie, Michigan, by William A. Pratt and Alfred N. Lawrence, upon the NW. ¼ of the SE. ¼, Sec. 30, T. 53 N., R. 35 W., now district of Marquette, Michigan.

The location, made July 9, 1852, No. 120, was suspended for lack of an order of the proper court authorizing the guardian of the minor warrantees to assign the warrant, and March 18, 1853, the warrant was returned to the local office to permit the locators to remedy defect of the assignment. June 3, 1853, Alfred N. Lawrence, not having remedied the defect in assignment of the former warrant, nor asking to make substitution therefor, located warrant No. 15,785, forty acres, act of 1850, on the same land. November 1, 1854, this location was rejected by your office because of the prior location of Pratt and Lawrence.

The record indicates that prior to March 29, 1905, Frederic W. Nichols, on behalf of himself as owner of one-fourth, and of Rufus R. Goodell of three-fourths undivided interest in the land, applied for issue of *patent* for the land upon an entry supposed to have been made by Samuel P. Bell, July 9, 1852, as shown by the entry book of the register of deeds of Houghton county, Michigan, and claiming title deraigned under Bell. March 29, 1905, he was advised by your office that its record shows the land was located by William A. Pratt and Alfred N. Lawrence, and attempted to be located by Lawrence (as above recited), and that:

> The location made by Lawrence alone may have been intended as a substitute for the defective warrant location made by him in conjunction with Pratt, and Bell, through whom you claim title, may have purchased under the location made by Lawrence. If you claim ownership of the land in point, you should furnish to this office an abstract of title under seal of the proper officer, showing how you came in possession of the land. You should also endeavor to obtain possession of said warrant No. 17,158, and if this is impossible, you should furnish an affidavit explaining your inability to recover the warrant.

In response thereto Nichols furnished an abstract and affidavit, upon examination whereof your office, June 10, 1905, advised him, and held that:

> The records of this office show no entry on this land by Bell. On October 4, 1852, Samuel P. Bell made C. E. No. 1111, for the SE. ¼ NW. ¼ of said Sec. 30, and same was patented October 10, 1853. This is the only entry shown by the records of this office to have been made in this section by Bell.
>
> It would therefore appear . . . . that you have no such interest in this land as would justify this office in allowing you to succeed to the rights and interest of the locators of said warrant.

The abstract of title shows that the entry book gives July 9, 1852, as date of the entry by Bell, which date is the same as that of the location of warrant No. 17,158, and not October 4, 1852, that of Bell's cash entry for the SE. ¼ NW. ¼, indicating that S. P. Bell is a mistake for William A. Pratt and Alfred N. Lawrence, but that the warrant location was the one referred to. The abstract further shows that April 20, 1853, by two quitclaim deeds of that date, William A. Pratt, and William A. Pratt and wife, conveyed by each an undivided one-third of the land to Benjamin Howard, which deeds were recorded, respectively, on April 20, and June 28, 1853. Neither Howard nor Lawrence ever conveyed, and this claim of title rests in them.

As to taxes nothing is shown prior to 1880. For tax of that year and for every one subsequent to and including 1899, except the years 1889, 1892, 1894, and 1895, the land was sold for taxes. It was twice sold for tax of the year 1888. All but two of the sales (for tax of 1880 and one sale for tax of 1888) were made to Rufus R. Goodell,

and in the two sales to others the purchasers conveyed their interests to Goodell. But, as the United States has never been satisfied for its right in the land, Goodell has no right that can be asserted against the United States.

The chain of claim of title asserted under the erroneous minute in the entry book of a supposed entry by Bell has some remarkable features. No claim seems to have been made under it until January 9, 1899, over forty-six years after the supposed entry, when Frank Bell and Josie Bell by quitclaim conveyed to Frederic W. Nichols. The abstract shows (Instrument 5)—

Grantor Willard E. Gray, Judge of Probate, Grantee Frederic W. Nichols, Probate Decree February 15, 1900, filed for record February 17, 1900, M. R. [Miscellaneous Record?] 4, page 288, NW. ¼ of SE. ¼, to determine heirs, Frank Bell, son undiv. ½, Kate Dobbie undiv. ½.

The court (county and State) is not indicated, nor whether this was a final decree in administration and distribution of estate of S. P. Bell, deceased, or what was the nature of the proceeding, or that the court ever had jurisdiction of the subject-matter.

A more remarkable feature of the abstract is that subsequently, November 24, 1900 (Nos. 6 and 7, Abs't), Samuel P. Bell, not as sole, and not joined by his wife, executed two quitclaim deeds, each for the consideration of one dollar, to Frederic W. Nichols, which were filed for record, respectively, November 24, 1900, and January 27, 1905. Of these transactions Nichols, in his affidavit of April 12, 1905, says:

That said Samuel P. Bell appearing of record in the office of the Register of Deeds of said County of Houghton to have originally entered said land, and this deponent understanding that he was dead, procured to be conveyed to him, as appears by the abstract of title to said land furnished by deponent to the General Land Office, all the right, title and interest of the heirs at law of said Bell in and to said land; but being afterwards informed that said Bell was alive, deponent entered upon a search for him, and finally found him at Duluth, Minnesota, and then procured from him a deed of the land, as also appears by said abstract. That while so procuring a deed from said Bell deponent asked him for all papers which he had relating to his title to said land, and he then informed deponent that he had no such papers, they having been mislaid or lost in the course of his travels; that said Bell is of very migratory habits, and is a very hard person to find, as deponent discovered when trying to ascertain his whereabouts on the occasion aforesaid; that deponent does not know his present whereabouts, and can not ascertain the same.

It is of course possible that one making an entry July, 1852, presumably then of full age, should be alive over forty-eight years afterward, returning to claim his property abandoned for almost half a century, and to find his estate probated, distributed to his heirs, and by them sold, but such circumstances must require clear proof of identity of person, even if there was an undoubted and clear initiate right of property, which in this case seems to be wholly lacking and

to rest merely upon a mistaken minute in the county book of entered lands.

August 28, 1905, Nichols made an affidavit setting out the facts as to the original suspended location of land warrant 17,158, as advised of them by your office letters, above mentioned, and further that in the spring of 1868 the United States local land office, Marquette, Michigan, to which the records of this land had been removed, with nearly all the records, was destroyed by fire, and that, though restored so far as possible from the General Land Office records—

> a search of the records of said office, as they now exist, shows no evidence of record of the receipt of said letter of March 18, 1853, or of said warrant, or any other facts connected with the matter, on or after said date, ... that said William A. Pratt and Alfred N. Lawrence are deceased, and that deponent, after diligent search, has been unable to locate their heirs, or ascertain from them or others any information as to the return to their ancestors or either of them of said warrant, or its present possession or whereabouts; that the location still remains intact upon the records . . . . and constitutes in law an appropriation of said land, removing the same from all other disposition until final action by the General Land Office.

He claims under the act of May 14, 1880, right to prosecute for cancelation of the location, and, if successful, a preference right of entry of the land. Your decision held that no facts as to the location were charged other than those disclosed by your office records, which, if proven, would affect the legality or validity of the location, and declined to order a hearing.

The assignments of error, summarized, are:

1. To act upon the assumption that as a result of a hearing the government could be advised of no facts other than shown by its records.

2. That, were such the case, contestant would not be entitled to a preference right if successful.

3. That the warrant location was void *ab initio*, if the charge be true, and in case of cancelation of the location contestant is entitled to a preference right.

4. So also even if the location were not void *ab initio*.

This case is clearly not one within the letter or purpose of the act of May 14, 1880 (21 Stat., 140). That act specifies pre-emption, homestead, and timber-culture entries, for contest of which the reward of a preference right is offered. In these specified classes of entries there are requirements and conditions of improvement, cultivation, or residence which preclude knowledge or ascertainment of compliance with law by the entryman from an inspection of the land office records. It frequently happened that by false proof of compliance the government was defrauded of title to public lands. By administrative construction, following the purpose of the act, it is held to be applicable to all cases of entries of *pre-emptive* character

where the right of purchase, selection, or entry depends on some antecedent act of the claimant. Garner *v.* Mulvane (12 L. D., 336), coal lands; Hyde *v.* Warren (14 L. D., 576), Chippewa half breed scrip; Dornen *v.* Vaughn (16 L. D., 8), mineral entry; Olmstead *v.* Johnson (17 L. D., 151), timber and stone land; Smith *v.* King (19 L. D., 382), desert-land; Hobe *v.* Strong (25 L. D., 92), Sioux half breed scrip. It is also, by analogy to the homestead and timber-culture entries, held applicable to other entries wherein a forfeiture is imposed for non-performance of conditions subsequent to the entry, or the right of entry is lost by happening of events precluding its consummation into a title by patent. Some of the foregoing cases present such conditions, and such was Brummett *v.* Winfield (28 L. D., 530), an abandoned townsite, and Bunger *v.* Dawes (9 L. D., 329), Indian trust lands. Unlike either of these classes is the case of Mallet *v.* Johnston (14 L. D., 658), State swamp land selection, wherein the controlling question was the character of the land, swamp or not. This involved the question whether there had been mistake or fraud in its classification upon the plats as shown by the surveyor's field-notes. So far as examination of the cases cited discloses, this is the only one wherein a preference right under the act of May 14, 1880, has been adjudged a contestant for effecting cancelation of an entry or selection in entries of classes not named in the act, where all the proof necessary to the cancelation appeared in the records of the land department. The decision was based upon Ringsdorf *v.* Iowa (4 L. D., 497), and State of Oregon (5 L. D., 31, 35), wherein the character of the land in fact, by parol proof extrinsic to the record, was in contemplation, so that the decision was not well-founded on the precedents cited. In all the three cases the granting of the preference right to the swamp land contestant was expressly of administrative policy, and not of right under the statute.

In the present case no fact is alleged that calls for proof of matter *in pais*, or of facts not apparent upon the face of the records of the land department. No fraud in fact is charged to have been attempted or contemplated by the locators. It is therefore clear that the proposed contestant has no right under the act of May 14, 1880, nor yet has tendered to render a service to the government for which as a measure of administrative policy the reward of an informer should be granted to him. Your decision to that effect is affirmed.

It remains to direct proper action to be taken upon the suspended location. It was suspended for defect of required proof of the assignment on behalf of minor warrantees. Those minors have long since reached their maturity, and for at least thirty-three years since reaching full age have not disclaimed the act of their guardian or sought to reclaim their warrant, or to obtain a duplicate to be

issued, acquiescing in the assignment irregularly made. The purpose of the suspension was for their protection. Were the land warrant now in custody of the land department the irregularity of the assignment should properly be waived, the location approved, and patent thereon be issued, or if good title reasonably satisfactory to the present holders of that claim of title would not thereby be passed, they would be allowed to make substituted payment and to withdraw the warrant. William R. Borders (34 L. D., 37), wherein it was said:

> As the government is not free from fault in neglecting to take proper action upon the location for more than fifty years, and has silently acquiesced in the occupancy of the premises, by the present owner and his grantors under said entry, by withholding it from entry or other disposition, equity and justice would seem to require that his title should be quieted, and that a patent should issue without further consideration.

The record however presents an obstacle to that course. The land warrant is not in custody of the land department, and can not be satisfied, nor has the government received consideration for the land. The location therefore can not be approved and passed to patent. The record does not show who is in possession and use of the land. The original locators are dead. As to who claims under that location the abstract indicates that William A. Pratt fifty-three years ago conveyed one-third or perhaps assumed to convey two-thirds to Benjamin Howard, and that Lawrence has never conveyed his one-half. Taxes have not been paid by either for very many years, and the claim arising from default of so doing is vested in Rufus R. Goodell. He and Nichols seem to be in accord in seeking title, and if no one claiming under the location of Pratt and Lawrence is now claiming the land, in view of the Department Goodell, by payment of such taxes and thereby contributing to support of order and government the just contribution that the land for so many years ought to have paid, is entitled to be recognized as successor to the equity of the original locators.

You will therefore notify counsel for the proposed contestant that if Rufus R. Goodell, or he with Nichols, within a reasonable time to be fixed by your office, apply as successor in right to the locators to make substitution for location of land warrant No. 17,158, and will make clear and unequivocal showing of what person or persons is or are now in possession or occupancy of the land, or claiming its use and exercising dominion over it, and will duly notify all such persons of their proposed substitution, affording them opportunity to appear and object thereto, such application will be considered. If they fail so to do, your office will report to the Department recommending what course should be taken in this and similar long suspended entries and locations.

INDIAN LANDS IN MINNESOTA—HOMESTEAD SETTLERS—EXTENSION OF TIME WITHIN WHICH TO MAKE PAYMENT.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 31, 1906.

Registers and Receivers, Cass Lake, Crookston, and Duluth, Minnesota.

GENTLEMEN: The Indian appropriation act of June 21, 1906 (34 Stat., 325, 326), contains the following provision:

> That the homestead settlers on all ceded Indian reservations in Minnesota who purchased the lands occupied by them as homesteads be, and they hereby are, granted an extension of one year's time in which to make the payments now provided by law.

This law applies to homestead settlers on ceded Chippewa lands opened under the act of January 14, 1889 (25 Stat., 642), and the Red Lake lands opened under the act of February 20, 1904 (33 Stat., 46), except that it does not apply to ceded Chippewa lands opened by circulars of March 27, 1896, and August 12, 1898, as the lands described in said circulars were affected by the free homestead act of May 17, 1900, and payments are not "now provided by law" as to said lands. Inasmuch as proof and payment must be made at the same time, the extension of time for making payment involves a corresponding time within which to make final proof.

Very respectfully,

G. F. POLLOCK, *Acting Commissioner.*

Approved July 31, 1906:

THOS. RYAN, *Acting Secretary.*

CONTEST—CONFIRMATION—PROCEEDING BY GOVERNMENT.

JOHN N. DICKERSON.[a]

The act of May 14, 1880, awards a preference right to a contestant who has "contested, paid the land office fees, and procured the cancelation" of the entry attacked; but does not give an absolute right to contest an entry, nor take from or qualify the power and authority conferred by the organic act upon the land department to supervise and direct all proceedings relating to the disposal of the public lands, and to determine whether a contest against an entry shall or shall not be allowed.

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[a] Not reported in volume 34.

Where an application to contest an entry is not presented until after the lapse of two years from the issuance of final certificate, the Commissioner of the General Land Office has no authority or discretion to allow it, as the seventh section of the act of March 3, 1891, operates as a bar to any proceeding against the validity of an entry not commenced within that time, and a proceeding instituted against the entry by the government within that time does not suspend the running of the statute so as to subject it to attack by reason of an adverse or prior right that was not asserted within the period of limitation.

While an individual has no right to institute a new and independent proceeding against an entry after the lapse of more than two years from the issuance of the final certificate, the land department may accept the offer of an individual to aid in the prosecution of a proceeding commenced by the government prior to the expiration of that period, or adopt such agency and allow the individual to furnish the witnesses and prosecute the case.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 26, 1906.* (E. F. B.)

With your letter of December 12, 1905, you transmit the appeal of May Richmond and Maurice S. Woodhaus, from the decision of your office of October 6, 1905, rejecting their respective applications to contest the homestead entry of John N. Dickerson for the SW. ¼ NE. ¼, NE. ¼ SW. ¼ and W. ½ SE. ¼, Sec. 11, T. 9 N., R. 2 E., H. M., Eureka, California, upon which final certificate issued February 11, 1902.

This entry was suspended within two years from the issuance of the final receipt, upon the request of a special agent, pending an investigation of the entry. The special agent on November 4, 1904, submitted an adverse report and the entry was formally suspended upon the recommendation of the special agent. The entryman was then notified of his right to apply for a hearing.

Dickerson thereupon came before the Department upon a petition for certiorari, complaining of the action of your office in exercising jurisdiction over said entry, contending that it was confirmed by the 7th section of the act of March 3, 1891 (26 Stat., 1095), there being no pending contest or protest against the validity of the entry at the expiration of two years from the date of the final certificate. The Department ruled adversely to that contention (33 L. D., 498) and held that any proceeding initiated by the government within the statutory period is sufficient to suspend the running of the statute, whether notice of such action is given to the claimant within that period or not.

The petition was denied and upon notice thereof Dickerson applied for a hearing, which was ordered and May 27, 1905, was fixt as the date.

It does not appear from the papers in this appeal that action has been taken upon that hearing, but subsequent thereto and after

two years from the date of the final certificate, these appellants applied to intervene and contest the entry, alleging fraud in its inception and failure to comply with the law. You rejected the applications for the reason that if the entry be not canceled as the result of the investigation ordered by your office, it is confirmed by the proviso to section 7 of the act of March 3, 1891, *supra*.

There is no absolute right of contest given by the statute. The act of May 14, 1880 (21 Stat., 140), awards a preference right to a contestant who has "contested, paid the land office fees, and procured the cancelation" of the entry attacked (Strader *v.* Goodhue, 31 L. D., 137; McCraney *v.* Heirs of Hayes, 33 L. D., 21); but it does not give an absolute right to contest an entry, nor take from or qualify the power and authority conferred by the organic act upon the land department to supervise and direct all proceedings relating to the disposal of the public lands, and to determine whether a contest against an entry should or should not be allowed.

Under the prescribed rules governing the initiation of contests, the granting or refusal of an application to contest a final entry rests in the sound discretion of the Commissioner of the General Land Office, subject only to supervision and control by the Secretary of the Interior (Meyers *v.* Massey, 22 L. D., 159). This rule was designed to govern the conduct of local officers and not to restrict or limit the authority of the Commissioner of the General Land Office to determine in every case where no adverse claim or right is asserted, whether such proceeding shall be taken.

If, however, an application to contest an entry is not presented until after the lapse of two years from the issuance of the final receipt, the Commissioner has no authority or discretion to allow it, as the 7th section of the act of March 3, 1891, operates as a bar to any proceeding against the validity of an entry that is not commenced within that time, and a proceeding against the entry by the government within that time, as in this case, does not suspend the running of the statute, so as to subject it to attack by an adverse or prior right that was not asserted within the period of limitation.

In this view there was no error in your decision so far as it holds that appellants have no right to institute new and independent proceedings after the lapse of more than two years from the issuance of the final certificate, but there is nothing in the principle above announced that prohibits your office from accepting the offer of a contestant to aid in the prosecution of a proceeding against an entry that has been commenced by the government, or to adopt such agency and allow the contestant to furnish the witnesses and prosecute the case.

"While an individual may not come in and usurp the place of the government in adverse proceedings against the entry, there can be no

question of the right of the government to avail itself of, acquiesce in, or adopt the proceeding initiated and the proofs furnished by an individual in protest of final proof, or in the contest of an entry" (Sitzler *v.* Holzemer, 33 L. D., 422, 426). So in like manner, while the individual has no absolute right to proceed against an entry by contest, the government may avail itself of his services and allow the prosecution to be conducted in his name.

Every contest in the general sense is a proceeding by the government, whether it is prosecuted thru the accredited officials, or by the agency of individual contests. In either case it is a proceeding exercised by the land department in virtue of its supervisory control over the disposal of the public lands, and in fulfilment of its duty to investigate every entry, for the purpose of protecting the rights of the people as well as to do justice to all claimants (Knight *v.* Land Association, 142 U. S., 161; John N. Dickerson, 33 L. D., 498, 500).

Quoting from the decision of the Department in the case last cited (p. 500):

> If it be once established that the act does not take from your office the supervisory power to proceed against a fraudulent entry or to suspend it for investigation, it must then follow that the manner of proceeding is immaterial, whether by the allowance of contests or protests, or thru its accredited agents, by investigations conducted in the usual manner so as to secure accurate information as to the true status of the entryman [entry].

This expression was used with reference to the proceeding that would be sufficient to suspend the running of the statute, but it can be as aptly employed to signify the power and authority of the Commissioner to conduct that proceeding to its termination.

As no ground is shown for the reversal of your decision, and nothing appearing from the record to indicate any improper exercise of discretion, your decision is affirmed. But as the tenor of it rather indicated that you have no authority to accept the aid of a contestant in the prosecution of a proceeding commenced by the government, it is deemed advisable that the view of the Department in that respect should be communicated to you for your guidance in the future.

AFFIDAVIT FOR REHEARING—SETTLEMENT—QUALIFICATION.

SHORT *v.* BOWMAN.[a]

A petition for rehearing may properly be considered even tho the affidavit of petitioner filed as a basis therefor is not corroborated, where the matters alleged as ground for the petition are susceptible of proof by the records of the land department.

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[a] Not reported in volume 34.

The act of December 29, 1894, relating to second homestead entries, has no application to entries made and abandoned after its passage, but is specifically limited in its application to persons who had prior to its passage forfeited their rights for any of the reasons enumerated in section 3 of the act of March 2, 1889.

One disqualified to initiate a valid settlement right can not claim the privilege of having his status as an etryman determined as of the date of his application for the purpose of protecting such invalid settlement right: the right will only be protected from the date the impediment to its initiation is removed, and the right attaches, and if before that time a superior right intervenes it will be recognized and protected.

One who at the time he performed an act of settlement upon which he relies as entitling him to a prior right of entry is disqualified as an entryman by reason of having an entry, not actually abandoned, then of record, is disqualified to make a valid settlement and can therefore gain nothing thereby as against the valid adverse right of another, asserted prior to the removal of such disqualification.

Acting Secretary Ryan to the Commissioner of the General Land Office, June 13, 1906.

(F. L. C.) (E. O. P.)

March 27, 1906, the Department entertained a motion for rehearing in the above entitled case filed on behalf of Samuel M. Bowman. The said motion, together with the showing made by Walter Short in opposition thereto, are now before the Department for consideration, but before entering upon a discussion of the matters thereby presented a brief statement of the history of the case is necessary to a clear understanding of the question of law involved, for, by the admission contained in an affidavit subscribed by Short, all doubt is removed as to the facts set up as a ground for the motion for rehearing.

October 11, 1901, Samuel M. Bowman made homestead entry of the E. ½ NE. ¼, Sec. 17, T. 9 N., R. 11 W., Elreno land district, Oklahoma. November 5, 1901, Walter Short filed his affidavit of contest against his entry, alleging priority of settlement. Hearing was had and from a consideration of the testimony submitted the local officers recommended a dismissal of the contest. Subsequently a rehearing was ordered upon the application of Short and the case reopened for the introduction of newly-discovered evidence, and a reconsideration resulted in a reversal of the prior action of the local officers, which action was affirmed by your office and the entry of Bowman held for cancelation. On appeal the action of your office was sustained by departmental decision of July 20, 1905 (not reported). Motion for review of this decision was formally denied November 29, 1905.

The application now under consideration, which forms the next step in the proceeding, is based upon an allegation of newly-discovered evidence, going to show the disqualification of Short as a homestead entryman at the time he made his prior settlement on the

land, because of a prior exercise of his homestead right in making entry of the E. ½ SW. ¼, Sec. 22, T. 13 N., R. 15 W., I. M., which entry remained intact at the time he made his settlement on the land in dispute. The sole object sought by the application for rehearing being to prove this allegation, necessity for ordering such hearing is obviated by the statements contained in an affidavit filed by Short in support of his application to make second homestead entry, to the effect that the same is true, which affidavit accompanies the record. The truth of the allegation is not denied by Short or his counsel in the showing made in opposition to the pending application. The Department will therefore treat the allegation of Bowman as true and proceed with the consideration of the question presented.

It is contended by counsel that this application is not properly made in accordance with the rules of practice, in that it fails to state that it is not filed for purpose of delay. This objection is purely technical and can not be entertained as sufficient reason for denying the application. Further objection is made that it is not alleged in said application that due diligence had been exercised to procure the evidence now offered, at the time of hearing. The Department is of opinion this objection is not well taken, inasmuch as no other reasonable construction of the language used in said application could warrant any other conclusion.

The further objection that the affidavit of claimant is not properly corroborated is entitled to greater consideration, and if in this particular case the object of the rule were otherwise not fully accomplished, the Department would be inclined to recognize it. But the matters alleged in movant's affidavit are susceptible of proof by the records of the land department, and of the facts shown by such records the Department must take judicial notice, and it can not be contended that such evidence is inferior to that afforded by any number of affidavits. On the contrary, it is evidence of the highest character and needs no support to prove the facts there officially recorded. It is for this reason the usual corroborating affidavits required by the rules of practice in such cases, are dispensed with.

This leaves for consideration a single question of law, viz., whether or not any settlement right could have been gained by Short which he might assert as against Bowman, he being at the time he performed his acts of settlement the holder of a record entry for another tract of land, not adjoining the land settled upon by him. An examination of departmental decisions heretofore rendered clearly establishes the right of a homestead applicant, under certain conditions, to acquire a settlement right prior to the formal cancelation of a prior homestead entry made by him or the restoration of his homestead right, which right he may safely rely upon as a basis for asserting a prior right of entry as against a subsequent settler who has never exercised his

homestead right or is in any manner disqualified from exercising such right. Heiskell *v.* McDowell (23 L. D., 63); Smith *et al. v.* Taylor (ib., 440); Hall *v.* Mitchell (24 L. D., 584).

In the first of the cases above cited it appears that the party asserting a prior settlement right acquired prior to formal restoration of his homestead right for which he had made application, had, in fact, long prior to initiating his settlement right, abandoned his prior entry, because of an erroneous ruling by the local officers refusing a leave of absence, and that he was as a matter of right clearly entitled to a restoration of his homestead right at the time he made his settlement upon another tract.

The case of Smith *et al. v.* Taylor, *supra*, presents a condition more nearly analogous to the case at bar. Taylor, at the time he made settlement, had an entry of record for a different tract, which had been successfully contested on the ground of prior settlement, but the contest proceedings were not formally closed adversely to him until after he initiated his settlement right. In that case his right to make entry as a prior settler was recognized, for the reason, principally that a cancelation of his record entry for such a cause would not work a forfeiture of his right to make another entry, as probably would have been the case had his entry been properly allowed in the first instance, and its subsequent cancelation been the result of a contest brought upon the ground of abandonment or general failure to comply with the law.

The case of Hall *v.* Mitchell, *supra*, is not essentially different from the case of Heiskell *v.* McDowell, *supra*.

In each instance where the initiation of a settlement right prior to the removal of a disqualification to make entry by reason of the applicant having an entry then of record, or his entry having been canceled but his homestead right not then restored, it appears that the claimant was at the time of making his settlement rightfully entitled to have the disqualification formally removed. In other words, the only existing objection to his qualifications was a purely technical one which the Department refused to recognize to his prejudice or to defeat a valid settlement claim which the applicant was in equity and right entitled to rely upon. It is believed these are the only reasons underlying the rule laid down in the decisions cited, and the Department is unwilling to extend the scope thereof; nor will it recognize the validity of settlement rights acquired while the party asserting them had another entry of record or was otherwise disqualified and was not at the time of making settlement clearly entitled to have his record entry canceled or the other disqualifications, merely technical, removed.

The right claimed must be clearly established, especially where the rights of adverse claimants are involved. It is true, as a general

proposition, that the rights of a prior settler are no greater than his rights as an entryman, and if he is disqualified as the latter he becomes a mere trespasser when attempting to assert the former, and the rule permitting the initiation of a valid settlement right by one not technically, though rightfully, entitled to claim the qualifications of an entryman, was adopted only for the purpose of removing the technical objection, and is not to be construed as extending the general proposition for any other purpose, or as permitting the initiation of valid settlement rights by claimants who are, both in fact and in law, disqualified as entrymen.

The recognition or rejection of Short's right must therefore depend in the end upon his actual, not technical, qualifications as an entryman. The showing made in his behalf is briefly stated as follows:

His former entry of record at the time he made his alleged settlement on the tract in dispute, October 5, 1901, was made February 5, 1901, after a careful examination of the land. An attempt was made to raise a crop on the land that year but he discovered that the quality of the soil was inferior and crops could not be grown successfully. He was unable to obtain water for his stock and family, and finding that he would be unable to make a living on the land he abandoned it about October 1, 1901, five days prior to making his alleged settlement, and formally relinquished his entry October 26, 1901. He also relies upon the many valuable improvements made upon the land involved herein as a further reason for receiving equitable consideration.

It is doubtful if this showing, even though incontrovertible, would be sufficient to bring him within the rule announced in the cases cited. The evidence of actual abandonment prior to formal relinquishment is slight. He had not relinquished at the time he made settlement on another tract and his abandonment had existed for less than a week, a period far too short to permit the bringing of a contest on that ground. It appears further that he owned the improvements on the entered tract until after he executed his relinquishment, when he traded them to the person who made entry for the land, which entry was in fact made on the same date the relinquishment was filed.

Bowman, in his application for rehearing, asserted that Short raised a crop on the land he alleges he abandoned, and that he returned and harvested the same after he made settlement on the tract in dispute, and this allegation is not, in terms, denied by Short, though he does aver that the kaffir corn planted "dried and shriveled up and was worthless."

An examination of the original record discloses that no testimony was offered at the hearings had touching Short's qualifications as an entryman, and that he subsequently requested that he be permitted

to file an affidavit to cure the supposed defect in the record, which affidavit was duly executed, February 13, 1903, and made a part of the record. Short therein made oath—

> that I have never at any time filed upon or entered any portion of the public domain of the United States either for a homestead or otherwise.

In view of the admission made by Short in his present showing, the utter falsity of the averment contained in his former affidavit is manifest.

Only one natural presumption arises from such action and that is that at the time he executed the false affidavit he was attempting to conceal a fact which, if discovered, might defeat his right as a prior settler; and the belief that his former entry would, if known, prejudice his claim, tends to cast considerable doubt upon his later averment that he had totally abandoned his claim under his former entry at the time he made settlement on the land in dispute. Neither does his admission, coming as it does after the discovery by Bowman of the falsity of his former affidavit, entitle him to any equitable consideration. He not only suppresst the truth when it was his duty to disclose it, but wilfully denied it by his false affidavit, and but for the activity of Bowman the question of his qualifications might never have been made an issue in the case. The whole showing made on behalf of Short convinces the Department that Short was not in position to initiate a valid settlement right on October 5, 1901, the date his settlement on the land in question was made.

The claim to equitable consideration contended for by Short because of his extensive improvements on the land involved herein, is based upon facts which are perhaps true in every particular, and the denial of his application may entail a pronounced hardship so far as he is concerned, but such facts, even tho they might, in the absence of a perfect legal right, be allowed as an equitable defense, can not be set up at this time to perfect that which was without validity in its inception and such invalidity was not removed prior to the intervention of a valid adverse right. The acts performed by Short, upon which his equitable defense depends, were not innocently performed, for he had notice of the claim of Bowman from the beginning, and proceeded in the face of actual knowledge that the latter's claim might be upheld. He is in the position of one who takes *pendente lite*, and his right can not be freed from the final results of the pending litigation by any act of his. In other words, if the naked legal right to enter the land be found in favor of Bowman at the time Short asserted his claim, the legal right, unless abandoned, can not be defeated by any alleged equities in favor of Short, arising after the attaching of the legal right of Bowman and with notice of such right on the part of Short. Under such circumstances Short does not

occupy a position analogous to that of an innocent purchaser and can not rely upon his alleged equities to defeat a legal right.

Counsel for Short also contends that Short was a qualified entryman within the meaning of the act of December 29, 1894 (28 Stat., 599), but a careful reading of said act makes it plain that it had no application to entries made and abandoned after its passage but was specifically limited in its application to persons who had prior to its passage forfeited their rights for any of the reasons enumerated in section 3 of the act of March 2, 1889 (25 Stat., 854).

Neither can Short claim any right under the act of June 5, 1900 (31 Stat., 267), the same not being prospective. It is further contended that Short's application not having been made until after the passage of the act of April 28, 1904 (33 Stat., 527), the same should be allowed under its provisions. Even conceding that Short has upon the showing made brought himself within its provisions, it can not be maintained with any show of reason that such application can be accepted in the face of valid adverse claim, initiated prior to the acquisition of a superior right in Short. This act has no retroactive effect which will operate to cure a defective right based upon a claim of prior settlement, and at the same time cut off and defeat the assertion of a superior adverse claim. While the Department has held that the status of an applicant is to be determined as of the date of his application (James W. Lowry, 26 L. D., 448; Winborn *v.* Bell, 33 L. D., 125), is has never been held or intended that an application to enter when based upon a claimed settlement right would be accepted where it was shown that the right claimed by virtue of such application was subject to a superior right initiated prior thereto. In other words, one disqualified to initiate a valid settlement right can not claim the privilege of having his status as an entryman determined as of the date of his application to protect such invalid settlement right. The right will only be protected from the date the impediment to its initiation is removed, and the right attaches. If before the disqualification to make settlement is removed a superior right intervenes, such right, in all equity and justice, will be recognized and protected.

The Department is clearly of opinion that one who, at the time he performed an act of settlement relied upon to sustain his prior right of entry, was disqualified as an entryman by having an entry, not actually and wholly abandoned, then of record, was equally disqualified to make a valid settlement and gained nothing thereby as against the valid adverse right of another, asserted prior to the removal of such disqualification. Short therefore took nothing by his settlement on the land involved herein as against the rights of Bowman.

The prior departmental decisions of November 29, 1905, and July 20, 1905, are accordingly hereby recalled and vacated and the decision of your office of January 28, 1905, reversed; the entry of Bowman thereby erroneously canceled reinstated, and the contest of Short against said entry dismissed.

NORTHERN PACIFIC GRANT—INDEMNITY SELECTION—APPLICATION OF CASE OF SJOLI *v.* DRESCHEL.

OPINION.[a]

The Secretary of the Interior, in the administration of the several land grants to railroads, is not bound to follow the broad principles quoted in the decision of the supreme court in the case of Sjoli *v.* Dreschel (199 U. S., 564), but may confine what is said therein to a state of facts similar to those then before the court.

No title passes to lieu lands before approval by the Secretary of the Interior of the company's list of selections; and, when so approved, the lands are to be considered as fully selected as of the date of the listing, so as to give to the company superiority over the right of homestead or pre-emption claimants settling after the listing by the company.

Attorney-General Moody to the Secretary of the Interior, June 18, 1906.

I have received your request for an opinion in which you say:

In a decision of the Supreme Court of the United States handed down by Mr. Justice Harlan, December 18, 1905 (No. 79, October Term, 1905) [199 U. S., 564], in the case of Peter O. Sjoli *v.* Charles Dreschel, involving title to a tract of land within the first indemnity limits of the grant of public lands made by the act of Congress of July 2, 1864 (13 Stat., 365), to the Northern Pacific Railroad Company, it was held, among other things, upon propositions deduced "from numerous cases" in that court relating to said act:

1. That no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior.

2. That up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States, or to be settled upon and occupied under the pre-emption and homestead laws of the United States.

3. That the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road.

The cases which it is said justify these deductions are cited in a foot-note, at the bottom of page 2 of the decision.

You point out that in the case under consideration the facts were that prior to the time when, in pursuance of the regulations of the Department the railroad company filed its list of selections of indemnity

[a] See Opinions of Attorney-General, volume 25, page 632.

lands, Sjoli settled upon the land; the settlement being in 1884 and the listing by the company in 1885; that your department has been holding that the listing of the lands by a company segregates the land until final action by the Secretary in approving or disapproving the selections; and that the decision by the Supreme Court, followed literally, invites settlement and entry while selections await approval, and may result in defeating all pending indemnity selections. You say that you are not inclined to give such broad effect to the decision if it can be avoided, and submit the question whether the land department in the administration of the several grants is bound to follow the broad principles quoted from this decision or whether the same should be construed with due regard to the particular facts set forth in the case before the court and limited accordingly.

You say you do not recall any decision of the Supreme Court to the effect that an inchoate right is not secured upon the filing of the company's list of selections.

The language in the case referred to, in my opinion, does not seem to be intended to cover all land grants, but that to the Northern Pacific Railroad Company, which contains, in section six, certain special language applying the homestead and pre-emption laws to lands along the line of the railroad. It is for this reason that the court referred, first of all, to Hewitt *v.* Schultz (180 U. S., 139), and refers to so many other cases concerning the Northern Pacific railroad grant.

There is, accordingly, less reason for following the principles as stated by the court in questions arising under other grants than in questions arising in the adjustment of the Northern Pacific grant.

Undoubtedly the supreme court has said, and repeatedly said, that no title passes to lieu lands before approval by the Secretary of the company's list of selections; and the court has stated, as to the Northern Pacific grant, especially, that the Secretary has no authority to withdraw lands from sale or settlement which have not been previously selected with his approval.

But in a case which has not been referred to either by you or by the court in Sjoli *v.* Dreschel, namely, Oregon and California Railroad Company *v.* United States (189 U. S., 103, 112), the court uses the following language:

> Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd-numbered sections within its place or granted limits—which interest relates back to the date of the granting act—the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the land department; and then its right relates to the date of the selection.

This seems to mean, and, in fact, no other meaning can be made out of it, that when the Secretary approves the lists of the lands the lands are to be considered as fully selected as of the date of listing. This appears to be the real question as to which you are concerned, that is to say, whether, when there is an approval by the Secretary, the selection of the railroad company relates back to the date of the listing so as to give it superiority over the right of the homestead or pre-emption claimant settling after the listing by the company.

What you desire me to decide is, as I understand, whether the language in the Sjoli case requires you to give no effect to the company's list, if afterwards approved by you, or before you for approval, as against homestead or pre-emption claimants settling after the company files its list.

The court seems careful to avoid so deciding in Sjoli *v.* Dreschel, because it takes pains to point out that there *never* was any approval of the lists in that case and repeatedly alludes to the fact of the settling of Sjoli *before* the listing by the company. In Hewitt *v.* Schultz, also, it points out that the settlement was prior to the listing and to any attempt at selection on the part of the company.

I have been unable to find a case in which the court has had before it for consideration a pre-emption or homestead claim originating *after* the listing by the company and has held that the listing would not give the superior right to the company either by relation of its title from approval by the Secretary to the date of the filing of its list of selections or by the mere operation of priority of action in favor of one of two claimants equally entitled to take the land.

In Cohens *v.* Virginia (6 Wheaton, 399) the supreme court by Chief Justice Marshall says:

> The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the court, in the case of Marbury *v.* Madison. It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. In the case of Marbury *v.* Madison, the single question before the court so far as that case can be applied to this was, whether the legislature could give this court original jurisdiction in a case in which the constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case.

In my opinion the language of Chief Justice Marshall applies to the question you submit to me and you are not bound to follow the

broad language in Sjoli *v.* Dreschel, but may confine what is said in that case to a state of facts similar to the one before the court, which involved a settlement by the pre-emptor prior to the listing by the company, the patenting of the land to the pre-emptor, and no approval at any time of the list of selections filed by the company.

Respectfully,

CHARLES W. RUSSELL,
Assistant Attorney-General.

Approved:
W. H. MOODY, *Attorney-General.*

HOMESTEAD ENTRY BY INDIAN—TRUST PATENT.

JENNIE ADASS ET AL.

An Indian homesteader holding title under a trust patent issued to him under the provisions of the act of July 4, 1884, who at the time of making the entry had abandoned his tribal relation and was occupying the status of a citizen of the United States under the terms of section 6 of the act of February 8, 1887, may, upon application therefor, have the trust patent canceled and patent under the general homestead law substituted therefor.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, July 10, 1906.* (C. J. G.)

An appeal has been filed on behalf of Jennie Adass, widow, and the heirs at law of Charley Adass, deceased, from the decision of your office of February 6, 1906, denying their petition requesting cancelation of trust patent covering the homestead entry of said Charley Adass for lot 11, Sec. 6, and lots 11, 13 and the SE. ¼ SW. ¼, Sec. 5, T. 38 N., R. 5 E., W. M., Seattle, Washington, and the issuance in lieu of said patent of one in fee simple.

The date of Adass's entry was August 25, 1887, and in his application it was stated that he applied for the land under the act of March 3, 1875 (18 Stat., 402, 420), which extended the benefits of the homestead law of May 20, 1862 (12 Stat., 392), 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—

with a proviso that the title of lands thus acquired should not be subject to alienation or incumbrance for a period of five years from date of the patent issued therefor. Adass also stated that he was an Indian formerly of the Nooksack tribe; that he was born in the United States; that he had abandoned his relation with that tribe and adopted the habits and pursuits of civilized life; that he was the

head of a family over the age of twenty-one years; that he desired the land for the purposes of actual settlement and cultivation; that he was then residing upon said land and had made valuable improvements thereon. Notwithstanding the statements made by Adass his homestead application was indorsed "Indian, act of July 4, 1884" (23 Stat., 76, 96), which provided that Indians then or thereafter located on public lands might avail themselves of the provisions of the homestead laws as fully and to the same extent as citizens of the United States, but no fees or commissions were to be charged on account of entries or proofs under said laws. It was further provided 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 from all charge and incumbrance whatsoever.

The final certificate issued to Adass July 22, 1891, contained the same indorsement as the one above referred to, and his final proof showed that he was a native-born citizen sixty-eight years of age and had lived all his life upon the land entered by him.

This matter was submitted to the Department by your office under date of March 11, 1905, in view of the provisions of the act of April 23, 1904 (33 Stat., 297), and was referred to the Commissioner of Indian Affairs who recommended that the trust patent issued to Adass be not canceled. This recommendation was approved by the Department April 14, 1905, and it is because of this action that your office denied the petition herein, as hereinbefore stated.

The general allotment act of February 8, 1887 (24 Stat., 388), after providing for allotments of lands in Indian reservations, further provided in section 6 thereof, among other things, that—

> Every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizen, etc.

While the application of Adass, which was dated August 25, 1887, was made under the act of 1875 and patent was issued to him under the act of 1884, yet upon the showing made in said application and his final proof he possest the qualification prescribed by the act of 1887, he was therefore entitled as a citizen of the United States to the exercise of the rights accorded under the general homestead

law, and at the expiration of the statutory period to have issued to him the usual homestead patent. Both the acts of 1875 and 1884, extending the homestead privilege to Indians, impose restrictions as to alienation and incumbrance upon the beneficiaries thereunder, but the act of 1887 conferred upon Indians living apart from their tribes and who have adopted the habits of civilized life, the rights, privileges, and immunities of citizens. This was the status occupied by Adass at the date his entry was made. As was said in the case of Feeley *v.* Hensley (27 L. D., 502, 504):

> These conditions brought him within the pale of citizenship, where he has voluntarily placed himself. (24 Stat., 388, 390, Sec. 6, act of February 8, 1887.) . . . The homestead privilege was conferred upon native born Indians who have severed tribal relations and abandoned savage for civilized life. (Turner *v.* Holliday, 22 L. D., 215.) The Indian entryman did not attempt to secure an allotment to him of nonreservation lands, whereby he would become a citizen, but relied upon his citizenship as one who had separated from his tribe and had adopted the habits of civilized life. By his voluntary act, his declaration of citizenship under oath, and his accepting the conditions imposed by law upon other citizens, in filing his declaratory statement and making homestead entry for the tract in question, he acknowledged that he laid no further claim to the guardianship of his person by the United States. That relationship ceasing, all obligations on the part of the government toward him, as an Indian, except such as are enjoyed by citizens in common, are canceled. The protection afforded by Congress and by this Department to the Indians while in a state of dependency ceases when the state of pupilage or wardship of the latter no longer exists. (See the case of Miami Indians, 25 L. D., 426, 430.)

The facts of this case are similar to those in the case of Clara Butron in which departmental decision was rendered August 31, 1899 (not reported). There patent issued to Butron under the act of 1884, upon homestead entry made May 23, 1892, which confers the benefits of the homestead law upon "Indians" as distinguished from "citizens of the United States." Application was made for the substitution of a patent in fee for the trust patent thus issued. In her final homestead affidavit as well as in her testimony taken at time of final proof Butron testified that she was a "native born Indian woman who has abandoned all tribal relations," and it was held that "her citizenship results from such conditions under the terms of section six of the act of February 8, 1887." The decision in that case concluded:

> It appears, therefore, that prior to her entry the applicant was clothed with full citizenship even though she might have been of Indian birth, and that she had the right to make entry of public lands without any restrictions except such as are imposed upon citizens generally.
>
> Your office is therefore advised to allow the application to cancel the trust patent surrendered by the applicant, which she refuses to accept, and to cause to be issued in lieu thereof a patent in fee to said Clara Butron for the tracts embraced in her homestead entry.

That case is conclusive of the question involved here. It is not believed that the provisions of the act of April 23, 1904, *supra*, constitute any prohibition against following the same course in the case of Charley Adass that was pursued in the Butron case, as said act evidently has reference to allotments of Indians as such over whom the government is still exercising its guardianship and protecting care, as distinguished from Indians who are citizens of the United States toward whom all obligations of the government have ceased except such as are enjoyed by citizens in common.

The decision of your office herein is reversed, and you will take appropriate action accordingly.

INDIAN RESERVATION—LIEU SELECTION—ACT OF APRIL 21, 1904.

SANTA FE PACIFIC R. R. CO.

In case lands within the odd-numbered sections granted in aid of the construction of a railroad fall within an Indian reservation and it is sought to exchange such lands for other public lands in accordance with the provisions of the act of April 21, 1904, it is not necessary that the lands offered in exchange shall have been surveyed, where the amount of the lands embaced in the reservation and so lost to the grant may by protraction of the public survey lines be definitely ascertained.

Circular of June 8, 1906, 34 L. D., 666, construed.

Acting Secretary Ryan to the Commissioner of the General Land Office, August 2, 1906.

(F. L. C.) (F. W. C.)

At the request of the Santa Fe Pacific Railroad Company, the legal successor to the Atlantic and Pacific Railroad Company, your office letter of July 12, 1906, transmits as a preliminary application for exchange under the act of April 21, 1904 (33 Stat., 189, 211), its selection list covering 214,987.51 acres of public lands in the Clayton, New Mexico, land district, the same being in lieu of 215,090.56 acres in New Mexico 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, also within the limits of the Zuni and Navajo Indian reservations as extended by executive order.

Your office letter states that the preliminary requirements of the circular of June 8, 1906 (34 L. D., 666), have been satisfied, but you are of opinion that the exchange cannot be made for the reason that base lands are unsurveyed and it cannot be said, in view of the decision of the Supreme Court in the case of United States *v.* Montana Lumber Manufacturing Company (196 U. S., 573), that the right to a patent or its equivalent has been earned by full compliance with the

laws of the United States governing the disposal of the base lands sought to be made the subject of the exchange. The act of April 21, 1904, *supra*, provides, *inter alia*—

> That any private land over which an Indian reservation has been extended by executive order, may be exchanged at the discretion of the Secretary of the Interior and at the expense of the owner thereof and under such rules and regulations as may be prescribed by the Secretary of the Interior, for vacant nonmineral, surveyed public lands of equal area and value and situate in the same State or Territory.

Under the regulations of June 8, last, issued under said act, it was said—

> The land proposed to be surrendered must be accurately described by legal subdivisions if surveyed, or in the event that it is unsurveyed, by such designation as will readily enable the Commissioner of the General Land Office to identify it.

It is true that it is also said that—

> Private lands subject to exchange under the provisions of this act include all lands within the limits of an Indian reservation established by executive order, to which the right to a patent or its equivalent has been earned by full compliance with the laws of the United States governing the disposal of said lands.

The two, when considered together, indicate that it was not the intention of the Department in the case of a land grant like that made by the act of July 27, 1866, *supra*, of the alternate odd-numbered sections and parts of sections, to require that the lands the subject of exchange be actually surveyed before putting into operation the provisions of the act of April 21, 1904. If the lands were shown to be within the primary limits of the land grant and otherwise subject to the terms of the grant, the amount to be exchanged might be determined, if unsurveyed, by protraction, as is done in the case of ordinary indemnity selections. In the case of the Northern Pacific Railroad Company, on review (20 L. D., 187, 191), it was said:

> The lost lands are in an unsurveyed Indian reservation, but the surrounding lands appear to have been surveyed, and I see no reason why the surveys may not by calculation, and without difficulty, be projected over the reservation so as to specifically describe the lost sections tract for tract with the selections.

This rule of adjustment has been uniformly applied since the date of said decision to the several grants made in aid of the construction of railroads.

In the case of United States *v.* Montana Lumber Manufacturing Company, *supra*, after referring to the provisions of the act of July 15, 1870, by which it was provided that the cost of survey must be paid by the grantee company and no conveyance should be made of the land until said cost be paid, it was said:

"The equitable title becomes a legal title only upon the identifica-

tion of the granted sections," and that to secure the payment of the expenses incident to the survey, the government "retains the legal title in its own name until they are paid." It was not proposed at the time of the formulation of the regulations of June 8, 1906, that a patent should actually issue to the lands the subject of exchange before the act could be given operation. Neither was it purposed that unsurveyed lands in Indian reservations should be actually surveyed, but rather that the amount to be exchanged was to be determined by protraction, and, to meet the requirement of law for the payment of the costs of survey, it was proposed that the company should be required to pay, before patent would issue for the lands selected in lieu of those unsurveyed lands surrendered, the actual cost of survey of the selected lands, this being considered a legal equivalent and more likely to be accurate than an estimate for the survey of the unsurveyed lands within the Indian reservation which were to be surrendered.

Your office letter, as before stated, states that the preliminary requirements of the circular have been satisfied. The application has therefore this day been referred to the Commissioner of Indian Affairs for report as to whether the whole or any part of the described lands made bases for the selections in question are needed for the use of the Indians, and such recommendations as that officer may deem proper in the premises. Upon receipt of his report and recommendation, the area to be exchanged can be determined in the manner herein specified.

In the future administration of the act you will be guided by the construction herein placed upon the circular letter of instructions of June 8, 1906.

SALE OF LANDS IN FORT CRITTENDEN ABANDONED MILITARY RESERVATION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 2, 1906.

Register and Receiver, Salt Lake City, Utah.

GENTLEMEN: Referring to the instructions of November 20, 1896 (23 L. D., 567), in regard to the disposal of lands in the Fort Crittenden abandoned military reservation, I have to advise you that section 1 of the act of June 30, 1906 (34 Stat., 808), entitled, "An act to extend the public land laws of the United States to the lands comprized within the limits of the abandoned Fort Crittenden military

reservation in the State of Utah, and for other purposes," provides as follows:

> The general laws for the disposal of the public lands of the United States are hereby extended and made applicable to the lands comprized within the limits of the abandoned Fort Crittenden military reservation in the State of Utah.

Therefore you will no longer be governed by said instructions of November 20, 1896, but lands in said reservation are subject to disposal under the general laws for the disposal of public lands.

Very respectfully,

G. F. POLLOCK,
Acting Commissioner.

Approved:
THOS. RYAN, *Acting Secretary.*

REOFFERING OF LANDS IN FORT ELLIOTT ABANDONED MILITARY RESERVATION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 3, 1906.

Register and Receiver, Woodward, Oklahoma.

GENTLEMEN: I have to direct that you will, on the date fixed for the reoffering of the lands in the Fort Elliott abandoned military reservation, in Texas, proceed to the ground with the necessary papers and proceed with the offering of the lands by forty-acre tracts, in the order in which they appear on the inclosed list, which shows the appraised value of said lands.

When the NW. ¼ of Sec. 55 is reached you will notify the bidders that so much of the NW. ¼ of the NW. ¼ of this subdivision as is occupied as a cemetery (about one acre) and inclosed with a barbed wire fence, with iron posts, is reserved and will not be sold.

These lands are to be sold to the highest bidders at not less than the appraised price. Upon payment by the purchaser of the amount of his bid the receiver will issue his receipt, in duplicate, and the register will issue a cash certificate, such certificates and receipts to be numbered in consecutive order, beginning with number one, designating them on the papers and abstracts as "Fort Elliott Series."

In issuing receipt and certificate for the NW. ¼, Sec. 55, you will be careful to make the exception of the one acre mentioned above.

Upon the conclusion of the sale you will make a report to this office of the result thereof and return the appraised list and plat herewith inclosed.

Further instructions will be given you in regard to your monthly and quarterly reports and your disbursing and other accounts in connection therewith.

Notices of the offering have been sent to the "Bulletin," Woodward, Oklahoma, "St. Louis Globe Democrat," St. Louis, Missouri, the Sunday edition of the "Record," Fort Worth, Texas, and the "Texas Panhandle," Mobeetie, Texas, for publication, the date of the offering being fixt for November 1, 1906.

Very respectfully,

G. F. POLLOCK,
Acting Commissioner.

Approved:
THOS. RYAN, *Acting Secretary.*

MILITARY BOUNTY LAND WARRANT—ASSIGNMENT.

ANNA R. KEAN ET AL.

Where the soldier in whose favor a military bounty land warrant is issued makes affidavit that the warrant has never been received by him, and thereupon a duplicate issues to him, and, with both the original and duplicate in his possession, he assigns them to different parties, and the duplicate is located and patent issues for the land so located, the obligation of the government is thereby satisfied and the land department is thereafter without authority to recognize any further liability on the part of the government on account of the original warrant.

Acting Secretary Ryan to the Commissioner of the General Land Office, August 4, 1906.

(F. L. C.) (J. R. W.)

Anna R. Kean appealed from your decision of February 28, 1906, holding for cancelation original military bounty land warrant, No. 33193, eighty acres, under the act of March 3, 1855 (10 Stat., 701), to Elijah Hulsey.

May 27, 1856, the warrant was issued. August 21, 1857, Hulsey made affidavit that he had not received the warrant, and requested withholding of the patent, if location thereof had been made.

November 21, 1857, a duplicate issued to Hulsey, who, November 16, 1858, assigned it to Walter Craig, who located it October 17, 1859, on the S. ½ of the SW. ¼, Sec. 18, T. 57 N., R. 4 E., Omaha, Nebraska, and patent issued to him April 18, 1863.

November 25, 1857, after issue of the duplicate, Hulsey assigned the original warrant to Hugh Morgan. The number of the warrant in the assignment was given as 33695, and the original number on the warrant was before that time changed to that number, the

razures still appearing—that of *3* only by transmitted light, the other being plainly visible.

January 1, 1859, before location of the duplicate, but after its issue, Morgan located the original on the S. ½ of NE. ¼, Sec. 24, T. 14, R. 15, at Ionia, Michigan. When Morgan's location reached your office, the razure was discovered, and March 24, 1860, the Commissioner of Pensions noted in red ink on the warrant that "the alteration of the number of this warrant was made after its transmission from this office, it having been originally 33193." December 17, 1862, you directed the Ionia office to notify Morgan that "patent on said location cannot issue until he shall have complied with the provisions of the act of June 23, 1860 (12 Stat., 90)." He substituted warrant No. 43402, act of 1855, eighty acres, and patent issued April 25, 1863. March 27, 1863, the original 33193, with changed number 33695, was returned to the Ionia office for delivery to Morgan, who, April 13, 1863, assigned it to David Preston, who, April 15, 1863, assigned it to Anna R. Kean.

January 27, 1905, counsel for Mrs. Kean submitted to you the warrant for consideration of the validity of the assignments, and filed the affidavit of S. A. Kean, of Chicago, Illinois, of his good faith as one of the former owners, and the good faith of his wife. April 6, 1905, you declined to certify to the validity of the assignments and allowed applicant sixty days to show cause why the original 33193 be not canceled because a duplicate had been issued, located, and patented. June 5, 1905, Mrs. Kean showed a general assignment of the personal property of S. A. Kean to her August 25, 1891, recorded in Cook county, Illinois, September 18, 1891. July 3, 1905, you advised applicant that the showing was unsatisfactory, the principal point in Mr. Kean's statement being that the red ink notation by the Commissioner of Pensions was not on the paper when it was purchased from Morgan. October 30, 1905, after allowance of further time to show cause, counsel submitted an assignment, made October 25, 1905, by Mrs. Kean to S. A. Kean, and his affidavit as to former transfers, with letters of W. D. Preston, John L. Harper, and Helen Preston, none of whom had any knowledge of the warrant, or its transfers. S. A. Kean asked that he, Mrs. Kean, and David Preston be regarded as innocent purchasers, and argued that:

> It is impossible to suppose and incredible to believe that David Preston acted otherwise than honorably in the transaction, and it is sure that when he made the original purchase there was no memorandum on the warrant and no knowledge on his part that anything was wrong with the warrant; that deponent says it was customary for dealers in land scrip to purchase and hold the assignment blank until a purchaser appeared who desired to make the selection and then the purchaser's name would be inserted or the blank assignment completed. If

the warrant was then rejected, the original dealer took back the warrant which would be necessary for it to be reassigned to the dealer or to some one he might designate.

You held that Preston and subsequent purchasers had sufficient notice as to the character of the warrant, and, making reference to section 2441 of the Revised Statutes, held the warrant for cancelation, to be retained in the files of your office.

The appeal alleges error not to have recognized Mrs. Kean as an innocent purchaser of the warrant by virtue of Preston's assignment, she being without knowledge of fraud. In argument attention is called to the fact that the warrant was not "confiscated," or canceled, March 24, 1860, when the change of the number was noted, but that it was returned to its owner, Hugh Morgan, and thereafter assigned through Preston to the present owners.

The case here is in some features like that of Andrew M. Turner (34 L. D., 606). In both cases there was but one obligation, to evidence which two warrants issued. In both cases the duplicate was issued before the act of June 23, 1860 (12 Stat., 90), now codified as section 2441 of the Revised Statutes, so that there was no authority of law therefor (5 Op. Att'y-Gen'l, 387, 389). In both cases the soldier held both warrant and duplicate before either was assigned.

In the order of assignments the cases are reversed. The original warrant here, its serial number being previously razed, was first assigned and first located. In Turner's case the duplicate was first assigned and the original first located. In each case, however, both the locations were before the land department and pending before either location passed to final action of approval and patent. During that time, while both claimants of the soldier's right were in adversary positions before the land department an issue might have been formed and a determination had as to which assignee of the soldier had the better right. This was in effect what was done without a formal issue. In Turner's case the first assignment was held to transfer the right, and location of the duplicate was approved and passed to patent. In the present case the second assignment was held to transfer the right. In both cases the defeated claimant abided by the decision, made substitution, and received back what had been adjudged an invalid instrument, to be used in seeking remedy against his assignor for the consideration paid—not as a subsisting obligation of the United States. In both cases there was an adjudication by the proper officer of the government as to which claimant had valid assignment of the right, and the obligation of the government was satisfied by issue of patent for the proper area of public land. The executive power was thereby exhausted. The land department has no power to issue a second patent for that

quantity of land. If its judgment was wrong, the remedy must be sought from Congress. The warrant, having been satisfied by issue of a patent, belongs in the records of your office as a satisfied obligation.

The claimants here took by assignment from Morgan after the warrant was adjudged satisfied and with notice by the razure itself, as well as by the red ink notation of it by the Commissioner of Pensions. They stand merely in Morgan's place, with no better right, and with actual notice that the warrant was not recognized as a valid obligation. The paper was never negotiable, and no executive officer has power to double the liability of the government where but one liability in fact exists. Andrew M. Turner (34 L. D., 606, 608).

Your decision is affirmed.

The razure of the serial number cuts no figure in the case, as it nowise changed the obligation or effect of the instrument. Commonwealth *v.* Emigrant Savings Bank (98 Mass., 12; 93 Am. Dec., 126); Daniels Negotiable Instruments, Sec. 1400. It is disregarded.

TIMBER CUTTING ACT—TIMBER AND STONE ACT.

GALLAGHER ET AL *v.* GRAY.

The authority and permission to fell and remove timber and trees, conferred by the act of June 3, 1878 (20 Stat., 88), extends only to the public mineral lands, susceptible of mineral entry alone. The act does not, as to such lands, secure to miners of the vicinity an exclusive right of timber appropriation. If any given tract is in fact mineral in character, title to the land, together with the timber thereon, may be acquired under the mining laws; and if vacant and nonmineral, valuable chiefly for timber, but unfit for cultivation, containing no mining or other improvements, it may be purchased upon the conditions imposed and as provided by the act of June 3, 1878 (20 Stat., 89).

Acting Secretary Ryan to the Commissioner of the General Land Office, August 4, 1906.

(F. L. C.) (F. H. B.)

Against the application of Susie F. Gray, filed June 14, 1904, to purchase as timber land, under the provisions of the act of June 3, 1878 (20 Stat., 89), as extended by the act of August 4, 1892 (27 Stat., 348), the NW. ¼ of Sec. 9, T. 6 N., R. 6 E., Boise, Idaho, land district, William H. Silberhorn and Mike Gallagher filed protests, alleging the land in question to contain valuable mineral deposits and to be chiefly valuable therefor.

Thereafter such further proceedings were had as resulted in a hearing before the local officers, November 18, 1904, at which appearance was made and testimony submitted on behalf of all parties.

January 23, 1905, the local officers found, in substance and effect, that the testimony so adduced fails to establish that the land is mineral in character or that any portion of it is claimed or occupied for mining purposes, and recommended the dismissal of the protests.

Upon appeal by the protestants your office, by decision of May 29, 1905, sustained the finding and conclusion of the local officers; and protestants have appealed to the Department.

Protestants rely upon the act of June 3, 1878 (20 Stat., 88; Chap. 150), whereunder *bona fide* residents of the States and Territories therein named are "authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry," etc., with respect to which counsel for protestants say in their brief:

> It seems to have been the intention of Congress to appropriate the timber in a mineral country for the benefit of the miners upon land in such district. It is apparently not necessary, according to the view of the federal courts, that there should be a mineral location or an actual mine upon the land containing the timber. If the land in that district is not agricultural land and is of the character generally known as mineral land, the timber in that district is reserved for the use of the miners and others in that vicinity.

The Department deems it sufficient to say, without extended statement or discussion of the contentions of counsel in this behalf, that not only is the authority and permission to fell and remove timber and trees extended to cover only the public mineral lands, susceptible of mineral entry alone, but the act does not as to such lands and for obvious reasons, secure to miners of the vicinity an exclusive right of timber appropriation. If any given tract is in fact mineral in character, title to the land, together with the timber thereon, may be acquired under the mining laws; and, on the other hand, if the tract is vacant and non-mineral, valuable chiefly for timber, but unfit for cultivation, containing no mining or other improvements, etc., it may be purchased upon the conditions imposed and as provided by the act first above mentioned, and the timber-cutting act is without application to it.

The testimony submitted at the hearing fails to sustain the allegations of the protestants, or to disclose any barrier to the application of Gray. The decision of your office is therefore affirmed, and the protests will be dismissed.

DESERT LAND ENTRY—PERMANENT IMPROVEMENT—WELL CASING.

WILKINSON *v.* STILLWELL.

Well casing purchased and placed upon a desert-land entry can not, so long as it is unattached to the realty and retains its status as personal property, be considered a permanent improvement of the land within the meaning of the desert-land act.

Acting Secretary Ryan to the Commissioner of the General Land Office, August 5, 1906.

(F. L. C.) (E. O. P.)

James Forrest Stillwell has appealed to the Department from your office decision of November 10, 1905, affirming the action of the register and reversing that of the receiver of the local office and holding for cancelation his desert-land entry, made February 24, 1904, for the N. ½, Sec. 4, T. 17 S., R. 25 E., Roswell land district, New Mexico, upon contest initiated against said entry of John Wilkinson.

The basis of said contest is the alleged failure of the entryman to make the required yearly expenditure in the permanent and necessary improvements specified by the statute.

As to the material facts upon which the issue presented must be determined, there is no conflict in the testimony offered at the hearing. All that had been done by claimant looking to the permanent improvement or reclamation of the land, prior to date of service of contest notice, was the purchase of 460 feet of well casing, for which he paid $322. A part of this was hauled to the land April 1, 1905, the day service of notice was made. The testimony shows that the hauling of the casing covered a period of two or three days. For this the claimant paid $8. This constitutes all of the acts performed by claimant upon which he relies as a sufficient showing to meet the statutory requirement as to annual expenditure.

The Department is cleary of opinion that, whatever may have been claimant's intention as to future permanent improvement at the time contest was regularly initiated, and without questioning his good faith in the premises, he had not, in any manner, performed a single act of *permanent improvement*. The well casing was not, at the date of contest, a fixture, being unattached to the realty. So long as it retains its status of personalty it can not be considered a permanent improvement of the land. The statutory requirement as to yearly expenditure is as explicit and mandatory as are any of the other requirements imposed by the desert-land act, and the Department, in the face of a contest brought upon that ground, is without authority to waive its observance, even tho it should be convinced of the intent of the claimant to in the future fully comply with the law.

The decision appealed from is hereby affirmed.

PATENT—INSTITUTION OF SUIT—SELECTION UNDER ACT OF JUNE 4, 1897—OCCUPANT.

SANDOVAL *v.* AZTEC LAND AND CATTLE CO.

Where an occupant of lands within the limits of a private land claim failed to assert his claim by petition to the proper court within the period fixt by section 12 of the act of March 3, 1891, refused, upon opportunity accorded him for that purpose, to assert his claim to the land as a "small holding claim" under said act, and upon survey of the township in which it is situated failed to assert any settlement right thereto within three months after the filing of the township plat, the lands thereupon, notwithstanding his occupancy thereof, became subject to entry by the first legal applicant, and the government having patented the land to another, by virtue of a selection thereof under the exchange provisions of the act of June 4, 1897, is under no duty to the occupant to institute suit for the cancelation of the patent, notwithstanding it was inadvertently issued without consideration of a protest against such selection filed by the occupant.

Acting Secretary Ryan to the Commissioner of the General Land Office, August 6, 1906.

(F. L. C.) (J. R. W.)

The Aztec Land and Cattle Company appealed from your decision of February 2, 1906, recommending that suit be instituted for cancelation of a patent inadvertently issued conveying to the Aztec company the NW. ¼ of the NW. ¼, Sec. 4, and lot 1, Sec. 5, T. 12 N., R. 6 E., N. M. M., Santa Fe, New Mexico.

November 20, 1902, the Aztec company filed selection No. 6293, your office series, under the act of June 4, 1897 (30 Stat., 36), for these lands, in lieu of land in the San Francisco Mountains forest reserve, Arizona. January 6, 1904, Juan C. Sandoval filed his protest against the selection, alleging occupation and improvement of the land by himself, his brothers, and their father for fifty years. The local office erroneously attached the protest to the proof of publication of notice in selection No. 6294, same series, for other land, filed at the same time as No. 6293. When No. 6294 was examined in your office it was not noticed that the selection and protest involved entirely different lands, and a hearing was ordered and set for April 25, 1904. When the hearing was called protestant's attorney called attention to the fact and declined to proceed, and the hearing was dismissed, and April 26, 1904, the local office reported the facts to you. In the meantime No. 6293 was examined, and no conflict appearing, it was approved, February 8, and patented February 18, 1904, before the error of misplacing of the protest was discovered.

September 2, 1904, a hearing was ordered on the protest to determine whether a suit should be instituted for cancelation of the patent. Both parties appeared, and the evidence was taken by order of the local office before a notary at Albuquerque, New Mexico. January

20, 1905, the local office found that at the time of selection and for many years prior thereto there were substantial improvements on the land which gave the selector notice that the land was not vacant, nor subject to selection under the act of 1897, and, even if the land was then temporarily unoccupied, the improvements were of too substantial character to justify a conclusion that they had been abandoned; that had the selector truly disclosed the facts its selection would have been rejected. The local office recommended institution of suit, and upon appeal by the Aztec company your office concurred in so recommending.

The land is in the Una de Gato private land claim, reported to Congress under section 8 of the act of July 22, 1854 (10 Stat., 308), but was never acted upon. It was by force of the act reserved from other disposal during its pendency before Congress. Lockhart *v.* Johnson (181 U. S., 516, 525–6). The act of March 3, 1891 (26 Stat., 854), established the court of private land claims, and provided:

SEC. 6. That it shall be lawful for any person or persons . . . claiming lands within the limits of the Territory derived by the United States from the Republic of Mexico and now embraced within the Territories of New Mexico . . . by virtue of any such Spanish or Mexican grant, concession, warrant, or survey as the United States are bound to recognize and confirm by virtue of the treaties of cession of said country by Mexico to the United States, which at the date of the passage of this act have not been confirmed by act of Congress, or otherwise finally decided upon by lawful authority, and which are not already complete and perfect, in every such case to present a petition in writing to the said court in the State or Territory where said land is situated and where the said court holds its sessions.

SEC. 12. That all claims mentioned in section six of this act which are by the provisions of this act authorized to be prosecuted shall at the end of two years from the taking effect of this act, if no petition in respect to the same shall have been filed as hereinbefore provided, be deemed and taken, in all courts and elsewhere, to be abandoned and shall be forever barred.

The Una de Gato claimants filed no petition, and your office, being so advised by the clerk of the court, notified the Santa Fe local office, August 21, 1895, that no authority longer existed for reservation of public lands in this claimed grant.

In 1892 survey in the field was made, and the deputy surveyor informed protestant and others then occupying these and other lands that they might secure a "small holding claim" under the act of March 3, 1891 (26 Stat., 854, 861–2), but he did not wish such a holding to be surveyed for him. The approved plat of survey was filed in the local office, September 14, 1895. Sandoval did not within three months thereafter or at any time before the selection apply for homestead entry, and the land, notwithstanding his occupancy, became subject to entry by any other legal applicant by force of the act of May 14, 1880 (21 Stat., 140), and section 2266 of the Revised Statutes.

Had patent not gone out the selection would have been rejected under the rule in Litchfield *v.* Anderson (32 L. D., 298). While, so long as it has the legal title, the United States may, and as the act of June 4, 1897, is construed by the Department does, withhold its lands from selection under the act for protection of a mere occupant who asserts to them no right under the laws for their disposal, it does not follow that it will, or that it can, ask aid of the courts to recover title it has inadvertently but for good consideration granted away.

The questions presented are: (1) Whether the United States can maintain a suit to recover a title for which it received an adequate consideration, and in so doing violated no duty due to any adverse claimant, merely on the ground that the patent was inadvertently issued. (2) Whether, if it can maintain such suit, the government ought to enter upon litigation, of mere grace, for protection of one who has heretofore declined three opportunities to acquire the tract.

In a proceeding for cancelation of a patent the United States is subject to the same equitable obligation as any other suitor. There is no law by which title to the land in the forest reserve which vested in the United States by the Aztec company's deed of relinquishment and approval of the selection can be restored to the selector. There is no duty due from the United States to Sandoval, who failed to avail himself of opportunity to show a right to the land by petition to the proper court; who refused to make claim to his holding under the act of March 3, 1891, *supra,* and who for over seven years after the land was subject to entry failed to claim an entry under the homestead law. The United States is not only under no duty to Sandoval, but Sandoval himself is without equity as against one who gave an actual and adequate consideration. The United States, having no right or equity of its own to vindicate, must show that it owes some duty to Sandoval, and can not show any. On this class of actions the court in United States *v.* San Jacinto Tin Company (125 U. S., 273), held (syllabus):

> The right to bring such a suit exists only when the government has an interest in the remedy sought by reason of its interest in the land, or the fraud has been practised on the government and operates to its prejudice, or it is under obligation to some individual to make his title good by setting aside the patent, or the duty of the government to the public requires such action.

No one of the conditions so declared necessary exists in the present case, and it therefore appears to the Department that valid ground for equitable relief does not exist, and that suit ought not to be instituted.

MILITARY BOUNTY LAND WARRANT—SCRIP—ACT OF AUGUST 31, 1852.

FRANK ELLIS ET AL.

Under the provisions of the act of March 3, 1899, all persons owning or holding Virginia military bounty land warrants who failed to present their claims and surrender their warrants within one year from the passage of that act are forever barred from asserting any claim or right to scrip therefor under the act of August 31, 1852.

The jurisdiction to determine whether a military bounty land warrant is outstanding and unsatisfied, and whether the owner thereof is entitled to scrip therefor under the act of August 31, 1852, rests solely with that branch of the Executive Department of the government charged with the duty of disposing of the public lands.

The act of February 18, 1871, ceding to the State of Ohio the residue of lands in the Virginia Military District, as construed by the act of May 27, 1880, had no reference to lands included in any survey or entry within said district founded upon a military warrant upon continental establishment, and any infirmities in title based upon or deducible from entry of a tract of land within said district founded upon such a warrant were cured by the act of August 7, 1882, where the party claiming in good faith under such title had been in continuous possession for twenty years prior thereto, and there therefore exists no right on the part of one in whom title was thus confirmed to have scrip issued to him, under the act of August 31, 1852, on the ground that the location of the warrant upon which the title so confirmed to him was founded was invalid and that the warrant for that reason has never been satisfied.

Acting Secretary Ryan to the Commissioner of the General Land Office, August 7, 1906.

(F. L. C.) (E. F. B.)

This is an application by Frank Ellis and others, owners and transferees of the right of Henry Heth, for the issuance of scrip under the act of August 31, 1852 (10 Stat., 143), in lieu of what is alleged to be the unsatisfied portion of a Virginia military bounty land warrant, No. 1894, issued to Henry Heth, October 20, 1783, for services as captain in the continental line of Virginia, War of the Revolution.

The warrant was issued for four thousand acres and was located and surveyed in four tracts of one thousand acres each. It does not appear from the records of your office or from the evidence that survey No. 1423, which represents that portion of the warrant in controversy, was ever returned to the War Department or to the General Land Office for patent, as required by law, and it is alleged that by reason of such failure, the location is void and the warrant as to this one thousand acres has never been satisfied.

The act of August 31, 1852, under which this application is made, provides:

That all *unsatisfied, outstanding* military land warrants, or parts of warrants, issued or allowed prior to the first day of March, 1852, by the proper authorities of the Commonwealth of Virginia, for military services performed by the officers

and soldiers, seamen or marines, of the Virginia State and Continental Lines in the Army and Navy of the Revolution, may be surrendered to the Secretary of the Interior, who upon being satisfied, by the revision of the proofs or by additional testimony, that any warrant thus surrendered was fairly and justly issued in pursuance of the laws of said Commonwealth, for military services so rendered, shall issue land scrip in favor of the present proprietors of any warrant thus surrendered, or the whole or any portion thereof yet unsatisfied.

By a provision of the act of March 3, 1899 (30 Stat., 1074, 1099), Congress limited the time in which the owners or holders of outstanding Virginia military land warants were allowed to present and surrender such warrants and to receive scrip in lieu thereof, which is as follows:

and the owners or holders of all outstanding military land warrants, or parts of such warrants, issued or allowed by the State of Virginia for military services performed by the officers and soldiers, seamen, or marines of the Virginia State Continental Lines in the army and navy of the Revolution, are hereby notified and required to present and surrender them to the Secretary of the Interior within twelve months from the passage of this act, for his action under the provisions of the act entitled "An act making further provisions for the satisfaction of the Virginia land warrants," approved August 31, 1852; and *all such warrants, or parts of warrants, not so presented and surrendered to the Secretary of the Interior shall be forever barred and invalid.*

This application was not filed until July 5, 1904, more than four years after the expiration of the period of limitation fixt by the act of March 3, 1899.

As that act required all persons claiming a right to scrip under the act of August 31, 1852, to present their claim and surrender their warrant within twelve months from the passage of the act and declared that "all such warrants, or parts of warrants, not so presented and surrendered to the Secretary of the Interior shall be forever barred and invalid," the executive department of the government is without authority to recognize any such claim not presented within the prescribed time, and the applicants by their failure to present their claim and surrender their warrant within such time are forever barred from asserting any claim or right to scrip under the act of August 31, 1852, unless there is some fact or circumstance in this case that takes it out of the operation of the act of March 3, 1899.

All of these applicants claim thru mesne conveyances as transferees under the location made by Henry Heth of that portion of the warrant located as "Survey 1423" and have ever since by themselves or their grantors been in possession of the several tracts occupied and owned by them respectively.

This location and survey was made in 1787 and a patent was issued thereon by the governor of Virginia April 20, 1792. The State of Virginia had, however, in 1784, ceded to the United States under authority of an act of its legislature, all the lands which it owned or

claimed northwest of the Ohio River, subject to certain reservations, among which was the reservation of what is commonly known as the "Virginia Military District in Ohio." The Supreme Court in Anderson *v.* Clark (1 Peters, 628) construed this to be not a reservation of the whole tract of country reserved by the deed of cession, but only so much of it as may be necessary to make up the deficiency of lands in the country set apart for the officers and soldiers of the continental line, on the southeast side of the Ohio, and that the residue was ceded to the United States to be disposed of for the benefit of the several states. It further held that it was within the power of Congress to prescribe the time within which the lands to be appropriated by such claims shall be separated from the general mass of the public lands, so as to enable the general government to apply the residue to the other purposes of the cession.

In the exercise of this power, Congress by the act of March 23, 1804 (2 Stat., 274), defined the territory reserved by the State of Virginia, in its deed of cession, and provided that all officers and soldiers entitled to bounty lands within such reserved territory shall complete their locations within three years after the passage of the act and that every officer and soldier whose location and entry had theretofore been made "shall make return of his or their surveys to the Secretary of the Department of War within five years after the passage of this act," and declared that when such surveys shall not have been returned within the prescribed period, such part of the reserved territory "shall thenceforth be released from any claim or claims for such bounty lands."

The period of limitation prescribed by the act of March 23, 1804, for making locations and returning surveys of bounty claims within that territory, was extended from time to time by a series of acts, beginning with the act of March 2, 1807 (2 Stat., 424), and ending with the act of February 20, 1850 (9 Stat., 421), the effect of which was to extend the time for the location of warrants, and the return of surveys to January 1, 1852, and to continue in force the provision of the act of March 23, 1804, fixing the penalty for failure to make such locations and returns within the prescribed period. In the meantime the General Land Office was established and the warrants and surveys were thereafter to be returned to that office instead of the Secretary of War. The act of March 3, 1855 (10 Stat., 701), further extended time for the return of surveys and warrants where the entry had been made prior to January 1, 1852.

As the right and title initiated by location and survey depended upon the performance of certain prescribed conditions, a failure to perform such conditions would, by the express terms of the act of March 23, 1804, release the land from the claim or right initiated by such location and survey. See Fussell and Gregg, 113 U. S., 550.

The next legislation affecting lands in this reservation was the act of February 18, 1871 (16 Stat., 416), ceding to the State of Ohio "the lands remaining unsurveyed, and unsold in the Virginia military district in the State of Ohio," subject to the condition that a *bona fide* settler on any portion of said land at the time of the passage of the act may preempt the same not exceeding 160 acres in such manner as the legislature of the State of Ohio may direct.

By act of May 27, 1880 (21 Stat., 142), Congress defined and construed the act of February 18, 1871, as follows:

> That the act ceding to the State of Ohio the lands remaining "unsurveyed and unsold" in the Virginia military district in the State of Ohio had no reference to lands which were included in any survey or entry within said district founded upon military warrant or warrants upon Continental establishment; and the true intent and meaning of said act was to cede to the State of Ohio only such lands as were unappropriated and not included in any survey or entry within said district, which survey or entry was founded upon military warrant or warrants upon Continental establishment.

To further quiet the title to lands within the Virginia Military District, based upon location of warrants, Congress by the act of August 7, 1882 (22 Stat., 348), provided:

> That any person in the actual, open possession of any tract of land in the Virginia military district of the State of Ohio, under claim and color of title, made in good faith, based upon or deducible from entry of any tract of land within said district founded upon military warrant upon Continental establishment, and a record of which entry was duly made in the office of the principal surveyor of the Virginia military district, either before or since its removal to Chillicothe, Ohio, prior to January first, eighteen hundred and fifty-two, such possession having continued for twenty years last past under a claim of title on the part of said party, either as entryman or of his or her grantors, or of parties by or under whom such party claims by purchase or inheritance, and they by title based upon or deducible from such entry by tax sale or otherwise, shall be deemed and held to be the legal owner of such land so included in said entry to the extent and according to the purport of said entry, or of his or her paper titles based thereon or deducible therefrom.
>
> That so much of the act approved February eighteenth, eighteen hundred and seventy-one, entitled "An act to cede to the State of Ohio the unsold lands in the Virginia Military district in said State," and of an act approved May 27, 1880, construing said act of February 18, 1871, as conflicts with this act, be, and the same is hereby, repealed.

Notwithstanding the legislation by Congress validating the title to lands based upon the location of Virginia military land warrants, these applicants, in 1903, applied to and purchased from the State of Ohio, under the provisions of the act of February 18, 1871, lands which had been in the possession of themselves or their grantors ever since the entry of Henry Heth, under which they derived their claim and title, although no adverse claim had ever been asserted to any of said lands and no one was seeking to evict them.

Thereafter they presented their petition to the court of common

pleas of Adams county, alleging the invalidity of their title under the location of Henry Heth, which became void December 31, 1851, by reason of the failure to return the survey to the proper office, under the ruling of the Supreme Court in the cases of Fussell *v.* Gregg, 113 U. S., 550, and Coan *v.* Flagg, 123 U. S., 117; that having purchased said lands from the State under its laws, the warrant as to said one thousand acres is unsatisfied and on file in the General Land Office. They prayed that they may be declared to be the owners of said unsatisfied warrant.

Upon the hearing of said petition the court found that said location had failed, because the survey was not returned for patent, and therefore null and void; that the warrant as to said one thousand acres is unsatisfied, and that the title to the same is in these applicants.

The jurisdiction to determine whether a warrant is outstanding and unsatisfied, and whether the owner of it is entitled to scrip under the act of August 31, 1852, rests solely with that branch of the executive department of the government charged with the duty of disposing of the public lands.

The opinions of the court in the cases of Fussell *v.* Gregg and Coan *v.* Flagg, are not decisive of the question presented in this case. In Fussell *v.* Gregg, the issue was as to the validity of a title to land claimed on the one hand under a location and survey made in 1823, but not returned, and on the other hand, by a subsequent location of the same land that had been returned and patented prior to January 1, 1852. The court sustained the title under the latter location upon the ground that the failure to return the survey within the prescribed period under the former location discharged the land from any claim founded on such location and survey, and extinguished all right acquired thereby. A valid claim had vested and intervened prior to the act of August 7, 1882.

In Coan *v.* Flagg, the land in controversy was claimed by Coan under a location made in 1849, but the survey was not returned until April 26, 1852. The survey was also excessive, covering an area more than three times greater than the face of the warrant. Flagg claimed under title from the State of Ohio acquired after the act of February 18, 1871, and prior to the act of May 27, 1880. The court sustained the title of Flagg upon the ground that the entry and survey under which Coan claimed, did not invest the owner of the warrant, or his assignees, with an equitable interest in the lands surveyed as against the United States, for the reason that the land surveyed was so much greater than that covered by the warrant as to make the survey fraudulent and void, and Congress could grant the lands at its pleasure; that the purpose of the act of February 18, 1871, was to grant to the State of Ohio all the lands in the Virginia

Military District that had not, at the time, been legally surveyed and sold by the United States, and the survey under which Coan claimed being invalid as against the United States, the lands covered thereby were within that description.

That was also the construction that had been placed upon the act of February 18, 1871, by the land department, which the court observed was the occasion of the passage of the act of May 27, 1880, which was for the express purpose of construing and defining the act of February 18, 1871, in order to change the interpretation which had been put upon it.

It also held that Flagg's title was conferred by the 4th section of the act of May 27, 1880, which declared that "this act shall not in any way affect or interfere with the title to any land sold for a valuable consideration by the Ohio Agricultural and Mechanical College, granted under the act of February 18, 1871." The court said (page 129):

> If the title of the Ohio Agricultural and Mechanical College, under the act of February 18, 1871, was valid, the act of May 27, 1880, giving for the future a new interpretation to that act, could not have the effect of divesting its title. If, on the other hand, the title to lands sold by the Ohio Agricultural and Mechanical College, under claim of title by virtue of the act of February 18, 1871, was unsupported by the terms of that act, then section 4 of the act of May 27, 1880, can have effect only as operating to confirm that title. This it was competent for Congress to do—no vested rights intervening—and this, in our opinion, is what they have done by the act of May 27, 1880.

In that case a vested right had intervened prior to the curative statutes of May 27, 1880, and August 7, 1882. In the case at bar no such condition existed at the time of the purchase by applicant from the State. The act of May 27, 1880, declared that the act of February 18, 1871, ceding to the State the residue of the lands in the Virginia Military District, had no reference to lands which were included in any survey or entry within said district founded upon a military warrant upon continental establishment, and that the true meaning of the act was to cede to the State only such lands as were unappropriated and not included in any such survey or entry. The State had therefore no title to these lands, that it could convey, and the entry was practically protected from interference.

The act of August 7, 1882, cured whatever infirmity there was in titles based upon or deducible from entry of a tract of land within said district upon such warrants, where parties claiming in good faith under such title had been in continuous possession for twenty years prior thereto.

The title of these applicants, claiming under the entry of Heth, had therefore been confirmed, and that portion of the warrant representing said entry was not outstanding and unsatisfied. Your decision is affirmed.

HOMESTEAD ENTRY—ADDITIONAL—KINKAID ACT.

JAMES DINAN.

An entryman under the act of April 28, 1904, who fails to take the full quantity of land he is entitled to enter, for the reason that there are at that time no other adjoining unappropriated public lands subject to entry, may, if other adjoining lands subsequently become vacant, enlarge his former entry to the full area permitted by the statute, by including contiguous tracts in and as a part thereof, regardless of whether at the time of his original entry he contemplated taking those particular tracts if they should subsequently become vacant, provided it be satisfactorily established that he did not at the time of making the original entry intend thereby to exhaust the right conferred by the statute.

Case of James W. Luton, 34 L. D., 468, overruled, in so far as in conflict.

Acting Secretary Ryan to the Commissioner of the General Land Office, August 9, 1906.

(F. L. C.) (E. O. P.)

James Dinan has appealed to the Department from your office decision of November 6, 1905, denying his application to enlarge his original homestead entry, made October 10, 1904, for the NW. ¼, Sec. 9, T. 34 N., R. 50 W., 6th P. M., Alliance land district, Nebraska, to include therein the NE. ¼, Sec. 9, and SE. ¼, Sec. 4, same township and range.

At the time the original entry was made there was no other vacant contiguous land which might have been included therein. The claimant has since procured the relinquishment of the tracts he now desires to enter as an enlargement of his original entry.

Your office rejected said application to amend for the reason that at the time Dinan made his original entry it does not appear that he intended to enter the tracts now applied for, and further, that said application does not conform to the regulations governing amendments, nor does it come within the provisions of section 2 of the act of April 28, 1904 (33 Stat., 547).

The record discloses that the original entry sought to be enlarged was made under the provisions of section 3 of the said act of April 28, 1904, *supra*, prior homestead entry having been made and perfected by the claimant of the SE. ¼, Sec. 4, T. 32 N., R. 50 W., 6th P. M., Chadron land district, Nebraska.

Two different rules have been adopted by the Department touching the allowance of applications of the character now under consideration. Under the rule touching entries made under the first section of said act permitting entry for 640 acres, where the full quantity was not taken in the first instance because there was not at that time other adjoining unappropriated public land subject to entry, the claimant has been allowed, when other lands became vacant, to enlarge his former entry to the full area permitted by the statute by

including contiguous tracts in and as a part thereof, and the application of this rule is not dependent upon proof of the existence of an intent on the part of the entryman at the time of his original entry to take the particular tracts which subsequently became vacant (Henry Hookstra, 34 L. D., 690), if it be satisfactorily established that he did not at that time intend to exhaust the right conferred by the statute.

The narrower rule announced in departmental decision rendered in the case of James W. Luton (34 L. D., 468), where it was held that "by making one entry under said act of April 28, 1904, the entryman has exhausted his right under said act," has been held to apply only to entries made under section 2 thereof, and the import of the unqualified language used has been modified by later decisions of the Department. Graves *v.* McDonald (34 L. D., 527); Green Piggott (34 L. D., 573).

While the rule adopted in the Luton case, when considered in connection with the theory upon which it was based, absolutely limits the exercise of the right conferred by the act to one entry, the later decisions, without controverting the general rule that one entry exhausts the right, permits a restoration thereof where it is shown that at the time of making the additional entry allowed under section 2 of said act, the entryman, by act or declaration then made, evidenced his intention to enlarge his entry by taking other specified tracts as soon as he cleared the record of existing entries. As to entries made under said section 2, the rule has never been further extended and the strictest proof as to the existing intent of the entryman at the time of making his first application, has been required.

The narrower rule applied to entries made under section 2 of said act, *supra*, is founded upon the theory that said entries are in fact additional or second entries and that the claimant having made such entry, even though for a less quantity of land than he might have taken, should, in the absence of satisfactory proof that he did not intend to thereby exhaust his right, be presumed to have elected so to do. Entries made under section 1 of said act, *supra*, are treated as strictly original entries and are therefore governed by the general rule adopted by the Department in such cases.

Entries made under section 3 of said act partake of the character of each of the other classes, and if either of the rules governing the enlargement of entries made under sections one and two, respectively, is to control as to entries made under said section 3, it will be necessary to determine which is most properly applicable thereto. Entries made under section 3 of said act differ from those made under section 2 thereof in that they need not be made of land contiguous to that previously entered, nor is any preference conferred upon such claimants. Entries under this section may, like those under section one,

be made for any vacant lands within the designated territory. They are, like those made under section 2, additional to a prior entry in that the quantity of land which may be taken is limited and controlled by the area included in the prior entry, yet unlike the entries made under section 2 in that the applicant at the time of entry need not own and occupy the land previously entered. Entries made under section 3 are not designated as "additional" by the statute as are those made under section 2. All entries are in fact either original or additional. Second entries made under the provisions of an act restoring the right previously exhausted are additional as to the prior entry, but considering only the act conferring the right they are original. This is especially true of entries made under the provisions of section 2 of the act of June 5, 1900 (31 Stat., 267), yet the Department has uniformly treated such entries as original ones, and entries of the character of the one under consideration can not be logically separately classified. They would therefore be controlled by the rules governing entries made under section 1 of said act, and not under those applicable to entries made under the second section. Such reasoning results in a conclusion not founded on broad equity or warranted by the rules of construction governing a remedial statute. The inequitable nature of this interpretation becomes apparent when the position of the persons sought to be benefited by the act is considered. Persons initiating their claims under the first and third sections of said act are free to locate any of the unappropriated land within the limits named in the statute. Their right of selection is only confined by the boundaries prescribed, yet, if under these favorable conditions they fail in the first instance to take all the land to which they are entitled, they may, upon a showing sufficient to meet the requirements of the old and well-settled rule of the Department, be allowed to extend their original entries. Entries governed by the provisions of section 2 are made by persons who have existing entries of record and who are not permitted to exercise the broad right of selection accorded entrymen making applications under sections 1 and 3 of said act. Their field is limited to lands in the immediate vicinity of their prior entry. If their original entry be for the full 160 acres allowed by the law under which it was made, they can not, in locating additional land, seek further than one and one-half miles in any direction from the land then held by them. This is the extreme limit, as the completed entry must be contiguous. The areas within which they may make selection is fixt by their original entry. Then, too, the time within which they are the preferred claimants for the tracts within prescribed limits is fixt, and within that time they must act if they wish to make certain of the benefits conferred by the statute. If there is insufficient vacant land within these narrow limits to make up the full area allowed them, they can not safely

postpone entry in order to clear the record of other entries. Surely they are entitled to as much consideration under the statute as are those who proceed under the other sections thereof. An examination of the object and intent of the act in question can lead to no other conclusion. Its object was the settlement and improvement of a vast tract of semi-arid land and an additional area was given to each homestead claimant to the end that compensation might be made in quantity for what was lacking in quality. This was the inducement held out to those who made entry after the passage of the act, or, in other words, those who made entry under the provisions of sections 1 and 2 thereof. Those who had previously made entry within the limits prescribed and were struggling to accomplish the very purpose of the act, were also justly the objects of consideration, and in order to encourage them in the work already begun under adverse conditions and to place them on as nearly an equal footing as possible, they were permitted to extend their original entries to include an area equal to that allowed subsequent applicants. To hold that these claimants are not entitled to the same equitable consideration accorded those specified by section 3 of said act, where the land embraced in the original entry was presumptively of inferior quality while that taken by claimants under section 3 may have been equal to any of the public land open to selection, is incompatible with a sound and equitable construction of the statute, and the Department is clearly of opinion that no different rule should be adopted which would tend to restrict their rights in any particular as measured by those enjoyed by claimants whose rights are dependent upon the language of sections 1 and 3 of said act.

There is no warrant for subjecting claimants under section 1 to any other or different rule than those making original entry under the general homestead law. As has been said, those proceeding under section 3 fall under the same rule. This is the rule adhered to by the Department in the case of Henry Hookstra (34 L. D., 690) and cases there cited, and inasmuch as the earlier departmental decisions announcing this doctrine were not referred to or questioned in the Luton case, *supra*, it is not believed that any annulment of the old rule was intended. Rather was a distinction attempted and a new rule established for the government of entries made under section 2 of said act. While the distinction may be clear, it is not believed that it warrants the imposition of any narrower rule as to the enlargement of such entries than is applied to the regulation of similar applications made for the extension of other entries, whether made under sections 1 and 3 or under the general provisions of the homestead law.

The general rule was followed by the Department in the Hookstra case, *supra*, entry having been made under section 1 of the act in

question, and is well stated in departmental decision in the case of Charles Carson (32 L. D., 176, 177), where it was held that an entryman—

> 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 where no innocent third party has been misled to his prejudice. The entry being still *in fieri*, not carried to completion, is amendable.

The statute permits entry to be made of a maximum quantity of land and so long as an entry made for a less amount is *unperfected* and *incomplete* and no adverse rights have intervened, applications of this character should not be restricted by narrow rules as against those who in good faith are attempting to establish and maintain a home on the public lands. A liberal interpretation is more in keeping with the proper construction of a benevolent statute. (Josiah Cox, 27 L. D., 389, 390.) Such a one is the act of April 28, 1904, *supra*.

The rule should not be carried beyond reasonable limits nor invoked to protect claims not supported by equity and justice. Neither should it be so inflexible as to defeat meritorious claims. In a word, it should be purely equitable and its application should rest "upon the facts and circumstances surrounding each particular case." (Green Piggott, 34 L. D., 573, 574.)

The showing made in the case at bar is in many respects similar to that presented in the Hookstra case, *supra*. At the time claimant made his first entry under the act conferring the right, there was no other adjoining land subject to entry. While claimant did not make any specific declaration to the effect that he did not intend to exhaust his homestead right by his first entry, yet it is clear that he did not intend to do so or he would not have sought and obtained relinquishments for the tracts now applied for. Unless he could enter them the relinquishments were of no value to him, and the trouble and expense of securing them would have been profitless. It is clear he believed that he could, as a matter of right, later extend his original entry. His acts evidence such belief and at the same time clearly bespeak his intention to proceed accordingly. While he was in error as to his strict legal right to so proceed, yet the Department has repeatedly relieved against the consequences of such error where an honest intent is manifest and no adverse rights have intervened. He further alleges in his duly corroborated affidavit that the land embraced in his original entry "is only fit for grazing and not at all fit for cultivation, as the sub-soil is commonly known as gumbo and totally unfit for raising crops," and that the amount thereof is totally inadequate to afford support for himself and family.

The Department being of opinion that one rule should govern in

the allowance or rejection of applications of this character, and that the long and well-established one is the more equitable and just, and that this applicant, upon the showing made, should be permitted to enlarge his former entry, your said decision is hereby reversed, and departmental decision rendered in the case of James W. Luton, *supra*, in so far as the same is in conflict herewith, is hereby overruled.

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

C. B. BURROWS.

The action of the President transferring the Crow Creek forest reserve to the administrative control of the War Department, to be used for certain military purposes, with the understanding and upon the condition that the use thereof for such purposes shall be subordinate to and not interfere with the object for which the forest reserve was established, did not amount to a vacation or abolition of the forest reserve, and lands therein constitute a proper basis for exchange under the provisions of the act of June 4, 1897, if otherwise subject thereto.

Acting Secretary Ryan to the Commissioner of the General Land Office, August 9, 1906.

(F. L. C.) (J. R. W.)

C. B. Burrows appealed from your decisions of September 11, 1905, and March 22, 1906, rejecting his selection, No. 12151, your office series, under the act of June 4, 1897 (30 Stat., 36), for the E. ½ of the SW. ¼ and the SE. ¼, Sec. 28, T. 8 N., R. 31 E., Walla Walla, Washington, in lieu of lands relinquished to the United States in what was, by executive proclamation of October 10, 1900 (31 Stat., 1981), established as the Crow Creek forest reserve, Wyoming.

May 3, 1904, Burrows filed for record his deed of relinquishment, and November 6, 1904, filed in the local office his selection of lands in lieu thereof. Your decision held that October 9, 1903, the Crow Creek forest reserve was vacated, and that the land was not a basis for exchange under the act of 1897, *supra*. The selector filed a motion for review, which you, March 22, 1906, denied. The sole question presented is, whether the Crow Creek forest reserve existed May 3, 1904.

July 10, 1903, the Brigadier-General commanding the Department of Colorado advised the Adjutant-General that it was desirable and he intended to establish within this reserve ranges for rifle and artillery practice, if no objection existed on part of the Interior Department. The matter was referred to the Secretary of the Interior July 21st, and consent was given. August 15, 1903, the Secretary of War advised the Secretary of the Interior of military maneuvers

contemplated in the vicinity of this reserve in the next year, and that—

the department is advised by the Commanding General of the Department of the Colorado, who has recently visited the ground, that the timber is scattered, very little of it, and is what is known as "bastard pine," that is, of stunted growth; also that it was never considered a timber reserve in the true sense of the term, but set aside so as to prevent the waters from which Cheyenne gets its supply from being contaminated by settlers. It will also be recalled that your department has very recently consented to the location thereon of a rifle range for the use of the Field Artillery and Infantry at Fort D. A. Russell and Fort Logan.

Under these circumstances and for the reasons above cited, I have the honor to request that I be advised if there will be any objection upon the part of the Department to the transfer, should there be no legal reasons to the contrary, of the said Crow Creek Forest Reserve, whose boundaries are fully described in the Executive Order of October 10, 1900, above cited, to this Department as a military reservation.

This was referred to you for report, and, August 28, 1903, making reference to facts rendering it highly desirable carefully to protect the timber and to conserve the waters within the reserve, you concluded that:

Respecting the request of the Secretary of War to be advised as to whether there will be any objection on the part of this Department to the transfer of this reserve to the War Department, provided there are no legal reasons to the contrary, I have the honor to further report that, provided the object for which the forest reserve was established would not be interfered with, this office would have no objection to abolishing the forest reserve and establishing a military reserve instead.

September 2, 1903, the Secretary of the Interior enclosed a copy of your report to the Secretary of War and advised him that—

in concurring with the views of the Commissioner I have the honor to advise you that there will be no objection on the part of this Department to the transfer on the conditions named.

October 9, 1903, the Acting Secretary of War, referring to the foregoing correspondence, addrest the President the request that:

I have, therefore, the honor to recommend that the lands in question be transferred to this Department as a military reservation. It is understood that the use of the lands for the purposes herein indicated shall not interfere with the object for which the forest reserve was established. Upon this condition the Interior Department is willing that the transfer be made.

October 9, 1903, this application was endorsed by the President: "The within recommendation is approved and the transfer will be made accordingly. The Sec. of the Int. will cause this action to be noted on the files of the G. L. O."

October 23, 1903, by General Orders, No. 40, it was announced that:

The President of the United States, by order dated October 9, 1903, transferred to the War Department, for use as a military reservation, a tract of public land situated in the State of Wyoming, which had been set apart as a public reservation to be "known as the Crow Creek Forest Reserve," . . .

This transfer was made with the understanding that the use of the lands for the purposes of a military reservation shall not interfere with the object for which the forest reserve was established.

The tract has since been designated as the Fort D. A. Russell Target and Maneuver Reservation.

The intent and effect of the foregoing executive orders and correspondence was not, in view of the Department, to abolish the forest reserve, or to displace such reservation by creating a military one. The President's order did not in terms vacate the reservation created by his proclamation, nor did the letter of the Acting Secretary of War of October 9, 1903, suggest that the forest reservation should be vacated. The request was for a "transfer" of the forest reserve to the War Department for the purpose of ranges and field maneuvers, with the express statement "that *the use* of the lands for the purposes herein indicated shall not interfere with the object for which the forest reserve was established." It was this recommendation, thus limited, that the President approved. The object for which the forest reserve was created is preserved as the dominant one, subject to which the War Department is given a use for ranges and occasional maneuvers, but this use is acknowledged to be subservient to the principal and dominant one of conserving the forests and the waters.

It is not the name given to the reservation that must determine its character, but its objects and purposes, and where, as in this instance, a tract is twice reserved for different purposes, it is that purpose which dominates and controls the other in any respect where they are incompatible that must determine its character.

If, for instance, the Fort D. A. Russell Target and Maneuver Reservation were abandoned, what disposal would be made of the public lands within it? Would they be disposed of as the acts of August 23, and December 29, 1894 (28 Stat., 491 and 599), require, or would that abandonment merely leave the lands as they were before the transfer of a subservient use and an administrative control to the War Department? Obviously the dominant use would control. That very object which the transfer conditioned should be *preserved* would not be defeated and destroyed by abandonment by the War Department.

This, in view of the Department, makes it clear that the Crow Creek forest reserve has not been vacated or abolished, but that to the uses and objects of that reservation have been added other, but subordinate, purposes, with present administrative control in the War Department while such uses shall continue.

As the forest reservation continues, the lands within it, at the time of their relinquishment and of making the selections, constituted proper base for selection under the act of 1897, and your decision adverse thereto is reversed. The case is remanded to your office for further proceedings appropriate thereto.

YAKIMA INDIAN RESERVATION—RECLAMATION—ACTS MARCH 6, AND JUNE 27, 1906.

OPINION.

Under the provisions of the act of March 6, 1906, authorizing the disposition of such surplus and allotted lands on the Yakima Indian reservation as may be subject to irrigation by means of projects under the reclamation act, twenty acres is fixt as the unit for Indian ownership to be irrigated by the waters of any such project, and if an Indian desires to accept the benefits of the act and place his surplus lands under the control of the government to be sold for his benefit, he can do so only upon the condition that he will retain twenty acres thereof, and no more, for which a water right shall be secured to him, appurtenant to the land and subject to the same charge for construction and annual charge for maintenance as other lands under the project.

Under the authority conferred upon the Secretary of the Interior by the act of June 27, 1906, to "fix a lesser area than forty acres as the minimum entry" and to "establish farm units of not less than ten or more than one hundred and sixty acres," as to all lands withdrawn and entered under the provisions of the reclamation act, he may make such subdivisions of the public lands entered under the reclamation act as in his judgment may be deemed advisable, in units of ten acres or multiples thereof up to one hundred and sixty acres.

Assistant Attorney-General Campbell to the Secretary of the Interior, August 10, 1906. (E. F. B.)

A letter from the Director of the Geological Survey relative to the disposal of allotted or patented Indian lands in the Yakima Indian reservation, State of Washington, has been referred to me for opinion upon the following questions:

1. Whether under the present law it is possible to fix a farm unit at 60 acres, so that the excess of each 80-acre allotment might constitute a farm unit.

2. Whether an Indian having 80 acres can be permitted to retain more than 20 acres if he should desire.

These questions arise in considering the duties imposed and the authority conferred upon the Secretary of the Interior by act of March 6, 1906 (34 Stat., 53), authorizing the disposition of surplus and allotted lands on the Yakima Indian reservation, which can be irrigated, and the act of June 27, 1906 (34 Stat., 519), providing for the subdivision of lands entered under the reclamation act.

So much of the act of March 6, 1906, as is necessary to an understanding of the questions submitted, will be found in the following excerpts from the 3rd, 4th and 5th sections of the act:

Sec. 3. That if any lands heretofore allotted or patented to Indians on said Yakima Indian reservation shall be found irrigable under any project the Secretary of the Interior is hereby authorized, upon the request or with the consent of such allottee or patentee, to dispose of all land in excess of twenty acres in each case, in tracts of an area approved by him and subject to all the provisions of the reclamation act to any person qualified to acquire water rights under the provisions of the reclamation act at a price satisfactory to the allottee or patentee and approved by the Secretary of the Interior, or at public sale to the highest bidder.

* * * * * * *

Sec. 4. That from the payments received from the sale of such individual Indian lands there shall be covered into the reclamation fund the amounts fixed by the Secretary of the Interior as the annual charges on account of the land retained by such Indian for the construction and maintenance of the irrigation system as required under the reclamation act.

The 5th section of the act authorizes the Secretary of the Interior to cover into the reclamation fund from the money of any such Indian, either from his individual credit or from the general Yakima Indian fund, for the payment of charges for construction and maintenance for the water rights appurtenant to the land retained by him or for the annual maintenance charges payable on account of such water rights after the construction charge thereon has been paid in full; that when the title in fee has past from the United States " for any lands retained by such Indian," the water shall be furnished on the same terms as for other lands under the project, and he shall have a perpetual water right so long as the maintenance charges are paid, whether he uses it or not, " and the Secretary of the Interior is hereby authorized to use the funds of the tribe to pay such maintenance charges, which in his discretion it is necessary to preserve said water right: "

Provided further, That he may, in his discretion, use said funds to pay for water rights and the maintenance charges on twenty acres of any Indian allotment if the sum obtained from the sale of the allottee's land in excess of twenty acres and his interest in the tribal funds be insufficient for those purposes.

The Secretary of the Interior has no authority to dispose of any of the allotted or patented land except " upon the request or with the consent " of the allottee or patentee, and until such request is made or consent given he has no authority to dispose of such lands and can then only dispose of the lands in excess of twenty acres, of each allottee or patentee.

The question arises whether, when consent is given to sell the surplus land the Indian may retain a greater area than twenty acres or

is restricted to that area and must surrender the entire excess for disposal under the provisions of the act.

There are expressions in the act tending to sustain the construction that the specific quantity of twenty acres to be retained by the Indian was only intended as a limitation upon the authority of the Secretary to sell so that the Indian should not be permitted to alienate all his land, and that it was the purpose of the act to invest the Indian with a right to the use of water from the irrigation works of the irrigation project to be constructed under the act of June 17, 1902, "for any lands retained by such Indians" subject to the charges for construction and maintenance.

This construction finds support in that provision of the act by which security for the payment of the cost of construction and the annual maintenance charge is not dependent solely upon the proceeds arising from the sale of the surplus lands, but the Secretary is authorized to cover into the reclamation fund, from the money of any such Indian, either from his individual credit or from the general Yakima Indian fund, for the payment of such charges, and to use the funds of the tribe to pay such maintenance charges if in his discretion it is necessary to preserve such water right.

But construing the several provisions of the act together, and with reference to the irrigation of such lands from government works constructed under the provisions of the act of June 17, 1902 (32 Stat., 388), it is apparent that the purpose of the act was to fix twenty acres as a unit for Indian ownership to be irrigated from the waters of such project and that if the Indian desired to accept the benefits of the act and to place his surplus lands under the control of the government to be sold for his benefit, it can only be done upon the condition that he will retain twenty acres, and no more, of his land, for which a water right shall be secured to him, which shall be appurtenant to the land and be subject to the same charge for construction and the same annual charge for maintenance as for other lands under the project.

Whatever doubts may arise as to the construction of the act from the various expressions contained therein, they seem to be dispelled by the final proviso to the 5th section, authorizing the Secretary to use the general fund of the Indians to pay for water rights and maintenance charges "on twenty acres of any Indian allotment" if the sum obtained from the sale of the allottee's land in excess of twenty acres and his interest in the tribal funds be insufficient. The Indian is not bound to accept the benefits of the act or to dispose of any of his land. If he does, he consents to retain twenty acres and no more.

The act of June 27, 1906, authorizes the Secretary of the Interior to "fix a lesser area than forty acres as the minimum entry and may establish farm units of not less than ten nor more than one hundred

and sixty acres" as to all lands withdrawn and entered under the provisions of the reclamation act. Under the authority conferred by this act he may make such subdivisions of the public lands entered under the reclamation act as in his judgment he may deem advisable, in units of ten acres or multiples thereof, up to one hundred and sixty acres. He may, therefore, in his discretion, fix the excess of an eighty-acre allotment, acquired under the act of March 6, 1906, as a sixty-acre unit or may divide the same in units of not less than ten acres or multiples of ten acres.

Approved:

THOS. RYAN, *Acting Secretary.*

SCHOOL LAND—CHEROKEE OUTLET—MINING LAWS.

E. A. SHIRLEY.

The United States mining laws have no application to sections sixteen and thirty-six in the Cherokee Outlet, reserved to the Territory of Oklahoma, and granted to the future State, for school purposes.

Acting Secretary Ryan to the Commissioner of the General Land Office, August 11, 1906.

(F. L. C.) (E. P.)

September 18, 1905, E. A. Shirley filed in your office an affidavit wherein it was alleged, in substance and effect, that he and a number of associates, on August 22, 1905, located as a placer mining claim the S. ½ of the NW. ¼ and the W. ½ of the SW. ¼ of Sec. 16, T. 21 N., R. 8 E., situate in the Cherokee Outlet, Territory of Oklahoma; that the land is chiefly valuable for petroleum and mineral oil; that the land has been leased to others by the School Land Leasing Board of the Territory of Oklahoma; that the lessors and the lessees, pretending to have absolute control of the land, "are permitting absolute strangers to this action, by means of divers oil wells about the boundaries of said tract of land, to drain large portions of oil from underneath claimant's property, to their great and irreparable injury, and will continue to do so up to the time of the trial of this cause." Wherefore, it was prayed that a hearing be ordered for the purpose of affording the claimants an opportunity to prove said allegations; "that the said lease be canceled;" and that "these claimants be permitted to go upon said lands and develop said mineral to the exclusion of the Territory of Oklahoma and all persons whomsoever."

Your office, by decision of October 9, 1905, held that the mining laws of the United States are not in force as to the land in question, and that, therefore, it is not subject to exploration, location or entry under such laws; and dismissed the application for a hearing.

The petitioner has appealed to the Department.

The land in question is embraced in a school section (16) situated in what is known as the Cherokee Outlet, acquired by the United States under an agreement dated December 19, 1891, with the Cherokee Indians, which agreement was ratified by Congress by the act of March 3, 1893 (27 Stat., 612, 642).

By the tenth section of that act it is provided, with respect to the lands within the territory covered by the agreement, that in the opening of the same to settlement—

> sections sixteen and thirty-six in each township, whether surveyed or unsurveyed, shall be, and are hereby, reserved for the use and benefit of the public schools to be established within the limits of such lands under such conditions and regulations as may be hereafter enacted by Congress.

And in the same section the President is authorized—

> to open to settlement any or all of the lands not allotted or reserved in the manner provided in section thirteen of the act of Congress approved March second, eighteen hundred and eighty-nine, entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and ninety, and for other purposes" (twenty-fifth United States Statutes, page ten hundred and five); also subject to the provisions of the act of Congress approved May second, eighteen hundred and ninety, entitled "An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Territory, and for other purposes;" also, subject to the second proviso of section seventeen, the whole of section eighteen of the act of March third, eighteen hundred and ninety-one, entitled "An act making appropriations for the current expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and ninety-two, and for other purposes;" except as to so much of said acts and sections as may conflict with the provisions of this act.

It is unnecessary herein to set forth the provisions made for the disposition of the unreserved and unallotted lands in the Cherokee Outlet. Suffice it to say that section 13 of the act of March 2, 1889, *supra* (the provisions of which, not in conflict with the provisions of the act of March 3, 1893, *supra*, are extended by the act last mentioned to such unreserved and unallotted lands), provides that such lands "shall be a part of the public domain, to be disposed of only as herein provided," and that no provision has been made in any of the acts or parts of acts referred to in the act of March 3, 1893, *supra*, for the disposition of any of said lands under the mining laws.

By section 18 of the act of March 3, 1891 (26 Stat., 989, 1026), whose provisions were by the act of March 3, 1893, *supra*, extended to sections sixteen and thirty-six in the Cherokee Outlet, it is provided—

> That the school lands reserved in the Territory of Oklahoma by this and former acts of Congress may be leased for a period not exceeding three years for the benefit of the school fund of said Territory by the Governor thereof, under regulations to be prescribed by the Secretary of the Interior.

By section 7 of the act of June 16, 1906 (34 Stat., 267), entitled, "An act to enable the people of Oklahoma and of the Indian Territory to form a constitution and State government and be admitted into the Union on an equal footing with the original States," etc., it is provided—

That upon the admission of the State into the Union sections numbered sixteen and thirty-six, in every township in Oklahoma Territory, and all indemnity lands heretofore selected in lieu thereof, are hereby granted to the State for the use and benefit of the common schools: *Provided*, That sections sixteen and thirty-six embraced in permanent reservations for national purposes shall not at any time be subject to the grant nor the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character, nor shall land owned by Indian tribes or individual members of any tribe be subjected to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.

By the last paragraph of section 8 of the act last mentioned it is provided that—

Where any part of the lands granted by this act to the State of Oklahoma are valuable for minerals, which terms shall also include gas and oil, such lands shall not be sold by the said State prior to January first, nineteen hundred and fifteen; but the same may be leased for periods not exceeding five years by the State officers duly authorized for that purpose, such leasing to be made by public competition after not less than thirty days' advertisement in the manner to be prescribed by law, and all such leasing shall be done under sealed bids and awarded to the highest responsible bidder. The leasing shall require and the advertisement shall specify in each case a fixed royalty to be paid by the successful bidder, in addition to any bonus offered for the lease, and all proceeds from leases shall be covered into the fund to which they shall properly belong, and no transfer or assignment of any lease shall be valid or confer any right in the assignee without the consent of the proper State authorities in writing: *Provided, however*, That agricultural lessees in possession of such lands shall be reimbursed by the mining lessees for all damage done to said agricultural lessees' interest therein by reason of such mining operations.

And by section 9 of said act, with respect to such sections sixteen and thirty-six, and lands theretofore selected in lieu thereof, it is further expressly provided that—

such lands shall not be subject to homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

The foregoing provisions are wholly inconsistent with the theory that Congress intended to subject the school sections in the Cherokee Outlet to the operation of the mining laws. The Department is of opinion, therefore, that the mining laws have no application to said lands, and so holds. The action appealed from is accordingly affirmed.

CERTIFICATES OF NATURALIZATION—SECTION 39, ACT OF MARCH 3, 1903.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *August 11, 1906.*

Registers and Receivers, United States Land Offices.

SIRS: Your attention is called to section 39, act March 3, 1903, (32 Stat., 1222), which declares that all final orders and certificates of naturalization thereafter issued or made by courts or tribunals granting naturalization shall be null and void if they do not show on their faces specifically that there has been made and filed of record in such court or tribunal an affidavit executed by the applicant for naturalization reciting and affirming the truth of every material fact requisite to his naturalization; and you are directed to reject all such orders or certificates, or copies thereof, as have not been made in conformity with that statute when presented by persons who claim to have been naturalized since the date of that act.

Very respectfully,

G. F. POLLOCK,
Acting Commissioner.

Approved:
THOS. RYAN, *Acting Secretary.*

BROPHY ET AL. *v.* O'HARE.

Motion for review of departmental decision of May 4, 1906, 34 L. D., 596, denied by Acting Secretary Ryan, August 14, 1906.

FOREST RESERVE—LIEU SELECTION—ACT OF MARCH 3, 1905.

FREDERICK W. KEHL.

The proviso to the act of March 3, 1905, repealing the act of June 4, 1897, which declares that a selection made under the provisions of the latter act prior to the date of the repealing act, may be perfected and patent issue thereon the same as though the repealing act had not been past, and if for any reason not the fault of the party making the same any pending selection is held invalid, another selection for a like quantity of land may be made in lieu thereof, applies as well in instances where the selection is held invalid in part only as where the selection is held invalid in its entirety.

Acting Secretary Ryan to the Commissioner of the General Land Office, August 13, 1906.
(S. V. P.) (J. R. W.)

Frederick W. Kehl appealed from your decision of March 8, 1906, rejecting his application to select the SE. ¼ SW. ¼, Sec. 10, T. 60 N., R. 18 W., Duluth, Minnesota, as supplemental to selection numbered 1993 your office series, under the act of June 4, 1897 (30 Stat., 36), filed in the local office November 7, 1905.

February 6, 1900, Kehl filed in the local office his application to select unsurveyed lands including among others a tract described as what, when surveyed, would be the NW. ¼ NE. ¼, Sec. 21, T. 69 N., R. 22 W. This tract, after the survey, was found, March 5, 1903, to be in conflict with Henry Hanson's claim of settlement and application for homestead entry and the whole selection of one hundred and sixty acres was for that reason rejected by your office.

July 9, 1903, upon Kehl's appeal, that decision was reversed (unreported) and the Department held that—

> Kehl should have been ruled only to eliminate those tracts to which prior claim existed and to fill the unsatisfied portion of his rights assigned as base for the application or to waive the excess resulting. . . . This procedure conserves to the applicant so much right as he has acquired and gives him opportunity to satisfy that part of the relinquishment for which he failed to select land subject to be so appropriated.

July 22, 1904, instead of ruling Kehl to fill his partial selection, or to waive the excess, as was held to be his right, your office returned the application to him to be amended by withdrawal of forty acres of the base assigned, which he consented to do and withdrew the NE. ¼ SW. ¼, base for the present selection. This was not contemplated by the decision and was a departure from proper procedure as fixed by instructions of March 6, 1900 (29 L. D., 578, paragraph 1), and instructions of July 7, 1902 (31 L. D., 372, paragraph 8), but as your office and the selector concurred in this irregular course, neither the selector nor the land department is in position to recede from the error and proceed regularly, as the selection thus rendered partial in character was approved and passed to patent. By concurring acts of the selector and the department, the unity of the transaction was broken and the tract so withdrawn was severed and became a distinct base for a transaction apart from that to which it properly belonged, distinct by itself as if it had been relinquished by a separate deed. Your decision held that—

> Kehl did not avail himself of his right to exhaust the right arising by his relinquishment of the NE. ¼ SW. ¼, Sec. 10, T. 1 N., R. 6 E., B. H. M., withdrawn from selection No. 1993, until after the approval of the act of March 3, 1905, which repealed the act of June 4, 1897, and other acts, and as at said date he had no selection pending based upon said forty-acre tract, he is

not permitted to make another selection in lieu thereof as it would be in violation of said act of March 3, 1905.

The application cannot be considered as supplemental to selection No. 1993, as that selection was perfected and the case closed by the issuance of patent. It can be considered only as a new application where the base land has been reconveyed to the United States prior to March 3, 1905, but no selection made in lieu thereof prior to said date, and there being no provision of law under which it can be considered, the said application is rejected.

The act of March 3, 1905, referred to (32 Stat., 1264), repealing the act of June 4, 1897, was limited by the proviso—

that selections heretofore made in lieu of lands relinquished to the United States may be perfected and patents issued therefor the same as though this act had not been passed and, if for any reason, not the fault of the party making the same, any pending selection is held invalid, another selection for a like quantity of land may be made in lieu thereof.

Had selection 1993 failed in its entirety without fault of Kehl there would be no doubt but his right to make another selection is saved by the express words of the proviso. The proviso is remedial in character, plainly intended to conserve rights that were in good faith asserted and attempted to be exercised before passage of the act. No reason appears why the proviso should be limited in operation to cases of total failure of the selection and the Department construes it as applying as well to a partial failure as to a total one.

This construction is in harmony with the practise prior to the passage of the act. It had been the practise to permit one who had made a partial selection to preserve his right in the lands selected by filling his selection so as to satisfy the base relinquished (Instructions, 29 L. D., 578; 31 L. D., 372), and this was no less due to one whose selection was intended to be full but failed from conflict with a prior right than to one who originally made only a partial one. Tho the procedure in the present case was irregular in that the original selection was not filled by selection of another tract in the place of that lost by the conflict, Kehl is entitled to make another selection for the base tract so withdrawn from his original selection upon its partial failure, the land department having co-operated to his so doing.

Your decision is therefore reversed and if no other objection appear, the selection will be approved.

BURROUGHS *v.* CARROLL.

Motion for review of departmental decision of May 31, 1906, 34 L. D., 626, denied by Acting Secretary Ryan, August 22, 1906.

FORT BUFORD ABANDONED MILITARY RESERVATION—HOMESTEAD APPLICATION—WITHDRAWAL UNDER RECLAMATION ACT.

MERCER *v.* BUFORD TOWNSITE.

One who on January 1, 1900, was an actual occupant of lands within the Fort Buford abandoned military reservation, and otherwise qualified, is, under the provisions of the act of May 19, 1900, restoring said lands to settlement and entry, entitled to a preference right of entry; and where he asserts such right within due time, by filing an application covering the lands occupied by him, a temporary withdrawal of such lands under the reclamation act will not defeat his right to make entry thereof, where his application was pending for adjudication before the land department at the date of the order of withdrawal.

Where on January 1, 1900, there was no claim to a tract of land within the Fort Buford abandoned military reservation by virtue of actual occupancy, an application to make homestead entry thereof, filed within due time after the filing of the township plat of survey, and which was pending before the land department for adjudication at the date of a temporary withdrawal of the land under the reclamation act, is effective to prevent the attachment of the withdrawal as to such tract, and the applicant may be allowed to make entry thereof.

Acting Secretary Ryan to the Commissioner of the General Land Office, August 25, 1906.

(S. V. P.) (P. E. W.)

With your office letter of June 28, 1906, you transmit the application of John Mercer, Sr., to make homestead entry for the NE. ¼, Sec. 16, T. 152 N., R. 104 W., Minot, North Dakota, also that of Sarah D. Mercer to enter the W. ½ SE. ¼ and the SE. ¼ SE. ¼, Sec. 9, in the same township and range.

Said applications are before your office upon appeal from their rejection by the local officers and are submitted to the Department for instructions in view of the former departmental action of May 11, 1905, herein (not reported), attention being called to the opinion, Fort Buford abandoned military reservation—reclamation act (34 L. D., 347).

The lands in question were a part of the said reservation, and were restored to settlement and entry under the act of May 19, 1900 (31 Stat., 180), in which it was provided, *inter alia*—

> That actual occupants thereon upon the first day of January, nineteen hundred, if otherwise qualified, shall have the preference right to make one entry not exceeding one quarter section.

Instructions (30 L. D., 394) allowed three months from the date of filing of the township plat for the exercise of such preference right of entry. Said plat was filed July 15, 1903, and on the same day said John Mercer filed his homestead application in due form for said NE. ¼, Sec. 16, alleging settlement, improvement, and cultivation thereof since December 1, 1895, and that the same was not adversely

occupied on January 1, 1900. July 22, 1903, said Sarah D. Mercer filed her homestead application for the other described land, alleging that it "is not subject to adverse claim except the Buford townsite."

Both applications were rejected by the local officers for conflict "with the application for Fort Buford townsite," against which they had filed protests.

October 20, 1903, your office rejected all said applications and ordered a hearing—

to determine what portion or portions of the 320 acres in controversy is subject to townsite entry and whether the two Mercers have any superior right to the land claimed by them over the townsite claimants for the 320 acres.

Upon the hearing the local officers found that no part of the lands in question herein were actually occupied for townsite purposes and that "John Mercer, Sr., one of the protestants to the [townsite] final proof is entitled to the NE. ¼, Sec. 16, . . . by reason of his residence, cultivation and occupancy of the tract prior to the survey," and recommended the allowance of both said homestead applications.

November 5, 1904, your office reversed their decision and rejected both said homestead applications.

Upon appeal the Department, on May 11, 1905, found that—

It is shown beyond question that John Mercer, Sr., was . . . a settler and homestead claimant on and prior to January 1, 1900, upon the NE. ¼ of said Sec. 16 . . . It is not shown that he, in any manner, has waived his claim or forfeited his right.

As to all the other land described herein the Department found that Sarah D. Mercer was the first legal applicant therefor.

Thereupon the Department held that, by virtue of said proviso in the act of May 19, 1900, *supra*, John Mercer had a preference right to make the entry applied for by him; that Sarah D. Mercer, as the first legal applicant, shall be allowed to make entry for all the land described in her application; and that the said townsite application should be allowed as to the remainder of the 320 acres involved, together with forty acres of other lands.

On December 8, 1905, the local officers allowed the entry of the townsite claimants for the eighty acres awarded to them in said departmental decision, and on December 18, 1905, they rejected the applications of John and Sarah D. Mercer, which had been renewed at close of said townsite contest, for the respective tracts awarded to them in the same decision, on the ground that, by an order of withdrawal made January 20, and promulgated January 21, 1905, the said lands had been withdrawn from all forms of disposal, for reclamation purposes. From that action the present appeal was taken.

The application of John Mercer filed July 15, 1903, asserting his preference right under the statute, within the prescribed period, was

a continuing application that, at the date of withdrawal of January 20, 1905, was pending before the land department for adjudication. When it was finally determined by the Department that the land applied for by Mercer was subject to his application, his right related back to that date as if his entry had been allowed.

The application of Sarah D. Mercer filed July 22, 1903, seven days after the filing of the township plat, which was pending before the land department for adjudication at the date of the withdrawal of the land under the reclamation act, was equally effective to initiate and protect her claim to the land applied for, if it was subject to her application. There was no prior claim to said land by virtue of actual occupancy on January 1, 1900, and the finding of the Department in the decision of May 11, 1905, that no portion of the 120 acres applied for by Sarah D. Mercer was actually occupied for town purposes at the date of her application, and that she was the first legal applicant for the land, was in effect a holding that her application was improperly refused and should have been allowed.

Neither of these applicants was claiming a right to enter the land as a successful contestant alleging the invalidity of a prior claim or entry, but one was asserting a preference right under the statute by virtue of occupancy, and the other a right to enter by virtue of priority of application after the land became subject to entry. The renewal of their applications at the close of the controversy before the land department did not impair nor in any wise affect the legal operation of their original applications under the decision of the Department and the delay in having their claims made of record by reason of such proceedings prior to the date of withdrawal did not affect their right to have their entry relate back to the date of their respective applications. Motherway *v.* Parks, (13 L. D., 56); Perrott *v.* Connick, Ib. 598. It follows that in considering the effect of the withdrawal of January 20, 1905, upon the lands in question, the applications of John Mercer and Sarah D. Mercer must be regarded as the equivalent of entry so far as the rights of such applicants were affected by said withdrawal.

The lands in this township south and west of the Missouri and Yellowstone rivers were withdrawn August 24, 1903, as irrigable lands under the Yellowstone River project. The lands in question are embraced within the limits of a temporary withdrawal "from any form of disposition whatever," made January 20, 1905, for the Buford-Trenton project.

In the instructions of October 12, 1905 (34 L. D., 158), to the Director of the Geological Survey, a direct ruling was made as to the effect of preliminary or "temporary" withdrawals upon existing entries, and as to the effect upon such entries of the withdrawals

made under the statutory authority and direction. It was said that withdrawals made by the Secretary with a view to determine whether any contemplated project is practicable and advisable are made under his supervisory authority as a means to accomplish some end in the performance of a duty enjoined upon him, and that a withdrawal of lands from all forms of entry pending examination was justified as a legitimate aid in the performance of that duty; that while such withdrawals are effective to withhold the lands from every form of entry, they do not take away the inchoate rights acquired under entries prior to withdrawal (page 161).

The withdrawals authorized and directed by the statute, have all the force of legislative withdrawals and must be made strictly in accordance with the legislative will. As for lands needed for use in the construction and operation of the works, the statute does not authorize an absolute withdrawal and appropriation of those lands until it has been determined that the project is practicable (page 160), but as to "lands believed to be susceptible of irrigation from said works" the Secretary is authorized, "at or immediately prior to the time of beginning the surveys for any contemplated irrigation works," to withdraw such lands from entry, except under the homestead laws, and "all lands entered and entries made under the homestead law within the areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms and conditions" of that act.

When a site has been selected with a view to examination and survey for the purpose of determining whether the construction of an irrigation project upon such site is practicable and advisable, a withdrawal will immediately be made of all lands believed to be susceptible of irrigation from such contemplated works, in accordance with the second form of withdrawal provided for by the third section of the act of June 17, 1902. At the same time a preliminary withdrawal will be made of lands that may be needed for use in the construction and operation of the works, which will reserve such lands from entry of every character, but will not affect entries previously made.

As soon as it shall be determined that the project is practicable and advisable and the construction of the same is approved and authorized by the Secretary of the Interior, a withdrawal will be made of all public lands shown by the examination and survey to be required for use in the construction and operation of the works, and all persons who may have made entry of such lands within such withdrawal prior to the preliminary withdrawal and who have not acquired a vested right thereto, will be notified of the appropriation of their lands for irrigation purposes and that their entries will be canceled and their improvements paid for by the government as provided for by the 8th and 9th sections of the circular of June 6, 1905 (33 L. D., 607), unless sufficient cause be shown within sixty days from the date of such notice.

Care must be taken to confine such withdrawals strictly to lands of the character and class authorized to be withdrawn and not to embrace lands of one class in the withdrawal of lands of the other class, nor to make any unnecessary withdrawal of land, as far as it can be prevented.

It has been determined that the Buford-Trenton project is practicable, but it has not been determined whether these lands will be needed for use in the construction and operation of the works. They are, however, subject to appropriation by the United States for such use, notwithstanding they were not affected by the temporary withdrawal. Entries of any lands that are needed in the construction and maintenance of any irrigation work may be canceled, and the lands appropriated by the government, where final certificate has not issued and the legal or equitable title has not vested. See instructions June 6, 1905 (33 L. D., 607); opinion January 25, 1906 (34 L. D., 421); opinion February 20, 1906 (34 L. D., 445).

If the lands are not needed for use in the construction and maintenance of the works, they are subject to homestead entry notwithstanding the withdrawal, and if they are subject to such withdrawal, the entryman will be required, after the limit of area has been fixt and notice given thereof, to conform their entries to the areas and farm units that may be prescribed by the Secretary of the Interior. "Instructions" October 10, 1904 (33 L. D., 268). If they are not subject to the withdrawal, as in this case, the entry is not subject to the limitation that may be prescribed by the Secretary.

In view of the facts in this case, you will allow these entries to be made of record, but when the entryman offers to submit final proofs, information should then be sought, through the Department, from the Reclamation Service, whether the lands will be needed for use in the construction and maintenance of the irrigation works, unless specific withdrawals are made in the meantime.

PRIVATE LAND CLAIM—SURVEYOR-GENERAL'S CERTIFICATE—JURISDICTION OF LAND DEPARTMENT—ACT OF JUNE 2, 1858.

J. G. PARKER.

The Commissioner of the General Land Office has jurisdiction to supervise and review the action of surveyors-general in awarding certificates of location under the provisions of the act of June 2, 1858, and to determine, either prior or subsequent to their location, whether such certificates were properly issued.

The judgment of a court appointing an administrator for the estate of a deceased private land claimant and directing that the indemnity right arising out of the private claim be sold as an asset of the claimant's estate, is not binding upon the land department as to the question of title to such right, where the court acted without jurisdiction of the parties or the subject-matter, and the land department has authority to determine for itself whether or not the court rendering the judgment had the requisite jurisdiction, whenever such judgment is relied upon to sustain the right to enter public lands, regardless of whether or not the necessary jurisdictional facts appear upon the face of the record.

Acting Secretary Ryan to the Commissioner of the General Land Office, August 28, 1906.

(S. V. P.) (E. F. B.)

With your letter of July 18, 1905, you transmit the appeal of J. G. Parker from the decision of your office of February 27, 1905, holding for cancelation certificates of location issued by the surveyor-general of Louisiana, under the act of June 2, 1858 (11 Stat., 294), in satisfaction of that part of the private land claim of John Brenton remaining unsatisfied and unlocated, said claim being reported by Commissioners Cosby and Skipwith in the list of settlers as claim No. 142, November 18, 1820.

The succession of John Brenton was opened in the district court for the parish of East Feliciana, Louisiana, October 28, 1903, by J. L. Cravens, clerk of said court, thru his attorneys, Wall and Kilbourne, who subsequently, under order of the court, exposed for sale the right to the unlocated portion of said claim as an asset of said estate remaining unadministered, at which sale Theodore G. Uhlhorn became the purchaser, who afterward transferred his right to J. G. Parker.

July 27, 1904, Parker filed his application with the surveyor-general of Louisiana for certificates of location under the act of June 2, 1858, in satisfaction of the unlocated portion of said claim, and upon this application the surveyor-general found that the claim of John Brenton remains unlocated and unsatisfied to the extent of 253.35 acres, for which he issued six certificates of location, Nos. 1110–A to F, inclusive, for forty acres each, and one certificate, No. 1110–G, for 13.35 acres, aggregating 253.35 acres.

When the certificates came before your office for approval and authentication, you instructed the special agent of your office at New Orleans to investigate said claim and report whether there is any reason why the scrip issued by the surveyor-general in satisfaction thereof should not be authenticated.

Pursuant to said instructions the special agent investigated said claim and under date of February 15, 1905, submitted a report of his investigation, from which the following is taken:

> Owing to the fact that the claim was partially satisfied by survey, as above stated, in the parish of West Feliciana, on February 10, 1905, I visited St. Francisville, the parish seat of West Feliciana Parish, and examined the probate records on file in the clerk's office at that place, with the result that I found that in 1824 the succession of John and Lavenia Brenton was opened by Escena Brenton, who alleged herself to be one of the legitimate forced heirs of the said John and Lavenia Brenton.
>
> I procured a certified transcript of the proceedings had in the parish of West Feliciana in 1824, in the matter of the succession of John and Lavenia Brenton, deceased, and transmit the same herewith, from which it will be seen that the succession was opened, the persons who were entitled thereto were legally

organized into a family meeting, and after considering the matter decided that in order to pay the debts due by the estate, the personal property should be sold and that the landed part of the estate should not be sold.

From this it will be seen that the allegations contained in the petition filed in the parish of East Feliciana on October 13, 1903, were not true, because as is herein shown the succession of John Brenton had been opened nearly 80 years prior to the opening of the succession in East Feliciana parish, and the certified transcript of the proceedings had in West Feliciana parish in 1824, shows that the succession was accepted by the parties entitled thereto.

Thinking that perhaps the clerk of court who acted as administrator in opening the succession in the parish of East Feliciana, or that his attorneys who acted for him in the matter had some knowledge of the facts and would be able to furnish some authority for the statements contained in the petition, I visited Clinton, the county seat of East Feliciana parish, on the same day, and was informed by the clerk of court and also by Mr. Kilbourne, of the firm of Wall and Kilbourne, that the information contained in the petition for letters of administration had been furnished by Mr. James L. Bradford, and that the petition had in fact been drawn by him.

In view of the foregoing, I am of the opinion that the proceedings had in the year 1903, in the parish of East Feliciana, were null and void, and that the sale of the claim ordered by the probate court of East Feliciana parish was without authority and that the purchaser acquired nothing by his purchase.

Upon the coming in of this report your office by decision of February 27, 1905, held said certificates for cancelation and notified the attorneys of Parker of his right of appeal.

There appears to be no question as to the right of the proper representatives of John Brenton to indemnity under the act of June 2, 1858, for the unsatisfied portion of said claim, and that the claim to the extent represented in said certificates remains unsatisfied. The only question is whether it is the duty of the Department to deliver the certificates to appellant in view of the information furnished by the report of the special agent.

Two questions are raised by the appeal from your decision to wit:

1st. That the act of June 2, 1858, does not confer upon your office jurisdiction over the decision of the surveyor-general awarding certificates of location under said act with a view to approving or disapproving the same.

2nd. That you erred in holding that the succession of John Brenton having been opened and settled in the parish of West Feliciana, as a consequence thereof, the probate court for the parish of East Feliciana had no jurisdiction over said estate and that its judgment appointing an administrator therefor and settling said estate was null and void.

The third section of the act of June 2, 1858, makes it the duty of the surveyor-general, upon satisfactory proof that a private land claim has been confirmed and remains unsatisfied in whole or in part, to issue to the claimant, or his legal representatives, a certificate of location for a quantity of land equal to that so confirmed and unsat-

isfied, which may be located on public lands subject to sale at private entry at $1.25 per acre.

There is nothing in this provision that indicates a purpose to confer on the surveyor-general absolute and exclusive jurisdiction over such matters, and to divest the land department in this particular matter of the supervision and control conferred by the organic act to review and supervise all proceedings having for their ultimate object the disposal of the public lands. On the contrary, supervision and control of the action of the surveyor-general in the issuing of such certificates is expressly conferred by the 4th section of the act, which provides:

> That the register of the proper land office, upon the location of such certificate, shall issue to the person entitled thereto a certificate of entry, upon which, if it shall appear to the satisfaction of the Commissioner of the General Land Office that such certificate has been fairly obtained, according to the true intent and meaning of this act, a patent shall issue as in other cases.

It may be contended that the certificate as to which jurisdiction was conferred upon the Commissioner to determine whether it was fairly obtained, is the "certificate of entry." It is obvious that such construction is not tenable. The certificate of entry, technically known as the "final certificate," issued by the receiver of a local land office, was first provided for by the act of May 10, 1800 (2 Stat., 73), establishing the officer of "Register of the Land Office," and "Receivers of Public Monies," and since that time a register is required to issue such certificate as the basis of a patent in every case upon a final entry of public lands.

The "certificate of entry" for lands of the character described in the "certificate of location" issues as a matter of right if the certificate of location—the foundation of the right of entry—"has been fairly obtained according to the true intent and meaning of this act." The act made special provision for the issuance of this certificate and it was the subject-matter of the fourth section of the act. It is therefore apparent that the words "such certificate" last mentioned in the section, have reference to the words "such certificate" first mentioned therein, and not to the intermediate words, "certificate of entry."

Such was the view of the Department in the instructions to the surveyor-general of Louisiana, relative to the administration of this act.

> As the act of June 2, 1858, charges this office with the duty of determining whether such certificates of location are properly issued, you will in all cases where you issue certificates, forward them to this office for approval, accompanied by the evidence upon which you have based your decision, and also state fully, in a report over your own signature, your reasons for issuing such certificate. Copps Land Laws (Ed. 1875, 513, 516).

The purpose of taking such action in advance of location was to prevent the withholding of lands under improper locations. The wis-

dom of the practice is evident. If the Commissioner has authority to supervise the action of the surveyor-general after the location of a certificate, and determine whether such certificate was or was not obtained according to the true intent and meaning of the act, no valid reason can be perceived why he can not determine that question in advance of location and authenticate the certificate if it has been properly obtained or cancel it if it has not. The substantial right conferred by the act is the entry of public lands as indemnity for the loss of lands in the private land claim.

But independently of this, the authority of the Commissioner of the General Land Office to supervise the action of the surveyor-general in issuing certificates under the act of June 2, 1858, is derived from the general power and authority conferred by the organic act to perform, under the direction of the Secretary of the Interior, all duties pertaining to the disposal of the public lands. In the absence of some specific provision to the contrary, the power of review is vested in the Commissioner, under the supervision of the Secretary, in every case, by virtue of the enabling acts of Congress conferring upon him control over the acts of subordinate officers charged with specific duties in the disposal of the public lands. Castro *v.* Hendricks (23 How., 438); Cousin *v.* Blanc's Executors (19 How., 202); Knight *v.* Land Association (142 U. S., 161); Bishop of Nesqually *v.* Gibbon (158 U. S., 155).

The material question presented by the second ground of error is whether the judgment of the district court for the parish of East Feliciana, appointing an administrator for the estate of John Brenton and directing that the indemnity right arising out of the private claim of John Brenton be sold as an unadministered asset of his estate, is binding upon this Department as to the question of title to such right and of all matters determined by said court in that proceeding.

Where a court has jurisdiction of the subject-matter and of the person it has a right to determine every question material to the cause, and until such judgment is set aside and reversed it is regarded as binding on every other tribunal; but, if it acts without jurisdiction of the parties or the subject-matter, its acts are mere nullities and bind no one. The important question to be considered is whether such judgment is subject to collateral attack, and when, by whom, and in what manner may the jurisdiction of the court rendering the judgment be inquired into. If such inquiry can be made in a collateral proceeding by extrinsic evidence, notwithstanding the necessary jurisdictional facts appear upon the face of the record, this Department will determine for itself whether the court rendering the judgment had jurisdiction of the person and of the subject-matter when-

ever such judgment is relied upon by any one to sustain his or her right to enter public lands. The Department can not justify the delivery of this scrip to one not entitled to it by refusing to inquire into the validity of a judgment under which the title is claimed.

The following provisions from the laws of Louisiana (Revised Code, 1900), relating to the question under consideration, were in force at the time of the proceedings under which this judgment was obtained, and at the time of the death of Brenton they were in force and have been ever since:

Succession is the transmission of the rights and obligations of the deceased to the heirs (Art. 871).

It also signifies "the rights and charges which a person leaves after his death" (Art. 872), including not only "the rights and obligations of the deceased as they exist at the time of his death, but all that has accrued thereto since the opening of the succession, as also the new charges to which it becomes subject" (Art. 873). "Finally, succession signifies also that right by which the heir can take possession of the estate of the deceased, such as it may be" (Art. 874).

ART. 935. The place of the opening of successions is fixed as follows:

In the parish where the deceased resided, if he had a fixed domicil or residence in this State.

In the parish where the deceased owned immovable property, if he had neither domicil nor residence in this State, or in the parish in which it appears by the inventory, his principal effects are, if he have effects in different parishes.

In the parish in which the deceased has died, if he had no fixed residence, nor any immovable effects within this State, at the time of his death.

* * * * * * *

ART. 940. A succession is acquired by the legal heir, who is called by law to the inheritance, immediately after the death of the deceased person to whom he succeeds.

This rule applies also to testamentary heirs, to instituted heirs and universal legatees, but not to particular legatees.

This is by operation of law (Art. 941), and the right of possession being transmitted to the heir without change in the nature of the possession (Art. 943), the effect is: first, "that the heir transmits the succession to his own heirs" (Art. 944), and second, that it authorizes the heir "to institute all the actions, even possessory ones, which the deceased had a right to institute . . . For the heir, in everything, represents the deceased, and is of full right in his place as well for his rights as his obligations."

The heir is required to accept or reject the succession (Art. 946), but when he accepts he is considered as having succeeded to the deceased from the moment of his death (Art. 947).

ART. 988. The simple acceptance may be either express or tacit.

It is express, when the heir assumes the quality of heir in an unqualified manner, in some authentic or private instrument, or in some judicial proceeding.

It is tacit, when some act is done by the heir, which necessarily supposes his intention to accept, and which he would have no right to do but in his quality of heir.

* * * * * * *

ART. 1013. The effect of the simple acceptance of the succession, whether express or tacit, is such, that when made by an heir of age, it binds him to the payment of all debts of the succession, not only out of the effects which have fallen to him from the succession, but even personally, and out of his own property, as if he had himself contracted the debts or as if he was the deceased himself; unless, before acting as heir, he made a true and faithful inventory of the effects of the succession, as here above established, or has taken the benefit treated of hereafter.

* * * * * * *

ART. 1095. A succession is called vacant when no one claims it, or when all the heirs are unknown, or when all the known heirs to it have renounced it.

The district court for the parish of East Feliciana had therefore no jurisdiction over the succession of Brenton unless it appeared that he "had no fixt residence, nor any immovable effects within this [the] State, at the time of his death" (Art. 935), and that his estate had never been administered upon and settled according to law (Art. 945). These are essential jurisdictional facts that must be made to appear to the court.

The petition for the opening of the succession of John Brenton in the parish of East Feliciana recites—

> that John Brenton who formerly resided in the parish of West Feliciana, where he owned real estate, departed this life intestate, many years ago in the parish of East Feliciana, leaving no known heirs, or other representatives, and that his succession has never been administered upon and settled according to law and remains a vacant and intestate succession.

It may at least be questioned whether the recital that Brenton formerly resided in the parish of West Feliciana, where he owned real estate, does not show want of jurisdiction upon the face of the record, inasmuch as it is not alleged that he had ever changed that domicil and there is nothing to show that he ever acquired or intended to acquire a domicil in the parish of East Feliciana, where he died.

The domicil of each citizen is in the parish where he has his principal establishment (Old Code, Art. 42). A change of residence is produced by the act of residing combined with the intention of making one's principal establishment there (Art. 43), which may be proven by express declaration before the recorder of the parish (Art. 44), or if such declaration is not made, "the proof of this intention shall depend upon circumstances" (Art. 45).

In Verret *v.* Bonvillian (33 La. An., 1304), a person who formerly resided in New Orleans, where he owned real estate, took his furniture and effects with him to the home of his nephew in St. Mary's parish, where a few days later he died. It was held that his succession was properly opened in St. Mary's parish, but it was distinctly put upon the ground that the circumstances showed an intention to change domicil and that St. Mary's parish was his fixt domicil at the time of his death.

The decisions of the courts of Louisiana have been uniform in holding that the court of the parish in which the deceased had his domicil at the time of his death, has *exclusive* jurisdiction of his succession and that the opening of a succession and the appointment of an administrator by the court of another parish is a nullity. If an administrator be appointed where a party only temporarily resided, having a fixt domicil elsewhere that has never been changed, the proceedings are absolutely null and void. Succession of Williams (3 La. An., 261); Millenberger *v.* Knox (21 La. An., 399); Clemens *v.* Comforth (26 La. An., 269).

It is not necessary, however, to rest the decision of this case upon the ground that the necessary jurisdictional facts are not shown by the record, for the reason that the want of jurisdiction may be inquired into by extrinsic evidence even though it appear that every material fact necessary to confer jurisdiction was recited in the petition.

This rule was broadly stated in the case of Thompson *v.* Whitman (18 Wall., 457), in which the court, after reviewing the decisions of that court holding that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court when the proceedings on the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings, said (page 468):

> But it must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted to contradict the record as to jurisdictional facts asserted therein, and especially as to facts stated to have been past upon by the court.
>
> But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right to question it.

It was distinctly held that the record of a judgment rendered in another State may be contradicted as to the facts necessary to give jurisdiction either as to the person or the subject-matter, and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist.

There has been no departure from the doctrine thus announced but, on the contrary, it has been frequently reaffirmed. National Exchange Bank *v.* Wiley, and authorities cites (195 U. S., 257, 270). In Pennoyer *v.* Neff (95 U. S., 714, 730), the court having under consideration the same question, said:

> This whole subject has been very fully and learnedly considered in the recent case of Thompson *v.* Whitman, 18 Wall., 457, where all the authorities are carefully reviewed and distinguished, and the conclusion above stated is not only reaffirmed but the doctrine is asserted, that the record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction against its recital of their existence.

In Thormann *v.* Frame (176 U. S., 350), which arose upon the presentation of a will for probate in a court in Wisconsin, the question before the court was whether the judgment of a probate court of the State of Louisiana opening a succession and appointing an administrator therefor upon a petition alleging, among other necessary jurisdictional facts, that "up to and at the time of his death he, the said deceased, was domiciliated in the city of New Orleans, in the State of Louisiana, and an inhabitant and resident thereof," was an adjudication, conclusive against all the world; that the domicil of the deceased was, at the time of his death, in the parish of Orleans, Louisiana, and whether such judgment was subject to collateral attack in the courts of another State in which adverse proceedings had been commenced. The court held that the Wisconsin court was not bound to treat the proceeding in Louisiana as conclusively determining the question of domicil, resting its decision upon the rule that—

> the constitutional provision that full faith and credit shall be given in each State to the judicial proceedings of other States, does not preclude inquiry into the jurisdiction of the court in which the judgment is rendered, over the subject-matter or the parties affected by it, or into the facts necessary to give such jurisdiction.

The question as to how far the judgment of a probate court of the State of Louisiana would be conclusive and binding upon other tribunals, and under what circumstances and how it may be attacked, also came before the supreme court in Simmons *v.* Saul (138 U. S., 439), and before the Department in the case of Narcisse Carriere (17 L. D., 73). In both cases the jurisdiction of the court that rendered the judgment was clearly shown and decisions were rendered accordingly, but, the rule laid down in Thompson *v.* Whitman, that inquiry may be made as to the facts necessary to confer jurisdiction, and that extrinsic evidence may be admitted to contradict the record as to the jurisdictional facts asserted therein, was adhered to and distinctly announced.

In the case of Carriere it was said (page 77):

> Whether this Department may, of its own motion, inquire as to the jurisdiction of a court of this character in any given case, and if so, what circumstances will justify such an inquiry, need not be considered here, for it is, in my opinion, sufficiently shown that it had jurisdiction in this particular case.

But it held—

> that in the absence of a showing that there ever was in this case an assignee or legal representative of Carriere by contract, the judgment of the parish court that the claim became assets of his estate must be accepted—

thus impliedly accepting the doctrine that the Department may go behind the judgment to determine in whom the right to indemnity was vested.

Following the rule so clearly announced in these decisions, can there be any question as to the authority and duty of this Department, in view of the report of the special agent who investigated this case?

The absolute want of jurisdiction by the court of East Feliciana over the succession of Brenton is shown by the record of the court that originally had exclusive jurisdiction over that succession, which was exercised and exhausted in 1824, when it was opened and finally closed and settled. Although extrinsic in character, it is the highest evidence that the succession of Brenton was not an open and vacant succession at the time of the attempted opening in the parish of East Feliciana.

It is shown by that record that one of the daughters of Brenton filed her petition in the probate court for the parish of West Feliciana in 1824, alleging that she is one of the heirs of John and Lavinia Brenton, "late of said parish, deceased," and praying that his succession be opened and a partition of said estate be made according to law; that under said proceeding the heirs of Brenton organized a family meeting at which an agreement was made that certain property be sold to pay the debts of the estate and that other personal property be sold for distribution and that the landed estate be not sold at that time. By this action the heirs unconditionally accepted the succession and were legally placed in possession of all of said estate.

Where the heirs unconditionally accept the succession and are placed in possession of the estate the property can not be placed in the hands of an administrator to be administered as succession property. The court is without jurisdiction over such succession, as it no longer exists. Heirs of Pearson *v.* Judge (22 La. An., 61); Woolfolk *v.* Woolfolk (30 La. An., 139); Freret *v.* Freret (31 La. An., 506).

The effect of the acceptance of a succession by the heirs is thus stated by the supreme court of Louisiana in the Succession of Thibedeaux (38 La. An., 716):

> Where the heirs of a succession, which owes no debts, have been placed in possession, as such, of the property left by the decedent, there is an end of the succession which is wound up and settled, and thus ceases to exist, and that therefore there is no reason or room for an administrator.
>
> If after such an operation any debts should be discovered, the recourse of creditors could not be exercised against the succession, which has no longer any existence, but against the heirs, who would thus become debtors for their virile shares of their ancestor's debts. [citing] Sener *v.* Sargent (25 An., 221); Succession of Walker (32 An., 321); Succession of Hebert (33 An., 1107); Succession of Bumgarden (35 An., 675); Same (36 An., 46); Succession of Geddes (36 An., 963); Succession of E. S. Powell (38 An., 181).

The decisions of the supreme court of Texas, where the laws in force are very similar to the laws of Louisiana, are to the same effect. Under the laws of that State the property immediately vests in the heirs upon the death of the testator or intestate, subject to acceptance or renunciation. If accepted without inventory, the heir becomes unconditionally liable for the payment of the debt, and there is no necessity for administration.

In Fisk *v.* Norvel (9 Tex., 13; 58 Am. Dec., 128), it was held that where a succession has once been administered and closed the effects are by operation of law vested in the heirs, who have full ownership with all incidental rights of control, disposition and actions for its recovery and possession, and the judgment of a court opening such succession and granting letters of administration is void and assailable in a collateral proceeding.

This is in harmony with the current of authority in the States generally, where the rule is alike applicable that the complete exercise of jurisdiction over a subject-matter exhausts the jurisdiction of the court exercising it as well as of another court having concurrent jurisdiction over the same subject-matter. Freeman on Judgments, Secs. 120–121.

The only pretense for the opening of the succession in the parish of East Feliciana was for the payment of a debt that did not exist at the time of the death of the intestor, and is alleged to be taxes due to the State upon said inchoate indemnity right.

Your decision holding for cancelation the certificate of location issued by the surveyor-general upon this claim, is affirmed.

HOMESTEAD—EFFECT OF APPLICATION—ACT OF APRIL 28, 1904.

MILLER *v.* ROBERTSON.

The mere fact that a departmental decision is rendered in the shape of a formal affirmance of the decision appealed from is no ground for valid objection, where the decision below sufficiently sets forth the facts and covers all the material questions involved.

A pending petition to amend an application to make homestead entry is no bar to the acceptance of other applications to enter the same land, subject to the petition to amend; and upon rejection of such petition the subsequent applications to enter should be considered and disposed of in the order of filing.

The provisions of the act of April 28, 1904, are not applicable to homestead entries based upon applications filed prior to the passage of the act; but the qualifications of all claimants who prior to the passage of the act filed proper application for lands subject to entry should be determined under the law as it existed at the time the application was filed.

Acting Secretary Ryan to the Commissioner of the General Land Office, August 30, 1906.

(S. V. P.) (E. O. P.)

The above-entitled case is now before the Department on review, motion therefor having been entertained February 21, 1906. By the departmental decision complained of, rendered November 4, 1905 (unreported), the action of your office holding Robertson's homestead entry, allowed November 3, 1902, for the NE. ¼, Sec. 25, T. 1 N., R. 14 W., Lawton land district, Oklahoma, subject to the right of William H. T. Miller to make homestead entry for said land, was formally affirmed.

The right of Miller rests upon the filing of his application October 16, 1901, long prior to the presentation of the application of Robertson. At the time Miller's application was offered the land described therein was embraced in the pending application by one Alf. M. Poffenberger to amend a former application made for other lands, and the same was therefore suspended by the local officers pending final action upon Poffenberger's application, which was subsequently denied, October 17, 1901. The proceedings had, dating from the final rejection of Poffenberger's application and continuing until the allowance of Robertson's entry, were decidedly irregular, unless it appears that the application of Miller instead of being suspended should properly have been rejected, in which event the action taken would have been warranted.

October 30, 1901, the entry of one Heatly was allowed for the land in controversy, against which action Miller protested. March 27, 1902, the relinquishment of Heatly was filed and the entry of John M. Peckham allowed, against which the protest of Miller was also lodged. Subsequently, Peckham's relinquishment was filed and

the existing record entry of Robertson allowed. Against this Miller likewise interposed his protest, and the resulting action finally developed the issues now presented for consideration.

But two grounds are specified by counsel as a basis for altering or reversing the prior departmental decision. By the first of these objection is made to the action of the Department in formally affirming the decision of your office, which it is contended did not pass upon all the material questions presented by the appeal. An examination of your office decision, formally affirmed by the Department, tends to refute this allegation of counsel, inasmuch as the decision therein announced could only have been reached after passing upon the other questions presented by the appeal from the decision of the local officers. The mere fact that a departmental decision is rendered in the shape of a formal affirmance is no ground for valid objection. This method of expressing its conclusion is frequently adopted by the Department, especially in cases where all the questions thereby presented have been carefully considered and discussed in the decision appealed from and appear, as therein decided, after a full examination of the record, to be correct. In such cases a prolonged discussion thereof would serve no purpose. The consideration given to the cases before the Department is not measured by the length of its decisions, and brevity of expression through the medium of a formal affirmance signifies no more than that the Department, after a most careful examination of the entire record, finds the material facts thereby disclosed correctly stated and the resulting conclusions and rules of law correctly found and applied.

The second ground relied upon was also considered by your office and the Department in prior decisions, though counsel complains that they did not directly determine whether or not the application of Miller, filed during the pendency of Poffenberger's application to amend, should have been finally rejected. The determination of this question adverse to the contention that Miller's application should have been rejected instead of suspended, leads to the consideration of the effect to be given to the act of April 28, 1904 (33 Stat., 527), upon applications filed prior to its passage but suspended.

The Department entertains no doubt as to the correctness of the suspension of Miller's application. It is true that at the time it was presented Poffenberger's application to amend was pending, and Miller's rights were dependent upon the denial of the application to amend. But, until the application of Poffenberger was finally accepted he could make no valid entry of the land, and until such an entry had been placed of record the local officers might properly accept subsequent applications to enter, subject to whatever rights Poffenberger might have by virtue of his amended application. If finally accepted,

it would take effect by relation as of the date filed and defeat all applications subsequently filed. If rejected, the rights of subsequent applicants attached in the order of the filing of the applications (Jerry Watkins, 17 L. D., 148). Where the land applied for is covered by the record entry of another, the application should be rejected and the applicant filing same gains no rights thereby (Walker *v.* Snider, on review, 19 L. D., 467, 468, and cases cited). But this was not the condition existing at the time Miller filed his application. At that time there was no valid entry covering the land applied for. It was unappropriated public land subject to entry by the first qualified applicant, and unless Poffenberger possessed the requisite qualifications his application would stand for naught and the rights of the next subsequent applicant would attach immediately upon the final rejection of the pending application. The rules governing the rejection and suspension of applications to enter are founded in sound reason and well settled in practice. It is the existence of a record entry which prevents the acceptance of an application for the same land and not the mere filing of a prior application. (Berry *v.* Towner, 21 L. D., 434.) Any other practice would open the door to sharp practice and possible injustice. If all applications presented after the offering of a prior pending one were to be unqualifiedly rejected, any person, though totally disqualified, by being first in time would be able to tie up the disposition of the land until final action was taken on his application and thereby be afforded opportunity to speculate upon a right to which in equity and justice he was not entitled. The Department will never adopt a rule or sanction a practice tending to create or protect a mere claim of right not capable of perfection, in order that it may be made the subject of speculative traffic, to the possible injury of those who in good faith are seeking to exercise a valid right.

The application of Miller was properly suspended, but as stated in the decisions heretofore rendered, the long-continued suspension thereof, due to the allowance of the entries of Heatly, Peckham and Robertson, respectively, was irregular and erroneous. Because of such action and the prosecution of the proceedings directly resulting therefrom, the application of Miller was still in a state of suspension at the date of the passage of the act of April 28, 1904, *supra*, and because of the modification of the law existing at the date his application was filed, imposing additional restrictions upon the right to make second homestead entries, it becomes material to determine whether or not said act has any bearing upon applications to enter, filed and suspended prior to its passage, inasmuch as the record discloses the apparent disqualification of Miller to make entry under the law as modified by said act.

It has been repeatedly held by the Department that the filing of a homestead application for lands properly subject to entry, protects all the rights of the applicant thereunder against all parties but the United States until it is abandoned or properly rejected, as effectually as though entry had been allowed at the time of filing the application. Gallagher *v.* Jackson (20 L. D., 389, 390); McMichael *v.* Murphy *et al.*, on review (ib., 535); Maggie Laird (13 L. D., 502); Goodale *v.* Olney (12 L. D., 324); Coder *v.* Lotridge (ib., 643). The right is initiated by the filing of a proper application and is secure against all claims asserted solely under naked applications subsequently presented. (Williams *v.* Clark, 12 L. D., 173.) While this rule is not to be invoked as against the right of the United States, whose claim is not disturbed until entry is actually allowed and the right to complete it has *vested* in the applicant, yet as between individuals the right of the prior applicant, he being qualified to make and the land being subject to homestead entry, is paramount to the right of subsequent applicants. It would seem therefore that the claim of Miller is superior to that of Robertson, he having persistently pursued the only course open to him to protect it, and that it should not be defeated by legislation passed subsequently to the time his entry should have been allowed but for the erroneous action of the agents of the government, and through no fault of his.

The rule that an applicant must be a qualified entryman at the date of entry is equally well settled, and if, after filing of the application and prior to the allowance thereof, the claimant becomes disqualified, the entry can not stand (Brown *v.* Cagle, 30 L. D., 8; Case *v.* Kupferschmidt, ib., 9). However, in the cases cited, the disqualification was the result of the act of the party, and not attributable to a change in the law. In the case of Brown *v.* Cagle, *supra*, the hardship occasioned by the application of this principle was relieved by a subsequent act of Congress, and the Department thereupon reversed its prior decision and by giving a retroactive effect to the statute restored the claimant to the position occupied at the date of filing her application and allowed her entry. The effect of such construction as affecting the qualifications of the entryman was clearly retroactive and it might seem that the rule followed might be as correctly applied to defeat an entry by imposing added restrictions as in the case cited where it was applied to remove a disqualifying condition. The difference in the cases presented, when carefully noted, reveals the distinction which must be observed in applying well-settled rules of construction. In the one case the statute was remedial and a greater latitude was properly given to its application.

Remedial statutes are to be liberally construed; and if a retrospective interpretation will promote the ends of justice and further the design of the legislature in enacting them, or make them applicable to cases which are within the

reason and spirit of the enactment, though not within its direct words, they should receive such a construction provided it is not inconsistent with the language employed. (Black on Interpretation of Laws, 261.)

This is the rule of construction underlying the action of the Department in the cases cited, but, as stated in the language quoted, it is only to be applied to protect a right or further the ends of justice. A vastly different rule governs where a right or an equity will be defeated by construction having a retrospective effect. Black on Construction of Laws (256, 259); Sedgwick on Stat. Const., 164–170.

The Department is clearly of opinion that the act of April 28, 1904, *supra*, is not to be given such retrospective effect but that the qualification of all claimants who have filed prior to its passage, proper applications for lands subject to entry, are to be determined by the law as it then stood.

Miller's application having been regularly filed prior to the application of Robertson, upon which her entry was erroneously allowed, and for land not then appropriated or segregated by a record entry, his rights thereto are superior. It is argued that to cancel the record entry of Robertson will inflict a hardship upon her in the way of pecuniary loss, and that inasmuch as Miller has made no improvements on the land which he would lose by the rejection of his application, and that as Robertson's entry and subsequent investments were made in ignorance of the rights of Miller and by reason of the erroneous action of the local officers, her equitable claim should be recognized. But to this the answer is plain. Such recognition would necessitate the destruction of a prior right in Miller which right he has endeavored to protect from its inception, and the loss of which, under such circumstances, could be attributable to precisely the same ground as that relied upon by Robertson for relief, namely, the error of the local officers. Miller has done nothing to create an estoppel against the present assertion of his prior right; no act of his has contributed to place Robertson in her unfortunate position, and he is not responsible therefor. On the contrary, he has proceeded in the only way open to him to protect his right and the Department would be unwarranted in arbitrarily refusing at this time to recognize it. The fact that one is subjected to possible injury does not confer an equitable right unless in addition the cause of that injury is the result of some wrongful act on the part of him against whom it is set up, thus creating an estoppel.

For the reasons herein stated the prior departmental decision complained of must be adhered to, and the relief sought by the motion for review denied.

TOWNSHIP PLATS OR DIAGRAMS UNDER ACT OF MARCH 3, 1883.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *August 28, 1906.*

Registers and Receivers, United States Land Offices.

GENTLEMEN: For the purpose of avoiding the frequent misunderstandings which have arisen in your offices as to the meaning and intent of the regulations on page 111 of the General Circular from this office dated January 25, 1904, and of prior dates, and reiterated on page 4 of the circular of instructions dated May 20, 1905 (33 L. D., 627, 631), relative to the character of the township diagrams for which charges of $1, $2, $3, and $4 are made, the said regulations are modified to read as follows:

For a diagram showing entered land only	$1
For a township plat showing form of entries, names of claimants, and character of entries	2
For a township plat showing form of entries, names of claimants, character of entry, and number	3
For a township plat showing form of entries, names of claimants, character of entry, number and date of filing or entry, together with topography, etc	4

Form of blank township diagram 4–590 B only must be used for all diagrams or plats prepared by you under the act of March 3, 1883 (22 Stat., 484), and the regulations thereunder, as modified by these instructions.

G. F. POLLOCK, *Acting Commissioner.*

Approved:
THOS. RYAN, *Acting Secretary.*

OKLAHOMA LANDS—SALE OF LEASED LANDS IN PASTURE RESERVE NO. 3.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *September 1, 1906.*

REGISTER AND RECEIVER,
Lawton, Oklahoma.

SIRS: Your attention is called to the act of June 28, 1906 (34 Stat., 550), a copy hereto attached, which gives to persons who were on that date in possession of lands under leases approved by the Secretary of the Interior in Pasture Reserve No. 3, in your district, the right to purchase such lands at their appraised value within sixty days from

the notice of such appraisement, and you are instructed thereunder as follows:

1. You will at once prepare a notice to each of the lessees named in the schedule of leases hereto attached, on the blank form herewith, and mail the same to such lessees in a registered letter, first making a press copy of each notice; and promptly, after the expiration of the sixty days named in the last notice issued by you, you will at once forward to this office a report in duplicate showing all the lands sold under this act, the name of the purchaser and the amount of the purchase price, and also a list of the unsold lands embraced in any of these leases.

2. Any lessee may purchase one or more contiguous legal subdivisions embraced in his lease, but his right under this act to purchase such tracts as have not been applied for will be forfeited, and such tracts will become subject to disposal under the act of June 5, 1906 (34 Stat., 213), after the expiration of sixty days from the date of such notice.

3. You will require each lessee to present an application for contiguous tracts embraced in his lease, and file an affidavit substantially in compliance with the blank form herewith, in which the lessee will be required to swear from his own personal knowledge that the applicant was on June 28, 1906, in possession of all of the lands described in his application, under a valid, unexpired, uncanceled, and unforfeited lease theretofore approved by the Secretary of the Interior, and that no part of said lands have been subleased or sublet in any manner whatever by said applicant to any other person without the proper consent of the Indians interested or the approval of the Secretary of the Interior; and the application must be supported by affidavit of two corroborating witnesses to the effect that the applicant was on June 28, 1906, in possession of all of the lands described in the application and that, as they believe, all the statements of the applicant in support of his application are true.

4. Each purchaser will be required to pay one-fifth of the appraised value of the tracts applied for by him at the time he presents such application, and the remainder of the purchase price must be thereafter paid in four equal annual instalments, with interest thereon at the rate of six per centum per annum, but you are not authorized to require purchasers to pay any fees or commissions.

5. When any lessee presents a proper application and makes the advance payment on the purchase price, the receiver will issue to him a receipt therefor on the blank form herewith transmitted; but no final certificate will be issued until all of the purchase price has been paid. The receipts issued by you should bear new serial numbers beginning with number 1, and a receipt bearing the same number as the first receipt should be issued at the time each of the deferred payments are made on the tract of land described in the first receipt.

6. The proceeds of the sale of such lands are Indian moneys and must be deposited to the credit of the Treasurer of the United States

on account of "Kiowa, Comanche, and Apache Indian Lands, act June 28, 1906." You will report the lands disposed of under this act in the same monthly and quarterly accounts and returns with the lands disposed of under the act of June 5, 1906.

Very respectfully,

G. F. POLLOCK, *Acting Commissioner.*

Approved:

THOS. RYAN, *Acting Secretary.*

[PUBLIC—No. 330.]

AN ACT Giving preference right to actual settlers on pasture reserve numbered three to purchase land leased to them for agricultural purposes in Comanche County, Oklahoma.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That persons who are now in possession of land under leases approved by the Secretary of the Interior on pasture reserve numbered three, open for settlement by act approved June eighth, nineteen hundred and six, the same being situate in township one north and one south, in range eight west, Indian meridian, Territory of Oklahoma, be given a right to purchase said lands, as follows: That the land so leased shall be appraised by a commission of three persons to be appointed by the Secretary of the Interior, one upon the recommendation of the Kiowa and Comanche Indians through their agent; said commissioners to receive such compensation as the Secretary of the Interior may direct, the same to be paid from the funds received from the sale of said lands, and said appraisement when made to be approved by the Secretary of the Interior; said land to be appraised without regard to any improvements that have been placed thereon, except such as are required by the provisions of said leases, and the said lessee to have the privilege to purchase at its appraised value the amount of land covered by his lease within sixty days after notice of said appraisement, one-fifth of the price of the same to be paid at the time of notice of acceptance of said purchase and the balance of the purchase price to be paid in four equal annual installments, bearing interest at the rate of six per centum per annum; and in case any purchaser fails to make the annual payment when due all rights in and to the land covered by his or her purchase shall at once cease and be forfeited, and any payment theretofore made shall be forfeited. The funds received from said sales to be placed to the credit of the Indians the same as other funds provided for in said act approved June eighth, nineteen hundred and six: *Provided,* That the Secretary shall appoint said commissioners within thirty days from the passage of this act, and said commissioners shall make said appraisement and file their report within thirty days from the date of their appointments.

Approved, June 28, 1906.

NOTICE TO LESSEES.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
Lawton, Okla., ———, *1906.*

Mr. —— ——,
—— ——.

SIR: You are hereby notified that the Secretary of the Interior has approved the appraisement of the lands embraced in your lease and situated in Pasture Reserve No 3, as follows:

The —— quarter, Section ——, in Township One ——, of Range Eight West, Indian Meridian, at $——;

The —— quarter, Section ——, in Township One ——, of Range Eight West, Indian Meridian, at $——;

The —— quarter, Section ——, in Township One ——, of Range Eight West, Indian Meridian, at $——;

The —— quarter, Section ——, in Township One ——, of Range Eight West, Indian Meridian, at $——; making a total appraisement of $——; and you are informed that you have a right under the act of June 28, 1906 (34 Stat., p. 550), to purchase any or all of the tracts here specified at the appraised value thereof, upon presenting a proper application therefor to this office, within sixty days from the date of this notice, and not thereafter; but the tracts applied for must be contiguous to each other.

You will be required, at the time of making application to purchase these lands, to tender one-fifth of the appraised value of the lands applied for, in cash, to the Receiver of the land office, and thereafter you will be required to pay the remainder of the purchase price in four equal annual installments, together with six per cent interest on the deferred payments per annum, and should you fail to make any of these payments when the same become due your entry will be canceled and the payments theretofore made will be forfeited.

Your application to purchase should be made on, or substantially in the form of the inclosed blank application, and must be supported by your affidavit corroborated by the oaths of two disinterested persons having a personal knowledge of the facts stated, showing that you were on June 28, 1906, in possession of all of the lands described in your application under a valid, unexpired, unforfeited lease theretofore approved by the Secretary of the Interior, and that you have not, without proper consent and approval, sublet any portion of the lands embraced in your lease.

This affidavit must be exected before the register or receiver, a United States court commissioner, a United States commissioner, or a judge or a clerk of a court of record in Comanche County, Okla.

Very respectfully,

——— ———, *Register.*
——— ———, *Receiver.*

—

APPLICATION TO PURCHASE UNDER ACT JUNE 28, 1906.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
Lawton, Okla., ———, *1906.*

I, —— ——, of —— Post-Office, do hereby apply to purchase the —— quarter of Section No. ——, in Township No. One —— of Range No. Eight West of Indian Meridian, Oklahoma, under the act of June 28, 1906, for which I agree to pay the total sum of $——, the appraised value thereof, as follows: The sum of $—— at this time, and a like sum annually at the end of one, two, three, and four years, from the date hereof, with interest on each of said deferred payments at the rate of six per centum per annum.

—— ——, *Applicant.*

I, H. D. McKnight, register of the above-named land office, do hereby certify that the land above described has been appraised at the total sum mentioned therein.

—— ——, *Register.*

TERRITORY OF OKLAHOMA,
County of Comanche.

Personally appeared before me the undersigned —— ——, the applicant named in the foregoing application, who, after being first duly sworn, upon his oath states that he was on June 28, 1906, in possession of all the lands described in said application under a valid unexpired, uncanceled, and unforfeited lease theretofore

approved by the Secretary of the Interior, and that no part of said lands has been subleased or sublet in any manner whatever to any other person without the proper consent of the Indians interested therein or without the approval of the Secretary of the Interior.

—— ——.

Subscribed and sworn to before me this —— day of ——, 1906.

—— ——,
—— ——.

TERRITORY OF OKLAHOMA,
County of Comanche.

—— ——, of —— Post-Office, and —— ——, of —— Post-Office, after being by me first duly sworn, each for himself states that he knows of his own personal knowledge that —— ——, the applicant named in the foregoing application was on June 28, 1906, in possession of the lands described in said application, and that they each believe all the statements made by the said applicant in support of his application are true.

—— ——.
—— ——.

Signed and sworn to before me this —— day of ——, 1906.

—— ——,
—— ——.

INDIAN ALLOTMENT—RESIDENCE—ACT OF APRIL 28, 1904.

OPINION.

The term "residence" as used in the provision of the act of April 28, 1904, restricting allotments thereunder to those who were legally residing upon the White Earth reservation at the date of the passage of the act, and to those who may remove to and take up their residence on said reservation, should be given its ordinary meaning as recognized in legal parlance and construction, and, so construed, the act does not require that those already having legal residence on the reservation, altho temporarily absent for any reason, must return thereto in order to receive the benefits of its provisions.

Assistant Attorney-General Campbell to the Secretary of the Interior, September 7, 1906. (C. J. G.)

Under date of June 21, 1906, I rendered an opinion based on the request of the Commissioner of Indian Affairs to be advised "as to whether the wife of Robert Morrison, a Mississippi Chippewa Indian, is entitled to hold an additional allotment on the White Earth reservation, Minnesota, under the act of April 28, 1904 (33 Stat., 539), and at the same time reside off the reservation." After referring to the legislation under which the Chippewa Indians in Minnesota ceded their reservations in that State, and the interpretation placed at divers times by the Department and the Indian Office upon said legislation, as well as to the act of April 28, 1904, known as the Steenerson act, which, after authorizing allotments to those Chippewa Indians "now legally residing upon the White Earth reservation," and "to those

Indians who may remove to said reservation," further provided (first proviso)—

> That where any allotment of less than one hundred and sixty acres has theretofore been made, the allottee shall be allowed to take an additional allotment, which, together with the land already allotted, shall not exceed one hundred and sixty acres,

the opinion was expressed:

> The facts of this case are not before me, the matter submitted in the communication from the Commissioner of Indian Affairs merely being "relative to the right of the wife of Robert Morrison, a Mississippi Chippewa, to hold her allotment on the White Earth reservation, under the Steenerson act, and at the same time reside at Detroit, Minnesota, off the reservation." As a conclusion of law, however, my opinion is, from the legislation involved, that the authority contained in the act of 1904 to make allotments is restricted to those Chippewa Indians who were legally residing upon the White Earth reservation at the date of the passage of the act, and to those who may remove to and take up their residence on said reservation; and that the same rule is equally applicable and should prevail with respect to those claiming the benefits of the first proviso to said act.

A further communication from the Commissioner of Indian Affairs, dated August 14, 1906, has been referred to me "for opinion and consideration in connection with opinion of June 21, 1906." In advising the Indian agent at White Earth agency of said opinion of June 21, 1906, the Indian Office directed him, by letter of July 3, 1906, "to inform Mrs. Morrison and all other Chippewa Indians that they can not hold their additional allotments under the so-called Steenerson act without removing to and taking up their actual residence on the White Earth reservation." He was also directed to report to the Indian Office the names and addresses of all Indians having allotments on said reservation made under the act of April 28, 1904, who declined to remove to and take up their actual residence thereon, with a view to the cancelation of their allotments. The agent, acting under these instructions, notified numerous allottees that they would be allowed sixty days to remove to and take up their residence on the reservation. From letters written in the interest of some of these allottees, which accompany the communication of the Commissioner of Indian Affairs, it appears that numerous persons engaged in different vocations and occupying various positions are affected by the order of the Indian agent, including minor children attending non-reservation schools, whose parents reside on the reservation, wives of employes at Indian agencies, pupils of Indian schools, and persons under judicial restraint. The Commissioner recommends—

> that the ruling that all members of this reservation must remove to and take up their residence thereon to entitle them to take or hold an allotment, be so modified as to exempt from its operation all Indians engaged in the public service, and the wives of such employes, persons under judicial restraint, and those attending non-reservation schools, and that the office be authorized to extend the time when such ruling would become operative on all other classes of persons until April 1, 1907, at least as affecting original allottees.

The opinion in question was not intended to convey the meaning and have the scope imputed to it by the Indian Office. What was understood by residence as used in the act was the ordinary meaning of the term recognized in legal parlance and construction. In this view, for instance, the place of residence of minor children is determined by the residence of their parents. Other familiar rules are, especially under the land laws, that the residence of a person when once established is not abandoned by temporary absences, and that residence and presence are not convertible terms. These rules are particularly applicable to the cases under consideration, so that the matter of the residence of those parties becomes a mere question of fact to be determined by the circumstances surrounding each case. The opinion of June 21, 1906, held that the act of April 28, 1904, restricted allotments thereunder to those who were legally residing upon the White Earth reservation at the date of the passage of the act, and to those who may remove to and take up their residence on said reservation; but there was no attempt to hold that those already having legal residence there, although temporarily absent for any reason, must immediately return to the reservation. As to those who must remove to and take up their residence on the reservation under the terms of the act, I see no good reason why the time for doing so may not properly be extended as recommended by the Commissioner of Indian Affairs. The instructions issuing in this matter from the Indian Office may be framed or modified in accordance with the views herein expressed.

Approved:

THOS. RYAN, *Acting Secretary.*

INDIAN ALLOTMENT—SECTION 6, ACT OF JUNE 5, 1906.

OPINION.

In making allotments under section 6 of the act of June 5, 1906, all selections presented at a time when the same could properly be received for a party then in being should be accepted, altho the party may die before the schedules are completed or approved.

Assistant Attorney-General Campbell to the Secretary of the Interior, September 7, 1906. (C. J. G.)

Under date of July 5, 1906, I expressed to you my opinion on certain questions propounded by the Commissioner of Indian Affairs concerning allotments authorized by section 6 of the act of June 5, 1906 (34 Stat., 213), to be made to children born to members of the Comanche, Kiowa or Apache tribes of Indians. Question numbered 4, which

read: "Should allotments be made to children alive on June 5, 1906, but who may die before allotments are made under the act of that date?" was answered in the negative, the opinion being expressed that allotments should only be made to those children who are in being "at the time the schedules are made up," and "at the time the allotment work is done." The Indian agent in charge of the Kiowa agency, referring to said opinion in a letter dated August 6, 1906, addrest to the Commissioner of Indian Affairs, states:

> There are several instances where selections of land have been made by the parents of certain children who were alive on June 5, 1906. These selections were noted on the temporary schedule referred to in agency letter of June 25, 1906. Subsequent to June 5, 1906, and prior to the date the allotting crews reached the land selected for allotment, some of these children have died. Are they entitled to allotments under the act of June 5, 1906?

The Commissioner of Indian Affairs, in a letter dated August 16, 1906, which has been referred to me for opinion, says:

> In question 4, above quoted, the word "allotments" in the second line thereof, should be construed to mean selections, for unless this is true, no schedule of selections can be approved, because some of the selectors, whose names are included on a given schedule, always die before this occurs, and hence if only those alive when the schedule is approved are entitled, it would always be impossible to determine the allotted and those not. The practice has been uniform heretofore, and that is, all who select or have selections made for them within the time the right attaches and die before such selection is scheduled or approved, are included among those allotted, and patents issue in their names.

The language of the agent where he says "there are several instances where selections of land have been made by the parents of certain children who were alive on June 5, 1906," is clearly susceptible of different interpretations. It might refer to children who were alive on June 5, 1906, and for whom selections were made prior to their death, altho the death in fact occurred before the allotment work was done. Or it might refer to selections for children who were alive on June 5, 1906, but who died before selections had been made by them or in their behalf. The latter is contrary to the rule against selections being made for any persons except those in being at the time of selection. It may be stated generally that all selections presented at a time when the same could properly be received for a party then in being should be accepted, altho the party may die before the schedules are completed or approved. [See Willie Dole, 30 L. D., 532, 536.] It was not intended to hold, nor is the opinion in question to the effect, that the children referred to in section 6 of the act of June 5, 1906, must, as a condition precedent, be alive or in being at the time the allotment selections properly made in their behalf are approved.

Approved:

THOS. RYAN, *Acting Secretary.*

DESERT-LAND ENTRY—CONTEST—ANNUAL PROOF—EVIDENCE.

McKEAND *v.* WARING ET AL.

In case of a contest against a desert-land entry, the annual proofs offered by the claimant, and forming a part of the records of the land department, altho not put in evidence at the hearing on the contest, may, where the truth of any of the statements made in said proof is the main question in issue, be properly judicially noticed with a view to determining the truth or falsity of subsequent statements made by the same witnesses concerning the same facts.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *September 10, 1906.* (E. O. P.)

Bruce Waring has appealed to the Department from your office decision of November 24, 1905, reversing the action of the local officers and holding for cancelation his desert-land entry, made February 19, 1901, for the NW. ¼, W. ½, SW. ¼, NE. ¼, SW. ¼, Sec. 10, T. 13 N., R. 27 E., W. M., North Yakima land district, Washington, upon contest initiated against said entry by John R. McKeand.

Contest was based upon allegations that the third year proof offered by Waring was fraudulent for the reason that he had not made the required annual expenditure for that year.

Robert E. Turney filed a subsequent affidavit of contest, alleging that Waring had contracted to convey a portion of the land entered to third parties, which action was asserted to be fraudulent and contrary to the provisions of the desert-land law. At the hearing the local officers dismissed the contest of Turney and denied his application to intervene, for the reason that he had no interest in the land and that his said affidavit failed to state a cause of action. This action of the local officers was affirmed by your office, and as no appeal has been taken by Turney from your said decision the same has become final as to him. The dismissal of his contest for the reason stated and upon the authority relied upon by your office (Wheaton *v.* Wallace, 24 L. D., 100) is noticed by the Department at this time for the reason that since said decision was rendered the authority cited has been virtually overruled by departmental decision rendered in the case of Herbert C. Oakley (34 L. D., 383), in so far as executory contracts to convey desert land is concerned. For the reasons stated in said decision the Department will not admit the validity of such contracts, and proof of their execution will, in the absence of sufficient showing that they were innocently made by reason of the former construction of the law and have since been revoked, afford ground for the cancelation of such entries.

The decision having become final as to Turney, the Department has only to consider the case made upon the contest of McKeand. The testimony offered at the hearing shows that the only expenditure of

claimant looking to the reclamation of the land since the date of entry was made in drilling an artesian well on the premises, which had been sunk to a depth of about 400 feet and from which no water had been obtained. The only question presented is the value of the work. The only witness who testified on behalf of claimant had been employed by him to assist in this work and stated that the usual price for drilling wells of this character was one dollar per foot, but that by reason of the conditions surrounding the drilling of this particular well, he estimated the cost thereof at about four dollars per foot. If this estimate be correct, the contest must fail. The witnesses for contestant, he being one of them, assert that the value of all the work performed on the premises would not exceed $500 and that claimant had expended nothing in the way of permanent improvements during the year next preceding the submission of the proof alleged to be fraudulent.

An examination of the proof submitted discloses that this contestant was one of the witnesses who corroborated claimant's statements made in connection with the submission of his second-year proof, and that he, contestant, then testified under oath that claimant had expended $1,000 in the drilling of the well in question. The annual proofs offered by the claimant were not put in evidence at the hearing, but they are properly a part of the records of the Department, and when the truth of any of the statements made in said proof is the main question in issue, they may properly be judicially noticed for the purpose of ascertaining, if possible, the truth of subsequent statements made by the same witnesses concerning the same facts. (Ward's Heirs *v.* Laborraque, 22 L. D., 229.) Such a comparison of the testimony of contestant at the hearing with his prior testimony on annual proof serves to entirely discredit him as a witness. It is impossible that both statements are true, yet both were delivered under oath. If there could be any presumption as to the truth of either, that presumption would favor the earlier declaration, as the one having been made when the witness had no interest involved. Such statement was to the effect that the claimant had fully complied with the law in the matter of expenditure made for permanent improvements looking to a reclamation of the land, and the amount testified to at that time by this contestant was sufficient to cover the expenditure required for the full three years. In any event, the Department is unwilling to accept his later contrary statement as sufficient to warrant a cancelation of the entry under consideration, and as without his testimony there is not sufficient evidence to warrant such action, the contest will be dismissed.

The lifetime of the entry in question has now expired and if claimant has not already done so he should be called upon to submit his final proof, at which time the local officers should be directed to care-

fully inquire into all the matters connected therewith with a view to ascertaining all the facts necessary to fully satisfy themselves that claimant has met all the requirements of the law.

For the reasons stated your said decision is hereby reversed.

DIOCESE OF DULUTH *v.* BENA TOWNSITE.

Motion for review of departmental decision of June 26, 1906, 34 L. D., 708, denied by Acting Secretary Ryan, September 10, 1906.

RAILROAD GRANT—SALINE LANDS—ACT OF JULY 27, 1866.

ELLIOTT ET AL. *v.* SOUTHERN PACIFIC R. R. CO.

Lands more valuable for saline deposits than for agricultural purposes, or that contain valuable deposits of salines that will justify expenditures for their extraction, are "mineral lands" within the meaning of that term as used in the exception from the grant to the Southern Pacific Railroad Company made by the act of July 27, 1866.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *September 11, 1906.* (G. N. B.)

April 10, 1903, the Southern Pacific Railroad Company filed its list, embracing, with other lands within the primary limits of its grant under the act of July 27, 1866 (14 Stat., 292), section 23, T. 9 N., R. 10 W., S. B. M., Los Angeles, California.

May 6, 1903, your office prepared supplemental list No. 97, in accordance with departmental instructions of July 9, 1894 (19 L. D., 21), embracing, with other lands, the S. ½ of said section 23, and directed the local office to publish and post notice of the listing of the same by the railroad company. Publication and posting was had accordingly, and during the period thereof, and on July 11, 1903, Alexander Elliott *et al.* filed a protest, in which it was alleged, amongst other things, in effect, that the said tract is covered by placer mining locations owned by the protestants, and that it is chiefly valuable for its deposits of mineral, consisting of large bodies of chloride of sodium and sulphate of sodium, and that it contains springs of salt water.

A hearing on the protest was had May 12, 1904, at which the parties appeared and submitted evidence. At the hearing the protestants withdrew their protest as to all except the SW. ¼ of the SW. ¼ of the section, covered by the Buckhorn and Elliott placer claim.

January 17, 1905, the local officers found the land involved to be more valuable for its saline deposits than for agricultural purposes,

and recommended that said supplemental list be canceled to the extent thereof. Upon appeal, your office, by decision of June 30, 1905, affirmed the finding of the local officers, and held the supplemental list for cancelation to that extent.

The railroad company has appealed to the Department.

The grant to the Southern Pacific Railroad Company is of "every alternate section of public land, not mineral," within certain prescribed limits, and with stated provision for indemnity for losses in place limits. The grant also contains several provisos, amongst which are the following:

Provided further, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, and within twenty miles thereof, may be selected as above described.

And provided further, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal.

It is contended by the appellant company that your office erred in holding that land containing salines is excepted from its grant.

To support this contention it is argued by counsel that there is no reservation to the State of California of saline lands in the act of September 9, 1850 (9 Stat., 452), by which the State was admitted into the Union, nor in any subsequent act respecting the public domain in that State, and that Congress has never declared salines to be mineral; therefore, that lands of the United States containing salines in the State of California, and lying within the limits of the grant by the act of July 27, 1866, passed to the company. It is further argued that at the time the grant was made to the company the act of July 26, 1866 (14 Stat., 251), declared what lands upon the public domain must contain to be free and open to exploration and occupation as mineral lands, and that only lands containing the minerals named in the act are excepted from the grant.

A sufficient answer to the first part of the argument is found in the case of the Territory of New Mexico (31 L. D., 389, 390), wherein it is said that—

The uniform policy of the government since the inauguration of the public land system has been to reserve lands containing valuable deposits of mineral, of any kind or nature, from grants for the benefit of schools, to aid in the construction of railroads, or for other public purposes, whether expressly excluded from such grants or not; and until the passage of the act of January 31, 1901 (31 Stat., 745), whereby all unoccupied lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, were declared to be subject to location and purchase under the provisions of laws relating to placer mining claims, the policy of the government was to reserve saline lands from disposition under any of the public land laws, whether relating to the disposal of agricultural lands or relating to the location and purchase of mineral lands, excepting as provided by the act of January 12, 1877 (19 Stat., 221), the provisions of which are not material here. (See Morton *v.* Nebraska, 21 Wall., 660; Salt Bluff Placer, 7 L. D., 549; Southwestern Mining Company, 14 L. D., 597.)

The Department is unable to admit the soundness of the second part of the argument. The act of July 26, 1866, provided by its section 1, amongst other things, that "the mineral lands of the public domain are free and open to exploration and occupation" by qualified persons, "subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts." Sections 2, 3 and 4 of the act provided how any person or association of persons who claimed a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, could proceed to make entry for such vein or lode, and secure patent therefor, and provision is also made respecting the size of the claim that might be so entered and patented. There was no attempt to define mineral lands in the act. Provision was therein made for entry and patent of certain vein or lode claims, leaving to "regulations as may be prescribed by law" the exploration and occupation of other mineral lands of the public domain.

A contention that an exception of "mineral lands" from a railroad grant meant only lands containing the metallic minerals, and based upon substantially the same theory as is advanced in this case, was considered by the Department in the case of the Pacific Coast Marble Company *v.* Northern Pacific R. R. Co. *et al.* (25 L. D., 233). The grant to the railroad company was made by the act of July 2, 1864 (13 Stat., 365), two years prior to the passage of the original lode mining law, and contains the same provisions respecting the exception of mineral lands from the operation of the grant as are contained in the act here under consideration. After a thoro and an exhaustive consideration of the subject the Department adhered to the rule—

> That whatever is recognized as mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws.

And it was further held—

> That lands containing valuable mineral deposits, whether of the metalliferous or fossiliferous class, of such quantity and quality to render them subject to entry under the mining laws—that is, when they are more valuable on account of such mineral deposits than for agricultural purposes—are "mineral lands" within the meaning of that term as used in the exception from the grants to the railroad company and the State.

To the same effect is the decision of the Supreme Court of the United States in Northern Pacific Railway *v.* Soderberg (188 U. S., 526), wherein the act of July 2, 1864, was under consideration.

It is not, and cannot successfully be, disputed that salines are recognized as mineral by the standard authorities on the subject; and if the land in controversy is more valuable for its saline deposits than for

agricultural purposes, or if it contains valuable deposits of salines that will justify expenditures for their extraction, it comes clearly within the principle and rulings of the case cited.

It is, however, further contended by the appellant company that your office erred in finding and holding that the saline character of the land had been established by the evidence.

The evidence has been carefully examined, and it is stated fully and with substantial accuracy in your office decision and need not be restated here. It is shown that the land contains valuable deposits of salines, consisting of common salt, sulphate of soda and carbonate of soda, and that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine thereon (Castle *v.* Womble, 19 L. D., 455). The evidence also shows that the land has little value for agricultural purposes. It must therefore be held that it is mineral in character and not subject to selection by the railroad company.

No other question raised by the appeal, or suggested in the argument of counsel, need be considered.

The decision of your office is affirmed.

SHORT *v.* BOWMAN.

Motion for review of departmental decision of June 13, 1906, 35 L. D., 70, denied by Acting Secretary Ryan, September 11, 1906.

REPAYMENT—DESERT-LAND ENTRY—COMPACTNESS.

J. C. MURPHY'S ADMINISTRATOR ET AL.

If an entry on its face shows no departure from any reasonable degree or requirement of compactness, it is not a case for repayment, regardless of the facts disclosed by the records.

A desert-land entry consisting of four forty-acre tracts in a row, contiguous only by the joining of the ends thereof, is not such a departure from a reasonable requirement of compactness as to render the entry impossible of confirmation, and repayment on that ground will not be allowed.

Acting Secretary Ryan to the Commissioner of the General Land Office, September 11, 1906.

(F. L. C.) (C. J. G.)

The Department is in receipt of the letter of your office of July 18, 1906, retransmitting the repayment cases of J. C. Murphy's administrator, Mary McCaffery, Daniel H. Rowe, Charles N. Rose, Daniel Garrison, and John T. Dunlap. The entries in all of said cases were

made under the desert-land law and the applications for repayment, under the act of June 16, 1880 (21 Stat., 287), are on the ground that said entries were erroneously allowed and could not be confirmed within the purview of said act because the several tracts of land were not in compact form, as required by the desert-land law. The cases were recommended for repayment by your office, it being stated that the want of compactness was not excusable on account of the topography or prior entries of adjoining lands. The applications in the first three cases named were returned to your office for a statement of the cause of cancelation of the entries—which your office now states was because of failure of the entrymen to make proof and payment as required by law—the next two applications were disallowed under the decision in the case of Paris Gibson (33 L. D., 437), and the last-named application was returned for consideration under said decision.

Your office states that all of these entries "consisted of four forty-acre tracts contiguous only by the joining of the ends thereof, or, in other words, a tract of land one mile in length and one-quarter of a mile in width." The application of the latter mode of determining whether or not an entry is in compact form appears to overlook or disregard the fact that such mode of determination was eliminated from the desert-land regulations as early as the case of Francis M. Bishop (5 L. D., 429), which was fully referred to and discussed in the Paris Gibson case. The reason given for such elimination was—

> The residue of the regulation is in my judgment ample for the protection of the government and for the proper administration of the law by your office and the Department; and it properly leaves to the land department some discretion in determining what is and what is not a compliance with the law.

Attention is also called by your office to the fact that repayment applications were allowed by the Department in April and May, 1906, upon entries of exactly the same form as those here in question; and that—

> This office has for several years, and certainly ever since the issuance of the circular *in re* compactness (see 31 L. D., 441), held desert-land entries of the form of those herein under consideration to be *prima facie* non-compact; and has invariably required the showing specified in said circular, and upon default thereof, has canceled such entries; and such practice is now in full force in this office.

If it be true that applications like the present ones have inadvertently been allowed, the fact was due solely and primarily to the failure of your office and the Department to give proper force and effect to the decision in the Gibson case, which, in construing the regulations, departmental decisions and practice, held among other things as applicable to the facts of said case:

> Where the face of the entry shows no gross or absolute departure from any reasonable degree of compactness it is not a case for repayment, and this regardless of the facts disclosed by the records.

And if it is now the practice of your office to hold desert-land entries of the form of those here in question to be non-compact, it is in utter disregard of the plain deductions that ought to be made from the Gibson case, which was considered at great length for the express purpose of showing that it is clearly within the province of your office to exercise some discretion in determining "what is and what is not a compliance with law" in these matters. The application for repayment in the Gibson case was denied by your office and for the reason that—

A diagram of the petitioner's claim shows that it was in the form of a parallelogram, with the exception of one subdivision of 40 acres, and that it was sufficiently compact to meet the requirements of the law (5 L. D., 429; 31 L. D., 441).

The contention made in behalf of repayment in that case was that a desert-land entry must if possible be made in square form; that an entry showing on its face a departure from such form is *prima facie* non-compact and therefore invalid unless it is disclosed that it could not have been made in other form on account of the topography or prior appropriation of adjacent lands. This is the position which your office now appears to virtually assume, altho it clearly recognized a different rule in the case of Paris Gibson. To what further cases your office may have extended the same recognition it is unnecessary to determine here. The above conclusion is inevitable, f r in case of four forties in a row the removal of one forty would not make the entry more compact in any sense; so that in the view now exprest by your office the entrymen in question ought to have been required to adjust their entries to the form of an absolute square, or their entries ought to have been disallowed. The Department has found that there is no reason or support for such a rule, and that the desert-land law contains no such requirement. The denial of the various applications now retransmitted, on the principle announced in the Gibson case, namely, that there was no departure from a reasonable degree of compactness in case of these entries, was therefore proper and will be adhered to. All of said applications will stand denied.

RIGHT OF WAY—RESERVOIR SITE—SECTIONS 18 TO 21, ACT OF MARCH 3, 1891, AND SECTION 2, ACT OF MAY 11, 1898.

SIERRA DITCH AND WATER COMPANY.

An application for right of way for a reservoir site under sections 18 to 21 of the act of March 3, 1891, by a company "formed for the purpose of irrigation," may be approved under the provisions of said sections and section 2 of the act of May 11, 1898, notwithstanding the articles of incorporation of the company may permit it to also engage in the business of furnishing and using the water "for purposes of a public nature, and for the purposes of water transportation, domestic use and development of power, as subsidiary to the main purpose of irrigation."

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *September 11, 1906.* (G. B. G.)

This is the appeal of the Sierra Ditch and Water Company from your office decisions of April 17, 1905, and May 31, 1905, denying its application under the act of March 3, 1891 (26 Stat., 1095), for right of way for the Emigrant Lake reservoir site in T. 4 N., R. 21 E., Stanislaus forest reserve, Tuolumne county, California. The said application presented at the local land office February 17, 1905, was duly forwarded to your office, and on the 17th day of April, 1905, the map and field notes were returned for correction in certain particulars. Before the papers were returned to your office the Director of the Geological Survey submitted a report recommending that the company's application be rejected because of claimed interference with a contemplated project of the Reclamation Service.

The company made all corrections required by your office, except (1st) that the map be amended so as to make it an application under the act of Congress approved February 15, 1901 (31 Stat., 790), instead of an application under the act of March 3, 1891, *supra*, and (2nd) the direction that the map should be so amended as to show the lines of the subdivisions of the township within which the said reservoir site is located according to the public surveys.

It is urged upon the appeal, in substance and effect, (1) that the application is a proper one under the act of March 3, 1891, especially in view of the provisions of the act of May 11, 1898 (30 Stat., 404); (2) that under the circumstances of this case it was error to require an amendment of the map to show the lines of subdivision of the township in which said reservoir site is located; and (3) that the right of the company to an approval of its map of location of this reservoir site should not be denied because of the suppositious claim of the Reclamation Service.

Sections 18 to 21 of the act of March 3, 1891, grant to any canal or ditch company "formed for the purpose of irrigation" a right of way thru the public lands and reservations of the United States, and such right of way may embrace a reservoir site. The application of the Sierra Ditch and Water Company shows that it is a corporation organized under the laws of the State of California to engage in "the business of acquiring, using, selling, renting, distributing and otherwise disposing of water for the main purpose of irrigation, for purposes of a public nature, and for the purposes of water transportation, domestic use and development of power, as subsidiary to the main purpose of irrigation."

Your office erred in holding that this application, if otherwise regular, is not a proper application under the act of March 3, 1891. This case might have been argued with force and submitted with confidence

upon the provisions of said act standing alone. A company organized for the "main purpose of irrigation," as was the Sierra Ditch and Water Company, is surely "formed for the purpose of irrigation" within the meaning of section 20 of said act, notwithstanding its articles of incorporation may permit it to engage in other business as subsidiary thereto; but aside from this, section 2 of the act of May 11, 1898, *supra*, provides that rights of way theretofore or thereafter granted under the act of March 3, 1891, "may be used for purposes of water transportation, for domestic purposes or for the development of power, as subsidiary to the main purpose of irrigation."

It is not perceived how it can be well said that a company which may own these rights of way for the purpose mentioned in the act of 1898 may not declare its intention to so use them and make such declaration a part of its application. Indeed for a company to disclose its whole purpose as the basis for its application goes far to establish the good faith of the company.

The opinion of Assistant Attorney-General Van Devanter (28 L. D., 474) is not at variance with this view. In that opinion it was held that the Secretary of the Interior has no authority under the acts of March 3, 1891, and May 11, 1898, to grant the right to establish a reservoir or construct a ditch for mining or domestic purposes within any forest reserve in the State of California. The question of granting a right of way under those acts for the purposes of irrigation, with the right to use the way granted for other subsidiary purposes, was not involved in the question there presented and was not decided or even considered.

Upon the second question it appears from your said office decision of April 17, 1905, that the township in which the Emigrant Lake reservoir site is located has been surveyed, and the requirement that applicant amend its map to show the lines of subdivisions of this township is based upon paragraph 10 of the regulations of June 26, 1902, concerning right of way for canals, ditches and reservoirs, which paragraph is as follows:

> 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 (31 L. D., 510).

Responding to this requirement the company has filed the affidavit of a civil engineer to the effect that there are no monuments upon the ground in the vicinity of the said reservoir site by means of which the location of the lines of the public surveys of the township in question may be definitely ascertained. This being true, it is believed that to require the company to comply with the provisions of paragraph 10 would impose an unnecessary hardship, as it would probably necessitate a resurvey of at least a portion of the township to re establish these courses, and when considered in connection with the fact that

the lands are included within a forest reserve, it is the opinion of the Department that, in this instance, compliance with the requirement should not be insisted upon. But the main ground for the action of your office in denying this application rests upon a declaration by the Director of the Geological Survey that—

> The engineer in charge of operations in that locality states that these reservoir sites will in all probability be needed for future use in connection with work in the Modesto and Turlock Irrigation Districts.

This declaration is too vague, indefinite and uncertain to authorize a rejection of said application, and when considered in connection with the fact, shown by this record, that there are no public lands that can be brought within the tentative project of the Reclamation Service, the Department is constrained from giving such weight to the objection as calls for refusal to give effect to an application properly presented under existing laws, having as its primary object the same end, to wit, the reclamation of lands.

It should be here stated that on March 13, 1906, there was filed with this Department and made a part of the record herein application on behalf of the Turlock and Modesto irrigation districts "for reservoir sites on the Tuolumne river for the storage of sufficient water to meet the requirements of these districts and for the construction of the same under the terms of the national irrigation act." The authorized representatives of the interests of these irrigation districts were by letter of March 31, 1906, addrest to the Hon. J. C. Needham, House of Representatives, advised that these applications did not conform to the regulations of this Department governing rights of way for reservoir sites and therefore presented nothing for present consideration by the land department. Said letter further advised, however, of the pending applications of the Sierra Ditch and Water Company and of the fact that the Director of the Geological Survey was objecting and protesting against the allowance of these applications. On the same day, March 31, 1906, it was directed that action upon the applications of the Sierra Ditch and Water Company be suspended, to the end that the land department might be fully advised upon the conditions in these districts before final action upon the applications of the Sierra Ditch and Water Company, for the period of sixty days, "or until such time as authorized representatives of the interests of said districts may submit views thereon."

April 28, 1906, there was filed in this Department a communication from the attorney for the Modesto irrigation district from which it appears that said districts desire a ruling from this Department "as to whether or not aid could be extended to them under the terms of the national reclamation act," but no application for specific reservoir sites have ever been filed.

In view of the conclusion hereinbefore reached with reference to

the protest of the Director of the Geological Survey, and in the absence of any conflicting claim to the site covered by the application, it will not be necessary at this time to consider the legality of the scheme suggested by the Modesto and Turlock irrigation districts, based on a possible appropriation by the Reclamation Service. As the Sierra Ditch and Water Company's application is regular in form, it becomes the duty of the Secretary of the Interior to approve the same, the objections presented in this record having been fully considered and abundant time having been given within which to show cause why the application should not be allowed.

The decision appealed from is reversed, but inasmuch as your office has not passed upon the sufficiency of the application as amended, the case is remanded with directions to re-submit the company's map for my approval if, upon further examination, objection other than that herein considered, does not appear. Your office will advise the attorney of record for said districts of this decision.

Repeater and Other Lode Claims.

Motion for review of departmental decision of July 23, 1906 (35 L. D., 54), denied by Acting Secretary Ryan, September 13, 1906.

SCHOOL LAND—FOREST RESERVE—INDEMNITY SELECTION.

The title of the State to sections sixteen and thirty-six, by virtue of the grant for school purposes made to the several States named therein by the act of February 22, 1889, is not affected by the inclusion of the lands within a forest reserve prior to survey; but the State may, if it does not desire to await the termination of the forest reserve, select other lands in lieu of those included therein, and approval of such indemnity selections will operate as a complete extinguishment of all title in the State to the lands in place made the basis therefor.

Acting Secretary Ryan to the Secretary of Agriculture, September 14, 1906.

(F. L. C.) (F. W. C.)

I have to acknowledge the receipt of Acting-Secretary's letter of August 18, last, in which, after referring to departmental decision of June 8, last, in the case of State of South Dakota *v.* Mathew Riley (34 L. D., 657), is submitted the question as to whether or not this Department considers unsurveyed lands in the states of Montana, South Dakota and Washington included within a forest reserve a part of the reservation altho it may, after the creation of the reserve and upon survey, be found to be portions of sections 16 and 36.

The question raised involves a consideration of the act of February 22, 1889 (26 Stat., 676, 679, 680), making grants to the several states named in support of common schools. This matter was very carefully

considered by this Department in its decision of May 21, 1904, in the case of State of South Dakota *v.* Hiram H. Ruby, a copy of which was sent you, wherein it was held that the creation of the Black Hills forest reserve under the provisions of the act of March 3, 1891 (28 Stat., 395), did not operate as a legal impediment to the vesting of title in the State of South Dakota to such portions of the lands as, on survey, were shown to be within sections 16 and 36. This question was not involved in the departmental decision referred to in Acting-Secretary's letter of August 18, last, and it was not intended by any language used in that decision to affect the previous holding of the Department in the Ruby case. This Department is still of the opinion that the title of the several states named to sections 16 and 36 is not affected by the inclusion of the lands within a forest reserve created under the provisions of the act of 1891, but it is believed that under the provisions of the act of February 28, 1891 (26 Stat., 796), amending sections 2275 and 2276, Revised Statutes, it is possible for the State, if it does not desire to await the termination of the forest reserve, to select other lands in lieu of such sections 16 and 36 as may be included therein, and that the approval of such indemnity selections will operate as a complete extinguishment of all title in the State to the lands in place made the basis for such selections.

COEUR D'ALENE INDIAN LANDS—SOLDIERS' ADDITIONAL ENTRY.

JAMES J. BELL.

Lands formerly within the Coeur d'Alene Indian reservation and restored to entry by the act of March 3, 1891, are not subject to soldiers' additional entry under the provisions of section 2306 of the Revised Statutes.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F.L.C.) *September 18, 1906.* (P.E.W.)

James J. Bell has appealed to the Department from your office decision of April 21, 1905, rejecting his application, as assignee of Joseph M. Wolbert, to make soldiers' additional homestead entry for lot 8, Sec. 22, T. 48 N., R. 2 W., Coeur d'Alene, Idaho, containing 5.50 acres.

Rejection was upon the ground that the said land was not subject to entry under section 2306 of the Revised Statutes.

It appears that said land was formerly a part of the Coeur d'Alene Indian reservation, Idaho, which was restored to entry by the act of March 3, 1891 (26 Stat., 1031). Said act provides that the land so restored—

shall be disposed of . . . . to actual settlers only, under the provisions of the homestead law, except section 2301 of the Revised Statutes of the United States, which

shall not apply, and under the law relative to townsites or to locators or to purchasers under the mineral laws of the United States . . . . *Provided*, That each settler or purchaser under and in accordance with the provisions of said homestead act, shall pay to the United States, for the land so taken by him . . . . but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged, except as to the said sum to be paid as aforesaid.

It is contended in the appeal that (1) the foreging does not expressly exclude said section 2306 and that the latter section is "so closely interwoven with 2304 and 2305 that it could scarcely be excluded," and that (2) "all things necessary to title to any lands subject to homestead entry having been performed, would bring them within the provisions of section 22 of the act of March 3, 1891 (26 Stat., 1031)."

In his affidavit filed with this appeal the claimant states that while he has cultivated, partly fenced, and in other ways exercised rights of ownership over said lot 8, the land in question, which is in section 22, "his residence is and has been ever since his said application for lot 8, located on the NW. ¼ of the SW. ¼ of Sec. 23, T. 48 N., R. 2 W., B. M."

As to the first contention, the maxim *expressio unius est exclusio alterius* is clearly applicable. Said sections 2304 and 2305 together provide for actual homestead settlement from the period of which the time of military service shall be deducted, but direct that "no patent shall issue to any homestead settler who has not resided upon, improved and cultivated his homestead for a period of at least one year after he shall have commenced his improvements.

Said section 2306, however, is of very different import in that it bestowed, as a gratuity, upon any one entitled to make entry under said section 2304, who had theretofore entered less than 160 acres, the right to enter so much land as when added to the quantity previously entered, shall not exceed one hundred and sixty acres. And this right has been held to be a gift, free, unfettered and assignable, while the two former sections contemplate settlement and residence, and the act in question disposes of this land "to actual settlers only under the provisions of the homestead law." By reason of this inherent radical difference as well as by the force of the said maxim, it is clear that the provision for the non-abridgment of soldiers' and sailors' rights was purposely limited to sections 2304 and 2305, and did not include section 2306, as contended in this appeal.

The application was therefore properly rejected and the showing subsequently filed with this appeal that the applicant has improved and exercised ownership over the land, does not remove the vital objection stated.

Your said decision is accordingly hereby affirmed.

LAND DEPARTMENT—EQUITABLE JURISDICTION—TOWNSITE SETTLEMENT—HOMESTEAD ENTRY.

AZTEC LAND AND CATTLE CO. *v.* TOMLINSON.

The land department has jurisdiction to determine the equitable as well as the legal rights of parties claiming interests in public lands, and it is the duty of that department to recognize equities such as are recognized by the courts.

Lands actually appropriated to urban uses are not subject to homestead entry.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *September 19, 1906.* (J. R. W.)

The Aztec Land and Cattle Company, Limited, filed a petition asking an order that your office certify to the Department the proceedings in its case involving the SE. ¼ of the NE. ¼, Sec. 14, T. 11 N., R. 30 E., N.M.M., Clayton, New Mexico, included in selection 5841, your office series, under the act of June 4, 1897 (30 Stat., 36), also included in the subsequent homestead entry of James A. Tomlinson, subject of your decision of April 13, 1906, wherein your office, June 12, 1905, denied its right of appeal. June 29, 1906, the order, for good cause appearing, was allowed. Service was made and the record certified to the Department for determination.

It appears that the Aztec Land and Cattle Company, by Henry Daub, filed its selection, September 3, 1902, with its deed filed for record May 14, 1902, relinquishing to the United States, as base for the selection, land in Coconino county, Arizona, in the San Francisco Mountains forest reserve, and therewith an abstract of title thereto, upon which the county treasurer certified, June 7, 1902, "that the taxes for 1902 on said lands are unpaid, and are now a lien thereupon under paragraph 3833, Chapter I, Title XLII, Revised Statutes of Arizona, 1901." December 15, 1902, your office directed the selector, within sixty days from notice, "to file a certificate under seal, from the treasurer of Coconino county, showing that such taxes have been paid." Service was duly made by registered mail by the local office, January 19, 1904, directed to the selector in care of its attorney-in-fact, at Tucumcari, New Mexico, his record address, and was returned to the local office, March 23, 1904, unclaimed. No action was taken, and on report of the local office, with proof of service, you rejected the selection April 29, 1904, advising the local office of such action.

January 23, 1905, James A. Tomlinson applied for homestead entry of this and other land, which was rejected by the local office for conflict, as to other land, with another selection under the act of June 4, 1897, and Tomlinson appealed to your office.

January 26, 1905, Alexander D. Goldenberg filed in the local office his application for reinstatement of the selection, sworn to before the

register. Referring to the selection, the rule respecting taxes, its manner of service, and its non-receipt because of Daub's change of residence, and the cancelation of the selection, he alleged that he purchased the land from the selector for value, and was ignorant of such proceedings until January 24, 1905; prayed reinstatement of the selection, and tendered within sixty days to pay the tax and conform to the rule imposed. The local office recommended the petition be granted.

February 10, 1905, your office held that (1) the application must be made by the selector itself, with "satisfactory reason why the requirements were not complied with;" (2) the abstract be extended to date with new certifications; (3) complete new non-mineral and non-saline and non-occupancy proofs of the land selected be made, and new certificate by the register that it was free from conflict, and the local office was instructed to hold the land from any disposal until further advised.

May 19, 1905, the selector filed its application with proof of the then non-mineral and non-saline character of the land, and that at the time of selection it was unoccupied, but "subsequently to said selection the lands were transferred and improvements have been made thereon by the various transferees."

June 3, 1905, you held this unsatisfactory and ambiguous because your office—

> has no knowledge of any transferee from the selector, or that there is no occupation of the land other than by the transferees, nor does he state any facts whereby this office can determine whether there is any occupation of the land adverse to the selector.

You again required complete new selection proofs. This rule was complied with; the rule of December 5, 1903, had in the meantime been fully complied with, and July 27, 1905, you reinstated the selection, and August 1, 1905, it was approved for patent.

August 25, 1905, your office held, upon Tomlinson's appeal from rejection of his homestead application, that its rejection as to the other lands was proper, but as to the tract here involved that "at the time when Tomlinson made his said homestead application that tract was vacant and subject to entry and he should have been permitted to enter the same under the homestead laws by amending his application."

You revoked the approval for patent, and, after proceedings not here material, before Tomlinson's entry was made, January 2, and January 8, 1906, the selector filed two protests against its allowance, praying a hearing, stating its own interest in the land, the fact of actual failure of notice, the sale to Goldenberg, and sales to others—

> innocent purchasers who have constructed and made valuable improvements on the land . . . . and the allowance of an entry to any person or persons will impose a great hardship and loss upon people who have purchased parcels of this land for the purpose of making and building homes thereon. Because a large number of people

have purchased and have builded homes upon and otherwise improved said lands which they have purchased as transferees of Alex. D. Goldenberg, who is the transferee of the selecting company, these transferees will suffer heavy loss if this application to enter under the homestead law is allowed. Because the lands . . . . are and have been owned and used and improved by innocent purchaser, without notice, for a valuable consideration for more than three years last past.

April 13, 1906, you held that the service of notice of the rule of December 15, 1902, was good, as Daub had given no notice of change in his record address, and the transferees had filed no notice of their interests claimed to have been acquired. You denied a hearing and canceled the selection as to this tract. An appeal was prayed and denied, and the certiorari was allowed.

It is true that the service upon the attorney at his last record address is sufficient. But, on the other hand, it is clear that there was no actual notice, that the selector admits it has parted with its interest, and that as successors to it "a large number" of subsequent transferees are claimed to have become involved in peril of loss of their improvements and homes, to whom no direct act of negligence is attributable, and to whom such loss comes thru accident due to Daub's change of residence.

The land department has jurisdiction to determine the equitable, as well as the legal, rights of parties claiming interests in public lands, as no other tribunals have jurisdiction, and it is the duty of the Department to recognize equities such as courts recognize. Brown *v.* Hitchcock (173 U. S., 473, 478). Tomlinson's mere application for entry, founded on no equity, did not entitle him to an entry in disregard of one who had attempted in good faith to obtain title and had conveyed full consideration. Equity required that the prior applicant, who had given value, should be preferred to the new applicant without the equity of a consideration paid, and who merely tendered and proposed to render the consideration that the law requires. The transferee has not less, and sometimes has more, equity than his grantor. The accident of lack of notice should have been relieved.

The proceedings appear to be erroneous for another reason. The Supreme Court of Arizona held, in case of Territory of Arizona *v.* Perrin, November 18, 1905 (83 Pac., 361), that:

> Lands acquired for public purposes during the period between the first and final steps of taxation are exempted from taxes levied during the year in which they are acquired. Bannon *v.* Burnes (39 Fed., 892); Gachet *v.* City (52 La. Ann., 813; 27 So., 348); Buckhout *v.* City (176 N. Y., 363; 36 N. E., 65) . . . . There can be no real or effective lien until the amount of the taxes are ascertained and assessed. "In the nature of things no tax or assessment can exist, so as to become an incumbrance on real estate, until the amount thereof is ascertained and determined." Black Tax Titles, Sec. 189, Dowdney *et al. v.* Mayor (54 N. Y., 186); Gillmor *v.* Dale (75 Pac., Utah, 932, 934). The lands having become the property of the United States, at the time the taxes were levied and assessed, and no longer subject to taxation, the acts of the taxing officers were void and of no effect.

In this case the Supreme Court of the Territory held that title passed to the United States by filing of the deed of relinquishment, and the decision being one of the court of last resort, defining a rule of title to real property in that jurisdiction, is conclusive upon the question, and the Department accepted it as such by instructions of January 17, 1906 (not reported—L. & R., Misc. Vol. 564, p. 31). The rule applies to the present case, and, tho your decision of December 15, 1902, was in accord with the views and practise of the Department at the time, the tax was not a lien on the land. The land selected being still within the jurisdiction of the land department, the selector is entitled to have the error corrected and to have the selection approved, if no other objection appears.

Another objection, fatal to Tomlinson's entry, was disclosed by the protests, if the facts therein alleged were true. The protests allege, in substance, that for three years prior to Tomlinson's application the land had been actually appropriated to urban uses by purchasers under the selector, many of whom had built their homes thereon. Such lands are not subject to homestead entry. Burfenning *v.* Chicago, St. P., M. & O. R. R. Co. (163 U. S., 321); Norman Townsite *v.* Blakeney (13 L. D., 399, 400); Walker *v.* Lexington Townsite (13 L. D., 404); Guthrie Townsite *v.* Paine (13 L. D., 562); North Perry Townsite *v.* Linn (26 L. D., 393); Needham *v.* Northern Pacific R. R. Co. (26 L. D., 444); Turnbull *v.* Roosevelt Townsite (34 L. D., 94). Nor is land subject to entry that is improved and in actual occupancy in good faith by others. Leon *v.* Grijalva (3 L. D., 362). The protests therefore presented a charge which, if true, excluded the land from homestead entry and rendered such entry fraudulent and in violation of law, but a hearing is unnecessary in light of the decision in Territory *v.* Perrin, *supra*.

Your decision is therefore reversed, and the revocation of approval of the selection is annulled, its approval is reinstated, and Tomlinson's homestead entry is canceled.

HOMESTEAD—SOLDIERS' ADDITIONAL—DEVISEE.

FIDELO C. SHARP.

The right of additional entry accorded by section 2306 of the Revised Statutes is not a life interest merely, but is part of the soldier's estate and as such may be devised by him, subject to appropriation by the widow or minor orphan children, as provided by the statute; and if not so appropriated, the right vests absolutely in the devisee.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *September 19, 1906.* (E. O. P.)

Fidelo C. Sharp, claiming as assignee of the right of Andrew J. Hays, deceased, has appealed to the Department from your office decision of June 20, 1906, rejecting his application to enter under the

provisions of section 2306, Revised Statutes, the N. ½ SE. ¼, SW. ¼ SE. ¼, Sec. 13, T. 26 N., R. 44 E., M. P. M., Miles City land district, Montana. The right claimed is based upon the alleged military service of Hays and original homestead entry made by him August 12, 1865, for the SE. ¼ SW. ¼, Sec. 22, T. 32 N., R. 27 W., Boonville, Missouri, canceled for abandonment, March 27, 1869.

The record discloses that no attempt was made by the soldier in his lifetime to exercise the right in person, nor did he assign the same. By his will all his property, real and personal, passed to his widow, Jane S. Hays. Nothing was done by the widow with respect to the right in question during her lifetime. She, by will, devised and bequeathed to William C. Green all the property of which she died possest. Green is the immediate assignor of the present applicant, whose claim rests upon the chain of title above set out, and it is the sufficiency of ownership, as thus disclosed, which is presented by the pending appeal.

Your office, citing and relying upon departmental decision rendered in the case of John M. Maher (34 L. D., 342), held as follows:

> Each of the persons named is "entitled to all the benefits conferred." No distinction whatever in the nature and extent of the right granted to the different persons named is made by the statute. The same right granted the soldier-entryman is granted in succession to the other persons specified. If the whole right granted the soldier-entryman upon his death inures, passes or is granted to his surviving widow, and upon her death or remarriage to his minor children during their minority, it becomes as fully vested in the widow or minor children as it has been in the soldier-entryman.

The estate, or more properly the interest, of the soldier in the additional right is not a life interest merely, simply because the right to *appropriate* it passes to the widow or minor children at his death, according to the conditions then existing. The right itself remains where it first lodged—in the estate of the soldier—subject only to the liability to be divested by the parties entitled to exercise the right of appropriation. This is the rule announced in the departmental decision rendered in the case of Allen Laughlin (31 L. D., 256) and reaffirmed in the later decision rendered in the case of John C. Mullery *et al.* (34 L. D., 333, 337) in the following language:

> Not being exercised or disposed of by his orphan children, during their minority, through a guardian, the estate of the soldier was not divested of said right.

It does not follow that because an estate is burdened with a condition, by which the interest of the possessor thereof may be divested, such estate is for that reason restricted or cut down to a life estate. An estate in lands is none the less a fee because a condition is annexed thereto. (Washburn Real Prop., 5th Ed., Vol. 1, p. 82, 83.) So it is in the case of a soldiers' additional right. The provision governing the manner of its exercise after his death is a condition only, which

may or may not operate to divest his estate of interest therein. The estate is, of necessity, greater than a life estate, else he could not, during his lifetime, grant a greater estate, and all his interest would fail at his death. But it is not denied that he can convey an absolute, unfettered interest during his lifetime. The entire interest is in the soldier and his estate at all times, until divested according to the manner specified and by the persons designated in the statute. It follows, therefore, that such an interest is devisable. This power to devise would be unquestioned were there no conditions annexed, or had the conditions been defeated during his lifetime by reason of his leaving surviving him no widow or minor children, for in such case the right becomes an absolute asset of his estate, without possibility of being subsequently divested. Such an asset may as well pass by will as by the rules of distribution in cases of intestacy. There is no reason why, even though the estate may be divested of the right by virtue of the condition imposed, it may not as well be the subject of testamentary disposition. The condition would of course follow the right and, until all possibility of its exercise had determined, the rights of the successors in interest under the will would be liable to appropriation by the persons in whom the right to exercise the power which passed by virtue of the statute rested. But unless the interest of the party who took under the will were thus divested, it would remain as complete and undisturbed as tho the interest still remained in the estate of the soldier, and with the removal of the possibility of appropriation of the interest by the parties designated, it would become absolute.

The doctrine of reversion does not obtain and the language used in the departmental decision in the case of John M. Maher, *supra*, and quoted in the decision appealed from, was not intended to announce such a doctrine. This is clearly apparent when the facts in that case are examined, and while the word "revert" was therein used it was not employed in its technical sense.

From what has been said it follows naturally that the soldier, by his will, divested his estate of all interest in his additional right and that such interest past to his widow by virtue of the will. Had there been no will the mere right to appropriate this interest would have past to the widow *by virtue of the statute.* Her will, she not having exercised or disposed of the right, vested it in her beneficiary, subject of course to the only remaining condition that it might be divested by an appropriation thereof by the minor children of the soldier in the manner pointed out by the statute. If this possibility were removed by reason of there being no minor children, the interest transmitted by the will of the widow was an absolute one. Inasmuch as your office found as a fact, which finding appears to be warranted, that there were no minor children of the soldier surviving the widow, the Department

is clearly of opinion all the interest of the soldier, by reason of the wills heretofore referred to, in and to the additional right in question, past to and vested in the beneficiary named in the will of the widow, as an absolute and unqualified right. This beneficiary is the immediate assignor of the present applicant. This being true, the Department is further of opinion that the right of the present holder of the right, Sharp, the said assignment thereof to him by Green being in other respects regular and proper, should be recognized.

The decision appealed from is, for the reasons herein set forth, reversed.

GOTEBO TOWNSITE *v.* JONES ET AL.

Motion for review of departmental decision of July 14, 1906, 35 L. D., 18, denied by Acting Secretary Ryan, September 19, 1906.

CONTEST—OKLAHOMA HOMESTEAD—SECTION 20, ACT OF MAY 2, 1890, AND ACT OF MAY 22, 1902.

GROVE *v.* BONEWITS.

The dismissal of a contest without passing on the matters charged, is no bar to another contest on the same ground by a different party.

The act of May 22, 1902, gives to the class of persons therein specified a new and independent right to make a homestead entry for not exceeding one hundred and sixty acres, without restriction or qualification, and the provisions of section 20 of the act of May 2, 1890, holding disqualified to make homestead entry in Oklahoma any person seized in fee simple of one hundred and sixty acres of land in any State or Territory, are therefore superseded by the provisions of the act of May 22, 1902, to the extent of the class of persons therein described.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *September 19, 1906.* (G. C. R.)

This case involves the NW. ¼, Sec. 6, T. 24 N., R. 12 W., Alva, Oklahoma, for which Jacob Bonewits made homestead entry November 5, 1902. Prior to said entry, Bonewits, on October 5, 1893, entered the SW. ¼, Sec. 32, T. 25 N., R. 12 W., of the same district, and after living thereon more than five years, he, April 17, 1899, made final proof of his compliance with law. Final certificate and patent duly issued.

Both tracts entered as aforesaid are a part of what was commonly called the "Cherokee Outlet," formerly belonging to the Cherokee Indians and sold by that nation to the United States, and were disposed of under the provisions of section 10 of the act of March 3, 1893 (27 Stat., 640). Final certificate having issued for the tract last described before the passage of the act of May 17, 1900 (31 Stat., 179), known

as the free homestead law, the entryman was required to pay for the land at the price fixed by law, viz., one dollar an acre.

April 29, 1903, Charles W. Byers filed a contest against the said entry made November 5, 1902, alleging in substance that at the date said entry was made the entryman owned the land he first entered (above described); that he was therefore not a qualified entryman, and the entry was fraudulent.

A hearing was had, when the attorneys for the respective parties, by stipulation, agreed upon the facts, which as signed by them reads as follows:

We agree, that Jacob Bonewits was at the date of his present homestead entry, November 5, 1902, the owner of one hundred and sixty acres of land in Woods County, Oklahoma Territory.

That he, having prior to this date, September 30, 1899, received patent under the commuted provisions of the homestead law to the SW. ¼ section 32, T. 25 N., R. 12 W., O. T., and that he was the owner of said tract of land, and that when the said Jacob Bonewits made his application for said land he stated he was the owner of one hundred and sixty acres of land in his homestead affidavit, having made homestead entry No. 1214 for the above last described tract, which he commuted to cash entry No. 9, April 17, 1899, at the Alva, O. T. Land Office, and that on the 29th day of April, 1903, Charles W. Byers filed his affidavit of contest against said entry alleging that said entry was fraudulent as above stated.

It is further agreed and admitted that prior to the initiation of this contest the said defendant did on the 23rd day of January, 1903, sell and convey by warranty deed to one Hiram C. Bensing the SW. ¼, section 32, T. 25 N., R. 12 W., O. T., which he had received patent for April 30, 1899, the consideration being $3,000.00.

It is agreed that Jacob Bonewits made homestead entry No. 1214 at the Alva, O. T., United States Land Office for the SW. ¼, section 32, T. 25, R. 12, that he made final proof for the said tract, under the commuted provisions of the homestead laws and received final certificate dated April 17, 1899, and that patent was issued to him for said tract dated September 30, 1899. That there was real estate mortgage against said tract as follows: One of $600 dated February 15, 1902; one of $2,000 dated November 8, 1902. It is agreed that Jacob Bonewits acquired title to the above tract and received patent therefor under the commuted provisions of the homestead laws.

It is agreed that when Jacob Bonewits made homestead entry No. 13800 on November 5, 1902, for the tract in dispute, that he made the said entry in perfect good faith, believing that he had a legal right to make said entry. That both the register and receiver of the United States Land Office at Alva, O. T., assured him that he had a perfect right to make said entry under the act of Congress of May 22, 1902 (Public, No. 122), entitled "An act to allow the commutation of and second homestead entries in certain cases," set forth in circular of the General Land Office, dated June 18, 1902, "C." That at the time Jacob Bonewits made this second entry, the register and receiver of the Alva, O. T., United States Land Office assured him that under this act of Congress he had a right to make and perfect this last entry.

It is agreed that Jacob Bonewits on the 23rd day of January, 1903, two months before the contest affidavit in this contest was filed, had no interest in the SW. ¼, section 32, T. 25 N., R. 12 W., his commuted entry, or in any other tract of land except the tract covered by homestead entry 13800. That at the time Jacob Bonewits made entry on the tract in dispute here, he stated in his homestead affidavit

that he had made a prior entry and that he gave the number, date, office where made, and other data, concerning his former entry, to wit: Homestead entry No. 1214, Alva, O. T., United States Land Office.

It is agreed that Bonewits purchased the improvements on the tract in dispute here from Israel F. Byers, the father of the contestant herein, and that the said Israel F. Byers relinquished the said tract, NW. ¼, 6-24-12, on November 5, 1902, a few moments before Bonewits made his entry, the consideration being $2,500.00.

The register and receiver recommended that the contest be dismissed. On appeal, your office, April 14, 1905, affirmed that action, and on failure to further appeal, the case was closed August 18, 1905.

July 25, 1905, James P. Grove filed a contest against said entry, alleging the same cause as given by Byers in his contest, as aforesaid.

The register and receiver rejected the affidavit on the ground that the allegations contained therein were the same as those contained in the contest of Byers *v.* Bonewits, which last-named contest had been already adjudicated.

On appeal, your office, January 29, 1906, affirmed the action of the register and receiver, and Grove's further appeal, filed February 19, 1906, brings the case here.

The reason given by your office for dismissing the contest, viz., that the issue sought to be raised by contestant "has been tried and determined and can not be made the basis of a second contest," is not tenable. It is true that in the case of Byers *v.* Bonewits, involving a contest against the same entry, the same charge was made as in this contest, but your office dismissed Byers's contest by reason of his "unconscionable manner," bad conduct, and "the peculiar circumstances surrounding the case."

Your office disclaimed any intention of passing upon the legal questions raised on the appeal. No charge of bad faith or improper conduct is made against contestant in this case. The appeal raises a direct question of law not passed upon by your office.

Grove's contest herein charges specifically that at the date, November 5, 1902, claimant made the entry, he was the proprietor of one hundred and sixty acres of land in Woodford county, Oklahoma, being the SW. ¼, Sec. 32, T. 25 N., R. 12 W.; that the entry was therefore fraudulent, etc.

Section 20 of the act of May 2, 1890 (26 Stat., 81), provides that:

> No person who shall at the time be seized in fee simple of a hundred and sixty acres of land in any State or Territory shall hereafter be entitled to enter land in said Territory of Oklahoma.

It is admitted that claimant was the proprietor of 160 acres, being the said SW. ¼ of section 32, at the date (November 5, 1902) he made the entry herein, but that he had sold that land before the contest herein was filed. It is further admitted that he m e the entry herein in good faith; that when he did so, he disclosed the fact that he

was then the proprietor of 160 acres of land, and that the register and receiver then assured him that he had a perfect right to make the entry under the provisions of the act of May 22, 1902 (32 Stat., 203). It is clear therefore that the charge of fraud made in the contest affidavit herein can not be shown.

It is contended, however, that under the provisions of the act of May 2, 1890, *supra*, Bonewits, the entryman, was clearly disqualified.

There can be no doubt that such would be the case, but for the provisions of the act of May 22, 1902, *supra*, which read as follows:

> 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 17th, 1900, 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.

The land first entered and patented to Bonewitz was, as above stated, a portion of the Cherokee Outlet, Indian lands. As the law existed in 1899, when he received patent therefor, he was required to pay for it. The act of May 17, 1900 (31 Stat., 179), known as the free homestead law, relieved subsequent entrymen of these Indian lands from paying for them, and provided that patents should issue therefor after residence for the period required by law upon payment of the usual fees and commissions—the right of commutation, however, being preserved.

The act of June 5, 1900 (31 Stat., 267), followed, giving the right to persons who had theretofore made homestead entry and commuted the same to enter other lands "as though such former entry had not been made," commutation, however, being denied. The act of May 22, 1902, above quoted, gave "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" (Thomas L. Bowdon, 32 L. D., 135). The class of persons specified as being entitled to the right thus given are those who had entered Indian lands and acquired title thereto by paying for them prior to the passage of the free homestead law, and who would have been entitled to the benefit of the free homestead law had they not made final entry before the passage of said act.

Claimant herein was of that class of persons contemplated by the act quoted. If the act of May 22, 1902, gave a "new and independent right to make homestead entry," as held in the Bowden case above cited, also in case of Otto Hansen (32 L. D., 505), and if, as held in latter case, the said act entitles one situated as claimant herein was "to the full quantity of one hundred and sixty acres without condition, qualification or restriction other than such as is prescribed by the act," it would follow that claimant was a qualified entryman and

entitled to make entry of the land in controversy, notwithstanding he was, at date of entry, the proprietor of one hundred and sixty acres of land in Oklahoma.

The act of May 22, 1902, does not contain any prohibition against an applicant for its privileges who owns 160 acres of land. It was past by reason of the peculiar and unusual conditions growing out of the free homestead law, and the act of June 5, 1900, *supra*. It placed all persons on an equal footing. The act was in a sense remedial. It is not believed by the passage of the act that Congress intended that one who had entered and paid for Indian lands must sell the same before he could be qualified to take advantage of its provisions. The act does not so state. To so construe it would be to subvert one of the purposes of Congress in its passage.

It follows, that as the act quoted gives a new and independent right to the class of persons named, which right is without restriction or qualification, the previous act of May 2, 1890, *supra*, was, to the extent of the class described in the act of May 22, 1902, superseded by the later act.

The action of your office rejecting the contest affidavit herein is affirmed.

SCHOOL LAND—SETTLEMENT ON UNSURVEYED SCHOOL SECTION.

STATE OF SOUTH DAKOTA *v.* THOMAS.

A settler upon unsurveyed public land who fails to assert his claim within three months after the filing of the township plat of survey does not thereby forfeit his settlement right in favor of the State's claim to the land under its school land grant.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *September 21, 1906.* (F. W. C.)

The Department has considered the appeal of the State of South Dakota from your office decision of November 14, 1905, dismissing its protest filed against the homestead entry of Mark S. Thomas, so far as the same covers the N. ½ NE. ¼, Sec. 16, T. 5 S., R. 5 E., B. H. M., Rapid City, South Dakota.

The tract in question is within the limits of the Black Hills forest reserve, created by proclamation dated September 19, 1898. The survey of the township was completed on November 12, following, approved May 23, 1899, and the township plat of survey was filed in the local land office on April 10, 1900. February 28, 1903, Mark S. Thomas filed an affidavit, accompanying a homestead application, in which he alleged settlement upon the tract above described, together with the S. ½ SE. ¼, Sec. 9, adjoining land, March 1, 1892; that he had at that time an actual *bona fide* settlement upon the land and had established a residence thereon with the intention of making the same his

home, which residence has since continued; that he had upwards of fifteen acres under cultivation, with improvements consisting of a barn, thirty-two by seventy-five feet, a farm house, fourteen by eighteen feet, shed, twenty-four by ninety feet, chicken-house, fourteen by eighteen feet, and two miles of fencing, the reasonable value of the same being placed at $1,000; and that his failure to make earlier assertion of his claim was alleged to be because of the great distance from the land office and the inconvenience of getting there. He was permitted to make homestead entry of the land on March 7, 1903, and, after due notice by publication, submitted final proof on April 20, 1903, upon which final homestead receipt and certificate issued. No appearance was made by the State at the time of the offering of final proof, but its protest was filed in response to a notice issued by your office August 7, 1905.

The protest questions Thomas's alleged residence upon the land and compliance with law, calling attention to the fact that the township plat of survey made no note of his improvements; and further objected to the allowance of his entry, assuming that he settled and resided on the land as alleged, because of the fact that he did not make timely assertion of his claim within three months after the filing of the township plat of survey. Your office decision holds that he is protected by the remedial provisions of the act of April 15, 1902 (32 Stat., 106), referring particularly to the ruling of this Department in the case of Hiram H. Ruby.

By section 11 of the act of February 22, 1889 (26 Stat., 676), which act made a grant of sections sixteen and thirty-six to the State of South Dakota in support of common schools, provides that—

> Such lands shall not be subject to pre-emption, homestead, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

It has been many times claimed by the State in cases pending before this Department that the effect of this language was to vest a title in the State to all sections sixteen and thirty-six in each township at the date of the admission of the State, without regard to whether the land had been at that time identified, by the extension of the lines of public survey over the same, as portions of such sections or not, but such contention has never been acceded to by this Department.

It was said in the departmental decision of May 21, 1904 (not reported), in the case of South Dakota *v.* Hiram H. Ruby, that—

> It will be noted that no provision was made for the protection of settlers upon such sections sixteen and thirty-six prior to the survey thereof, but such a provision is found in the act of February 28, 1891 (26 Stat., 796), amending sections 2275 and 2276 of the Revised Statutes, and said act of 1891 has been uniformly construed by this Department as being a general adjustment act applying alike to all school grants to the several States and Territories, and in the instructions of April 22, 1891 (12 L. D., 400), it was held that the provisions of the act of February 22, 1889, *supra*, in

so far as in conflict with sections 2275 and 2276 of the Revised Statutes, as amended by the act of February 28, 1891, are superseded by the provisions of said amended sections and that the grants of school lands provided for in the act of 1889 should be administered and adjusted in accordance with the later legislation. See also State of Washington *v.* Kuhn (24 L. D., 12).

The school grants made by the act of 1889 have been since administered under those holdings, which clearly negatives the idea that the grant made by the act of 1889 was a present grant of sections not identified by the public survey at the time of the State's admission into the Union, but rather that such grant had no binding effect until the survey of the townships and the designation of the specific sections granted. In applying the protective features of the act of 1891 in favor of settlements made upon school sections prior to survey, the Department in effect has held that the reservation, by the act of 1889, of school sections, whether surveyed or unsurveyed, does not preclude the power of Congress to make other disposition of the lands prior to the time when this State's title may become complete, viz., upon their identification by the lines of the government survey.

Section 2275 of the Revised Statutes, as amended, provides that—

where settlements, with a view to preemption or homestead, have been or shall hereafter be made before survey of the land in the field, which are found to have been made on sections sixteen or thirty-six, these sections shall be subject to the claims of such settlers.

In the administration of the school grants this Department has held that the protection thus accorded to settlements made upon school sections before their identification, is a saving clause only, that it protected such settlers in their rights initiated prior to survey, but if they failed in the completion of their claims the State's title remained unaffected thereby. At the same time, the State has never been held to be bound to await the action of the settler, but may immediately, upon the filing of the township plat of survey, select other lands in lieu thereof under the indemnity provisions of its grant where the land is at that time covered by a *bona fide* settlement claim. The law clearly subjects lands so settled upon to the claim of such settler, and any question governing the formality of the assertion and completion of title under such settlement is clearly a matter between the United States and the settler. As repeatedly held by the courts, "the law deals tenderly with one who, in good faith, goes upon the public land, with a view to making a home thereon." (Ard *v.* Brandon, 156 U. S., 537, 543.) For the protection of other settlers under the public land laws, it is provided that those settling upon the public lands must make assertion of their claims within a given time or forfeit the same to the next settler in order of time who shall comply with all the provisions of the law, but this forfeiting provision in favor of the next settler in order of time has never been applied by this Department in favor of a grantee claimant. It must be held therefore that Thomas did not forfeit his homestead claim by failing to make formal entry in the local land office within three months after the filing of the township plat.

Altho the protest questions Thomas's proof of settlement, residence and improvement prior to survey, no question is raised in the appeal, and in view of the substantial character of the improvements as shown by his final proof, submitted without protest or objection, it is deemed unnecessary to further notice this feature of the case. Under the rulings herein referred to it becomes also unnecessary to inquire whether Thomas comes within the remedial provisions of the act of April 15, 1902, *supra*.

The entire matter considered, the decision appealed from is affirmed, and Thomas's entry, if otherwise regular and his proof satisfactory, will be passed to patent.

MINING CLAIM—VERIFICATION OF AFFIDAVITS—NOTARY PUBLIC.

MILFORD METAL MINES INVESTMENT COMPANY.

The mere fact that the application for patent to a mining claim and the affidavit as to the posting of notice on the claim, executed by the duly authorized agent of a corporation, were verified before a notary public who was also secretary of the corporation, is not sufficient reason for requiring new application and affidavit, unless the notary public was at such time also a stockholder or otherwise beneficially interested in the corporation.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *September 21, 1906.* (G. N. B.)

May 14, 1903, the Milford Metal Mines Investment Company made entry for the Paradox, and Paradox No. 1 lode mining claims and the Paradox and Moloch mill sites, survey No. 4976 A and B, Salt Lake City, Utah.

February 3, 1905, your office directed the local officers to notify the company that it must furnish, amongst other things not necessary to be considered here, a new application for patent and a new affidavit as to posting of plat and notice on the claim, because the application and affidavit, executed by a duly authorized agent of the company, were verified before S. J. Bryan, a notary public, who is also secretary of the corporation. It was stated in your office decision that—

> It is the practice of the Department not to accept affidavits verified before a notary when the latter is an interested party in the affidavit, as the notary public appears to be in the case under consideration.

It was also stated that the agent of the company—

> must be considered as having acted for and in behalf of S. J. Bryan, secretary of the company, in making said affidavits. The act of the secretary in administering the oaths to the agent as aforesaid is equivalent to administering the oaths to himself; and, in order that an official's acts may be entitled to due faith and credit, they must be free from personal interest.

Subsequently the local officers forwarded a communication from an attorney of the company in which, amongst other things, it is stated that the required application and affidavit would be furnished as soon as practicable.

By decision of July 13, 1905, your office, citing the departmental decision of June 15, 1905 (unreported), in the case of the Frazier Borate Mining Company *v.* Calm, on review, held the entry for cancelation for the stated reason, in effect, that the secretary of the company was disqualified to act as notary in the premises; that his attempt to verify the application and affidavit was therefore without authority under the law and of no effect, and that the defect was one which could not be cured by filing new papers properly verified.

The company has appealed to the Department.

In the Frazier Borate Mining Company case, *supra*, the question of the verification of an application for patent to a mining claim and the verification of an affidavit as to posting plat and notice on the claim, was, amongst other things, under consideration, and it was therein stated that—

> Neither section 2335 of the Revised Statutes, nor any other provision of the mining laws, authorizes the verification of applications for patent or affidavits such as here involved otherwise than before an officer authorized to administer oaths within the land district where the claim is situated. The attempted verification of the application and affidavit in question before an officer acting without authority under the law, was of no more legal effect than if no attempt at verification had been made; and the notice published by the register based upon such application and affidavit, being without legal foundation, was fatally defective. The case was therefore not one of mere irregularity, or one which presented defects that might be cured by supplemental proceedings. The notice being invalid, the entry can not stand. (Southern Cross Gold Mining Company *v.* Sexton *et al.*, 31 L. D., 415.)

The question here is: Was the secretary of the company acting without authority under the law when he verified the application for patent and the affidavit as to posting plat and notice on the claim?

It appears from the record that the notary public who verified the affidavits and the secretary of the company are one and the same person. It also appears that as notary public he was commissioned to act in and for a county within the land district in which the claims are situated; that the oaths were regularly administered by him to the agent of the company; and that he attested the verification of the affidavits.

The propriety of the rule that oaths and affirmations should be taken before officers who are disinterested and unbiased is too manifest to require discussion. Peck *v.* The People (153 Ill., 454). But the mere fact that the notary is an officer of a corporation will not, however, disqualify him from taking an acknowledgment in favor of such corporation unless it be also shown that he is a stockholder or otherwise beneficially interested. (Amer. and Eng. Ency. of Law, 2nd Edit.,

Vol. 21, p. 569, and cases there cited.) In the case of Horbach *v.* Tyrrell *et al.* (48 Neb., 514; 67 N. W. Rep., 485), it was held that a notary public is not disqualified from taking an acknowledgment of a mortgage made to a corporation merely because it is shown that he was at the time secretary and treasurer of the mortgagee, it not appearing that he was a stockholder in such corporation or otherwise beneficially interested in having the mortgage made. In discussing the case the court said:

> Was the acknowledgment of Mr. and Mrs. Tyrrell to the mortgages on their homestead, taken by the notary public void because of the fact that such notary public was then and there the secretary and treasurer of the mortgagee? There is no evidence in the record that this notary public had any interest whatever in the corporation mortgagee. No law of this state requires that a secretary or treasurer of a corporation shall be a stockholder thereof, and simply because the evidence shows that a person is secretary and treasurer of a corporation, the court ought not to presume that he is therefore a stockholder in such corporation. Bank *v.* Rivers (Fla.) 18 South., 850. What interest and what relationship possessed by an officer disqualifies him from taking an acknowledgment of a conveyance of real estate? We have not been cited to any authority, nor have we been able to find one, which lays down, or attempts to lay down, any rule which will afford in all cases a safe test for determining whether an officer is disqualified, by reason of his relationship or interest, from taking acknowledgment in any particular case. Whether such disqualification exists in any case must be determined from the peculiar facts and circumstances of that case.

By parity of reasoning it does not appear that the verification of the affidavits in this case should be held void merely because the notary was secretary of the corporation. The record shows that the appellant company is a corporation organized under the laws of the State of Utah. No statute of that State has been found which requires that a secretary of a corporation shall be a stock-holder therein. Furthermore, it is stated in the appeal that the secretary of the appellant company is not a stock-holder, and that he is merely employed to act as such officer.

Officers of corporations are merely the agents thereof (Burr *v.* McDonald, 3 Gratt., Va., 215), and a secretary of a corporation, outside his duties as such officer, can only act for it under a special power. Thompson on Corporations, Vol. 7, par. 8551. The agent who executed the affidavits in question acted, as shown by the record, under a special power of attorney regularly given by the board of directors of the corporation. The administration of the oaths to him by the notary public, who is secretary of the corporation, was in no sense equivalent to administering such oaths to the latter. The agent was not appointed by such secretary and did not act for him. In verifying the affidavits the secretary did not and could not act as an officer of the corporation. He acted therein by virtue of his appointment as notary public, a public function entirely separate and apart from any relation to, or connection with, the corporation.

Whilst it is a practice, which should be discouraged, for an officer of a corporation, seeking title to the public lands, to act as notary public in verifying affidavits to be furnished as evidence for the information of the land department; and whilst in each such case your office is fully justified in calling upon the company for evidence respecting the interest of such officer in the corporation, the mere fact that a notary is secretary of a corporation does not make his act of verifying affidavits in matters before the land department, in which such corporation is interested, void, nor is that fact alone sufficient to warrant a holding that he acted without authority of law.

In this case if it be shown that the secretary of the corporation was not at the time he verified the affidavits in question a stock-holder in such corporation, or was not otherwise beneficially interested, such affidavits will be held sufficient.

The decision of your office is accordingly modified.

PETERSON *v.* PALMER.

Motion for review of departmental decision of June 18, 1906, 34 L. D., 695, denied by Acting Secretary Ryan, September 26, 1906.

REPAYMENT—DOUBLE MINIMUM EXCESS—SECTION 2, ACT JUNE 16, 1880.

WILLIAM F. BROWN.

Where a tract of land was at the date of entry and purchase thereof within the limits of the withdrawal upon the map of general route of a railroad, and properly rated as double-minimum land, and the portion of the grant within which the tract is situated was subsequently forfeited, and the price of lands therein reduced to one dollar and twenty-five cents per acre, there is no authority, under section 2 of the act of June 16, 1880, for allowing repayment of the amount paid for the land in excess of one dollar and twenty-five cents per acre.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *September 26, 1906.* (C. J. G.)

An appeal has been filed by William F. Brown from the decision of your office of April 7, 1906, denying his application for repayment of alleged double-minimum excess paid by him on cash entry No. 1907, made March 28, 1884, for the NW. ¼ of Sec. 8, T. 2 S., R. 27 E., Oregon City, Oregon.

Repayment is claimed under section 2 of the act of June 16, 1880 (21 Stat., 287), which provides:

and in all cases where parties have paid double-minimum price for land which has afterward been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to the heirs or assigns.

"It has uniformly been ruled by this Department that the proper construction of said section makes the condition at the time of the entry the criterion in determining the question as to whether repayment should be made under said section." Luretta R. Medbury (25 L. D., 308). The tract embraced in Brown's entry was at the date of his purchase within the limits of the withdrawal upon the map of general route of the Northern Pacific Railroad between Wallula, Washington, and Portland, Oregon, *via* the valley of the Columbia river. The grant for said railroad was made by the act of July 2, 1864 (13 Stat., 365), and the map of general route was filed by the company August 13, 1870. The line was never definitely located opposite the tract in question, but by section 6 of the granting act it was provided that "the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale," thus increasing the price of the even-numbered sections in the limits upon the map of general route. The portion of the road opposite the tract in question was never constructed, and by section 4 of the act of March 2, 1889 (25 Stat., 854), it was provided:

> That the price of all sections and parts of sections of the public lands within the limits of the portions of the several grants of lands to aid in the construction of railroads which have been heretofore and which may hereafter be forfeited, which were by the act making such grants or have since been increased to the double-minimum price, and also of all lands within the limits of any such railroad grant, but not embraced in such grant, lying adjacent to and coterminous with the portions of the line of any such railroad which shall not be completed at the date of this act, is hereby fixed at one dollar and twenty-five cents per acre.

Thus the price of even-numbered sections was by said act of 1889 reduced to one dollar and twenty-five cents per acre. The grant to the Northern Pacific railroad, in question, was forfeited by the act of September 29, 1890 (26 Stat., 496). But at the time Brown made his cash entry, to wit, March 28, 1884, the price of the land had not been reduced nor had the grant to the railroad company been forfeited; hence the land was properly rated at two dollars and fifty cents per acre. Therefore the section of the repayment act of 1880 under which the present claim is made, is not applicable to the facts. The Supreme Court in the case of Medbury *v.* United States (173 U. S., 492, 499), said:

> Whatever may have been the reason of Congress in making the charge of $2.50 per acre the minimum price for alternate sections along the line of railroads within the place limits of the grant, the meaning of the act of 1880 is not in anywise affected thereby. That act plainly referred to the case of a mistake in location at the time when the entry was made. Where the parties supposed that the land entered was within the limits of the land grant, and where subsequently it is discovered that the lands were not within those limits, that a mistake had been made, and that the party had not obtained the lands which he thought he was obtaining by virtue of his entry, then the act of 1880 applies.

Here no mistake whatever has been made. The lands were within the limits of the land grant at the time of the entry, and so remained for many years and up to the time of the act of forfeiture by Congress.

See also in this connection cases of Thomas Kearney (7 L. D., 29); Byron Allison (19 L. D., 458); and especially James S. Elliott (25 L. D., 309), involving land similarly situated to that in the case under consideration.

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

HOMESTEAD—SOLDIERS' ADDITIONAL—SECTION 2306, R. S.

FIDELO C. SHARP.

A homestead entry allowed upon an application executed outside the land district wherein the land is located is not for that reason void, but voidable merely, and furnishes a sufficient basis for a soldiers' additional right under section 2306 of the Revised Statutes.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *September 27, 1906.* (E. O. P.)

Fidelo C. Sharp, claiming as assignee of William E. Smith, has appealed to the Department from your office decision of June 22, 1906, denying his two separate applications to enter, under the provisions of section 2306, Revised Statutes, the NE. ¼ SE. ¼, Sec. 26, T. 26 N., R. 44 E., M. M., and lot 1, Sec. 12, lot 1, Sec. 15, same township and range, Miles City land district, Montana.

The right claimed is based upon the alleged military service of said Smith and original homestead entry made by him February 7, 1867, for the E. ½ SE. ¼, Sec. 7, T. 39, R. 4, Boonville land district, Missouri, which entry was canceled for abandonment, after contest, March 23, 1871.

By your office decision of March 30, 1906, the application under consideration was rejected for the reason that no sufficient showing had been made to establish the identity of the soldier and original entryman. Motion for review of said decision was filed and a supplemental showing was made in connection therewith, which was considered by your office sufficient to overcome the objection upon which your prior decision was based, but in the decision appealed from your office refused to disturb the action previously taken for the further reason that—

The preliminary homestead affidavit on which said Boonville, Missouri, entry was allowed on February 7, 1867, was executed before the clerk of the court of common pleas at Aurora, Illinois, on February 1, 1867.

As there is no provision in law under which the preliminary homestead affidavit may be made outside the land district in which the land applied for is located (See

Sec. 2294, R. S.), and assuming that said soldier executed said affidavit as alleged by him, the entry allowed thereon in the Boonville, Missouri, land district, was illegal, and does not therefore constitute a proper basis for the right claimed.

The Department concurs in the finding of your office embodied in the decision appealed from that the evidence now before it is sufficient to establish the identity of the soldier and entryman. This leaves only the question of the sufficiency of the original entry, allowed upon an application of the character described, as a basis for the additional right claimed.

That there was an entry made is not controverted. The application upon which it was based was irregular and might properly have been rejected because not executed in accordance with law, but the entry, after allowance, was not absolutely void. It was only voidable, and the party with whom the avoidance thereof rested was the government and not the entryman. This view accords with the rule announced by the Department in the case of Hollants *v.* Sullivan (5 L. D., 115, 118), where a similar state of facts was presented and wherein it was held that—

> The ground of the objection to the affidavit is that it was made before a clerk of the court, under section 2294 of the Revised Statutes, whereas it could not legally be so made, for the reason that neither Sullivan nor any member of his family were then residing on the land.
>
> Admitting the fact to be as charged, such irregularity could be cured by the filing of a properly-executed affidavit, and would not render the entry void, but only voidable; and said entry being on its face valid, segregated and appropriated the land covered thereby, so long as it remained of record.

In the case of John S. Owen (32 L. D., 262, 264) the method of determining whether or not the original entry made by the soldier constitutes a sufficient basis for an additional right was thus outlined:

> 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 an *entry* for a less amount, but whether or not he had thereby *exhausted his right.*

In the case last cited the entry originally made was voidable at the *election of the entryman*, which election was never made. In the case at bar the entryman had no election, that right resting alone with the government, and the proper exercise thereof dependent upon notice to the claimant. The entryman, however, was entitled to no more than an opportunity to remedy the defect which rendered his entry voidable, and if after being offered such opportunity he had failed to respond and his entry had been canceled, he could not thereafter have asserted a right to make another entry upon the ground that he had not exhausted his homestead right. Had the entry been arbitrarily canceled without notice because of the defective affidavit, his homestead right might, and probably would, have been restored. But the

very idea of restoration presupposes exhaustion and whatever the rights of claimant in this respect may have been does not alter the fact that by actual entry the right was exhausted.

There being no right of election in the entryman to avoid the effect of an entry made under such circumstances, and that entry having been canceled for other reasons, attributable solely to his failure to comply with the law, and after due notice to him, he would not after cancelation upon such grounds be permitted to allege the voidability of his entry as ground for the restoration of his homestead right.

It follows from what has been said that Smith, by making his original entry, though voidable, but which was canceled for other reasons, attributable solely to his failure to comply with the law, falls within the doctrine announced in the case of John S. Owen (*supra*), for the reason that he had, in fact, made an entry, and by so doing he exhausted his homestead right. This being true the original entry made by him constitutes a sufficient basis for the assertion of the additional right conferred by section 2306 of the Revised Statutes.

The assignment of the said right to the present holder thereof being in other respects regular, his application to exercise the same should be granted.

The decision appealed from is accordingly hereby reversed.

DESERT-LAND ENTRY—FINAL PROOF—WATER RIGHT.

DAVID H. CHAPLIN.

The fact that it appears from the final proof that the water right of a desert-land entryman, relied upon to effect reclamation of the land embraced in his entry, is encumbered by a mortgage to secure the balance of the purchase price of said right, will not justify rejection of the proof, on the ground that the entryman has not "an *absolute* right to sufficient water to successfully irrigate the land," within the meaning of the departmental regulations, where it appears that the entryman is acting in good faith and the proof is in all other respects satisfactory.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *September 29, 1906.* (E. O. P.)

David H. Chaplin has appealed to the Department from your office decision of April 12, 1906, holding for cancelation his desert-land entry for the SE. ¼, Sec. 34, T. 14 S., R. 13 E., NE. ¼, Sec. 3, T. 15 S., R. 13 E., Los Angeles land district, California, in the event he failed to submit further and more satisfactory proof that he had an absolute right to sufficient water to properly irrigate the land.

The entry in question was made October 2, 1901. Final proof was submitted thereon June 20, 1904, at which time it developed that the water right of Chaplin had been mortgaged, together with the land embraced in his entry, to secure the balance of the purchase price of said right, viz., $6,000. In a supplemental affidavit filed with the

appeal Chaplin alleges that the mortgage debt has been reduced to $2,000. He further asserts that, by reason of the terms of his agreement with the mortgagee, he could not pay the balance due even if he were financially able to do so, and can not therefore meet the requirements imposed by your office by removing the incumbrance. It is this lien upon the water right which your office holds qualifies and destroys the "absolute" character of the ownership thereof.

The only question presented is one touching the nature or quality of the ownership of the right in question, which must be vested in the entryman at the time he submits final proof, in order that such proof may meet the essential requirements of the law under which the entry was made. If the proof offered is sufficient for this purpose it must be accepted.

The statute itself nowhere directly defines the nature of the interest in the water right which must be possest by the entryman. It prescribes the amount which shall be expended in the reclamation, etc., of the land and recognizes expenditures made in the acquisition of a water right as a part of the aggregate amount specified. The requirement that the entryman have an "absolute" right to sufficient water to reclaim the land is not found in the language of the statute, but the term is used in departmental circular of February 17, 1904 (32 L. D., 456), in defining the nature of the ownership in the right to the water. It is stated therein—

> That the entryman has an *absolute* right to sufficient water to successfully irrigate the land . . . . are essential facts which must in all cases be clearly established by the proofs.

A correct disposition of the case under consideration depends upon a proper determination of the meaning of the word "absolute" as used in said circular. The circular referred to must be construed in the light of the statute upon which it rests and which it was intended to explain from an administrative point of view. Unless the proper administration thereof requires a narrow or technical construction of the term such interpretation is unwarranted.

Blackstone (Cooley Ed., Vol. 1, Book 2, p. 387) defines the term absolute in its relation to personalty as that—

> where a man hath, solely and exclusively, and also the occupation of any movable chattels; so that they cannot be transferred from him, or *cease* to be his, *without his own act or default.*

As applied to the ownership of realty the term is equally broad.

> Now what does "sole owner" mean, or what did the parties understand thereby? Evidently, we think, they meant, and must have understood, that the assured had a fee-simple title. "Sole owner" must mean, it seems to us, that no one else has or owns an interest in the real estate. If one should state that he was the sole owner of real estate, describing it, the hearer would understand that he owned all there was or could be owned; that no one else had any interest therein. If one should covenant in a deed that he was the sole owner of the real-estate, such a cove-

nant would be broken if he owned a life-estate only. There is no distinction between "sole owner" and the owner of an "absolute interest" in real estate. A sole interest and *absolute* interest mean the same thing. [Garver, administrator *v.* Hawkeye Ins. Co. (69 Iowa, 202).]

See also Words and Phrases Judicially Defined (Vol. 1, 39) and cases cited.

The terms "vested" and "absolute" are often, as applied to realty, used as meaning the same in law.

If the nature of the *interest*, ownership or estate which may be had in real property, as above described, is considered it will be found that it is divided into *vested* and contingent . . . . according as it is *absolute* or uncertain. [Washburn Real Prop., 4th Ed., Vol. 1, p. 34.]

Unless administrative policy clearly requires a different application of the term, its use in a sense more restricted than that adopted by the courts would amount to little less than a curtailment of the rights conferred by the statute thru the instrumentality of "judicial legislation." Such a result is to be carefully avoided at all times, even in construing the specific language of the statute, and where it is likely to follow from a narrow construction of a term *not used* in the act itself, but only adopted and applied by the administrative department as a necessary incident to the correct application of the law, such construction is all the more to be avoided.

In the opinion of the Department the definition of the term adopted and followed by the courts need not be limited in order to compel a strict compliance with the law in cases similar to the one under consideration. Under that definition and the laws of the State of California it is clear the owner of property does not by mortgage divest himself of any interest therein nor change the nature or character of his ownership. A lien only is created by mortgage and the rights of the mortgagor to the control, possession and disposition of the mortgaged property cannot be defeated except by default and foreclosure. The mortgagor's interest cannot be disturbed "without his own act or default." His interest, if absolute before the giving of the mortgage, remains the same until defeated by foreclosure. The vesting of the estate or interest in Chaplin was not prevented by the giving of the mortgage at the time of purchase. His interest in the right is an absolute one within the definition of Blackstone.

The absolute interest referred to in departmental circular of February 14, 1904, *supra*, was not intended to mean an interest whose perpetual continuance in the claimant was assured. Reference was rather to the land itself, the aim being to require a showing that a sufficient, permanent water supply had been obtained for the purposes of reclamation, regardless of whether the ownership thereof might or might not remain forever in the claimant. If the water and the right be annexed to the land the continued ownership thereof by the original

claimant is immaterial and not to be expected. The question, moreover, is largely one which must be considered in connection with the facts presented by each particular case. Though the right were legally vested in the claimant but so encumbered as to raise a suspicion touching the good faith of the transaction which the other facts tended to confirm, the good faith of the claimant would become the subject of inquiry, which proof or disproof of *bona fide* ownership of the water right would tend to establish or refute.

However, in the case at bar, the other facts disclosed clearly evidence the good faith of the claimant. His expenditures have been far in excess of the amount required by the statute. Nearly the whole area covered by his entry is under cultivation and he is evidently making an honest attempt to remove the lien against the land and the water right. In view of all this, the Department is of opinion his showing with respect to the ownership of the right to sufficient "water to successfully irrigate the land" is sufficient, and in the absence of other objection the proof offered should be accepted.

The decision appealed from is accordingly hereby reversed.

SOLDIERS' ADDITIONAL APPLICATION—WITHDRAWAL FOR FORESTRY PURPOSES.

BLAIR BURWELL.

An application to make soldiers' additional entry, in attempted substitution for a similar application theretofore filed and rejected for invalidity, can not be accepted in the face of an intervening withdrawal for forestry purposes; nor can the original invalid application, held for rejection prior to the creation of the forest reserve embracing the land, be regarded as a "lawful filing" within the meaning of the exception in the proclamation establishing the reserve.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *September 29, 1906.* (C. J. G.)

An appeal has been filed by Blair Burwell from the decision of your office of February 21, 1906, rejecting his application to enter, under section 2306 of the Revised Statutes, the SE. ¼ SE. ¼, Sec. 8, and SE. ¼ SE. ¼, Sec. 16, T. 37 N., R. 5 W., Durango, Colorado.

February 21, 1903, Burwell, as assignee of John W. Mann, made application to enter the above-described tract, based on Mann's service in the army of the United States and homestead entry alleged to have been made by him in 1870 at Washington, Arkansas. October 12, 1904, your office rejected the application on the ground that the identity of the soldier with the homestead entryman had not been sufficiently established. Altho Burwell was afforded opportunity for appeal, and extension of time was, upon request, granted within which to procure and submit "new and additional evidence" in support of his application, no further action appears to have been taken by him

along those lines. September 26, 1905, the local officers transmitted an application by Burwell, as assignee of Levi W. Simmons, to make soldiers' additional entry of the tract originally applied for, based on the military service of said Simmons and homestead entry made by him in 1866 at Topeka, Kansas. After reciting the fact of his original application and its rejection by your office, Burwell stated that he desired to file his application, based on Simmons's right, in substitution for the rejected application made as assignee of Mann, and asked that the same be considered as of the date of the original application, "in accordance with the case of Robeson T. White, 30 L. D., 61." He also asked that all papers in connection with the Mann case be returned to his attorney, reserving the right to subsequently locate Mann's soldiers' additional right on other lands, provided proper showing should be made in conformity with the requirements of your office.

In the decision appealed from your office held that by reason of the substituted application the decision of October 12, 1904, rejecting the application of Burwell based on the Mann right, became final, said application finally rejected, and as the validity of said right had not been established, refused the request for the return of the papers.

The township in which the land in question is situated was reserved April 2, 1903, for the San Juan forest reserve, and was permanently withdrawn for such purpose by executive proclamation of June 3, 1905, in which were excepted from the force and effect of said proclamation—

> all the lands which 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 particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing or settlement was made.

Your office rejected the application based on the Simmons right for the reason—

> The first above described application was filed in your office on February 21, 1903, which was prior to said temporary withdrawal and to the President's proclamation of June 3, 1905, but as the alleged soldier's right upon which it was based is invalid, it was not a "lawful filing" and can therefore have no effect to except the land covered thereby from said permanent withdrawal, and as said substituted application was filed subsequent to such withdrawal, it can have effect only from the time it was filed in your office, September 23, 1905, at which time the land was no longer subject to such appropriation. See Peter M. Collins, 33 L. D., 350.

In the appeal here it is urged that the filing of the substituted application by Burwell was not a new application or an abandonment of his former application; that he merely submitted a valid consideration to be applied on the old application in place of the original consideration offered and found to be bad. In this contention the White

case, *supra*, is cited and relied upon exclusively. A careful examination will disclose a clear distinction between the facts of the two cases. In the White case the claimant had a preference right of entry under the act of May 14, 1880 (21 Stat., 140), by reason of a successful contest of a former entry. In an attempt to exercise this preference right White used the soldiers' additional right of one Carver, which was in fact valid, but as there was some question as to its validity, he tendered as a substitute the additional right of one Pugh, which was also valid. Your office held that tender of the Pugh right was a waiver of White's claim under the Carver right, and that therefore the intervening settlement of one Moran defeated entry under the Pugh right. The Department held that the intention to claim benefit of and attempt to exercise his preference right was the material and controlling fact in White's case; that "in what manner or by what consideration the government should be satisfied for the land was only matter of incident to the essential and principal thing—the exercise of his preference right of entry;" that having claimed and exercised his preference right, rights under the Carver certificate were not abandoned by the tender of the Pugh certificate when question arose as to the validity of the former; that had the Carver right been in fact invalid White would be allowed to save his preference right and cure such invalidity by substituting a good consideration; and that as he had been misled into giving two considerations for his entry, he might withdraw either. The ruling in that case obviously is not controlling in this one. Here Burwell had no antecedent right in the attempted exercise of which he made his original application. Besides, at the time White applied to substitute, no action had been taken on his original application, while here the former application of Burwell had been finally rejected prior to the withdrawal of the land for forestry purposes. In no true sense can the first application of Burwell be regarded as a valid or lawful filing within the meaning of the exception provided for in the executive proclamation which included the land in the withdrawal for the forest reserve, for the invalidity in the additional right offered as base for said application went to the essence of the transaction, which was an original one and not in the exercise of a vested preference right. The application based on the Simmons right was necessarily a new one, the old application having been finally rejected, consequently there was no pending application at date of the creation of the forest reserve. For the same reason, said application could not be treated as an amendment of the old, and owing to the intervening withdrawal for forestry purposes, substitution either of application or consideration was absolutely inhibited. For these reasons, among others, the application of Burwell, based on the Simmons right, can not be considered as of the date of his original application.

The decision of your office herein was proper and is hereby affirmed.

SUGGESTIONS TO HOMESTEADERS AND PERSONS DESIRING TO MAKE HOMESTEAD ENTRIES.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 4, 1906.

1. Persons desiring to make homestead entries should first fully inform themselves as to the character and quality of the lands they desire to enter, and should in no case apply to enter until they have visited and fully examined each legal subdivision for which they make application, as satisfactory information as to the character and occupancy of public lands can not be obtained in any other way.

As each applicant is required to swear that he is well acquainted with the character of the land described in his application, and as all entries are made subject to the rights of prior settlers, the applicant can not make the affidavit that he is acquainted with the character of the land, or be sure that the land is not already appropriated by a settler, until after he has actually inspected it.

Information as to whether a particular tract of land is subject to entry may be obtained from the register or receiver of the land district in which the tract is located, either thru verbal or written inquiry, but these officers must not be expected to give information as to the character and quality of unentered land or to furnish extended lists of lands subject to entry, except thru plats and diagrams which they are authorized to make and sell as follows:

For a township diagram showing entered land only	$1.00
For a township plat showing form of entries, names of claimants, and character of entries	2.00
For a township plat showing form of entries, names of claimants, character of entry, and number	3.00
For a township plat showing form of entries, names of claimants, character of entry, number, and date of filing or entry, together with topography, etc	4.00

A list showing the general character of all the public lands remaining unentered in the various counties of the public-land States on the 30th day of the preceding June may be obtained at any time by addressing "The Commissioner of the General Land Office, Washington, D. C."

All blank forms of affidavits and other papers needed in making application to enter or in making final proofs can be obtained by applicants and entrymen from the land office for the district in wihch the land lies.

2. *Kind of lands subject to homestead entry.*—All unappropriated surveyed public lands are subject to homestead entry if they are

not mineral or saline in character and are not occupied for the purposes of trade or business and have not been embraced within the limits of any withdrawal, reservation, or incorporated town or city; but homestead entries on lands within certain areas (such as lands in Alaska, and lands withdrawn under the reclamation act, certain ceded Indian lands, and lands within abandoned military reservations, etc.) must be entered subject to the particular requirement of the laws under which such lands were opened to entry. None of these particular requirements are set out in these suggestions, but information as to them may be obtained by either verbal or written inquiries addressed to the register and receiver of the land office of the district in which such lands are situated.

HOW CLAIMS UNDER THE HOMESTEAD LAW ORIGINATE.

3. Claims under homestead laws may be initiated either by settlement on surveyed or unsurveyed lands of the kind mentioned in the foregoing paragraph, or by the filing of a soldier's or sailor's declaratory statement, or by the presentation of an application to enter any surveyed lands of that kind.

4. *Settlements may be made under the homestead laws* by all persons qualified to make either an original or a second homestead entry of the kind mentioned in paragraphs 6 and 13, and in order to make settlement the settler must personally go upon and improve or establish residence on the land he desires. By making settlement in this way, the settler gains an exclusive right to enter the lands settled upon as against all other persons, but not as against the Government should the lands be withdrawn by it for other purposes.

A settlement made on any part of a surveyed technical quarter section gives the settler the right to enter all of that quarter section which is then subject to settlement, altho he may not place improvements on each 40-acre subdivision; but if the settler desires to initiate a claim to surveyed tracts which form a part of more than one technical quarter section he should perform some act of settlement—that is, make some improvement—on each of the smallest legal subdivisions desired. When settlement is made on unsurveyed lands, the settler must plainly mark the boundaries of all the lands claimed by him.

Settlement must be made by the settler in person and can not be made by his agent, and each settler must, within a reasonable time after making his settlement, establish and thereafter continuously maintain an actual residence on the land, and if he, or his heirs or devisees, fail to do this, or if he, or his heirs or devisees, fail to make entry within three months from the time he first settles on surveyed lands, or within three months from the filing in the local land office

of the plat of the survey of unsurveyed lands on which he made settlement, the exclusive right of making entry of the lands settled on will be lost and the lands will become subject to entry by the first qualified applicant.

5. *Soldiers' and sailors' declaratory statements* may be filed in the land office for the district in which the lands desired are located by any persons who have been honorably discharged after ninety days' service in the Army or Navy of the United States during the war of the rebellion or during the Spanish-American war or the Philippine insurrection. Declaratory statements of this character may be filed either by the soldier or sailor in person or thru his agent acting under a proper power of attorney, but the soldier or sailor must make entry of the land in person, and not thru his agent, within six months from the filing of his declaratory statement, or he may make entry in person without first filing a declaratory statement if he so chooses. The application to enter may be presented to the land office thru the mails or otherwise, but the declaratory statement must be presented at the land office in person, either by the soldier or sailor, or by his agent, and can not be sent thru the mails.

BY WHOM HOMESTEAD ENTRIES MAY BE MADE.

6. Homestead entries may be made for a quarter section or less by any person who does not come within either of the following classes:

(a) Married women, except as hereinafter stated.

(b) Persons who have already made homestead entry, except as hereinafter stated.

(c) Foreign-born persons who have not declared their intention to become citizens of the United States.

(d) Persons who are the owners of more than 160 acres of land in the United States.

(e) Persons under the age of 21 years who are not heads of families, except minors who make entry as heirs, as hereinafter mentioned, or who have served in the Army or Navy for at least fourteen days.

(f) Persons who have acquired title to or are claiming under any of the agricultural public land laws, thru settlement or entry made since August 30, 1890, any other lands which, with the lands last applied for, would amount in the aggregate to more than 320 acres.

7. *A married woman*, who has all of the other qualifications of a homesteader, may make a homestead entry under any one of the following conditions:

(a) Where she has been actually deserted by her husband.

(b) Where her husband is incapacitated by disease or otherwise

from earning a support for his family and the wife is really the head and main support of the family.

(c) Where the husband is confined in a penitentiary and she is actually the head of the family.

(d) Where the married woman is the heir of a settler or contestant who dies before making entry.

(e) Where a married woman made improvements and resided on the lands applied for before her marriage, she may enter them after marriage if her husband is not holding other lands under an unperfected homestead entry at the time she applies to make entry.

A married woman can not make entry under any of these conditions unless the laws of the State where the lands applied for are situated give her the right to acquire and hold title to lands as a femme sole.

8. *If an entryman deserts his wife* and abandons the land covered by his entry, his wife then has the exclusive right to contest the entry if she has continued to reside on the land, and on securing its cancelation she may enter the land in her own right, or she may continue her residence and make proof in the name of and as the agent for her husband, and patent will issue to him.

9. *If an entryman deserts his minor children* and abandons his entry after the death of his wife, the children have the same rights the wife could have exercised had she been deserted during her lifetime.

10. *If a husband and wife are each holding an original* entry or a second entry at the same time, they must relinquish one of the entries, unless one of them holds an entry as the heir of a former entryman, settler, or contestant. In cases where they can not hold both entries, they may elect which one they will retain and relinquish the other.

11. *The unmarried widows of soldiers and sailors who were honorably discharged* after ninety days' actual service during the war of the rebellion, or the Spanish-American war, or the Philippine insurrection, may make entry as such widows, if their husbands died without making entry; but a widow may make entry in her own right as an unmarried woman, regardless of the fact that her husband may have made entry, but she can not claim credit for her husband's service.

12. *A person serving in the Army or Navy of the United States* may make a homestead entry if some member of his family is residing on the lands applied for, and the application and accompanying affidavits may be executed before the officer commanding the branch of the service in which he is engaged.

13. *Second homestead entries* for a quarter section or a smaller legal subdivision of public lands may be made, under statutes spe-

cifically authorizing such entries, by the following classes of persons, if they are otherwise qualified to make entry:

(a) By a former entryman who commuted his entry prior to June 5, 1900.

(b) By homestead entrymen who, prior to May 17, 1900, paid for lands to which they would have been afterwards entitled to receive a patent without payment, under the "Free homes act."

(c) By any homesteader who forfeited his original entry prior to April 28, 1904, for the reason that he was unable to perfect it because of some unavoidable complication in his business or personal affairs, or because he was honestly mistaken in the character of the lands; but no such entryman is entitled to make a second entry if he relinquished his original entry for a consideration.

(d) Any person who has already made final proof for *less than one hundred and sixty acres* under the homestead laws may, if he is otherwise qualified, make a second or additional homestead entry for such an amount of public lands as will, when added to the land for which he has already made proof, not exceed in the aggregate 160 acres.

(e) *Persons whose original entries have failed* thru no fault of their own may, under certain circumstances, be permitted to make second entries, if they have not relinquished their original entries for a consideration, altho there is no specific statute which authorizes the making of second entries under such circumstances. There are not many conditions under which second entries of this kind can be made, and any person who feels that he is entitled to make such an entry can only have that question determined by presenting an application to enter specified lands, and accompany that application by a corroborated affidavit fully setting forth the grounds on which he claims that privilege.

14. *An additional homestead entry* may be made by a person for such an amount of public lands adjoining lands then held and resided upon by him under his original entry as will, when added to such adjoining lands, not exceed in the aggregate 160 acres. An entry of this kind may be made by any person who has not acquired title to and is not, at the date of his application, claiming under any of the agricultural public lands laws, thru a settlement or entry made since August 30, 1890, any other lands which, with the lands then applied for, would exceed in the aggregate 320 acres; but the applicant will not be required to show any of the other qualifications of a homestead entryman.

15. *An adjoining farm entry* may be made for such an amount of public lands lying contiguous to lands owned and resided upon by the applicant as will not, with the lands so owned and resided upon,

exceed in the aggregate 160 acres; but no person will be entitled to make entry of this kind who is not qualified to make an original homestead entry.

HOW HOMESTEAD ENTRIES ARE MADE.

16. A homestead entry may be made by the presentation to the land office of the district in which the desired lands are situated of an application properly prepared on blank forms prescribed for that purpose and sworn to before either the register or the receiver, or before a United States commissioner, or a United States court commissioner, or a judge or a clerk of a court of record, in the county or parish in which the land lies, or before any officer of the classes named who resides in the land district and nearest and most accessible to the land, altho he may reside outside of the county in which the land is situated.

17. *Each application to enter and the affidavits accompanying it must recite all the facts* necessary to show that the applicant is acquainted with the land; that the land is not, to the applicant's knowledge, either saline or mineral in character; that the applicant possesses all of the qualifications of a homestead entryman; that the 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; that the applicant will faithfully and honestly endeavor to comply with the requirements of the law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that the applicant is not acting as the agent of any person, persons, 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; that the application is not made for the purpose of speculation, but in good faith to obtain a home for the applicant, and that the applicant 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 he may acquire from the Government to the lands applied for shall inure, in whole or in part, to the benefit of any person except himself.

18. *All applications to make second homestead entries* must, in addition to the facts specified in the preceding paragraph, show the number and date of the applicant's original entry, the name of the land office where the original entry was made, and the description of the land covered by it, and it should state fully all of the facts which entitle the applicant to make a second entry.

19. *All applications by persons claiming as settlers* must, in addition to the facts required in paragraph 21, state the date and describe

the acts of settlement under which they claim a preferred right of entry, and applications by the widows, devisees, or heirs of settlers must state facts showing the death of the settler and their right to make entry; that the settler was qualified to make entry at the time of his death, and that the heirs or devisees applying to enter are citizens of the United States, or have declared their intentions to become such citizens, but they are not required to state facts showing any other qualifications of a homestead entryman, and the fact that they have made a former entry will not prevent them from making an entry as such heirs or devisees, nor will the fact that a person has made entry as the heir or devisee of the settler prevent him from making an entry in his own individual right, if he is otherwise qualified to do so.

20. *All applications by soldiers, sailors, or their widows,* or the guardians of their minor children should be accompanied by proper evidence of the soldier's or sailor's service and discharge, and of the fact that the soldier or sailor had not, prior to his death, made an entry in his own right. The application of the widow of the soldier or the sailor must also show that she has remained unmarried, and applications for children of soldiers or sailors must show that the father died without having made entry, that the mother died or remarried without making entry, and that the person applying to make entry for them is their legally appointed guardian.

RIGHTS OF HEIRS UNDER THE HOMESTEAD LAWS.

21. *If a homestead settler dies* before he makes entry, his widow has the exclusive right to enter the lands covered by his settlement, and if there be no widow, then any person to whom he has devised his settlement rights by proper will has the exclusive right to make the entry; but if a settler dies leaving neither widow nor will, then the right to enter the lands covered by his settlement passes to the persons who are named as his heirs by the laws of the State in which the land lies. The persons to whom the settler's right of entry passes must make entry within the time named in paragraph 4 or they will forfeit their right to the next qualified applicant. They may, however, make entry after that time if no other qualified person has applied to enter the lands.

22. *If a homestead entryman dies before making final proof* his rights under his entry will pass to his widow; but if there be no widow, and the entryman's children are all minors, the rights to a patent vests at once in them, or the lands may be sold for their benefit in the manner in which other lands belonging to minors are sold under the laws of the State or Territory in which the lands are located.

If the children of a deceased entryman are not all minors and his wife is dead, his rights under his entry pass to the person to whom such rights were devised by the entryman's will, but if an entryman dies without leaving either a widow or a will, and his children are not all minors, his rights under his entry will pass to the persons who are his heirs under the laws of the State or Territory where the lands are situated.

23. *If a contestant dies after having secured the cancelation* of an entry of any kind, his right as a successful contestant to make entry passes to his heirs; but if a contestant dies before he has secured the cancelation of the entry he has contested his heirs may continue the prosecution of his contest and make entry if they succeed in securing the cancelation of the entry contested.

No foreign-born person can claim rights as heirs under the homestead laws unless they have become citizens of the United States, except that aliens who have declared their intentions to become citizens may make entry as the heirs or devisees of settlers or contestants.

24. *Minor children of soldiers or sailors* who have been honorably discharged after ninety days' actual service during the war of the rebellion, the Spanish-American war, or the Philippine insurrection may make a joint entry, thru their guardian, if their fathers failed to make homestead entry and their mothers have died or remarried without making entry after their father's death.

RESIDENCE AND CULTIVATION.

25. *The residence and cultivation required by the homestead law* means a continuous maintenance of an actual home on the land entered to the exclusion of a home elsewhere, and continuous annual cultivation of some portion of the land. A mere temporary sojourn on the land, followed by occasional visits to it once in six months or oftener, will not satisfy the requirements of the homestead law, and may result in the cancelation of the entry.

26. *No specified amount of either cultivation or improvements* is required, but there must in all cases be such continuous improvement and such actual cultivation as will show the good faith of the entryman. Lands covered by homestead entry may be used for grazing purposes if they are more valuable for pasture than for cultivation to crops. When lands of this character are used in good faith for pasturage, actual grazing will be accepted in lieu of actual cultivation. The fact that lands covered by homestead entries are of such character that they can not be profitably cultivated or pastured will not be accepted as an excuse for failure to either cultivate or graze them.

27. *Actual residence on the lands entered must begin within six months* from the date of all homestead entries, except additional entries and adjoining farm entries of the character mentioned in paragraphs 14 and 15, and residence with improvements and annual cultivation must continue until the entry is five years old, except in cases hereafter mentioned, but all entrymen who actually resided upon and cultivated lands entered by them prior to making such entries may make final proof at any time after entry when they can show five years' residence and cultivation.

Under certain circumstances, leaves of absence may be granted in the manner pointed out in paragraph 36 of these suggestions, but the entryman can not claim credit for residence during the time he is absent under such leave.

28. *Residence and cultivation by soldiers and sailors* of the classes mentioned in paragraph 5 must begin within six months from the time they file their declaratory statements regardless of the time when they make entry under such statement, but if they make entry without filing a declaratory statement they must begin their residence within six months from the date of such entry, and residence thus established must continue in good faith, with improvements and annual cultivation for at least one year, but after one year's residence and cultivation the soldier or sailor is entitled to credit on the remainder of the five-year period for the term of his actual naval or military service, or if he was discharged from the Army or Navy because of wounds received or disabilities incurred in the line of duty he is entitled to credit for the whole term of his enlistment.

29. *A soldier or sailor making entry during his enlistment* in time of peace is not required to reside personally on the land, but may receive patent if his family maintain the necessary residence and cultivation until the entry is five years old or until it has been commuted, but a soldier or sailor is not entitled to credit on account of his military service in time of peace.

30. *Widows and minor orphan children of soldiers and sailors* who make entry as such widows and children must begin their residence and cultivation on the lands entered by them within six months from the dates of their entries, or the filing of declaratory statement, and thereafter continue both residence and cultivation for such period as will, when added to the time of their husbands' or fathers' military or naval service, amount to five years from the date of the entry, and if the husbands or fathers either died in the service or were discharged on account of wounds or disabilities incurred in the line of duty, credit for the whole term of their enlistment, not to exceed four years, may be taken, but no patent will issue to such widows or children until there has been residence and cultivation by them for at least one year.

31. *Persons who make entry as heirs of settlers or contestants* are not required to both reside upon and cultivate the land entered by them, but they must within six months from the dates of their entries begin, and thereafter continuously maintain either residence or cultivation on the land entered by them for the required five-year period, unless their entries are sooner commuted.

32. *The widows, heirs, or devisees of a homestead entryman*, who dies before he earns patent, are not required to both reside upon and cultivate the lands covered by his entry, but they must within six months after the death of the entryman begin either residence or cultivation on the land covered by the entry, and thereafter continuously maintain their residence or cultivation for such a period of time as will, when added to the time during which the entryman complied with the law, amount in the aggregate to the required five years, unless they sooner commute the entry.

33. *Homestead entrymen who have been elected or appointed* to either a Federal, State, or county office after they have made entry and established an actual residence on the land covered by their entries are not required to continue such residence during their term of office, if the discharge of their *bona fide* official duties necessarily requires them to reside elsewhere than upon the land; but they must continue their cultivation and improvements for the required length of time.

A person who makes entry after he has been elected or appointed to office is not excused from maintaining residence, but must comply with the law in the same manner as tho he had not been elected or appointed.

34. *Neither residence nor cultivation is required* on lands covered by an adjoining farm entry, or an additional entry of the kinds mentioned in paragraphs 14 and 15; but a person who makes an adjoining farm entry is not entitled to a patent until he has continued his residence and cultivation, for the full five years, on the adjoining lands owned by him at the time he made entry or on the lands entered by him, unless he sooner commutes his entry after fourteen months' residence on either the entered lands or the adjoining lands owned by him. A person who has made an additional entry for lands adjoining his original entry is not entitled to a patent to the lands so entered until he has earned a patent to the adjacent lands embraced in his original homestead entry, but if he has earned a patent under his original entry at the time he makes his additional homestead entry he is entitled at once to a patent under the additional entry.

35. *Neither residence nor cultivation by an insane* homestead entryman is necessary if such entryman made entry before he became insane and complied with the requirements of the law up to the time his insanity began.

LEAVES OF ABSENCE.

36. Leaves of absence for one year or less may be granted to entrymen who have established actual residence on the lands entered by them in all cases where total or partial failure or destruction of crops, sickness, or other unavoidable casualty has prevented the entryman from supporting himself and those dependent upon him by a cultivation of the land.

Applications for leave of absence should be addrest to the register and receiver of the land office where the entry was made, and should clearly set forth:

(a) The number and date of the entry, a description of the lands entered, the date of the establishment of his residence on the land and the extent and character of the improvements and cultivation made by the applicant.

(b) The kind of crops which failed or were destroyed and the cause and extent of such failure or destruction.

(c) The kind and extent of the sickness, disease, or injury assigned, and the extent to which the entryman was prevented from continuing his residence upon the land, and, if practicable, a certificate signed by a reliable physician, as to such sickness, disease, or injury, should be furnished.

(d) The character, cause, and extent of any unavoidable casualty which may be made the basis of the application.

(e) The dates from which and to which the leave of absence is requested.

COMMUTATION OF HOMESTEAD ENTRIES.

37. All original, second, and additional homestead, and adjoining farm entries may be commuted, except such entries as are made under particular laws which forbid their commutation.

When actual residence has been established within six months from the date of a homestead entry, and continued with such cultivation and improvements as show the good faith of the entryman until the entry is fourteen months old, or where residence and cultivation was established and begun before the entry was allowed and has been actually continued in good faith with actual improvements for fourteen months, the entryman, or his widow, heirs, or devisees, may obtain patent by proving such residence and cultivation in the manner in which final proofs are made, and by paying the cost of such proof, the land-office fees, and the price of the land, which is $1.25 per acre for lands outside of the limits of railroad grants and $2.50 per acre for lands within the granted limits, except as to certain lands which were opened under statutes which require payment of a price different from that here mentioned.

HOMESTEAD FINAL AND COMMUTATION PROOF.

38. Either final or commutation proof may be made at any time when it can be shown that residence and cultivation have been maintained in good faith for the required length of time, but if final proof is not made within seven years from the date of a homestead entry the entry will be canceled unless some good excuse for the failure to make the proof within the seven years is given with satisfactory final proof as to the required residence and cultivation made after the expiration of the seven years.

39. *By whom proof may be offered.*—Final proof must be made by the entrymen themselves, or by their widows, heirs, or devisees, and can not be made by their agents, attorneys in fact, administrators, or executors, except in the following cases:

(a) If an entryman becomes insane after making his entry, patent will issue to the entryman on proof by his guardian, or other legal representative, that the entryman had complied with the law up to the time his insanity began.

(b) If a person has made a homestead entry and afterwards died while he was serving as a soldier or a sailor during the Spanish-American war or the Philippine insurrection, patent will issue upon proof made by his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, or his, or their legal representatives.

(c) Where entries have been made for orphan minor children of soldiers or sailors, proof may be offered by their guardian, if any, if the children are still minors at the time the proof should be made.

(d) When an entryman has abandoned the land covered by his entry, and deserted his wife, she may make final or commutation proof as his agent, or, if his wife be dead and the entryman has deserted his minor children, they may make the same proof as his agent, and patent will issue in the name of the entryman.

(e) When an entryman dies leaving children, all of whom are minors, and both parents are dead, the executor or administrator of the entryman, or the guardian of the children, may, at any time within two years after the death of the surviving parent, sell the land for the benefit of the children by proper proceedings in the proper local court, and patent will issue to the purchaser; but if the land is not so sold patent will issue to the minors upon proof of death, heirship, and minority being made by such administrator or guardian.

40. *How proofs may be made.*—Final or commutation proofs may be made before any of the officers mentioned in paragraph 20, as being authorized to administer oaths to applicants.

Any persons desiring to make homestead proof should first forward a written notice of his desire to the register and receiver of the land office, giving his post-office address, the number of his entry, the name and official title of the officer before whom he desires to make proof, the place at which the proof is to be made, and the name and post-office addresses of at least four of his neighbors who can testify from their own knowledge as to facts which will show that he has in good faith complied with all the requirements of the law.

41. *Publication fees.*—The entryman should, at the time he informs the register of his desire to make final proof, forward to the receiver sufficient money to pay the newspaper for publishing the notice, which fees will not exceed the fees provided by the State laws for the publication of legal notices of a similar kind. If the entryman does not forward the money to pay these fees he may forword a statement from the publisher of the paper, in which the notice is to be published, showing that he has arranged with the publisher for the payment of the fees.

42. *Duty of officers before whom proofs are made.*—On receipt of the notice mentioned in the preceding paragraph, the register will issue a notice naming the time, place, and officer before whom the proof is to be made and cause the same to be published once a week for five consecutive weeks in a newspaper of established character and general circulation published nearest the land, and also post a copy of the notice in a conspicuous place in his office.

On the day named in the notice the entryman must appear before the officer designated to take proof with at least two of the witnesses named in the notice; but if for any reason the entryman and his witnesses are unable to appear on the date named, the officer should continue the case from day to day until the expiration of ten days, and the proof may be taken on any day within that time when the entryman and his witnesses appear, but they should, if it is at all possible to do so, appear on the day mentioned in the notice. Entrymen are advised that they should, whenever it is possible to do so, offer their proofs before the register or receiver, as it may be found necessary to refer all proofs made before other officers to a special agent for investigation and report before patent can issue, while, if the proofs are made before the register or receiver, there is less likelihood of this being done, and there is less probability of the proofs being incorrectly taken. By making proof before the register or receiver the entryman will also save the fees which they are required to pay other officers, as they will be required under the law to pay the register and receiver the same amount of fees in each case, regardless of the fact that the proof may have been taken before some other officer.

Entrymen are cautioned against improvidently and improperly

commuting their entries, and are warned that any false statement made in either their commutation or final proof may result in their indictment and punishment for the crime of perjury.

43. *Fees and commissions.*—When a homesteader applies to make entry he must pay in cash to the receiver a fee of $5 if his entry is for 80 acres or less, or $10 if he enters more than 80 acres, and in addition to this fee he must pay, both at the time he makes entry and final proof, a commission of $1 for each 40-acre tract entered outside of the limits of a railroad grant and $2 for each 40-acre tract entered within such limits. On all final proofs made before either the register or the receiver or before any other officer authorized to take proofs, the register and receiver are entitled to receive 15 cents for each one hundred words reduced to writing, and no proof can be accepted or approved until all fees have been paid.

In all cases where lands are entered under the homestead laws in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming the commission due to the register and receiver on entries and final proofs, and the testimony fees under final proofs, are 50 per cent more than those above specified, but the entry fee of $5 or $10, as the case may be, remains the same in all the States.

United States commissioners, United States court commissioners, judges, and clerks are not entitled to receive a greater sum than 25 cents for each oath administered by them, except that they are entitled to receive $1 for administering the oath to each entryman and each final proof witness to final proof testimony, which has been reduced to writing by them.

W. A. RICHARDS, *Commissioner.*

Approved August 4, 1906:

THOS. RYAN, *Acting Secretary.*

HOMESTEAD ENTRIES WITHIN FOREST RESERVES—ACT OF JUNE 11, 1906.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 7, 1906.

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

SIRS: Your attention is called to the act of June 11, 1906 (34 Stat., 233), copy of which is hereto attached (Appendix A). This act authorizes homestead entries for lands within forest reserves, and you are instructed thereunder as follows:

1. Both surveyed and unsurveyed lands within forest reserves

which are chiefly valuable for agriculture and not needed for public use may, from time to time, be examined, classified, and listed under the supervision of the Secretary of Agriculture, and lists thereof will be filed by him with the Secretary of the Interior, who will then declare the listed lands subject to settlement and entry.

2. Any person desiring to enter any unlisted lands of this character should present an application for their examination, classification, and listing to "The Forester, Washington, D. C.," in the manner prescribed by regulations issued by the Agricultural Department. (The present regulations of this kind are attached as Appendix B.)

3. When any lands have been declared subject to entry under this act the land office for the district in which they are located will be furnished with a list thereof, and the register and receiver will immediately, upon receipt of such list, file it in their office, and at the same time issue notices of such filing and name therein the sixty-first day after the day on which the list is filed by them as the date on which the lands listed therein will be open to settlement and entry under the homestead laws.

4. The notice mentioned in the preceding paragraph should be substantially in the form of the notice hereto attached, and you will keep a copy of the notice of the filing of each list prominently posted in your office during the sixty days following such filing, and also publish a copy of the notice during that period for not less than four weeks in a newspaper of general circulation published in each county in which any of the lands are located, and if there be no newspaper published in such county you will publish the notice in a newspaper of general circulation published nearest the land.

5. The cost of publishing the notice mentioned in the preceding paragraph will not be paid by the receiver, but the publisher's vouchers therefor, in duplicate, should be forwarded thru your office to this office, accompanied by a duly executed proof of publication.

6. In addition to the publication and posting, above provided for, you will, on the day the list is filed in your office, mail a copy of the notice to any person known by you to be claiming a preferred right of entry as a settler on any of the lands described therein, and also at the same time mail a copy of the notice to the person on whose application the lands embraced in the list were examined and listed and advise each of them of their preferred right to make entry prior to the expiration of sixty days from the date upon which the list is filed.

7. Any person qualified to make a homestead entry who, prior to January 1, 1906, occupied and in good faith claimed any lands listed under this act for agricultural purposes, and who has not abandoned the same, has a preferred right to enter such contiguous

tracts covered by his settlement as will not exceed 160 acres in area and not exceed one mile in length, at any time within sixty days from the date upon which the list of such lands was filed in your office.

8. The fact that a settler named in the preceding paragraph has already exercised or lost his homestead right will not prevent him from making entry of the lands settled upon if he is otherwise qualified to make entry, but he can not obtain patent until he has complied with all of the requirements of the homestead law as to residence and cultivation and paid $2.50 per acre for the land entered by him.

9. The person upon whose application any land is listed under this act has, if he is qualified to make entry under the homestead laws, the preferred right to enter such contiguous tracts listed upon his application as will not exceed 160 acres in area and not exceed one mile in length, at any time within sixty days from the date on which the list embracing such lands was filed in your office, but his entry will be made subject to the right of any settler on such lands who makes entry within sixty days from the filing of the list in your office.

10. When an entry embraces unsurveyed lands, or embraces a tract which forms a fractional part of a quarter-quarter-section (40 acres), or embraces a fractional part of a lotted subdivision of a surveyed section, the entryman must cause such unsurveyed lands of such fractional parts to be surveyed by or under the direction of the United States Surveyor-General at some time before he applies to make final proof; but when all of any platted subdivision of a surveyed section is embraced in his entry he will not be required to resurvey such technical legal subdivision.

11. The commutation provisions of the homestead laws do not apply to entries made under this act, but all entrymen must make final proof of residence and cultivation within the time, in the manner and under the notice prescribed by the general provisions of the homestead laws, except that all entrymen who are required by the preceding paragraph to have their lands, or any portion of them, surveyed must within five years from the date of their settlement present to the register and receiver their application to make final proof on all of the lands embraced in their entries, with a certified copy of the plat and field notes of their survey attached thereto.

12. In all cases where a survey of any portion of the lands embraced in an entry made under this act is required the register will, in addition to publishing and posting the usual final proof notices, keep a copy of the final proof notice with a copy of the field notes and the plat of such survey attached posted in his office during the period of publication, and the entryman must keep a copy of the final proof notice and a copy of the plat of his survey prominently posted on the lands platted for at least thirty days prior to the day on which he

offers his final proof, and at the same time his final proof is offered he must file an affidavit showing the date on which the copies of the notice and plat were posted on the land and that they remained so posted for at least thirty days thereafter.

13. This act does not apply to any lands situated in the counties of Inyo, Tulare, Kern, San Luis Obispo, Santa Barbara, Ventura, Los Angeles, San Bernardino, Orange, Riverside, and San Diego, in the State of California, and entries made for lands in the Black Hills Forest Reserve can only be made under the terms and upon the conditions prescribed in sections 3 and 4 of this act.

14. This act does not authorize any settlements within forest reserves except upon lands which have been listed and then only in the manner mentioned above, and all persons who attempt to make any unauthorized settlement within such reserves will be considered trespassers and treated accordingly.

Very respectfully,

G. F. POLLOCK, *Acting Commissioner.*

Approved:

THOS. RYAN, *Acting Secretary.*

APPENDIX A.

AN ACT To provide for the entry of agricultural lands within forest reserves.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of Agriculture may in his discretion, and he is hereby authorized, upon application or otherwise, to examine and ascertain as to the location and extent of land within permanent or temporary forest reserves, except the following counties in the State of California, Inyo, Tulare, Kern, San Luis Obispo, Santa Barbara, Ventura, Los Angeles, San Bernardino, Orange, Riverside, and San Diego; which are chiefly valuable for agriculture, and which, in his opinion, may be occupied for agricultural purposes without injury to the forest reserves, and which are not needed for public purposes, and may list and describe the same by metes and bounds, or otherwise, and file the lists and descriptions with the Secretary of the Interior, with the request that the said lands be opened to entry in accordance with the provisions of the homestead laws and this act.

Upon the filing of any such list or description the Secretary of the Interior shall declare the said lands open to homestead settlement and entry in tracts not exceeding one hundred and sixty acres in area and not exceeding one mile in length, at the expiration of sixty days from the filing of the list in the land office of the district within which the lands are located, during which period the said list or description shall be prominently posted in the land office and advertised for a period of not less than four weeks in one newspaper of general circulation published in the county in which the lands are situated: *Provided*, That any settler actually occupying and in good faith claiming such lands for agricultural purposes prior to January first, nineteen hundred and six, and who shall not have abandoned the same, and the person, if qualified

to make a homestead entry upon whose application the land proposed to be entered was examined and listed, shall, each in the order named, have a preference right of settlement and entry: *Provided, further*, That any entryman desiring to obtain patent to any lands described by metes and bounds entered by him under the provisions of this act shall, within five years of the date of making settlement, file, with the required proof of residence and cultivation, a plat and field notes of the lands entered, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of such lands, which shall be distinctly marked by monuments on the ground, and by posting a copy of such plat, together with a notice of the time and place of offering proof, in a conspicuous place on the land embraced in such plat during the period prescribed by law for the publication of his notice of intention to offer proof, and that a copy of such plat and field notes shall also be kept posted in the office of the register of the land office for the land district in which such lands are situated for a like period; and further, that any agricultural lands within forest reserves may, at the discretion of the Secretary, be surveyed by metes and bounds, and that no lands entered under the provisions of this Act shall be patented under the commutation provisions of the homestead laws, but settlers, upon final proof, shall have credit for the period of their actual residence upon the lands covered by their entries.

SEC. 2. That settlers upon lands chiefly valuable for agriculture within forest reserves on January first, nineteen hundred and six, who have already exercised or lost their homestead privilege, but are otherwise competent to enter lands under the homestead laws, are hereby granted on additional homestead right of entry for the purposes of his act only, and such settlers must otherwise comply with the provisions of the homestead law, and in addition thereto must pay two dollars and fifty cents per acre for lands entered under the provisions of this section, such payment to be made at the time of making final proof on such lands.

SEC. 3. That all entries under this act in the Black Hills Forest Reserve shall be subject to the quartz or lode mining laws of the United States, and the laws and regulations permitting the location, appropriation, and use of the waters within the said forest reserves for mining, irrigation, and other purposes; and no titles acquired to agricultural lands in said Black Hills Forest Reserve under this act shall vest in the patentee any riparian rights to any stream or streams of flowing water within said reserve; and that such limitation of title shall be expressed in the patents for the lands covered by such entries.

SEC. 4. That no homestead settlements or entries shall be allowed in that portion of the Black Hills Forest Reserve in Lawrence and Pennington counties in South Dakota except to persons occupying lands therein prior to January first, nineteen hundred and six, and the provisions of this act shall apply to the said counties in said reserve only so far as is necessary to give and perfect title of such settlers or occupants to lands chiefly valuable for agriculture therein occupied or claimed by them prior to the said date, and all homestead entries under his act in said counties in said reserve shall be described by metes and bounds survey.

SEC. 5. That nothing herein contained shall be held to authorize any future settlement on any lands within forest reserves until such lands have been opened to settlement as provided in this act, or to in any way impair the legal rights of any bona fide homestead settler who has or shall establish residence upon public lands prior to their inclusion within a forest reserve.

Approved, June 11, 1906.—(34 Stat., 233.)

APPENDIX B.

[Form 969.]

UNITED STATES DEPARTMENT OF AGRICULTURE,
FOREST SERVICE.

APPLICATIONS FOR THE CLASSIFICATION AND LISTING OF AGRICULTURAL LANDS IN FOREST RESERVES UNDER THE ACT OF JUNE 11, 1906.

1. Only lands chiefly valuable for agriculture and not needed for administrative purposes by the Forest Service or for some other public use will be classified and listed under the act.

2. Land covered with a merchantable growth of timber will not be declared agricultural except upon the strongest evidence of its value for agricultural purposes, both as to productiveness and accessibility to a market.

3. Areas known to have been occupied by actual settlers prior to January 1, 1906, will be examined first, and when such areas are found chiefly valuable for agriculture they will be listed, in order that the occupant may make entry under the act. The mere fact that a man has settled upon the land will, however, not influence the decision with respect to its agricultural character.

4. Applications for classification and listing under the act must be forwarded by mail to the Forester, Washington, D. C.

5. All applications must give the name of the forest reserve and describe the land, examination of which is requested, by legal subdivisions, if surveyed; but if unsurveyed, by reference to natural objects, streams, or improvements, with sufficient accuracy to identify the land, and when convenient by a sketch map.

6. No examination of more than one quarter section will be ordered on the application of the same person; but if an application is withdrawn or rejected, a second application may be made for other land.

7. The question of prior right to land applied for can be determined by the Department of the Interior only, and the Forest Service will not investigate to determine whether such land is appropriated by a prior right. The applicant should satisfy himself upon this point for his own protection.

8. The first application received in Washington for any one tract is the one on which examination will be made, and all applications received in the same mail will be treated as simultaneous. Notice will be given of all simultaneous and conflicting applications.

9. The allowance of entries and the issuance of patents upon them, under the act, are entirely within the jurisdiction of the Secretary of the Interior.

10. Special attention is called to section 5 of the act, which provides that nothing therein contained shall be held to authorize any settlement after December 31, 1905, on any lands within forest reserves until such lands have been opened to settlement as provided in the act.

11. Settlement after December 31, 1905, and in advance of opening by the Secretary of the Interior, will confer no rights and will constitute trespass. Such trespassers will be ejected.

12. Special attention is called to that portion of the act which excepts from its operation certain counties of California, and its provisions relating to the Black Hills Forest Reserve in South Dakota.

GIFFORD PINCHOT, *Forester.*

Approved:

JAMES WILSON, *Secretary.*

WASHINGTON, D. C., *June 22, 1906.*

NOTICE OF LANDS SUBJECT TO ENTRY WITHIN THE ——— FOREST RESERVE.

UNITED STATES LAND OFFICE,

——— ———,

———, 190—.

Notice is hereby given that the following-described lands, to wit, ——— ———, will be subject to settlement and entry under the general provisions of the homestead laws of the United States on ———, 190—, by all persons legally qualified to make homestead entries. Any settler qualified to make a homestead entry who was actually occupying and in good faith claiming any of said lands for agricultural purposes prior to January 1, 1906, and has not abandoned the same, has a preferred right to enter one quarter section or less quantity of said lands so settled upon and occupied by him, and ——— ——— of ——— post-office, upon whose application said lands were examined and listed, has a preferred right, subject to the preferred right of the settlers mentioned above, to enter one quarter section or a less quantity of the lands described in his application for examination and listing if he is qualified to make a homestead entry. The said settlers and applicant must, however, exercise their preferred right by applying to make entry before the date last named above as all of these lands which have not been entered by them before that date will then become subject to settlement and entry by any qualified person.

———, *Register.*

———, *Receiver.*

HOMESTEAD ENTRY—KINKAID ACT—OWNERSHIP OF LAND—DISQUALIFICATION.

ARTHUR J. ABBOTT (ON REVIEW).

The fact that an applicant to make entry under the act of April 28, 1904, made a prior homestead entry for and is the owner of a quarter-section containing more than 160 acres, will not disqualify him as an entryman under section 3 of said act; but if he be the owner of more than 160 acres of land acquired otherwise than thru a prior homestead entry, he is disqualified to make such entry.

Acting Secretary Ryan to the Commissioner of the General Land Office, October 3, 1906.

(F. L. C.) (E. O. P.)

Motion for review of its decision of March 23, 1906 (34 L. D., 502), has been filed with the Department on behalf of Arthur J. Abbott. The decision complained of affirmed that of your office rejecting Abbott's application to make entry, under the provisions of section 3 of the act of April 28, 1904 (33 Stat., 547), for the W. ½, NW. ¼ NE. ¼, S. ½ SE. ¼, lots 1 and 4, Sec. 11, T. 24 N., R. 38 W., Broken Bow land district, Nebraska, for the reason that Abbott was at the time of filing his application the owner of more than 160 acres of land, and therefore disqualified to make entry under said act.

The correctness of this holding is the only question presented by the pending motion and counsel in their argument rely upon the proviso in section 3 as an absolute waiver of the general provision of

the homestead law prohibiting one who is the proprietor of more than 160 acres of land from enjoying the benefits thereby conferred. Said proviso reads as follows:

> 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.

The Department is of opinion that this language does not waive *all* the requirements in this respect imposed by the general homestead law, tho it is argued by counsel that unless the broad interpretation of this proviso contended for is adopted, the benefits sought to be conferred by sections 2 and 3 of said act will in many cases be denied because the original entry sought to be enlarged contains more than 160 acres. In other words, if the technical quarter-section originally entered should exceed in actual area 160 acres, all such entrymen who sought to proceed under section 2 of said act would be effectually barred and such of those who attempted to proceed under section 3 thereof who had not disposed of the excess would be in a similar position, regardless of whether or not they owned other lands than those acquired by virtue of a prior homestead entry. Such construction of the proviso as applied to section 2 would in effect nullify the provisions therein contained as to those claimants whose original entry exceeded 160 acres, as said section specifically requires that they shall "own and occupy the land heretofore entered by them" and they could not therefore dispose of the excess in order to bring themselves within the terms of the act. Manifestly, this is contrary to the plainly-expressed intent of said section. If the language therein used means anything it can only mean that the right was conferred to extend the area of the original entry, then owned and occupied by the entryman, to include that specified by the act, he being otherwise within the terms thereof. A similar construction of the language of section 3 reasonably follows.

This argument of counsel is probably based on the broad statement contained in the decision complained of to the effect that the disqualification resulting from the ownership of more than 160 acres of land at the time of making application under said act, "is operative regardless of the manner in which title to the other land was obtained." Certainly, one, who instead of relinquishing a former entry retains the same and by meeting all the requirements of law acquires title thereto, is not to be denied the privilege granted by said proviso. This would, in effect, be holding that the original entry, if perfected and the land retained, formed, in part at least, a bar to the allowance of the application made to enter under either section 2 or 3 of said act, yet the proviso explicitly states in words too plain to admit of doubt, that such prior entries shall be no bar

to the exercise of the right conferred by this act. In the opinion of the Department the language of the proviso means that in the determination of the applicant's qualifications under the act of April 28, 1904, *supra*, the former homestead entry should be entirely eliminated from the calculation and the right of the applicant determined as of the date of his application, without regard to any impediment thereto imposed under the general law by virtue of his prior entry, whether such entry was relinquished or perfected and the land thereby secured. In other words, if the applicant at the date of his application is not disqualified for some reason other than one arising out of his former entry, his application should be allowed. If he owned other land, exclusive of that embraced in his former entry, in excess of the amount which would disqualify him under the homestead laws, his application should be denied; otherwise, it should be accepted, there being no other objections.

The broad right asserted by counsel for Abbott to have been conferred by the proviso referred to herein, is equally unwarranted by the language used. The rule applied to entries made under section 2306 of the Revised Statutes, has no application to entries made under the act of April 28, 1904, *supra*.

An examination of the record now before the Department fails to disclose the amount of land owned by Abbott exclusive of that contained in his original entry, and upon the showing made his application could not be accepted but the Department is of opinion he should be permitted, if he so desires, to submit a supplemental showing in this regard, when the matter will be readjudicated upon the whole record.

The former departmental decision herein rendered, together with that of your office thereby affirmed, is modified accordingly.

HOMESTEAD—KINKAID ACT—FORT RANDALL ABANDONED MILITARY RESERVATION.

COX *v.* WELLS (ON REVIEW).

Lands within that part of the Fort Randall abandoned military reservation in the State of Nebraska, not selected by the State or otherwise disposed of under the act of March 3, 1893, providing for the disposition of the public lands in that reservation, are subject to entry under the provisions of the act of April 28, 1904.

Acting Secretary Ryan to the Commissioner of the General Land Office, October 5, 1906.

(F. L. C.) (C. J. G.)

A motion has been filed by plaintiff in the case of Peter G. Cox *v.* Levi F. Wells for review of departmental decision of February 7,

1906 (34 L. D., 435), involving the NE. ¼ of Sec. 1, T. 34 N., R. 11 W., O'Neill, Nebraska.

The land described has been in litigation between these parties since 1901. Originally Cox had a homestead entry covering the land and he was contested by Wells, with the result that the entry was canceled and Wells made homestead entry for the land July 29, 1904. Thereupon Cox filed affidavit of contest against Wells August 24, 1904, alleging, among other things, that he was not a qualified entryman for the reason that on May 20, 1892, he made homestead entry for the SE. ¼ SW. ¼, Sec. 26, and N. ½ NE. ¼, and NE. ¼ NW. ¼, Sec. 35, T. 33, R. 8, O'Neill, Nebraska, which he relinquished for a valuable consideration. The local officers rejected the affidavit of contest on the ground that it did not state a cause of action, in this, that Wells having lost or forfeited his entry of May 20, 1892, prior to the act of June 5, 1900 (31 Stat., 267), he was qualified under the provisions of said act to make a second homestead entry. The rejection was affirmed by your office in decision of December 27, 1904, the fact being overlooked that the act of April 28, 1904 (33 Stat., 527), entitled, "An act providing for second and additional homestead entries and for other purposes," imposed conditions and restrictions not found in the act of June 5, 1900, the later act providing, among other things, that an applicant for second entry must show with respect to his former entry "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." Upon appeal, however, said decision of your office was reversed June 26, 1905 (33 L. D., 657), it being held, syllabus:

> Construing the acts of June 5, 1900, and April 28, 1904, relating to second homestead entries, together, the earlier act is held to be modified by the later, and all applications to make second homestead entry filed subsequently to the date of the later act should be disposed of thereunder, so far as the provisions of that act are applicable.

Accordingly it was held, Wells's homestead entry in question having been made July 29, 1904, that the charge contained in Cox's affidavit of contest constituted a sufficient cause of action, and your office was directed to order a hearing on said charge. A motion for review was filed, when, for the first time, it was made to appear that Sec. 1, T. 34 N., R. 11 W., lies within the territory described in the act of April 28, 1904 (33 Stat., 547), known as the Kinkaid act, which provides, among other things:

> 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.

Upon said motion the decision now under review was rendered, wherein it was held that as the land is within the limits described in the Kinkaid act it is immaterial whether Wells relinquished his first entry for a consideration or not, and, hence, that the charge stated does not constitute a cause of action. The order for a hearing was therefore directed to be revoked.

It now appears that the land in controversy is not only within the territory covered by the Kinkaid act but is also within the limits of the Fort Randall abandoned military reservation, provision for the disposal of which was made in the act of March 3, 1893 (27 Stat., 555). In the present motion for review it is contended that this act provides a mode for the disposal of the lands within said reservation, exclusive of all others, and hence the land embraced in Wells's entry is subject to disposal only under the provisions of said act and not under the Kinkaid law.

The said act of March 3, 1893, after authorizing in section one thereof the survey and granting of the odd-numbered sections—without prejudice to existing lawful rights under any of the land laws of the United States—of that part of the Fort Randall military reservation in the State of Nebraska to said State as school indemnity lands, to be selected at any time within one year after the filing of the official plats of survey, provides in section two:

> That even-numbered sections, and all of the odd-numbered sections in said reservation not selected under the provisions of section one of this act, shall be open to settlement under the homestead law only: *Provided*, That before said lands shall be opened to settlement under this section, the Secretary of the Interior shall appoint a commission of three disinterested citizens of the United States, who shall appraise said lands and fix the value of each quarter section, and persons who may take such lands under the homestead laws, shall pay for such lands in three equal installments, at times to be fixed by the Secretary of the Interior, and they shall also comply with all provisions of the homestead laws of the United States.

The plats of survey under the foregoing act were filed in the local office November 27, 1896; hence the period within which the State of Nebraska might make selection of the odd-numbered sections under said act, expired on November 27, 1897. The local officers were advised by your office January 28, 1898, that the time within which the State could make selection under the act of 1893 had expired and that the lands not selected were subject to homestead entry. In instructions of August 18, 1897 (25 L. D., 141), it was held that the commutation provision of the homestead laws extended to entries under said act of 1893, final papers were to be issued as in ordinary homestead entries, and credit for residence prior to entry and for military service applied as to other homestead entries.

The first section of the act of April 28, 1904, *supra* (the Kinkaid act), is in part as follows:

> 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.

In addition to the provisions of said act hereinbefore set forth it is also provided therein that all of the lands in the territory described which it may be practicable to irrigate are excluded from its operation. Entrymen under the homestead laws within said territory who own and occupy the land entered by them prior to the passage of the act, are permitted to enter other contiguous lands which will not with the lands already entered exceed in the aggregate 640 acres. The commutation provisions of the homestead law are not applicable to entries made under the Kinkaid act, and in order to make proof a claimant must show that he has made improvements of the value of not less than $1.25 per acre. As stated, the land in controversy is within the limits of that portion of the Fort Randall abandoned military reservation lying within the State of Nebraska, and both land and reservation are within the territory described in the Kinkaid act. The boundaries of said territory are specifically described, leaving no room for doubt that they were intended to include the lands within said reservation. Nor is there any exception made of any particular tract or tracts falling within said boundaries. The records of Congress show that the said act was passed with deliberation and presumably with full knowledge of the act of 1893 providing for the disposal of the lands in the abandoned military reservation that were not timely selected by the State of Nebraska as school indemnity lands. It is likewise a fair presumption that the lands within said reservation were known to be practically of the same character as the other lands covered by the Kinkaid act, namely semi-

arid and arid lands, and that the reasons for their inclusion were therefore equally cogent. Here was a region where the lands owing to their character, although subject to entry under the homestead laws in 160-acre tracts for a great number of years, still remained untaken, and it was believed by Congress that by increasing the size of the homestead to an area upon which a family could be supported would have a tendency to attract homeseekers to such lands. This was equally true of the reservation lands, they being of the same character. Now, the act of 1893 provided for the disposal of the lands within the Fort Randall abandoned military reservation in the State of Nebraska, not selected by said State, under the homestead laws. There being no trust created in said act requiring a sale for the purpose of raising a fund for any particular object, and there being no words of exception or limitation to disposal of the lands within said reservation, under the homestead laws, said lands are of the class contemplated by the Kinkaid act, which is entitled, "An act to amend the homestead laws as to certain unappropriated and unreserved lands in Nebraska." Therefore, the effect of this later act was to provide, not for a different mode of disposal—the lands under both acts being subject to entry under the homestead laws—but for the enlargement of the area that might be entered under said laws. In view of such enlarged area the commutation provision which was applicable under the act of 1893 was eliminated from the Kinkaid act, and entrymen thereunder were required to make improvements of the value of not less than $1.25 on each acre of their entries.

Aside, therefore, from the absolute repeal of the commutation provision as to lands entered under the Kinkaid act, said act may very properly and justifiably be construed as an amendment and enlargement of the act of 1893 with respect to the lands within the abandoned military reservation. Otherwise the two acts are not in conflict or repugnant, no existing rights are impaired by extending the provisions of the Kinkaid law over the lands within the military reservation; and in fact owners of said lands under the homestead law are distinctly benefited, in that they may enter additional contiguous lands, if otherwise qualified, sufficient to make up 640 acres. Unperfected claims under the act of 1893 may be proved up under the old law, and lands remaining unsold within the reservation may be entered under the new act subject to its provisions. In this view the two acts may be administered with entire harmony, and the contention that the lands within the abandoned military reservation are not "unappropriated and unreserved lands" within the meaning of the Kinkaid act, and that the land in controversy must exclusively be entered under the provisions of the act of 1893, and not under those of the act of 1904, is not well made.

After carefully considering all the matters presented in the motion for review, the Department is of opinion that Cox's affidavit of contest does not furnish any sufficient basis for a hearing, and therefore adheres to its decision of February 7, 1906, revoking the former order for a hearing and in effect dismissing the contest.

The motion for review is accordingly denied.

HOMESTEAD—KINKAID ACT—PREFERENCE RIGHT OF ENTRY.

DAVIS *v.* WHITESELL.

Where under the provisions of the act of April 28, 1904, two or more claimants are entitled to the preference right of entry for the same land, and there is a limited amount of land open to entry upon which the respective claimants may exercise the right, an equitable adjustment should be made between them in order that all may derive the greatest benefit under their preference rights.

Acting Secretary Ryan to the Commissioner of the General Land Office, October 5, 1906.

(F. L. C.) (E. O. P.)

George W. Davis has appealed to the Department from your office decision of June 22, 1905, reversing the local officers and denying his application to enter, under the provisions of section 2 of the act of April 28, 1904 (33 Stat., 547), the W. ½ NW. ¼, Sec. 23, T. 22 N., R. 15 W., O'Neill land district, Nebraska, as additional to his original entry made October 1, 1903, for the NE. ¼, Sec. 22, same township and range, which he owned and occupied at the date of filing his said application, July 27, 1904.

The land applied for by Davis was included in the additional homestead entry of one Harry I. Whitesell, allowed June 28, 1904, as additional to his original homested entry made September 8, 1893, for the N. ½ NE. ¼, NE. ¼ NW. ¼, Sec. 23, and NW. ¼, Sec. 24, same township and range. The said additional entry of Whitesell included, in addition to the tract in controversy, 400 acres, thus completing the entire amount to which he was entitled under the statute.

Davis, upon the rejection of his application, filed contest against the additional entry of Whitesell as to the land in conflict, alleging as grounds therefor the disqualification of Whitesell to make entry because he was the proprietor of more than 160 acres of land at the time he made entry, and also insisted upon the preference right in himself to enter said tract, alleging that inasmuch as Whitesell was in position to assert his preference right as to 400 acres, without including this tract, it was inequitable to allow him to enter the only land open to Davis and which was much less than that taken by Whitesell. The contention of Davis respecting the exercise of the

preference right accorded by section 3 of said act to those qualified to make entry under section 2 thereof, amounts in substance to the claim that where there are two or more claimants entitled to such preference right and there is a limited amount of land open to entry upon which the respective claimants may exercise the right, an equitable adjustment should be made between them in order that all might derive the greatest benefit under their preference rights.

Touching the alleged disqualification of Whitesell because of his ownership of more than 160 acres of land, your office held:

> Whitesell however does not acquire any right *under the homestead law*, he acquires a right under a special statute enacted for a special purpose and applicable only in a specified territory, and the fact that he was the owner of lands, the ownership of which did not debar him from making the original entry upon which his preferential entry is predicated, is an immaterial incident.
>
> In other words, if Whitesell was qualified to make the original entry and was residing on it on April 28, 1904 (which is conceded), and had not in the meantime become disqualified according to the section you refer to, or otherwise, he was qualified to make a preferential entry under the Kinkaid law.
>
> Of course if Whitesell had been the owner of *more* than one hundred and sixty acres of land at the time he made his original entry, he would not have been qualified to make the entry, but such is not the case. The Kinkaid law simply enlarges the area of his original entry, and if he was qualified to make the one, it necessarily follows that he was qualified to make the additional.

This holding is not in accord with the rule announced in the case of Arthur J. Abbott (on review), decided by the Department October 3, 1906 (35 L. D., 206), where it was held:

> That in the determination of the applicant's qualifications under the act of April 28, 1904, *supra*, the former homestead entry should be entirely eliminated from the calculation and the right of the applicant determined as of the date of the application, without regard to any impediment thereto imposed, whether such entry was relinquished or perfected and the land thereby secured . . . . . If *he owned other land, exclusive* of that embraced in his former entry, in *excess* of the amount which would disqualify him under the homestead laws, his application should be *denied;* otherwise, it should be accepted, there being no other objections.

However, as it appears that the land alleged to have been owned by Whitesell exclusive of his original entry, was not more than 160 acres, this ground of contest is, under the rule laid down in the Abbott case (*supra*), insufficient, and the question of fraud in the transfer thereof need not be determined.

In a stipulation filed with the record it is agreed and admitted that at the date of the passage of the act of April 28, 1904, *supra*, there was no other vacant land upon which Davis could have exercised his preference right, and an informal examination of the records of your office shows that at the time of filing his said application the conditions remained unchanged.

The statute makes no provision for the adjusting of conflicts which

may arise under an attempted exercise of preference right. It is clear that both Davis and Whitesell were equally entitled to a preference right to make entry of the tract in controversy, and unless priority in time gives priority in right a correct determination of the equities presented becomes one of administrative policy. The preference right conferred vested in all claimants entitled to make entry under section 2 of said act, equally and at the same time, and the right to exercise it continued in all for the same period, and in the opinion of the Department the time of its exercise within the specified period in no way altered the rights of the applicant. The right was perfect until the expiration of the period allowed for its exercise, and could not be defeated or impaired by the earlier exercise of the right by another equally entitled.

The direction contained in departmental circular of May 31, 1904 (32 L. D., 670), to the effect that—

> 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—

was intended to secure information necessary to a complete and equitable adjustment of possible conflicting rights under a statute which, in itself, made no provision for their adjustment. Otherwise, a compliance with this direction would have been to no purpose. Had Whitesell complied therewith by disclosing the true situation the equal right of Davis to enter this tract would have been discovered by the local officers, upon whom would have devolved the proper adjustment of the conflicting rights. That they did nothing in this respect is attributable solely to the act of Whitesell. He can not complain, therefore, if by a delay in the adjustment he may be prevented from obtaining the full quantity allowed by the statute.

In adjusting conflicts which may arise in the attempted exercise of preference rights the intent of the statute must be examined and the equities of the different claimants determined in such manner as to most nearly carry out that intent. The statute requires that entries made under this act shall be as nearly compact in form as possible. By an adjustment permitting Davis to enter the tract in question his entry would be compact, while the entry of Whitesell is rendered more irregular by including therein this particular tract. In the opinion of the Department the primary intent of the act in question was to give to all persons entitled to make entry under section 2 of said act an equal benefit, and it is clear that this result will not be accomplished if the entry of Whitesell as made be allowed to stand. By so doing, Davis may be unable to secure any of the benefits conferred while Whitesell secures all. The inequitable nature of such

administration of the statute precludes all thought of adjustment, and should not be permitted.

The whole matter considered, the Department is clearly of opinion the claim of Davis to the tract in controversy is superior to that of Whitesell, and the latter's entry therefor will be canceled and Davis's application therefor allowed.

The decision of your office is accordingly hereby reversed.

WITHDRAWAL UNDER RECLAMATION ACT—MINERAL LANDS.

INSTRUCTIONS.

Lands valuable for mineral deposits and embraced within a withdrawal of lands susceptible of irrigation by means of a reclamation project under the act of June 17, 1902, are not thereby taken out of the operation of the mining laws, but continue open to exploration and purchase under such laws.

The right of the government to appropriate public land for use in the construction and operation of irrigation works under the act of June 17, 1902, is not affected by the fact that the land is mineral in character.

Acting Secretary Ryan to the Director of the Geological Survey,
(F. L. C.) *October 6, 1906.* (E. F. B.)

Your letter of March 28, 1906, relative to the matter of allowing parties to prospect for oil upon lands in certain townships that have been withdrawn for reclamation purposes under the act of June 17, 1902 (32 Stat., 388), in connection with the Sun River project in Montana, has been considered with the application of the Mountain Meadow Placer Company for permission to conduct mining operations on lands that have been withdrawn for reclamation purposes in Idaho, upon which you reported under date of June 29, 1906.

An important question involved in this application is whether lands containing valuable deposits of minerals can be taken out of the operation of the mining laws by a withdrawal made under authority of the act of June 17, 1902, for disposal as homesteads.

Sections 2318 and 2319, Revised Statutes, provide as follows:

In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free, and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Since the adoption of the Revised Statutes embodying the laws of the United States in force on December 21, 1873, providing for the disposal of mineral lands, no title to lands known to be valuable for its minerals can be obtained under the homestead law or in any other manner except under the provisions specially authorizing their sale. (Deffeback *v.* Hawke, 115 U. S., 392; Davis *v.* Weibbold, 139 U. S., 507; Barden *v.* Northern Pacific R. R. Co., 154 U. S., 288.)

In Mining Company *v.* Consolidated Mining Company (102 U. S., 167), the title to a school section containing mineral and surveyed in 1870 was involved. No express exception was made in the grant of mineral lands, but the court held that such lands were by the settled policy of the government excluded from all grants. Speaking of the purpose and effect of the legislation of Congress providing for the disposal of the mineral lands, it said:

> As we have already said, Congress, after keeping this matter in abeyance about sixteen years, enacted in 1866 a complete system for the sale and other regulation of its mineral lands, so totally different from that which governs other public lands as to show that it could never have been intended to submit them to the ordinary laws for disposing of the territory of the United States.

The executive department has therefore no authority to allow any land valuable for minerals to be entered under the homestead laws. Such lands can be disposed of only under the mining laws. (Coleman *v.* McKenzie, 28 L. D., 348.) They are excepted from the operation of other laws by force of the statute making special provision for their disposal, and can only be brought under the operation of other laws by express statutory provision.

This leads to the inquiry, whether—aside from the authority conferred upon the Secretary to appropriate and acquire rights and property for use by the government—the act of June 17, 1902, authorizes any withdrawal of lands containing valuable mineral deposits from the right of exploration and purchase given by section 2319 of the Revised Statutes.

By that section all valuable mineral deposits in lands belonging to the United States are "declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase." This right and privilege is not abridged by a mere right or authority to withdraw lands generally. It requires express authority to render such lands subject to disposal under any law other than the mining laws.

Furthermore, the homestead law expressly declares that lands of such character are not subject to homestead entry, and the Secretary of the Interior has no authority to dispose of lands susceptible of irrigation except under the homestead law. It therefore follows as a necessary consequence that lands valuable for the mineral de-

posits contained therein, altho embraced within the limits of a withdrawal of lands susceptible of irrigation from any contemplated works, are not affected by such withdrawal, and are not taken out of the operation of the mining laws. Hence, the privilege of exploring for minerals in such lands remains in full force, notwithstanding the withdrawal.

But this privilege must be exercised subject to the control and jurisdiction of the Secretary of the Interior, charged with the duty of seeing that the public lands are disposed of only in the manner authorized by law.

In grants of public lands by Congress, the determination of the character of the land granted, whether mineral or agricultural, rests with the officers of the land department. "Under their direction and supervision the actual character of the land may be determined and fully established." (Barden *v.* Northern Pacific R. R. Co., 154 U. S., 288, 321.) So likewise in the general administration of the public land laws the duty of determining the character of the land, whether mineral or nonmineral, and to see that it is disposed of only as authorized by law, rests upon the land department, under the supervision of the Secretary of the Interior, as the head thereof. (Coleman *v.* McKenzie, 28 L. D., 348.)

A withdrawal of lands for use in the construction and operation of irrigation works rests upon a different principle and authority.

In reply to your letter of October 24, 1903, asking to be informed as to the status of mining claims upon lands withdrawn for "reservoir sites or permanent works," you were advised 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" (32 L. D., 387). Such power is incident to the authority derived from the seventh section of the act, "to acquire any rights or property" for the United States by purchase or by condemnation, whenever it becomes necessary in carrying out the provisions of the act. "The power and authority to appropriate public lands is coincident and coextensive with the power to acquire private property." (Instructions, 34 L. D., 158, 160.) Such appropriation is accomplished by a mere withdrawal which applies to all lands within the limits of withdrawal, except lands to which such right or interest had vested at the date of the withdrawal as to deprive Congress of the power or disposition and control over the same. It is not a disposal of lands under any of the general land laws, or public land systems, but an appropriation of lands for the

uses of the government, exercised under a power coextensive with the authority to purchase private property. There can be no question as to the authority of the Secretary of the Interior to purchase for such use private property, altho it may contain valuable deposits of mineral. The power to appropriate public lands of such character for similar uses is surely coextensive with the power to purchase private property of that character.

It follows from this that the right to appropriate public land for use in the construction and operation of irrigation works is not affected by the fact that the land is mineral in character, altho such fact must necessarily enter into consideration in determining whether a project is practicable or feasible.

The object contemplated by the construction of works under the reclamation act is not of such great public interest and concern as to demand that important mining interests of great value be jeopardized or destroyed by the use of lands containing mineral deposits of great value, and the question as to the comparative value of the land for the uses to which it may be applied will always be considered whenever it may arise.

In your letter of March 7, 1906, you stated that the lands referred to in this application lie under a proposed section of the Sun River project, to be irrigated from the waters of the Teton River, that as it is not likely that any development along the Teton River will be undertaken for several years, and that it would involve no interference with the development of the project at this time, if parties were allowed to continue their prospecting upon the lands in question.

Acting upon that suggestion, and in view of the strong showing made by the petitioners as to the mineral character of the land, the Department by letter of March 26, 1906, said: "I have concluded that unless you advise me of some good reason to the contrary, I will vacate the withdrawal heretofore made, so far as said townships are concerned, and restore said townships to the public domain."

Upon further consideration I find there will be no necessity for the revocation of the withdrawal as suggested in the letter of March 26, 1906. As the Secretary of the Interior may exercise control over the operations and conduct of all persons prospecting for mineral upon the public lands to see that they are not despoiled or subverted to improper uses, I can see no reason why the prospecting for and development of oil upon the lands in question may not continue notwithstanding the withdrawal, which will serve to hold the land in reservation generally against other appropriation, it not appearing that any irrigable lands will be interfered with by such development.

If it should be developed by such prospecting that there is an oil-bearing field of commercial value, it can then be determined what disposition shall be made of the land. No special permit for this purpose is necesary, as the Secretary of the Interior may at any time, whether the land is withdrawn or not, exercise control of it as custodian of the public lands to prevent waste or improper occupancy of it.

INDIAN ALLOTMENTS—COLVILLE RESERVATION—ACT OF MARCH 22, 1906.

OPINION.

The children of those Indians who received allotments on the north half, or restored portion, of the Colville Indian reservation who did not themselves receive allotments thereon, and also the children of such allottees born since the allotments were made, are on the same footing in respect to allotments on the south half, or reserved portion, of the reservation, as the Indians residing thereon, and equally entitled with them to allotments under the provisions of the act of March 22, 1906.

Assistant Attorney-General Campbell to the Secretary of the Interior, October 6, 1906. (W. C. P.)

You have requested my opinion on certain questions arising under the act of March 22, 1906 (34 Stat., 80), authorizing sale of unallotted lands of the diminished Colville Indian reservation, Washington, formulated by the Commissioner of Indian Affairs as follows:

1. Are the children of those Indians who received allotments on the north half of the reservation under the act of July 1, 1892 (27 Stat., 62), and who did not receive allotments thereon, entitled to allotments on the south half of the Colville reservation under the act of March 22, 1906?

2. Are the children of allottees on the north half, born since the allotments thereon were made, entitled to allotments on the south half?

The act of 1892 restored to the public domain a portion of the Colville Indian reservation, described by metes and bounds, and directed the sale and disposition of such lands after certain reservations and allotments provided for therein should be made. The provision for allotments was, so far as necessary to be set forth here, "that each and every Indian now residing upon the portion of the Colville Indian reservation hereby vacated and restored to the public domain, and who is entitled to reside thereon, shall be entitled to select from said vacated portion eighty acres of land, which shall be allotted to each Indian in severalty." Evidently it was not the purpose or effect of this legislation to break up the tribe but rather to save to

those Indians who had settled and established homes within that portion of the reservation restored to public domain, their improvements. Those who did not desire to take allotments upon the restored lands had the privilege of removing to that part still held in reservation. It seems that, for some reason not disclosed by the papers here, some children of those Indians who elected to take allotments in the portion restored did not receive any land there.

The act of March 22, 1906, authorizes and directs the Secretary of the Interior to sell or dispose of unallotted lands in the diminished Colville Indian reservation, and as to allotments provides as follows:

> That as soon as the lands embraced within the diminished Colville Indian reservation shall have been surveyed the Secretary of the Interior shall cause allotments of the same to be made to all persons belonging to or having tribal relations on said Colville Indian reservation, to each man, woman, and child eighty acres, and, upon approval of such allotments by the Secretary of the Interior he shall cause patents to issue therefor under the general allotment law of the United States.

The wording of this provision is sufficiently comprehensive to include all regarded as belonging to the tribes inhabiting the diminished reserve. As stated before, the fact of taking allotments by those members of the tribe who happened to be located within that portion of the reservation restored to the public domain should not be considered as ending their tribal relations. They should be considered, for the purpose of determining their rights in the reservation lands, just as if no division of the reservation had been made. An Indian who takes an allotment within his reservation does not thereby so change his status as to deprive his children of a share in the lands of his and their tribe. The policy of the government has always been to secure to each individual of an Indian tribe an equal share in the lands of his tribe, and that policy should be adhered to by the executive branch of the government unless some provision of law clearly and expressly prevents that course. There is no such inhibition in the act of March 22, but, on the other hand, it seems to have been purposely so framed as to include all persons belonging to the reservation as formerly constituted.

I am of opinion, and so advise you, that children of those who took allotments upon the restored portion or north half of the reservation should be considered as on the same footing in respect of allotments as those residing upon the reserved portion or south half and that each question submitted by the Commissioner of Indian Affairs should be answered in the affirmative.

Approved:

THOS. RYAN, *Acting Secretary.*

RECLAMATION ACT—CAREY ACT—WATER RIGHTS.

OPINION.

Individual owners of lands acquired under the provisions of the Carey act may be supplied with such additional water from reservoirs constructed under the reclamation act as may be necessary to fully develop and reclaim the irrigable portions of such lands, subject to all the conditions governing the right to the use of water under any particular project.

Assistant Attorney-General Campbell to the Secretary of the Interior, October 11, 1906. (E. F. B.)

A letter from the Director of the Geological Survey of September 28, 1906, referring to an opinion of this office of November 24, 1905, advising that there is no authority under the act of June 17, 1902 (32 Stat., 388), to grant the American Falls Canal and Power Company a permanent interest in and right to the use of water stored in reservoirs constructed under said act for the irrigation of lands segregated under the Carey act and being reclaimed by said company under contract with the State of Idaho, has been referred to me for opinion as to whether additional water supply to the individual landowners can be furnished under the provisions of the reclamation act.

The Director in his letter states that the irrigation system established under the Carey act is more than half completed, two openings of land under the State laws having already been had by the State Land Board, and that the third opening will probably soon occur, which will cover practically all the remaining lands in the list approved by the Department. He further states that "the requirements of the Carey act have been fully complied with by the furnishing of an adequate water supply to reclaim the lands sufficiently to raise profitable crops each year."

His proposition is, not to furnish water for the reclamation of lands segregated under the Carey act, as that has been accomplished, but "to reinforce the supply to make possible a more complete development of the irrigable lands."

The situation is this: These lands are practically held in private ownership, and the proposition involved in the inquiry now submitted is, whether lands in private ownership that are partially irrigated may be supplied with additional water for the complete reclamation of those lands, if all the conditions imposed by the act are complied with and no restriction of the act as to area is violated.

I am of opinion that individual owners of lands acquired under the provisions of the Carey act may be supplied with such additional water from reservoirs constructed under the reclamation act as may

be necessary to fully develop and reclaim the irrigable portions of such lands.

I call attention to that provision of the contract entered into by the Secretary of the Interior with the Water Users Associations "that only those who are, or may become, members of said associations under the provisions of its articles of incorporation shall be accepted as entrymen or applicants for rights to the use of water impounded, developed, or the supply of which is or may be regulated or controlled by said proposed irrigation works," which would seem to require that all persons receiving water from such source must be members of the associations.

Approved:

E. A. HITCHCOCK, *Secretary.*

APPLICATION TO AMEND FOREST RESERVE LIEU SELECTION.

MARY E. COFFIN.

Applications to amend forest reserve lieu selections are governed by the same rules governing applications to amend homestead or other entries, and to support such an application it must be shown that the tract covered by the proposed amendment is the land originally selected, after inspection, and that the mistake was made thru no fault of the applicant.

Secretary Hitchcock to the Commissioner of the General Land Office.

(F. L. C.) *October 13, 1906.* (C. J. G.)

A motion has been filed by Mary E. Coffin for review of departmental decision of July 30, 1906, affirming the action of your office in denying her application to amend her lieu selection under the act of June 4, 1897 (30 Stat., 36), for the NE. ¼ SW. ¼, Sec. 20, and the NE. ¼ NE. ¼, Sec. 30, T. 61 N., R. 2 W., so as to embrace instead the S. ½ NW. ¼, Sec. 13, T. 56 N., R. 9 W., Duluth, Minnesota.

The lands in T. 61 N., R. 2 W., were selected December 24, 1901, and the application to amend was filed October 7, 1902, based upon the allegation that said selection was made from the report of an explorer employed to examine the lands in said township and range and who reported that the lands originally described "were of some value for the timber thereon; that subsequently upon a more careful and accurate survey of said tracts of land by the county surveyor," it was learned that the timber which was "supposed to be upon the tracts selected is in fact situated upon adjoining tracts which were and are not subject to selection, being already embraced in entries;" that the explorer attributed the mistake to the fact that "the marks

of survey in said township are very old and that it was very difficult to follow the lines accurately."

Your office declined to allow a change of selection upon the facts alleged, holding that there is no authority for allowing a change of selection on the ground that the tracts selected are not as valuable as they were thought to be when the selection was made, but such allowance is confined to cases where error or mistake is made in the description of the land selected. A motion for review of the decision of your office was filed, it being alleged, among other things, that it was error to treat the application as one to amend instead of one to make second selection, which motion was denied primarily for the reason that nothing new was presented therein. Thereupon an appeal was taken to the Department, where the decision of your office was affirmed. Upon motion for review the papers were returned to your office, the former action being vacated, "though without error," and directing "further consideration and such action as may be deemed appropriate upon the showing now made." The latter consisted of a statement by the county surveyor, an affidavit of his companion when the survey of the land originally selected was made, and one by the "explorer" who examined the land before such selection. The case was returned for the reason that the selector sought to introduce into the record facts not therein contained when the decision complained of was rendered, and upon which your office had not past. Your office concluded as follows:

> Considering the facts in the case as disclosed by the original papers in the case, as well as the evidence introduced in support of the amendment, the selector does not seem to have exercised common business care in making the selection, even if valuable timber was the object in making the selection. In the application to amend and all the evidence adduced in support thereof, there has not been a word in derogation of the character of the land originally selected, as agricultural or farming land. If the selector has any equity in the case it is not visible. The land originally selected seems to be in place, with no insurmountable obstacle to the perfecting of the selection therefor, and the acquisition of a patent thereto. The quality of the soil and the lay of the land, as developed after the McIvor survey has not been impeached or criticized. The only objection to the original selection seems to be its want of timber. Much valuable land for farming purposes is treeless prairie. It is not thought that a case for amendment of the application has been made, even considering the additional evidence furnished, and the application to amend is, therefore, rejected.

An appeal was taken from this action to the Department, when the decision now complained of was rendered. The facts of the case, including the substance of the subsequent affidavits filed by the selector, were fully set out in said decision, it being found that the examination made prior to selection to ascertain the lines and corners of survey was neither extended nor thoro; that the selector must be

held responsible for any lack of diligence on the part of her agent; and that the showing made in support of the application to amend was insufficient.

It is not again urged in the present motion for review that the application under consideration should have been treated as an application for second selection instead of one to amend, but in support of said motion is filed another affidavit of the selector's agent who examined the land prior to selection, and one by herself in which she alleges that the failure in having her said agent "fully state the facts in corroborating her statements and to furnish the details now given," was due to the fact that she did not deem that such full details were essential. The agent, after describing his work and its results, now states that he did in fact make an extended and careful examination for the lines and corners; "that his search was painstaking and diligent," but owing to lapse of time since the original survey and to forest fires a majority of the corner posts had been obliterated and it was difficult to locate a tract of land; and that the land embraced in the selection "is not even of any value for agricultural purposes, being very rough and rocky and with little soil."

Aside from the mere assertion of the selector's agent that he did in fact make a careful and diligent search for the true lines and corners, it is found from an examination and comparison of the affidavit now furnished that the statements contained therein do not materially differ from those previously made by him. Apparently there has been no disposition in the repeated denials of the application to amend, to question the fact that there was some mistake in making the selection; the main question has been whether the mistake might not with proper diligence have been avoided and whether it was sufficient to justify the allowance of a change of selection. There was undoubtedly basis for the conclusion that proper diligence was not exercised in examining the land prior to selection. The evidence now offered does not serve to alter that conclusion, the facts as to the alleged mistake being merely set out with a little more detail. It is conceded here by the selector that the true condition of the land was subsequently ascertained "upon a more careful and accurate survey." The familiar rules governing applications to amend in case of homestead and other entries are clearly applicable in the matter of lieu selections under the act of 1897. Under said rules, on application to amend it must be shown that the tract covered by the proposed amendment is the same as that originally selected, after inspection, and that the mistake was made thru no fault of the applicant. That, as heretofore held, has not been sufficiently shown here. The rule would hold equally good were this application treated as a second application to select, in which event, if it appeared that

the land was subject to selection but the same failed thru the failure of the selector, said application could not be allowed.

It is fair to conclude, too, with your office, from the evidence in this case, that the desire to change this selection to another tract is due principally to the subsequent discovery that the land selected is not as valuable for its timber as it was believed to be from the report of the selector's agent. In other words, that the alleged mistake was not as to the location of the land but as to the value and quality of timber thereon. Said agent had reported prior to selection "that there was timber of considerable value upon said land." In her nonmineral and nonoccupancy affidavit the selector stated that the object of securing the land was "for agricultural purposes," while her agent now states that it is not of any value for such purposes.

It is not considered that any new matters have been presented in support of the motion for review of sufficient importance to change the conclusion heretofore reached in this case, and no good reason appearing otherwise for disturbing the decision complained of the same will be adhered to, and said motion is hereby denied.

SOLDIERS' ADDITIONAL—FOREST RESERVE LIEU SELECTION.

WILSON F. PLEAS.

Where an application to make soldiers' additional entry is rejected for invalidity of the base offered, and no like valid base is supplied, substitution therefor of a forest reserve lieu selection will not be allowed, to the prejudice of intervening adverse rights.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 13, 1906.* (P. E. W.)

Wilson F. Pleas, as assignee of Edward Boster, has appealed to the Department from your office decision of March 1, 1906, in which you rejected a certain lieu selection filed by him as a substitute for the alleged soldiers' additional right derived from Edward Boster upon which he had previously applied to enter, under section 2307 of the Revised Statutes, the NE. ¼ NW. ¼, Sec. 17, T. 8 N., R. 2 E., Eureka, California. You also overruled his motion to reject a lieu selection filed for the same land by the Aztec Land and Cattle Company.

The record shows that his said application was filed January 20, 1903, and that of the Aztec Land and Cattle Company December 28, 1903. Pleas's application was past upon by your office September 24, 1904, and he was required to furnish certain evidence.

He appealed to the Department, but subsequently filed a withdrawal of his appeal and therewith a lieu selection for the land in question, stating that the latter was filed as a substitute for the alleged Boster additional right.

In the decision appealed from it was held that by failing to substitute a valid soldiers' right of additional entry in place of the alleged right derived from Boster, Pleas lost all rights acquired under his original application. This view is in harmony with the unreported departmental decision of October 14, 1904, in the case of John C. Ferguson, where it is said:

> McBean presented an application to enter. It was . . . rejected. His application was simply tentative and the most that it can be held to have done, as has often been decided, was to protect any rights that he might have as against other applicants . . . it was equivalent to an entry only so far as his rights were concerned.

In the case before us, when the offered base proved invalid and no like valid base was supplied, the said company's lieu selection right attached and became superior to Pleas's right under the lieu selection which he subsequently offered as a substitute. Not being entitled to consideration as a substitute, and adverse rights having intervened, his said lieu selection was properly rejected. And inasmuch as the merit of the lieu selection claim of the Aztec Land and Cattle Company is a question solely between the government and said company, Pleas's motion to reject the said lieu selection was properly dismissed.

Your said decision is accordingly affirmed.

SUSPENSION OF ENTRY—NOTICE—CHARGE—BONA FIDE PURCHASER.

MARY M. SHIELDS ET AL.

In case of the suspension of an entry on the report of a special agent, with opportunity to the entryman to apply for a hearing, the entryman by making such application without objection to the sufficiency of the notice of suspension, does not thereby waive the right to object, at the hearing, to the sufficiency of the charge in the notice.

The charge in a notice of suspension of a timber and stone entry, to the effect that the entry was not made in good faith for the exclusive use and benefit of the entryman, but at the solicitation and for the benefit of another, states a sufficient cause of action, and if proven would require the cancelation of the entry.

The transferee of an entry after the issuance of final certificate takes only such right as the entryman himself has, and if for any proper cause the entry be canceled, whatever rights the transferee may have in the land are lost and forfeited.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 15, 1906.* (A. W. P.)

An appeal has been filed on behalf of Mary M. Shields, entrywoman, and Charles E. Atherton, transferee, from your office decision of November 20, 1905, wherein you affirm the action of the local officers and hold for cancelation her timber and stone cash entry No. 6116 for the SE. ¼, Sec. 2, T. 6 N., R. 11 E., Vancouver, Washington, land district.

It appears from the record in this case that Mrs. Shields filed her sworn statement for the above-described tract June 12, 1902, in support of which she submitted proof on September 16, 1902, on which date it was approved and cash certificate No. 6116 issued thereon by the local officers.

By letter of September 11, 1903, your office transmitted to the Department a report of Special Agent Ferguson, dated February 5, 1903, charging, substantially, that said entry, together with six others therein described, was made at the solicitation of one Albert W. Lobdell, a timber cruiser, for the use and benefit of one Charles E. Atherton, to whom the land was conveyed within a few days after the issuance of cash certificate. In accordance with your recommendation the Department, by letter of September 28, 1903, directed that hearing be had under circular of August 18, 1899 (29 L. D., 141). Accordingly, by letter of October 20, 1903, you directed the local officers to suspend the said seven entries, and give notice to the claimants of the special agent's charges, as follows:

> All of these cases have to do with one Albert W. Lobdell, the locator and manipulator of the claims and the claimants, and one Charles E. Atherton, the ultimate purchaser of all the claims.
>
> These people, the agent states, were solicited by Lobdell to make entries under the timber and stone act (June 3, 1878, 20 Stat., 89); inducements were held out whereby they could make each a little money; parties stating that they had no money with which to make payment for the land were promised by Lobdell all that was necessary; they were further assured that they could get into no trouble; it was perfectly legal, but it was perfectly well understood that the entries would not be for the benefit of the claimants any further than that they were to receive $100.00 apiece guaranteed by Lobdell, the final purchaser to be "somebody Lobdell had on the string."
>
> It is further shown that within a few days after the issuance of final receipts the lands covered by these entries were conveyed to Charles E. Atherton, of Portland, Oregon, as shown by the records of Klickitat county, Washington.

In harmony with the above instructions, the local officers, on November 2, 1903, issued notice of suspension in each of the seven cases, and to the grantee, Charles E. Atherton, with notice that thirty days would be allowed within which to apply for a hearing, with information that:

> The charges on which said cash entry is suspended are summarized as follows: That you were solicited by one Albert W. Lobdell to make said entry,

with the understanding that the same would not be made for your use and benefit, but for the benefit of a final purchaser to be named by said Lobdell; that you made said entry with the understanding that you were to receive $100.00 for making the same, payment of which sum to you was guaranteed by said Lobdell, and that within a few days after final receipt was issued to you for said land you conveyed the same to one Charles E. Atherton, of Portland, Oregon.

This notice was properly served in each case and applications for hearing were duly filed on behalf of the several claimants and their transferee, and forwarded to your office, where, by letters of January 11, 1904, they were each pronounced of sufficient basis, and such hearings ordered.

Based thereon the local officers on January 26, 1904, issued the several notices for hearing, as follows:

Take Notice: That upon an order issued by the Hon. Commissioner of the General Land Office (Division P.), dated the 11th day of January, 1904, a hearing will be had before the register and receiver of this office on the 10th day of March, 1904, at 10 o'clock A. M., for the purpose of hearing testimony and determining whether or not the said entry shall be canceled, on the ground that the said application to purchase said land was not made for the use and benefit of said applicant, but that it was made in pursuance of an understanding and agreement between said applicant and one Albert W. Lobdell, of Portland, Or., that said Lobdell would furnish as much money as was needed to pay for said land, and that when proof had been made and final receipt issued, the said applicant would deed said land to whoever said Lobdell might designate, and would receive from the said Lobdell the sum of $100.00, or thereabouts, as compensation for going through the form of acquiring final receipt for said land. That said agreement and understanding was carried out, and in pursuance of the same said applicant did convey said land by warranty deed to one Charles E. Atherton, of Portland, Oregon, with whom said Lobdell had an understanding, and that said applicant was paid by the said Albert W. Lobdell the sum of $100.00 for making said conveyance, and that at said hearing you and each of you will be allowed opportunity to present testimony in support of said entry.

As a result thereof hearing herein was duly had and testimony submitted, on consideration of which the local officers on January 18, 1905, rendered their finding recommending the cancelation of the said entry. From their action claimant and transferee appealed to your office, alleging that they erred in making such recommendation, and also in denying defendants' motion to dismiss the proceedings, made at the beginning of the hearing, on the ground that the notice of suspension served on the defendants did not afford any ground for canceling the entry.

Upon consideration of the evidence and matters urged on appeal your office by decision of November 20, 1905, affirmed the action of the local officers and held the entry for cancelation, holding, as to the alleged error in denying defendants' motion to dismiss, that:

There is no merit in said motion, for the record shows that the notice of suspension clearly summarizes the charges, and stated a complete cause of action,

and, moreover, both the claimant and transferee made answer thereto in their respective applications for a hearing without then making the least objection to the sufficiency of said notice. Furthermore, it is shown that in the notice of the hearing said parties were again advised of the charges against said entry, which were set out more at length, and likewise clearly stated a cause of action.

The case is now before the Department upon the appeal filed in behalf of the entrywoman and her successor in interest, Charles E. Atherton, wherein it is urged that your office erred in finding that defendants' motion to dismiss the proceedings in this case was properly dismissed by the local officers; in holding that the appearance of the entrywoman and appellant at the hearing constituted a waiver of objections to the sufficiency of the charges against said entry; in not holding that the charges set forth in the notice served upon the defendants were not sufficient to require the cancelation of the entry if proved; and, in substance, that your said decision was contrary to law and the evidence adduced at the hearing.

It does not appear, however, that your office held that the appearance of appellant at the hearing constituted a waiver of objections to the sufficiency of the charges against said entry, but rather that both the claimant and transferee made answer to the charges contained in the notice of suspension, in their respective applications for a hearing, without their making the least objection to the sufficiency of said notice. However, if your office intended by this statement to hold that such action was a waiver of objections to the sufficiency of the charges against the entry, the Department can not concur. The notices of suspension having been duly issued by the local officers and personally served upon the defendants, it was proper that they should apply for a hearing in accordance therewith and in compliance with the regulations of the Department, in order that they might have standing to appear before the local office. Such action was not a waiver, and the defendants might very properly thereafter offer objection to the sufficiency of the charge on the day set for hearing. Were the charges set forth in the notice of suspension sufficient, if proven, to warrant the cancelation of the entry?

Section 2 of the act of June 3, 1878 (20 Stat., 89), provides:

That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belonged to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit,

and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

The applicant filed such sworn statement, duly executed, on which notice issued, proof was submitted, and the entry allowed. The notice of suspension based on the report of the special agent gave notice that the charges on which the cash entry was suspended were, in effect, that it was not made in good faith for the exclusive use and benefit of the applicant, but at the solicitation of one Albert W. Lobdell, with the understanding that it was to be for the use and benefit of a final purchaser, to be named by said Lobdell, and that for making such entry the applicant was to receive the sum of $100. Considering these charges, the Department is of the opinion that they state a complete cause of action, and if proven would require the cancelation of the entry. In fact, this notice contained a brief summary of the charges contained in the special agent's report, which you transmitted to the Department on September 11, 1903, in accordance with instructions of November 18, and 24, 1902, and when, upon examination of the same, the Department by letter of September 28, 1903, approved your recommendation of suspension with opportunity for hearing, it past on the charges and in effect determined them sufficient, if established, to warrant cancelation of the entries therein described. It is true, that the proceedings were to be based on the charges contained in such notice of suspension and not on any statements contained in the notice of hearing. It would have been sufficient had the latter given only the date of hearing and directed attention to the charges contained in the former notice. But the charges set out in the latter, while more elaborate, were only a repetition of those contained in the suspension notice, with perhaps additional data as to the chain of evidence that would be submitted to establish the said charges. In any event, it does not appear that the defendants were in any manner prejudiced by the matter contained in such latter notice.

The Department has very carefully examined the somewhat voluminous record in this case. The substance of the material parts of the testimony offered at the hearing has been set out at length and in detail in your office decision, and it is not therefore deemed

necessary that the same be herein repeated. Suffice it to state that upon full consideration of the evidence adduced, as well as the matters urged in support of the appeal, the Department finds that it is sufficiently established that this entry was not made in good faith for the exclusive use and benefit of the claimant, but was speculative in that it was made at the solicitation of one Albert W. Lobdell, and with the understanding between them that the latter would furnish all the money necessaary to make tour of examination and location, and to meet the proof expenses and payment for the land; that in consideration of making said entry the claimant was paid the sum of $100; and that a few days after issuance of certificate in accordance with understanding the land was conveyed to one Charles E. Atherton. At the time of making proof herein the claimant made sworn statement that she used her own money in making payment for the land—money obtained "from my own savings." But at the hearing she admitted that neither herself nor husband had contributed any part of the money necessary to making examination, proof, and payment on the land.

In response to the notice of suspension Atherton, transferee and intervener, also applied for a hearing, alleging in support thereof that he had made *bona fide* purchase of the land for his own sole use and behoof, and at the time he received conveyance thereof he had no knowledge, notice, or intimation that the entrywoman had not made said entry for her sole use and benefit: wherefore he prayed that his rights be considered and determined, and that he be adjudged the owner of the land as a *bona fide* purchaser, and that said proceeding be dismissed. Atherton did not, however, offer any testimony in support thereof at the subsequent hearing, or in any manner appear, other than by counsel, who also represented the claimant. While it is true that an entryman may sell his land after certificate has issued, yet it is sufficient to state, as has been repeatedly held by both the courts and the Department, that the transferee can take only such right as the entryman himself had. His title is in no way superior to that of the original holder. He is not a *bona fide* purchaser (C. P. Cogswell, 3 L. D., 23; Smith *v.* Anderson, 8 L. D., 46; Lough *v.* Ogden *et al.*, 17 L. D., 171). It therefore follows that for any proper cause the entry must be canceled as tho such transfer had not been made, and that whatever rights the transferee may have had in the land are lost and forfeited. In this connection see Hawley *v.* Diller (178 U. S., 476).

The Department is therefore of the opinion that the concurrent judgment of the local officers and your office should be affirmed, and it is accordingly so directed.

SECOND HOMESTEAD ENTRY—ACT OF APRIL 28, 1904.

CLARENCE MANN.

The mere allegation by an applicant to make second homestead entry under the provisions of the act of April 28, 1904, that he relinquished his former entry without consideration, will not, in the absence of an averment that he was mistaken as to the character of the land originally entered or that he was unable to complete the entry either on that account or because of some unavoidable complication of his personal or business affairs, bring him within the saving provisions of said act.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 17, 1906.* (E. O. P.)

Clarence Mann has appealed to the Department from your office decision of November 7, 1905, rejecting his application to enter, under the provisions of the separate acts of April 28, 1904 (33 Stat., 527, 547), respectively, the SW. ¼ NE. ¼, NW. ¼ SE. ¼, S. ½ SE. ¼, SE. ¼ SW. ¼, Sec. 2, SW. ¼ SW. ¼, Sec. 1, NE. ¼, NE. ¼ NW. ¼, N. ½ SE. ¼, NE. ¼ SW. ¼, Sec. 11, W. ½ NW. ¼, Sec. 12, T. 27 N., R. 44 W., Alliance land district, Nebraska, with leave to amend his said application by eliminating therefrom a tract of 160 acres.

May 26, 1899, Mann made homestead entry of the S. ½ NW. ¼, NW. ¼ SW. ¼, Sec. 10, NE. ¼ SE. ¼, Sec. 9, T. 28 N., R. 43 W., which was canceled on relinquishment February 3, 1904.

In the corroborated affidavit filed with his rejected application Mann avers that said relinquishment was made without consideration and solely because the land was—

entirely unfitted and unsuited for farming and agricultural purposes and good only for grazing purposes, affiant was compelled to abandon it because of inadequate range for cattle and lack of proper vegetation growing thereon for maintenance of cattle in number sufficient to warrant a living therefrom. That the claim was so situated that it was impossible for him to acquire additional vacant lands adjoining thereto, because of the rights of others to such adjoining land.

Your office held that inasmuch as the original entry was relinquished by Mann in order to obtain a "greater range" he was not within the class sought to be benefited by the act of April 28, 1904 (33 Stat., 527), restoring the homestead right in certain cases. The affidavit of Mann containing the averments above quoted, was executed April 3, 1905, and his statement to the effect that he was unable to secure additional lands contiguous to his original entry and that he relinquished the same because the land embraced therein was, because of its quality, insufficient in quantity to afford a living therefrom, when considered with relation to the time of the execution of said affidavit warrants the inference that the real object of the relinquishment was to secure the full benefits conferred by the act

of April 28, 1904 (33 Stat., 547). But in the determination of the right of Mann to the restoration of his homestead right the language used in said affidavit should be considered with reference to the conditions existing at the date of the *relinquishment* of his former entry, rather than the date of the execution of said *affidavit*. At that time neither of the said acts of April 28, 1904, *supra*, had been past, and there was no law under which he would have been permitted to secure other lands. It is not to be presumed that he at that time executed his relinquishment with any expectation of acquiring a "greater range" or, indeed, any land under the homestead law. His homestead right was at that time exhausted and that could not have been the motive for his action. In this respect the facts differ from those presented in the case of David H. Briggs (34 L. D., 60). But Mann makes no averment that he was mistaken as to the character of the land originally entered or that he was unable to complete said entry either on that account or because of some unavoidable complication of his personal or business affairs. The simple allegation that the land was relinquished without consideration, does not, standing alone, bring the applicant within the saving provisions of the act in question.

The decision appealed from is accordingly hereby affirmed.

SOLDIERS' ADDITIONAL—SECTION 2306 OF THE REVISED STATUTES.

FRANK V. HUNTER.

No right of additional entry under the provisions of section 2306 of the Revised Statutes exists where the original entry of the soldier was made for land embraced in an approved swamp-land selection upon which patent subsequently issued to the State, as the soldier's original homestead right was not thereby exhausted.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 17, 1906.* (P. E. W.)

Frank V. Hunter has appealed to the Department from your office decision of June 25, 1906, rejecting his two separate applications, as assignee of Nicholas *Lentz*, to enter, under section 2306 of the Revised Statutes, the NE. ¼ SW. ¼ and the SE. ¼ SW. ¼, Sec. 20, T. 161 N., R. 65 W., Devils Lake, North Dakota, based on the requisite military service of Nicholas *Lantz* and homestead entry, No. 2931, made by Nicholas *Lantz* at Fort Dodge, Iowa, October 28, 1870, for eighty acres of land. The preliminary affidavit filed with said homestead entry is signed Nicholas *Lentz*.

Accompanying the present application is an assignment executed March 23, 1905, wherein Nicholas *Lentz* assigned to William E.

Moses the alleged right to make entry for eighty acres, and on July 17, 1905, Nicholas *Lentz* assigned to W. A. Fleming Jones an alleged right to make entry for eighty acres, who, on July 27, 1905, assigned the same to Orville M. Field, who located the same on land in the Coeur d'Alene land district, Idaho. Both of said assignments are based on the same military service and on the same original homestead entry, and appear to have been made by the same party.

It further appears that the land covered by said original homestead entry was embraced in the list of swamp land selections by the State of Iowa, made under act of September 28, 1850 (9 Stat., 519), which selection was approved January 27, 1866, and patented February 9, 1871.

The appeal presents only the question whether by said homestead entry, No. 2931, any part of the homestead right of said Nicholas Lentz was exhausted.

In the recent like case of Edwin F. Flynn, assignee of Franklin Jordan (unreported), decided February 17, 1906, the Department held that, inasmuch as the designation of the land in question as swamp land had been confirmed, and the State's selection thereof had been approved prior to the attempted homestead entry by Jordan, no part of the latter's homestead right was thereby exhausted.

In the present case approved selection had been made by the State of Iowa for the land embraced in said attempted homestead entry, No. 2931, prior to the date of the homestead application. It is evident that said entry could never have been perfected and that no portion of Lentz's homestead right was exhausted thereby.

In the case of John S. Owen (32 L. D., 262, 264) the Department held that—

> In determining whether or not one is entitled under section 2306 to make an additional entry it is necessary to ascertain whether or not . . . he had *exhausted his homestead rights* by making entry for a less amount than one hundred and sixty acres. Not merely whether or not he had *made entry* for a less amount, but whether or not he had thereby *exhausted his right.*

No part of Lentz's homestead right having been exhausted by said entry No. 2931, it affords no basis for the additional right claimed herein, and the application was properly rejected.

Your said decision is accordingly hereby affirmed.

COAL LANDS—ENTRY BY MARRIED WOMAN.

JESSIE E. OVIATT ET AL.

In those States in which no right or title in the wife's property vests in the husband by virtue of the marital relation, she may, if otherwise duly qualified, purchase coal land in her own and exclusive interest; but the land department will require specific proof that she does not really purchase in the interest of her husband.

In connection with each coal-land entry the entryman must show under oath that the entry is made in good faith in his own and individual interest, and not in the interest, directly or indirectly, in whole or in part, of any other person or persons whomsoever.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 17, 1906.* (G. N. B.)

May 31, 1904, Jessie E. Oviatt, Jennette Abbott, and Sarah J. Abbott, and July 28, 1904, Carrie E. Rose and Sarah M. McDeid, made individual entries, under the coal-land laws, for the NE. ¼ of section 4, the SE. ¼ of section 4, the NE. ¼ of section 8, the NW. ¼ of section 6, and the SW. ¼ of section 6, respectively, all in T. 21 N., R. 103 W., Evanston, Wyoming, land district.

By letters of June 14, 16, and 17, 1905, your office advised the local officers, in the several cases, that—

Where a coal entry is made by a woman it is the practice of this office to require an affidavit on her part as to whether she is single or married, and if married, whether the purchase price is furnished from her own separate funds in which her husband has no interest.

And the local officers were directed to notifiy each entrywoman that she would be allowed sixty days within which to furnish the required affidavit.

It appears that such notice was given, and a motion for reconsideration was filed by each entrywoman, which by your office decision of September 7, 1905, was in each case denied.

The entrywomen have filed separate appeals to the Department. These appeals, however, which present the same question, have been docketed together and will be considered as one.

It is assumed that the entrywomen are all married, because the appeals, and the argument of counsel made to support them, proceed upon that theory.

The contention on appeal is, that there is no authority in law for the requirement that a married woman should show that her purchase of land under the coal-land laws was made with her own separate funds in which her husband has no interest, and that therefore your office exceeded its authority in directing that such showing should be made by the entrywoman.

The coal-land laws are embodied in the Revised Statutes from sections 2347 to 2352, inclusive, and the provisions thereof which are material to be considered here are as follows:

Section 2347. [In part.] Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United

States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person.

* * * * * * *

Section 2350. [In part.] The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions.

Section 2351. [In part.] The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

That the lands here involved are of the character subject to purchase as coal lands; that the entrywomen are over twenty-one years of age and citizens of the United States; and that they are otherwise qualified to purchase coal lands, are matters which are not questioned by your office.

The coal-land laws, above quoted, provide that an individual shall have the right to enter not to exceed one hundred and sixty acres, and that only one entry shall be allowed the same person. The law clearly contemplates, and the Department has repeatedly held, that an entry under the coal-land laws must be made in good faith in the entryman's interest, and not for the benefit of another. (See cases of Adolph Peterson *et al.*, 6 L. D., 371; Northern Pacific Coal Co., 7 L. D., 422; Brennan *v.* Hume, 10 L. D., 160; McGillicuddy *et al. v.* Tompkins *et al.*, 14 L. D., 633; Conner *v.* Terry, 15 L. D., 310; Elwood R. Stafford *et al.*, 21 L. D., 300.) In those States in which no right or title in the wife's property would vest in the husband by virtue of the marital relation, she may, if otherwise duly qualified, purchase coal land in her own and exclusive interest. Whilst an arrangement between them for the procurement by her from her husband of the purchase money would in such case stand upon the same footing here as a like transaction between any two individuals, yet in view of the peculiar personal relations which subsist between husband and wife the land department is entitled to specific proof that she does not really purchase in the interest of her husband, and the exceptional requirement in such cases, now a practice of long standing, is justifiable and reasonable.

It is, however, apparent that in such cases as the present, as well as in all others, whether of so-called private entries exclusively under section 2347, Revised Statutes, or entries made in the exercise of preference rights, a further showing by each individual entryman or association, that the entry is made in his or their own exclusive behalf, is necessary in order that the law may be properly administered. Otherwise, nominal entrymen, with money furnished by

disqualified persons or associations, might purchase outright large bodies of vacant coal lands for and on behalf of such persons or associations, and thus accomplish by indirection that which can not be done directly.

The provisions of the coal-land laws fully warrant the requirement in all cases that in entries thereunder the entryman shall show under oath that the entry is made in good faith in his own and individual interest, and not in the interest, directly or indirectly, in whole or in part, of any other person or persons whomsoever.

Your office is therefore directed to require that the entrywomen herein make the full showing above indicated, and to require that the appropriate showing, as above prescribed, be submitted in all other pending and future cases, upon pain of cancelation of the entry in each case.

The decision of your office is modified accordingly.

PROCLAMATION AND REGULATIONS OPENING THE PASTURE AND WOOD RESERVE LANDS IN THE KIOWA, COMANCHE, AND APACHE INDIAN RESERVATIONS IN OKLAHOMA.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas, section two of the act of June 5, 1906 (34 Stat., 213), directed that the four hundred and eighty thousand acres of grazing lands heretofore selected and set apart by the Secretary of the Interior in the Kiowa, Comanche, and Apache Indian Reservations in the Territory of Oklahoma, for the use in common of certain Indian tribes, pursuant to article three of section six of the act of Congress, approved June 6, 1900, entitled "An act to ratify and confirm an agreement with the Indians of the Fort Hall Indian Reservation, in Idaho;" and the twenty-five thousand acres of land heretofore set apart by the Secretary of the Interior as a wood reservation in said Kiowa, Comanche, and Apache Indian reservations "shall be opened to settlement by proclamation of the President of the United States within six months from the passage of this act, and be disposed of upon sealed bids or at public auction, at the discretion of the Secretary of the Interior, to the highest bidder under the provisions of the homestead laws of the United States, and under the rules and regulations adopted by the Secretary of the Interior;"

And, whereas, by section six of said act of June 5, 1906, it was declared that certain portions of said four hundred and eighty thousand acres of land should be allotted to certain Indians de-

scribed therein; and by the act of June 28, 1906 (34 Stat., 550), it was further declared that certain other portions of said four hundred and eighty thousand acres of land should be sold to certain lessees thereof;

And, whereas, under the act approved March 20, 1906 (34 Stat., 80), authorizing the establishment of town sites and the sale of lots within said four hundred and eighty thousand acres of land, the Secretary of the Interior was authorized to set aside and reserve such lands as he may deem necessary for the establishment of town sites;

Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by the said act of Congress, approved June 5, 1906, do hereby declare and make known that all of said four hundred and eighty thousand acres of land, except such portions thereof as may be allotted, sold or reserved in the manner prescribed in said acts of Congress, and all of said twenty-five thousand acres of land will be opened to settlement and disposition, under the provisions of said act of June 5, 1906, and under the rules and regulations adopted by the Secretary of the Interior, at such time and in such manner as the said Secretary of the Interior may fix and prescribe.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixt.

Done at this city of Washington this 19th day of September, in the year of our Lord one thousand nine hundred and six and of the Independence of the United States the one hundred and thirty-first.

THEODORE ROOSEVELT.

By the President:
ALVEY A. ADEE,
Acting Secretary of State.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 19, 1906.

Register and Receiver,
United States Land Office, Lawton, Oklahoma.

SIRS: By virtue of the authority of the act of June 5, 1906 (34 Stat., 213), and in accordance with the President's proclamation, it is hereby ordered and directed that all of the lands in the pasture and wood reserves in the former Kiowa, Comanche, and Apache Indian reservations, situated in the counties of Kiowa, Caddo, and

Comanche in your district, which are embraced and described in the schedules hereto attached, be disposed of under sealed bids to the highest bidder under the provisions of the homestead laws of the United States, the provisions of this act, and the following regulations.

METHOD AND TIME OF MAKING BIDS.

1. Each bid must be upon a form similar to that attached hereto, which form will be furnished to prospective bidders upon applications made either in person or by mail to the "Register and Receiver, Lawton, Oklahoma," or to the "Commissioner, General Land Office, Washington, D. C.," and must be signed by the bidder and contain his post-office address.

2. No bid will be considered which shall be at a less rate than $5 per acre for the lands embraced in such bid.

3. No bid will be considered that is received by you before 9 o'clock a. m. on Monday, the 3d day of December, or after 4 o'clock p. m. on Saturday, the 8th day of December, 1906.

4. Each bidder will inclose with his bid his affidavit, in the form hereto attached, showing his qualifications to make entry under the general provisions of the homestead laws, and no bid will be considered which is not accompanied by such an affidavit. The affidavit must be executed before some officer authorized to administer oaths and having a seal. Blank forms of this affidavit and of the bid may be obtained by prospective bidders upon application made either in person or by mail to your office or to this office.

5. Each bidder may make bids on as many separate tracts as he chooses, but he must list all of the tracts bid for by him separately on the same sheet of paper, and set opposite each tract the total amount he bids therefor, but the right to accept or reject any bid is hereby reserved.

6. No bid for a single tract must include more than one quarter section, and the tracts bid for must be described in the bids in the same manner in which they are described in the attached schedule and not otherwise, and all bids which describe lands in any other manner will be rejected.

7. Each bidder must inclose with his bid his check for one-fifth of the highest amount bid by him for any tract, but bidders who bid for more than one tract are not required to inclose more than one check. This check must be made payable to the order of "The Secretary of the Interior" and certified by the proper officer of some national bank.

8. Bids may be delivered at your office within the time mentioned above, either thru the mails or otherwise, but each bidder must, before delivering his bid to you, inclose it, together with the check

and affidavit mentioned, in a sealed envelop addrest to the "Register and Receiver, Lawton, Oklahoma," and the envelop must have indorsed upon its face near the left end the words "Bids for Pasture Lands," or other words indicating its contents, but the envelop should not bear any indorsement which in any way indicates either the name of the bidder, the land bid for, or the amount of the bid.

9. If any bid is delivered to you in an envelop which is not securely sealed or which does not bear an indorsement indicating its contents, or which bears any indorsement which indicates the name of the bidder, the lands bid for, or the amount of the bid, you will at once open the envelop and return the bid and accompanying affidavit and check to the bidder and notify him that you can not receive his bid until it is inclosed in an envelop sealed and indorsed as herein directed.

PERSONS ENTITLED TO MAKE BIDS.

10. All persons who are qualified to make either an original homestead entry, a second homestead entry, or an additional homestead entry are entitled to make bids for these lands, but persons who apply to make second or additional homestead entries must furnish with their bids the affidavits and evidence necessary to show that they are entitled to make such entries, and persons who apply to make additional entries must confine their bids to scheduled tracts embracing an area which they are entitled to enter and can not bid for portions of larger listed tracts.

11. Foreign-born persons who have become citizens of the United States or who have declared their intention to become such citizens will be entitled to bid for these lands, but they must inclose with their bids evidence of their naturalization or their declaration of intention.

METHOD OF RECEIVING, HOLDING, OPENING, AND RECORDING BIDS.

12. You will, as soon as you receive these instructions, provide yourself with a strong box or boxes securely closed, fastened, and sealed in such a manner that they can not be opened and closed again without leaving evidence of their having been opened. These boxes should be so constructed as to permit the envelops containing bids to be deposited therein and to prevent such envelops from being extracted therefrom until the boxes have been opened.

13. As soon as you have received any envelop, properly indorsed so as to show that it contains a bid, such envelop must be numbered, stamped "Received ———, 1906," and signed by the register or receiver, or by some clerk in their office designated by them, and then deposited in one of the boxes mentioned, in the presence of both the register and receiver, and the box must thereafter be kept

in your possession until it is opened as hereinafter directed, and no distinguishing mark must be placed on any properly indorsed envelop containing a bid, either by you or any person under your direction or control, before being deposited in the boxes, except as herein provided.

14. Beginning at 9 o'clock a. m. on Monday, the 10th day of December, 1906, and continuing thereafter, Sundays and holidays excepted, from 9 o'clock a. m. until 4 o'clock p. m., so long as may be necessary, you will publicly, under the supervision of such person or persons as the Secretary of the Interior may designate, open the box or boxes in which the bids have been deposited and take therefrom and thoroly mix and distribute all of the envelops containing bids in such a manner as to prevent their being opened in the order in which they were received by you, and after they have been so mixt and distributed you will proceed to publicly open the bids indiscriminately and at once cause the name of the bidder, the lands bid for, and the amount of his bid to be publicly announced as soon as the bid is open.

15. When the bid has been opened and announced, you will at once indorse thereon the number of the bid, the name of the bidder, beginning with Number 1 and continuing thereafter consecutively in the order in which the bids are opened, and as opened record them in duplicate in the books herewith furnished for that purpose. In making this record of the bids you will give the number of the bid, the name of the bidder and his post-office address, the schedule number and description of each tract bid for, and the amount bid and the amount deposited.

16. The bids, with the affidavits and checks attached, and one copy of the record of bids will then be forwarded to this office and you will make no notation on the records of your office until the successful bidders apply to make entry.

METHOD OF CONSIDERING BIDS AND MAKING AWARDS.

17. When the bids are received in this office they will be tabulated into a list showing each tract scheduled, the number of each bid made therefor, the name and post-office address of each bidder, and the amount of each bid. The bids and qualifications of each bidder will then be considered by this office and the bids, affidavits, and checks and the list so tabulated will be forwarded to the Secretary of the Interior, with appropriate recommendations, specifying the name of the bidder to whom, in the opinion of this office, each tract should be awarded.

18. Upon receipt of the recommendations of this office the Secretary of the Interior will take appropriate action thereon, and each tract will be awarded to the highest qualified bidder for the amount

of his bid therefor, and if two or more qualified bidders each bid the highest amount bid for any one tract, the tract will be awarded to the bidder whose bid was the first opened. As soon as a tract has been awarded to any bidder all other bids made by him will be canceled.

TIME AND METHOD OF MAKING ENTRY.

19. After the awards have been made you will be furnished with the names of the bidders to whom lands have been awarded, and the checks deposited by them will be endorsed to the Receiver, whereupon you will, in the order in which the bids are numbered, beginning with Number 1, arrange the dates upon which successful bidders will be required to make entry and mail to each successful bidder a notice advising him of the date on which he will be required to appear and make entry, and inclose therewith a copy of these regulations.

20. In arranging the dates upon which entries may be made you will assign to each day, Sundays and holidays excepted, only such number of tracts as may be reasonably entered during your office hours on that day.

21. After you have arranged the dates upon which entries may be made you will prominently post in your office a list, alphabetically arranged, according to the names of the successful bidders, giving the name and post-office address of each successful bidder and the day on which he may make entry, and furnish a copy of that list to the press for publication.

22. Persons who apply to make entry under this act must present the usual homestead applications and affidavits, executed either before you or some other officer qualified to administer such oaths, and the affidavit filed with the bid must not be accepted in support of the application as the homestead qualifications of the applicant must be shown to continue to the date of the application.

23. If any successful bidder fails without reasonable excuse to make entry on the day assigned to him for that purpose the deposit made by him will be forfeited, but if any such bidder within thirty days from the day assigned to him for the purpose of making entry presents his application to enter and files in your office a corroborated affidavit setting forth any reasonable excuse for his failure to timely make such application you will allow him to thereafter make entry at any time when the business of your office will permit.

24. When any successful bidder fails to enter the lands awarded to him as herein prescribed, you will, at the expiration of thirty days from the day assigned to such bidder, notify all the other qualified bidders for the same tract that they will be permitted to make entry in the order of precedence indicated by the size of their bids, beginning with the highest bidder, provided they have not

been awarded some other tract, but they will be required to deposit with their applications to enter one-fifth of the amount of the purchase money bid by them.

25. Each successful bidder must, at the time he applies to enter, and when he makes either five-year final or commutation proof, tender to the receiver, in addition to the amount deposited by him on the purchase price of the land, the usual fees and commissions required under homestead entries made for lands priced at $1.25 per acre.

26. The law requires these lands to be paid for in five equal installments, one-fifth at the time of entry, and the remainder in four equal annual installments.

27. When a successful bidder applies to make entry of a tract for which he was the highest bidder, you will collect the check deposited by him and issue to him a receipt for the amount of the first payment on the purchase price of the land and return to him the remainder of the sum deposited if the deposit exceeds such first payment.

28. The checks deposited by unsuccessful bidders to whom no lands are awarded will be returned to them by this office after all bids have been considered by the Secretary of the Interior.

29. When any land entered under this act is embraced in any valid, unexpired, unforfeited lease made by the Government for agricultural purposes prior to June 5, 1906, such land will be purchased subject to such lease, and the purchaser will not be entitled to possession of the lands until the lease expires or is canceled or forfeited, but all rentals accruing therefrom after the sale will belong and be payable to the purchaser of the land. Any lessee who has or may hereafter sublet his lease in violation of its provisions, thereby forfeits all rights under his lease, and the entryman will at once be entitled to possession of the leased lands.

30. No rights can be acquired in any of these lands thru a settlement made prior to entry, and before patent can issue for any entry made under this act the entryman must, in the manner provided by the homestead laws, make proof of his residence and cultivation upon the lands embraced in his entry, except that entrymen who have purchased lands all of which are embraced in any existing lease mentioned in the preceding paragraph, held by some other person, will not be required to reside upon and cultivate such lands during the continuance of the lease, but they must do so after the lease expires. If any lessee purchases the lands covered by his lease he must comply with all of the requirements as to residence and cultivation. In cases where the entryman acquires by purchase or otherwise the interest of any lessee under his lease, or where any lease has been for-

feited by being sublet or otherwise, the entryman will be required to reside upon and cultivate the lands from and after the time he receives possession of the lands from the lessee.

31. The time during which any entered land is covered by a valid, unforfeited lease after the date of the entry will be deducted from the five years during which the entryman would be required to maintain residence and cultivation if the lands had not been leased, and the entryman will only be required to reside upon and cultivate the land for the remainder of the five-year period, or he may commute by paying all of the deferred payments after an actual residence upon the land for fourteen months.

32. Any entryman may obtain title at any time by making proof that he has resided upon and cultivated the lands embraced in his entry for the period of fourteen months after the date of his entry and paying all of the unpaid purchase money, or he may continue his residence for five years and make proof at any time within two years after the expiration of the five years, but he can not commute while his land is in possession of a lessee without actual residence on the land.

33. All the rights and privileges given by the homestead laws to soldiers and sailors of the war of the rebellion, the Spanish-American war, and the Philippine insurrection, or to the widows and minor orphan children of such soldiers or sailors, may be claimed under entries made for these lands, except that entries can not be made under soldiers' additional rights.

34. In cases where soldiers or sailors or their widows or minor orphan children make acceptable proof of the required residence or cultivation by taking credit for military service before all of the annual installments of the purchase price have been paid you will suspend action on such proof and not issue final certificates until all of the unpaid installments have been paid.

35. The widows and heirs of persons who make entry under this act will not be required to maintain both residence and cultivation upon the lands covered by the entry of a deceased entryman, but patent will issue to them upon a sufficient showing of either residence or cultivation and the payment of the unpaid purchase money.

36. If any entryman fails to make any annual payment of the purchase price when due or fails to reside upon and cultivate the lands covered by his entry, as required by the homestead laws and these regulations, all rights in and to the lands covered by his entry shall cease, and all payments theretofore made shall be forfeited and his entry canceled.

37. If any land subject to sale under this act is not sold under

these regulations such land will thereafter, until June 5, 1911, remain subject to sale and entry at public auction or on sealed bids at such times as the Secretary of the Interior may direct, and they can not be settled upon, or entered in any other manner, unless Congress in the meantime otherwise directs.

38. Neither the non-mineral, nor the non-saline affidavit will be required of applicants who enter these lands, but all other affidavits required of homestead applicants must be presented with the applications to enter.

39. You will give a separate series of numbers to all receipts and certificates issued for entries made under this act and will, on the back of each receipt and certificate, indorse the words "Sold under the act of June 5, 1906," in red ink.

40. The proceeds of the sale of these lands and all moneys forfeited under these regulations must be accounted for separately and deposited in your designated depository to the credit of the Treasurer of the United States on account of "Kiowa, Comanche, and Apache Indian lands, act of June 5, 1906," the certificate of deposit setting forth that fact. The fees and commissions from the sale of these lands are not Indian moneys, but are public moneys, and are therefore to be deposited and accounted for in the same manner as fees and commissions arising from the sale of public lands.

41. A map of that part of Oklahoma in which the lands to be sold are located and a brief description of the general character of each township quoted from the surveyor's returns made from 1873 to 1875 are herewith furnished for the information of prospective bidders. Copies of field notes which furnish information as to the character of these lands will be on exhibition at the places named below, and may be examined at those places by prospective bidders.

The field notes of the lands in townships 4 and 5 north of ranges 9 and 10 west, Pasture Reserve No. 2, will be at the Indian Agency at Anadarko, in Caddo County; the field notes of the lands in townships 4 and 5 north of ranges 18 and 19 west, Pasture Reserve No. 4, will be at Hobart, in Kiowa County; the field notes of the lands in townships 2, 3, 4, and 5 south of ranges 14, 15, and 16 west will be at Frederick, in Comanche County, and the field notes of all the other lands at the Lawton, Okla., land office.

42. Notice of this sale will be given by publication in such newspaper as this office may hereafter direct.

Very respectfully,

W. A. RICHARDS, *Commissioner.*

Approved:

E. A. HITCHCOCK, *Secretary.*

[Copy of Act of Congress.]

AN ACT To open for settlement five hundred and five thousand acres of land in the Kiowa, Comanche, and Apache Indian reservations, in Oklahoma Territory.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all of that part of article three of section six of the Act of Congress of date June sixth, nineteen hundred, entitled "An Act to ratify and confirm an agreement with the Indians of the Fort Hall Indian Reservation, in Idaho," and making appropriations to carry the same into effect, which reads as follows, to wit: "That in addition to the allotment of lands to said Indians as provided for in this agreement the Secretary of the Interior shall set aside for the use in common for said Indian tribes four hundred and eighty thousand acres of grazing land to be selected by the Secretary of the Interior either in one or more tracts, as will best subserve the interests of said Indians," be, and the same is hereby, repealed.

SEC. 2. That the four hundred and eighty thousand acres of land set apart in the Kiowa, Comanche, and Apache Indian reservations, in Oklahoma Territory, by the Secretary of the Interior, referred to and mentioned in section one of this Act, and the twenty-five thousand acres of land set apart as a wood reservation in the Kiowa, Comanche, and Apache Indian reservations, in Oklahoma Territory, by the Secretary of the Interior, shall be opened to settlement by proclamation of the President of the United States within six months from the passage of this Act and be disposed of upon sealed bids or by public auction, at the discretion of the Secretary of the Interior, to the highest bidder under the provisions of the homestead laws of the United States and under the rules and regulations adopted by the Secretary of the Interior, and such purchaser must be duly qualified to make entry under the general homestead laws: *Provided*, That the money arising from the sale of said lands shall be paid into the Treasury of the United States and placed to the credit of said tribes of Indians; and said deposit of money shall draw four per centum interest per annum; and the principal and interest of said deposit shall be expended for the benefit of said Indians in such manner as Congress may direct: *Provided further*, That such sales shall be subject to any leases made for agricultural purposes prior to this Act, the rentals accruing after such sale to belong to the purchasers under this Act.

SEC. 3. That said lands shall be sold for not less than five 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 four equal annual installments; and in case any purchaser fails to make such annual payment when due all rights in and to the land covered by his or her purchase shall at once cease and any payments theretofore made shall be forfeited and his or her entry shall be canceled. And no title to said land shall inure to the purchaser, nor any patent of the United States issue to the purchaser, until the purchaser shall have in all respects complied with the terms and provisions of the homestead laws of the United States.

SEC. 4. That 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.

SEC. 5. That all lands remaining undisposed of at the expiration of five years from the taking effect of this Act shall be disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior.

SEC. 6. That prior to the said proclamation the Secretary of the Interior shall allot one hundred and sixty acres of land to each child of Indian parentage born

since June sixth, nineteen hundred, whose father or mother was a duly enrolled member of either the Kiowa, Comanche, or Apache tribes of Indians and entitled to an allotment of land under the Act of June sixth, nineteen hundred, opening said Kiowa, Camanche, or Apache reservations to settlement, said allotments to be made out of the lands known as the pasture reserves in said reservations.

Approved, June 5, 1906. (34 Stat., 213.)

FORM OF BID.

To THE REGISTER AND RECEIVER,

United States Land Office, Lawton, Oklahoma.

SIRS: I, the undersigned, being qualified to make entry under the homestead laws of the United States, hereby bid, under the act of June 5, 1906, and the regulations issued thereunder, for the separate tracts of land enumerated below the sum set opposite each tract, and deposit herewith my certified check for the sum of $———, drawn on the ——— National Bank ———, located at ——— post-office, THE SAME BEING ONE-FIFTH of the largest amount bid for any one tract. I agree and promise that if any one of said bids is accepted I will apply to make entry of the tract awarded to me on the day assigned to me for that purpose, and that the money collected on said check may be applied to the payment of the first installment of the purchase price of said tract so far as may be necessary to make said payment, and I further agree and consent that the said deposit may be forfeited to the United States in the event I fail, without sufficient excuse, to apply to make entry under said regulations.

My present post-office address is ——— ———, and if I change my address before thirty days from the day which may be assigned to me for making entry I will notify you of that fact.

——— ———.

Tracts bid for.

Schedule number of tract.	Parts of section bid for.	Section	Township.	Range.	Total amount of bid.

AFFIDAVIT OF BIDDER.

STATE OR TERRITORY OF ———, } *ss.*
COUNTY OF ———, }

Personally appeared before me the undersigned officer, ——— ———, the bidder named in the within bid, who, after first being duly sworn, upon his oath states that he is not the proprietor of one hundred and sixty acres of land in any State or Territory; that he is a citizen of the United Sates, or has declared his intention to become such a citizen; that if a tract of land is awarded to him under this bid he will honestly and in good faith apply to make entry of the

same for the purpose of actual settlement and cultivation, and not for the benefit or in the interest of any other person, persons, or corporations; that he will honestly and faithfully endeavor to comply with the requirements of the law as to residence and cultivation necessary to acquire title to the lands awarded him under this bid; that he is not acting as the agent of any person, corporation, or syndicate in making this bid, nor will he so act in making application to enter, in order that such person, corporation, or syndicate may obtain or in any manner derive any benefit from this bid or his entry; that he does not apply for the same for the purposes of speculation, but in good faith to obtain a home for himself, and that he has not directly or indirectly made, and will not so make any agreement or contract in any way or manner, with any person, persons, corporation, or syndicate whatever by which the title he may acquire from the United States Government to any of the lands enumerated in this bid, or any interest or benefit arising from this bid, shall inure in whole or in part to the benefit of any person except himself. The said applicant further swears that since August 30, 1890, he has not acquired title to, and is not now claiming under any agricultural public-land laws, any lands which added to the lands embraced in any tract enumerated in said bid will exceed three hundred and twenty acres, and that he has not heretofore made a homestead entry except as stated in the affidavit hereto attached.

(Sign plainly with full Christian name.)

_____.

Subscribed and sworn to before me this —— day of ——, 1906, at the county above mentioned.

[OFFICIAL SEAL.]

_____,

_____.

NOTE TO BIDDERS.

Each bidder should, before filling out the foregoing blank form, carefully read and fully understand the regulations issued by the Secretary of the Interior. The bids should be carefully filled out and legibly signed with the first full christian name and middle initial of each bidder, and the above affidavit should be executed before some officer authorized to administer oaths and having a seal. It is not necessary that this officer should reside in the Lawton land district or in Oklahoma, as the bid may be prepared and sworn to before any officer located in any other State or Territory having a seal. When the bid is filled out and sworn to it should be inclosed, with the required certified check for one-fifth of the highest amount bid for any one tract, in a sealed envelop, addrest to the "Register and Receiver, Lawton, Oklahoma." The words "Bid for Pasture Lands" should be written or printed on the face of the envelop, across the left end, but no other words, letters, or figures which would identify either the bidder, the tract bid for, or the amount of the bid should be placed on any part of the envelop. The envelop, securely sealed, may be mailed, with the proper amount of postage, or otherwise delivered to the register and receiver of the Lawton land office, in order that it may be received between the hours of 9 o'clock a. m. on the 3d day of December, 1906, and 4 o'clock p. m. on the 8th day of December, 1906, or it may be delivered to that office in any other way between those hours. All bids made by foreign-born persons or persons who desire to make second or additional homestead entries should be accompanied by evidence and affidavits required by the instructions, or their bids will not be considered.

[Schedule omitted.]

WITHDRAWAL UNDER RECLAMATION ACT—EFFECT OF APPLICATION TO ENTER.

JOHN J. MANEY.

By the mere filing of an application to enter under the homestead law, upon which action is suspended, and tender of the necessary fees, the applicant acquires no vested right to or interest in the land applied for, nor does such application have the effect to segregate the land from the public domain so as to prevent a withdrawal thereof for reclamation purposes under the provisions of the act of June 17, 1902.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 19, 1906.* (E. P.)

November 2, 1905, John J. Maney presented at the local office an application to make homestead entry of the SW. ¼ of Sec. 28, T. 11 N., R. 27 E., North Yakima land district, Washington, action upon which was suspended because of the serious illness of Mr. H. V. Hinman, the register. November 25, 1905, Mr. Hinman died, thus creating a vacancy in the office of register, which was not filled until the 17th of the following January, thereby further delaying action upon said application.

On December 28, 1905, and during the pendency of the application, unacted upon for the reasons above stated, the public lands in the township wherein the tract applied for is situated, were by your office, pursuant to instructions from the Department, withdrawn (first form) under the provisions of the act of June 17, 1902 (32 Stat., 388), and on January 19, 1906, the application was rejected because of said withdrawal.

On appeal by the applicant your office, by decision of April 30, 1906, affirmed the action of the local officers. From this decision the applicant appeals to the Department.

It is contended in the appeal, in substance and effect, that the applicant having presented at the local office a proper application to enter, accompanied by the affidavits required by law, and tendered the necessary fees, he had done all that was required by law to be done in order to entitle him to make entry, that at the time said application was presented there was no vacancy in the office of either register or receiver, and that the land was subject to entry: wherefore it is urged that the said application to enter conferred upon the applicant a vested interest in the land, or, at least, segregated the land from the public domain, and hence that it was wholly unaffected by the subsequent order of withdrawal for reclamation purposes of the public lands in the township wherein the same is situated.

There is absolutely no merit in the contention that upon the filing of a perfect and complete application to enter under the homestead law land then subject to such entry, and the tender of the necessary fees, there immediately arises in the applicant a vested right to or interest in, the land applied for. Such right exists in a homestead claimant only after he has done everything that he is required by law to do in order to acquire title—that is to say, made entry, submitted final proof thereon, showing full compliance with the requirements of the homestead law in the matters of residence, cultivation and improvement, paid all the necessary fees and charges, and become entitled to a final certificate. This principle is too well settled to render necessary the citation of authorities to support it.

Nor does such an application segregate a tract from the public domain. While pending it merely protects the applicant against the intervention of a subsequently asserted adverse claim to the land by another person. It does not in the slightest degree affect the right of the government to withdraw the land for a public purpose at any time before entry (Board of Control, Canal No. 3, State of Colorado *v.* Torrence, 32 L. D., 472; Todd *v.* Hays, on review, 34 L. D., 371; Charles A. Guernsey, Id., 560; Mary C. Sands, Id., 653). Indeed, even a valid homestead entry for land within the limits of a withdrawal for irrigation works, under the authority of the act of June 17, 1902, *supra*, existing at the date of such withdrawal, upon which entry final certificate had not issued, or the legal or equitable title to the land embraced therein become vested, may be canceled by the Department if it appear that such land is required for use in the construction and maintenance of such works (Instructions, June 6, 1905, 33 L. D., 607; Instructions, October 12, 1905, 34 L. D., 158; Opinion, January 25, 1906, Id., 421; Opinion, February 20, 1906, Id., 445), for, as was stated in instructions of January 13, 1904 (32 L. D., 387), such withdrawals "have the force of legislative withdrawals, and are therefore effective to withdraw all lands within designated limits to which a right has not vested."

The said order of withdrawal of December 28, 1905, in express terms excepts therefrom only those lands within the limits covered thereby "the title to which has not passed out of the United States." The tract here in question falls far short of meeting the description of land so excepted.

It is therefore held that the application was properly rejected because of the withdrawal. The action appealed from is accordingly affirmed.

COMMUTATION PROOF—RESIDENCE—ERRONEOUS ADVICE OF LOCAL OFFICERS.

JAMES A. HAGERTY.

To entitle a commuting homestead entryman to credit for constructive residence from the date of entry it must be shown, not only that he established a *bona fide* residence upon the land within six months from the date of the entry, but that his actual presence on the land was thereafter substantially continuous to the date of submitting final proof.

The laches or default of an entryman can not be excused because of erroneous advice given him by local officers.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 19, 1906.* (E. P.)

November 19, 1903, James A. Hagerty made homestead entry of the NW. ¼ of Sec. 29, T. 3 N., R. 25 E., Pierre land district, South Dakota, and on August 18, 1905, submitted commutation proof thereon, upon which final certificate issued August 25, 1905.

By decision of June 5, 1906, your office held the showing as to residence to be insufficient, rejected the proof, and held the commutation cash entry for cancelation.

From this decision the entryman appeals.

At the final-proof hearing the entryman testified that he was unmarried; that he established residence on the land April 27, 1904; that he had not resided continuously thereon; that he was absent from the land from the first of July until September 10, 1904, and again from November 25, 1904, until April 9, 1905, working for a living. From an affidavit filed by the entryman to support the appeal it appears that he remained on the land continuously from the 9th of April, 1905, until the date upon which he submitted final proof.

It is contended, in substance and effect, by the appellant that, having established his residence on the land five months and eight days after making entry, he is entitled, under the departmental ruling in the case of Fry *v.* Kuper (31 L. D., 159), to be credited with five months and seven days' constructive residence on the land, and that this period, added to the time he actually spent on the land, aggregates more than fourteen months, and hence that he has shown sufficient residence on the land to enable him to make commutation cash entry.

It was held in the case of Fry *v.* Kuper, *supra*, that a commuting entryman who establishes residence on the land within six months from the date of his entry is entitled to be credited with constructive residence from date of entry. To entitle himself to be so credited, however, the entryman must clearly and satisfactorily show, in

view of the comparatively brief period that he is required to live on the land in order to make commutation proof, and of the fact that he is not obliged to submit proof within the short time in which commutation is allowed, not only that he established a *bona fide* residence on the land within six months from the date of entry, but that his actual presence on the land was thereafter substantially continuous to the date of submitting final proof. This is clearly in accord with the principles repeatedly announced by the Department.

From the proof submitted in this case it appears that during the period of nearly sixteen months that intervened between the time the entryman established his residence on the land and the date upon which he submitted final proof, he was absent for two periods of, respectively, two months and ten days and four months and fourteen days. This showing falls far short of meeting the requirements above stated.

It is contended, however, that because, as stated in the affidavit of the entryman accompanying the appeal, he absented himself from the land for the periods named upon the advice of one of the local officers, whereas, had it not been for such advice he would have remained continuously on the land for the period which, he is now informed by your office, is required by law, the continuity of his actual residence on the land should be held to have been uninterrupted by such absences. There is no merit in this contention. The Department has repeatedly held that the laches or default of an entryman cannot be excused because of erroneous advice given him by local officers.

The proof submitted is, for the reason above stated, held to be insufficient. The decision appealed from is therefore hereby affirmed.

LEAVE OF ABSENCE—AUTHORITY TO GRANT—SEC. 3, ACT OF MARCH 2, 1889.

PHOEBE N. BUCKMAN.

The officers of the land department have no discretion in the matter of granting leaves of absence to homestead entryman beyond the authority conferred by statute, and can only allow leaves of absence to those applicants who have met all the requirements imposed by law.

The provisions of section 3 of the act of March 2, 1889, authorizing the granting of leaves of absence to homestead entrymen, were intended to assist homestead claimants who are making an honest effort to perfect their entries and acquire a home who expect in good faith to return to the land after the expiration of the leave of absence and to continue compliance with the law, and can not be extended to one who has no intention of returning to the land or making any further attempt to carry the entry to completion.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 19, 1906.* (E. O. P.)

Phoebe N. Buckman has appealed to the Department from your office decision of March 10, 1906, affirming the action of the local officers denying her application for leave of absence for one year from July 23, 1905, from the land embraced in her homestead entry made July 27, 1905, for the N. ½, SE. ¼, Sec. 15, T. 23 N., R. 18 W., O'Neill land district, Nebraska.

The applicant in her appeal intimates that the allowance of applications of this character is a matter resting solely in the discretion of the Secretary of the Interior. This conception of the discretionary power vested in the Secretary is erroneous. The right of homestead claimants to leave of absence is clearly defined by the statute granting it and it is only by virtue of such statute that any authority is conferred upon the land department to allow this privilege. The authority of the Secretary of the Interior is no greater than that conferred by law, and he can only allow leave of absence to those applicants who have met all the requirements imposed by the statute. Those requirements were clearly pointed out to the applicant by the local officers and the showing made by her in support of her application in no way tends to meet the conditions imposed.

The object of the statute is made plain by the language used (Sec. 3, Act March 2, 1889, 25 Stat., 854). It was intended to assist homestead claimants who were making an honest effort to perfect their entries and acquire a home, and who expected to, in good faith, return to the land after the expiration of the leave of absence and continue the work which had been interrupted by reason of any of the things specified in the act. This applicant, however, admits that she has no intention of making any further attempt to comply with the law and that she is only seeking this privilege in order that she may be given an opportunity to sell her improvements and dispose of her right to the land by relinquishment.

The Department has no hesitancy in affirming the action of your office and the local office upon the showing made.

CONTESTANT—APPLICATION TO ENTER PRIOR TO TERMINATION OF CONTEST—RELINQUISHMENT.

JUDSON RENO.

A contestant can acquire no right whatever to the land in controversy by the presentation of an application to enter the same prior to termination of the contest and while the entry remains of record.

Relinquishments of entries run only to the United States, and when filed for any purpose operate to clear the record of the entries to which they relate and should generally be retained as a part of the records of the land department.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 19, 1906.* (E. O. P.)

Judson Reno has appealed to the Department from your office decision of December 29, 1905, rejecting his application to enter, under the provisions of section 3 of the act of April 28, 1904 (33 Stat., 547), the NE. ¼ SW. ¼, W. ½ SW. ¼, Sec. 23, W. ½ NW. ¼, NW. ¼ SW. ¼, Sec. 26, N. ½ SW. ¼, Sec. 25, T. 35 N., R. 46 W., Alliance land district, Nebraska.

The action of your office was an affirmance of that of the local officers but in addition to the reasons assigned by them for the rejection of the said application you state that a portion of the land applied for is embraced in the existing entry of one Churchill. Since the rendition of your said decision the relinquishment of Churchill has been filed and the entry referred to canceled. It appears, however, from the report of the local officers, that one Burns had, prior to the filing of said relinquishment, instituted contest against said entry, which contest had proceeded to hearing and was awaiting decision in the local office. This being true, the application of Reno, as to this tract, cannot be allowed pending the exercise of any preference right to which Burns may be entitled.

Claimant urges that by reason of his pending contest against the homestead entry of Christina Keck for the SE. ¼ NW. ¼, NE. ¼ SW. ¼, N. ½ SE. ¼, of said section 26, which land he expects to enter upon the successful termination of his contest, his application should be relieved from the objection that the tracts therein described are noncontiguous. To allow this construction would amount to a most unreasonable construction of the statute under which the application is made, and could operate only as a nullification of one of its express requirements. It can not be presumed that a contest will be successful. On the contrary, the legal presumption is to the contrary, and the burden is upon the contestant to overcome it. In any event, so long as the entry under contest remains of record the land covered thereby is placed beyond the reach of other claimants for any purpose. The action taken by your office and the local officers is clearly correct and must be affirmed.

It is noticed that Reno in letter to the local officers of June 5, 1905, transmitting certain relinquishments, requests their return to him in the event of his application being rejected. In the opinion of the Department this request should not be complied with. Relinquishments run only to the United States and when filed for any purpose operate to clear the record of entries to which they relate and should be retained as a part of the records of the land department. They are not the proper objects of barter and sale and speculation and such traffic will not be encouraged by the land department.

HOMESTEAD—PREFERENCE RIGHT UNDER KINKAID ACT.

PUETZE *v.* MOELLER.

The preference right of entry accorded by the act of April 28, 1904, vested only in persons qualified to exercise it, and if, prior to the vesting thereof, intervening rights attached to the land, they will not be disturbed.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 19, 1906.* (E. O. P.)

Leopold Moeller has appealed to the Department from your office decision rejecting his application to enter, under the provisions of section 3 of the act of April 28, 1904 (33 Stat., 547), the S. ½ SE. ¼, Sec. 4, N. ½ NE. ¼, Sec. 9, T. 28 N., R. 49 W., Alliance land district, Nebraska, because of the prior preferential right of entry conferred by section 2 of said act claimed by Bernard Puetze, who filed protest against said application.

The material facts disclosed by the record are, briefly stated, as follows:

The land in controversy is contiguous to the original homestead entry of Puetze which he owned and occupied July 13, 1904, the date he sought to exercise his preferential right. Moeller had no original homestead entry for land contiguous to the tract described in his protested application filed in the local office July 2, 1904. On the latter date Puetze was the owner of more than 160 acres of land, exclusive of that embraced in his original homestead entry, which excess he alleges he sold and transferred on the same day he attempted to make entry of the land involved, but prior to the presentation of his application. Moeller, at the time of filing his application, swore that the land applied for was not subject to the preference right of any other claimant entitled to make entry under section 2 of the act of April 28, 1904, *supra*.

At the hearing ordered on the protest of Puetze an attempt was made on behalf of Moeller to establish the disqualification of Puetze by showing that the alleged transfer of the land owned by him exclusive of that embraced in his original entry, was not *bona fide*, but in the opinion of the Department a determination of this question will be unnecessary to a correct decision of the case. This is in accordance with the decision appealed from, but for the reasons following it will be observed that it is based upon different grounds from those relied upon by your office, which held that if Puetze "was qualified to make the original entry, which is not disputed, he is qualified to make the additional entry." The reasons advanced to support this construction of the act referred to are not supported by departmental decision rendered October 3, 1906, in the case of Arthur J. Abbott, on review (35 L. D., 206). It was therein held

that the area embraced in the original homestead entry should be eliminated from the calculation in determining the qualifications of the applicant, but that his qualifications were to be determined as of the date of the presentation of his application for second entry and not as of the date of his original entry. The analogy set up in your decision between entries made under section 5 of the act of March 2, 1889 (25 Stat., 854), and the act of April 28, 1904, *supra*, is destroyed when the language of the two acts is carefully considered. The distinction is pointed out in the brief of counsel filed in support of the appeal. By section 5 of said act of March 2, 1889, *supra*, no limitation was imposed upon the right of entry thereby granted, by compelling the entryman to meet the requirements of the general homestead law, while all entries under the act of April 28, 1904, *supra*, must be made subject thereto, except as those provisions are therein waived, and the act contains no language which warrants the implication of a waiver in respect to the qualifications of the claimant with respect to the ownership of land, except the elimination of all matters arising out of a prior homestead entry, authorized by the first proviso of section 3 of said act. It was therefore incumbent upon Puetze to show that he was not the owner of more than 160 acres of land exclusive of that embraced in his original homestead entry, and until he was possest of such qualification he could claim no rights under the act of April 28, 1904, *supra*. It is admitted that Puetze, at the date of the presentation of Moeller's application, was disqualified as an entryman under said act and that the affidavit of Moeller to the effect that the land applied for was not then subject to the preference right of any other person was literally true. At that time there was nothing to prevent whatever rights Moeller may have been entitled to under his prior application from attaching to the land applied for. The rights of Moeller are not affected by reason of the transfer by Puetze of the surplus land owned by him, even tho he was a qualified entryman entitled to the benefits of section 2 of said act, at the time he attempted to exercise his preference right, where such transfer was made *after* the filing of Moeller's application. The preference right granted by the act in question vested only in persons qualified to exercise it, and if, prior to the vesting thereof, intervening rights have attached to the land subject to its exercise, they will not be disturbed. The general rule that an entryman's qualifications are to be determined as of the date of the presentation of his application to enter is subject to the modification that where, prior to the removal of a disqualification which existed prior to such presentation, the adverse rights of others have intervened, they will be protected (Short *v.* Bowman, 35 L. D., 70, 74). It is clear therefore that at

the date of the filing of Moeller's application Puetze possest no rights under the act of April 28, 1904, *supra*, by reason of his admitted disqualification, and the subsequent removal of such disqualification will not operate to defeat the rights of Moeller under his prior application. Moeller's application for the land in controversy, if otherwise regular, should, for the reasons herein stated, be allowed.

The decision appealed from is accordingly hereby reversed.

PRIVATE LAND CLAIM—SMALL HOLDING—ACT OF MARCH 3, 1891.

JUAN SANCHEZ Y APODACA.

The confirmation of a Mexican grant under authority of the 8th section of the act of March 3, 1891, upon voluntary petition, will not prevent the issuance of patent for a small-holding claim lying within the surveyed limits of the grant and asserted in due time under sections 16 and 18 of said act, notwithstanding final proof upon said claim had not been made at the date of the decree.

Secretary Hitchcock to the Commissioner of the General Land Office
(F. L. C.) *October 24, 1906.* (E. F. B.)

The question involved in this appeal is whether a small-holding claim asserted in due time under sections 16 and 18 of the act of March 3, 1891 (26 Stat., 854), and lying within the surveyed limits of a Mexican grant confirmed under authority of the 8th section of said act upon a voluntary petition, is excepted from the operation of said decree if final proof had not been made at the date of the decree.

Notice of this claim was filed with the Surveyor-General June 6, 1893, and during that year was surveyed as lots 1 and 2, section 3, T. 7 N., R. 2 E., Santa Fe, New Mexico, embracing 38.47 acres.

It is within the limits of Lo de Padella Mexican grant, which was confirmed by the Court of Private Land Claims November 28, 1896, under section 8 of the act of March 3, 1891, upon the voluntary petition of the claimant, and the survey of that claim was approved by the court August 6, 1902.

You refused to approve this claim for patent for the reason that, as the final proof had not been made at the date of the decree of confirmation, it was not excepted therefrom, basing your decision upon "Instructions" of May 14, 1902 (31 L. D., 332).

In those instructions your office was advised that when at the date of a decree by the Court of Private Land Claims confirming a Mexican grant under authority of the 8th section of the act of March 3,

1891, a small-holding claim to lands lying within the limits of said grant, notice of which had been filed with the Surveyor-General in due time, and upon which final proofs had been made, showing that the claimant is entitled to a patent, must be held to have been disposed of or granted by the United States, within the meaning of sections 8 and 14 of said act and therefore excepted from the decree of confirmation.

These instructions were given in response to the inquiry of your office as to whether small-holding claims upon which final proofs had been made at the date of the decree, and in conflict with a Mexican grant, were excepted from the decree. They did not hold directly or inferentially that such claims upon which final proof had not been made at the date of the decree were not excepted.

Section 16 of the act, upon which appellant's claim is founded, provides that in township surveys thereafter to be made in the States and Territories named in the act—

> if it shall be made to appear to the satisfaction of the deputy surveyor making such survey that any person has, through himself, his ancestors, grantors, or their lawful successors in title or possession, been in the continuous adverse actual bona fide possession, residing thereon as his home, of any tract of land or in connection therewith of other lands, all together not exceeding one hundred and sixty acres in such township for twenty years next preceding the time of making such survey, the deputy surveyor shall recognize and establish the lines of such possession and make the subdivision of the adjoining lands in accordance therewith. . . .
>
> Upon receipt of such survey and proofs the Commissioner of the General Land Office shall cause careful investigation to be made in such manner as he shall deem necessary for the ascertainment of the truth in respect of such claim and occupation, and if satisfied upon such investigation that the claimant comes within the provisions of this section, he shall cause patents to be issued to the parties so found to be in possession for the tracts respectively claimed by them: *Provided, however*, That no person shall be entitled to confirmation of, or to patent for, more than one hundred and sixty acres in his own right by virtue of this section.

The 18th section of the act provides that claims arising under said section shall be filed with the Surveyor-General within two years from the passage of the act "and no claim not so filed shall be valid," and that, "no tract of such land shall be subject to entry under the land laws of the United States."

Section 16 was amended by the act of February 21, 1893 (27 Stat., 470), by striking out the words "residing thereon as his home," which also extended the time for filing claims to December 1, 1894.

The purpose of the 16th section of the act was to secure to the small-holding claimant, as a donation, the land which he had "through himself, his ancestors, grantors, or their lawful successors in title or possession, been in the continuous adverse actual *bona*

fide possession . . . for twenty years next preceding" the township survey, not exceeding one hundred and sixty acres.

The right thus granted was made to depend upon conditions existing at the date of the grant, and continuing up to the date of the township survey, and not upon any condition to be thereafter performed, except to file notice of the claim and to make proof of the continuous possession for twenty years next preceding the survey of the township.

These, however, are only concurring acts necessary to the acquisition of the legal title, the one asserting the existence of the claim at the date of the act, and the other establishing that fact by satisfactory proofs, and showing that the claim had not been abandoned at the time of the township survey. Altho a failure to file notice of the claim within the time fixed by the statute would render it invalid, and altho a failure to submit proofs within the time and in the manner required by the regulations might subject the claim to forfeiture at the instance of the United States, yet when final proof has been made in accordance with the regulations showing that the claim comes within the provisions of the act and that the claimant is entitled to a patent, the right thus completed relates to the date of the grant.

Barring the question of conflict with the Mexican grant, it is clear that this claimant, as against every one else and in virtue of the donation granted by the 16th section of said act, is entitled to a patent for his claim, if his proof shows that the claim comes within the provisions of the section.

A claimant who has filed notice of his claim within the time required by the act, and had by such notice protected the land from entry under the public lands laws, does not forfeit his right to make proof of his possession and occupancy by his failure to apply for a survey. The material question upon which his right depends is whether his occupancy and possession of the land is of such a character as to entitle him to the land and that fact must be made to appear to the satisfaction of the register and receiver and the Commissioner of the General Land Office. The survey of the claim is only a means to aid in perfecting his right secured by the filing of the claim and the making of proof in support thereof. (Hipolito Dominguez *et al.*, 33 L. D., 61, 63.)

In the case cited the question was as to the right of claimants under the 17th section of the act, relating to similar possessory claims in townships that had been surveyed at the date of the act. It was held that there is no limitation in the act as to the time in which the right of entry must be exercised, except that provision in the 18th section requiring notice of such claim to be filed with the Surveyor-General within the prescribed period and that the effect of such notice is to withhold the land covered by the occupancy and possession of the claimant from entry under the public land laws until the

claim is finally adjudicated and determined, citing Cantrel *v.* Burruss, 27 L. D., 278.

Does the confirmation of the Mexican grant prevent the perfecting of this claim by the issuance of patent? The recognition by Congress of such possessory claims and of the right to perfect the same by receiving patents therefor upon making proof to the satisfaction of the Commissioner of the General Land Office of the continued occupancy of the land for the prescribed period, was conferred by the same act that gave to the owners of Mexican grants the right to have such grants confirmed upon the condition that "any part of such land that shall have been disposed of by the United States" shall be excepted from confirmation, and which also provided, by section 14 of the act, that if any of the lands "decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid notwithstanding such decree, and upon proof being made to the satisfaction of said court of such sale or grant, and the value of the lands so sold or granted, such court shall render judgment in favor of such claimant against the United States for the reasonable value of said lands so sold or granted, exclusive of betterments, not exceeding one dollar and twenty-five cents per acre for such lands."

At the date of the decree of confirmation, and for three years prior thereto, this claim had been segregated by survey and was then, and had been since 1877, in possession of claimant and for more than fifty years prior thereto in possession of his predecessors in interest and title.

It is true the confirmee under the Mexican grant could not then have known whether this claim came within the provisions of section 16, so as to entitle him to a judgment for the money value of the land, for the reason that the right to a patent had not been established by proof.

It may be that the confirmee can not now be compensated by the money indemnity, for the want of a tribunal having jurisdiction to render a judgment for the amount. That is not a sufficient reason for withholding from this claimant the evidence of his compliance with the statute. If this claim is excepted from the decree, it is by force of the statute itself, and the issuance of a patent by the United States can neither add to the right or title of the small-holding claimant nor take from the confirmee any right secured under his patent. It would simply be the evidence of whatever right was confirmed by the 16th section of the act, and the courts would then have jurisdiction to determine whether such claim was excepted from the decree.

Your decision is reversed so far as it holds that the confirmation of

the Mexican grant is a bar to the issuance of the patent for the small-holding claim.

No decision is hereby made as to whether claimant comes within the provisions of the act, the final proofs not having been examined, and the case is therefore remanded for further consideration by your office.

AUTHORITY TO WITHDRAW LANDS WITHIN A FOREST RESERVE.

OPINION.

Lands within a forest reserve, not known to contain valuable mineral deposits, may be appropriated to such uses as may be necessary to carry out the aims and accomplish the ends contemplated in the establishment of the reserve.

Assistant Attorney-General Campbell to the Secretary of the Interior,
October 24, 1906. (W. C. P.)

The Secretary of Agriculture having requested that certain lands in Holy Cross forest reserve be withdrawn for use as a ranger station, and for experimental purposes, you referred his letter to me "for an opinion on the question presented in the first paragraph of the letter of the Secretary of Agriculture." The paragraph referred to reads as follows:

> I have the honor to request that the lands in the State of Colorado indicated by the attached description (List No. 1—Holy Cross Forest Reserve) be withdrawn from appropriation and use of all kinds under all of the public land laws, subject to all prior valid adverse claims, for use as a Ranger Station, for experimental purposes, by the Forest Service in the administration of the reserve.

No question is asked in this paragraph, but one which must be determined is as to the authority under the law to take the action requested, and that, I learn informally, is the one upon which an opinion is desired.

By section 24 of the act of March 3, 1891 (26 Stat., 1095, 1103), the President was authorized to set apart and reserve in any State or Territory having public lands bearing forests any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations. Further provisions relative to such reservations are found in the act of June 4, 1897 (30 Stat., 11, 35, 36), among which are the following declarations:

> It is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

* * * * * * *

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 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 is also provided in said act that, upon recommendation of the Secretary of the Interior with the approval of the President, after notice as therein prescribed—

any public lands embraced within the limits of any forest reservation which after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage may be restored to the public domain.

That it is the policy of Congress to exclude from forest reserves, so far as may be practicable, all lands except those chiefly valuable for forestry purposes, is further evidenced by the act of June 11, 1906 (34 Stat., 233), which provides that the Secretary of Agriculture may, upon application or otherwise, examine and ascertain as to the location and extent of lands within permanent or temporary forest reserves, except certain counties in California, which are chiefly valuable for agriculture and which, in his opinion, may be occupied for agricultural purposes without injury to the forest reserves, and which are not needed for public purposes," and file lists and descriptions of such lands with the Secretary of the Interior, who shall declare said lands open to homestead settlement and entry in the manner therein prescribed.

The original proclamations establishing such reservations effectually withhold the lands embraced therein from all forms of appropriation, except under claims initiated prior to the proclamation, which are excepted therefrom, and except under the mineral laws. Any lands within the reservations may be used for any purpose necessary to proper protection of the timber and effective administration of the reserve. A further order would not be necessary merely to subject lands within a forest reserve to use for a ranger station, if that be necessary to effective enforcement of the regulations governing such reservations, or to use for such experimental purposes as may be advantageous to the furtherance of such reserves. The only purpose of such a further order must therefore be to prevent the exercise of the privilege given by law to prospect, locate and develop the mineral resources of the land within forest reserves and to make entry under the mining laws of such lands therein as

may be shown to be mineral. That is, it is sought by such further withdrawals to effect something that was not and could not be, in the face of express provisions of law, accomplished by the proclamations establishing forest reservations.

If there be such power it must come from one of three sources: (1) the general authority of the Executive over the public lands; (2) the general authority vested in the Executive over forest reservations; (3) the authority given the Secretary of the Interior over forest reservations by some specific provision of law similar to that of the act approved June 4, 1897, *supra*, which reads as follows:

> The Secretary of the Interior shall make provision 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 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.

By the act of February 1, 1905 (33 Stat., 628), the Secretary of Agriculture is to execute all laws affecting public lands reserved for forest reserves "after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, appropriating, entering, relinquishing, reconveying, certifying, or patenting any of such lands." This provision does not in any manner affect the question as to the authority of the executive branch of the government to make the withdrawal requested.

The power of the President to withdraw and reserve from sale and set apart for public use parcels of the public lands has been recognized, as the supreme court said in Grisar *v.* McDowell (6 Wall., 363, 381), "from an early period in the history of the government." Such an order by the Executive operates to effectually withhold the land affected thereby from disposition under the general land laws. (Wolcott *v.* Des Moines Co., 5 Wall., 681; Wolsey *v.* Chapman, 101 U. S., 755; Bullard *v.* Des Moines, &c. R. R., 122 U. S., 167; Hamblin *v.* Western Land Co., 147 U. S., 531.) The ultimate control of the public domain and of the disposal thereof rests in the Congress. The Constitution (Art. 4, Sec. 3) provides:

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

Speaking of this provision the supreme court in United States *v.* Gratiot *et al.* (14 Pet., 526, 537), said:

> The term territory, as here used, is merely descriptive of one kind of property; and is equivalent to the word lands. And congress has the same power over it as over any other property belonging to the United States; and this power is vested in congress without limitation.

The exercise of any executive authority in the premises is therefore subject to such limitations and restrictions as Congress may see fit to impose either by general legislation or by enactments relative to specific subjects. Congress has imposed a limitation upon the power of the President in the matter of establishing forest reserves by declaring that his authority in this respect does not go to the extent of including in such reserves land more valuable for the mineral therein than for forest purposes and that such lands within the boundaries of a forest reserve shall continue to be subject to location and entry under existing mining laws. Lands that can not be appropriated or set apart for the main purpose for which forest reserves are created can not be appropriated for a subsidiary purpose or for use as an aid to the main purpose without the sanction of Congress therefor. In other words, the inhibition against inclusion of mineral lands in a forest reserve is equally effective unless or until modified by Congress, against their appropriation in aid of the administration of such reserves. The general authority of the executive branch over forest reserves is likewise subject to such restrictions and limitations as Congress may deem it proper to impose. The restrictions heretofore mentioned apply to the general authority of the executive branch in respect of the control of forest reserves. Authority to appropriate mineral lands for, or subject them to, use in aid of the administration of forest reserves can not be predicated upon the general authority of the Executive over the public lands or over forest reserves.

If there be such authority it must be found in some provision of law which grants it or plainly recognizes it either by express terms or by inference so strong as to clearly indicate an intention to grant or recognize it. The provisions in said act of June 4, 1897, that the Secretary of the Interior "shall make provisions for the protection against destruction by fire and depredations upon public forests and forest reservations" and that "he may make such rules and regulations and establish such service as will insure the objects of such reservations," carry with them of necessity authority to use portions of the reservations in such manner as may be proper and necessary for effective protection or for establishment and maintenance of such service as may be needful. Possibly, if necessary to proper performance of the duties devolved upon him by this law, he would be authorized to use for that purpose a portion of the public lands outside the boundaries of the reservation. At several sessions of Congress since that act appropriations have been made "to meet the expenses of executing the provisions" of the act of June 4, 1897. That of July 1, 1898 (30 Stat., 597, 618), is "to meet the expenses of forest inspectors and assistants and for the employment of foresters and other emergency help," etc. That of March 3, 1899 (30 Stat.,

1074, 1095), is to meet the expenses of forest inspectors and assistants, superintendents, supervisors, surveyors, rangers, and for the employment of foresters and other emergency help," etc. The acts of June 6, 1900 (31 Stat., 588, 614), March 3, 1901 (31 Stat., 1133, 1158), June 28, 1902 (32 Stat., 419, 453), March 3, 1903 (32 Stat., 1083, 1115), April 28, 1904 (33 Stat., 452, 483), follow the wording of that of March 3, 1899. Up to this time these appropriations were carried in the acts making appropriations for sundry civil expenses of the government, but since transfer of the administration of forest reserves to the Department of Agriculture (act of February 1, 1905, 33 Stat., 628), the appropriations for this purpose have been carried in the acts making appropriations for the Department of Agriculture under the head "Forest Service." In the act of March 3, 1905 (33 Stat., 861, 872–3), appropriations are made—

> To enable the Secretary of Agriculture to experiment and to make and continue investigations and report on forestry, forest reserves, forest fires, and lumbering; . . . seek through investigations and the planting of native and foreign species suitable trees for the treeless regions; to erect suitable buildings; . . . for all expenses necessary to protect, administer, improve, and extend the national forest reserves. . . .
>
> For ascertaining the natural conditions upon and for utilizing the national forest reserves, . . . for the employment of local and special fiscal and other agents, clerks, assistants, and other labor required in practical forestry, in the administration of forest reserves, and in conducting experiments and investigations in the city of Washington and elsewhere.

This wording is followed in the act of June 30, 1906 (34 Stat., 669, 683–4), except that the cost of any building was limited to $500 in the former act while in the later it is put at $1000.

By these provisions there has been created a system of administration which demands for its execution the permanent appropriation of lands either within or without forest reserves. It can not be that lands upon which money has been expended in erection of buildings or for any other purpose contemplated by these laws making appropriations for protection and administration of forest reserves may afterwards be taken by individuals. In respect of appropriation of agricultural lands for use in the administration of forest reserves, one provision of the act of June 11, 1906, *supra*, is significant. The lists to be made by the Secretary of Agriculture are to include lands chiefly valuable for agriculture which may be used for that purpose without injury to the forest reserves "and which are not needed for public purposes." Lands needed for any of the purposes specified in the appropriation acts, such as the planting of native and foreign species of trees, the erection of necessary buildings, the establishment of stations necessary to effective protection and various other purposes, are needed for public purposes. Clearly, then, such tracts as are needed for these purposes are to be excluded from the lists

of lands to be opened to homestead settlement and entry even tho they be agricultural lands.

In respect of mineral lands, an additional feature is to be considered. Such lands have been reserved from disposal under the general land laws and a separate and distinct system is prescribed for disposal of lands of that character. In the act of July 4, 1866 (14 Stat., 85), now section 2318, Revised Statutes, is the declaration: "In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law." The act of May 10, 1872 (17 Stat., 91), now sections 2319 *et seq.*, Revised Statutes, declared all valuable mineral deposits in lands belonging to the United States to be free and open to exploration and purchase and prescribed the method by which possession and title to such lands might be acquired and held. Thus lands of this character were in effect taken out of the operation of the general land laws. It was evidently in recognition and pursuance of this policy of holding mineral deposits free to exploration that Congress made the declaration in the act of June 4, 1897, that it was not the intent or purpose to authorize the inclusion in forest reserves of lands more valuable for the mineral therein than for forest purposes. So well established is this policy that it has been held that a grant of public lands did not carry mineral lands even tho there was no express exception (Mining Co. *v.* Consolidated Mining Co., 102 U. S., 167).

The duties devolving upon the Secretary of Agriculture under the act of June 4, 1897, and subsequent appropriation acts, require for their proper performance the occupancy and use of some land and therefore those acts carry with them by necessary inference power to subject tracts of public land within these reservations to such occupancy and use. An inhibition against the appropriation of mineral lands for such purposes is clearly to be drawn from the general policy of leaving mineral deposits open to exploration and the lands containing such deposits subject to disposition under the mineral laws only and also from the express declarations in the act of June 4, 1897, quoted above, that mineral deposits and land containing such deposits are not to be included in forest reserves, but are to be and remain open to exploration, location and entry under the mining laws. Lands known to contain valuable mineral deposits are not subject to withdrawal or appropriation for use in the administration of forest reserves any more than they are subject to inclusion in such reserves. The establishment of a forest reserve does not contemplate the actual use or occupancy of each or any particular tract within the designated boundaries of the reserve and, hence, there is no incongruity in providing that after the creation of the reserve lands therein may be prospected,

and, if shown to be mineral in character, located and entered under the mining laws. The purpose for which the withdrawal now proposed is to be made contemplates and requires the actual use and occupancy of each tract and the expenditure of money upon each or most of such tracts, and this of necessity excludes the assertion of any other claim.

Land not known at the time to be mineral in character may be devoted to purposes recognized by law as proper in aid of the objects sought to be attained by establishment of forest reserves or coming within the purview of the appropriation acts for protection and administration of such reserves, and subsequent discovery of mineral therein will not affect its use for those purposes or render it liable to exploration, location or entry under the mining laws. This is in accord with the general rule that the known character of land at date of its sale controls and that the right and title of a purchaser from the United States can not be defeated or affected by subsequent discovery of mineral in the land (Deffeback *v.* Hawke, 115 U. S., 392, 404; Aspen Consolidated Mining Co. *v.* Williams, 27 L. D., 1, 15–18). This rule is equally applicable to appropriations of public land for public uses and its application is necessary to properly safeguard and protect public interests. The known character of land at the time of its appropriation for government use, in this case for use in protecting and administering forest reserves and accomplishing the objects sought by establishment of such reserves, is the criterion for determining its liability to such appropriation. Having been once properly devoted to such public use no change in its known character resulting from subsequent discovery of mineral therein can have any effect upon such appropriation or make the land subject to exploration, location or entry under the mining laws.

The uses to which it is proposed to subject the land by the order now proposed are not sufficiently defined to justify an opinion as to whether they are uses recognized by law. Nor are facts stated that would justify this office in expressing an opinion as to the necessity for appropriation of the particular land mentioned by the Secretary of Agriculture. That question, however, is not a proper one for a legal opinion, it being administrative in character and resting for determination in the discretion of the executive officers. The quantity of land to be appropriated for designated uses should be limited to that actually necessary to effectually accomplish the purposes contemplated. That also is a matter of administration to be determined in the exercise of a wise discretion.

I am of opinion, and so advise you, that there is authority to appropriate land within a forest reserve, not known to contain valuable

mineral deposits, to the uses necessary to carry out the aims and accomplish the ends contemplated by the laws authorizing the establishment of such reserves and the appropriation acts making appropriations for protection and administration thereof and carrying forward investigations and experiments authorized thereby.

Approved:

E. A. HITCHCOCK, *Secretary.*

LEAVE OF ABSENCE—SECTION 3, ACT OF MARCH 2, 1889.

LEOLA FARLOW.

The affidavits to support an application for leave of absence may be executed before a notary public having jurisdiction to administer oaths within the land district in which the claim is situated.

The action of the local officers approving an application for leave of absence under the provisions of section 3 of the act of March 2, 1889, is in all cases subject to review by the Commissioner of the General Land Office.

The allegation in support of an application for leave of absence that the entrywoman, who is a school teacher, desires to "attend a term at the State normal school," does not set forth sufficient ground, under the provisions of section 3 of the act of March 2, 1889, to warrant the allowance of the application.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 25, 1906.* (A. W. P.)

An appeal has been filed on behalf of Leola Farlow from your office decision of February 20, 1906, wherein you reverse the action of the local officers and deny her application for leave of absence from her homestead entry No. 7435, made April 13, 1903, for the N. ½ of the SE. ¼ and the S. ½ of the NE. ¼, Sec. 26, T. 2 S., R. 12 E., Rapid City, South Dakota, land district.

Claimant's application was filed with the local officers on December 1, 1905, and the leave of absence therein requested was granted by them December 6, 1905; on which date they transmitted the same for the consideration of your office. The following is a copy of claimant's application:

STATE OF IOWA, *County of Cedar, ss.*

Leola Farlow, of Rapid City, S. D., being first duly sworn according to law, deposes and says that she is the identical Leola Farlow who made H. E. No. 7435, for the N. ½ SE. ¼, S. ½ NE. ¼, Sec. 26, Twp. 2 S., Range 12 E., B. H. M., on the 13th day of April, 1903, and established her residence on said land on the 16th day of August, 1903. Before the 16th day of August, 1903, she had her land fenced, by setting fence posts, 20 feet apart, and stringing 2 barbed wires, entirely around the claim; that she also had completed a house 12 x 14 feet, made of good lumber, with shingle roof, windows and doors, and established a residence. She had no breaking done, for the reason that she took it for grazing purposes. For which purpose she leases it. Being engaged in

teaching school, she found it necessary to attend a term at the State Normal School, at Cedar Falls, Iowa, and desires a six months' leave of absence from Dec. 25th, 1905, until June 25th, 1906, that she may finish the term, before returning to her home.

LEOLA FARLOW.

Subscribed and sworn to before me, this 28 day of Nov., 1905.

J. J. REFSHAUGE, *Notary Public.*

STATE OF SOUTH DAKOTA, *County of Pennington, ss.*

On this Dec. 1, 1905, before me J. S. Gantz, Clerk of Circuit Court, in and for county and State aforesaid, personally appeared Estella McMahon and Madge Keliher, who being severally duly sworn, each on oath for herself says: I am familiar with the contents of the within affidavit of Leola Farlow and know the statements therein contained are true.

ESTELLA MCMAHON,
MADGE KELIHER.

Subscribed and sworn to before me this 1 day of December, 1905.

J. S. GANTZ, *Clerk of Circuit Court.*

By decision of February 20, 1906, your office held that:

The reason set forth does not bring the said application within the provisions of Sec. 3, act of March 2, 1889 (25 Stat., 854), and you were without authority to grant the same. On this account and because her affidavit in support of her application was made before a notary public, an officer not qualified to act in homestead cases, under the act of March 4, 1904 (33 Stat., 59), the said application is hereby denied.

From that decision claimant has appealed to this Department, and assigned errors as follows:

1. In holding applicant's affidavit in support of her application for leave of absence was required to have been verified before an officer qualified to act in homestead cases, the act of March 4, 1904, not being applicable to a showing for leave of absence.

2. In holding that the showing herein was not sufficient to entitle this applicant to a leave of absence, and that it was not sufficient to bring said application within the provisions of section 3, act of March 2, 1889, or at least within the spirit of said provision.

3. In reviewing the decision of the Register and Receiver, the said decision being final under the provisions of law in such case made and provided, and subject to review only for manifest abuses of discretion, and there is no abuse of discretion in granting said leave of absence.

4. In denying said application for leave of absence, and in not granting the same.

Section 3 of the act of March 2, 1889, *supra*, under which this application was made, provides:

That whenever it shall be made to appear to the register and receiver of any public-land office, under such regulations as the Secretary of the Interior may prescribe, that any settler upon the public domain under existing law is unable, by reason of a total or partial destruction or failure of crops, sickness, or other unavoidable casualty, to secure a support for himself, herself, or those dependent upon him or her upon the lands settled upon, then such register and receiver may grant to such a settler a leave of absence from the claim upon which he

or she has filed for a period not exceeding one year at any one time, and such settler so granted leave of absence shall forfeit no rights by reason of such absence: *Provided,* That the time of such actual absence shall not be deducted from the actual residence required by law.

The first question raised by the appeal is, whether or not the application for leave of absence was properly executed. Relative to the holding of your office that in this respect it should conform to the requirements of the act of March 4, 1904 (33 Stat., 59), it will first be noted that parties desiring to make homestead entry were originally required to make affidavit before the register or receiver of the local land office, with the exception that under section 2294 of the Revised Statutes, on certain stipulated grounds, the *affidavit required by law* could be made before the clerk of the court for the county in which the applicant was an actual resident. This section was amended by the act of March 11, 1902 (32 Stat., 63), wherein it was provided that thereafter all affidavits, proofs, 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 theretofore authorized, 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 land district in which the lands are situated. The act of March 4, 1904, *supra*, amending this act, again provided for making the affidavits, proofs, and oaths, required to be made under these acts, before the officers named in the former act, the only changes being that such could be made in the county or parish in which the land is situated, altho the place of making the same be outside the proper land district, and also validated such proofs and affidavits which had theretofore been so made and duly subscribed. Reference has been made to these acts amending and enlarging the scope of section 2294, *supra*, in order to direct attention to the fact that each has reference to the oaths and affidavits required by the act under which entry is sought to be made. Now, it will be observed that section 3 of the act of March 2, 1889, *supra*, authorizing the granting of leave of absence, does not require the execution and filing of an affidavit or oath, but authorizes the local officers to grant such leave whenever it appears, for the reasons therein named, that any settler who has made entry is unable to secure support for himself and those dependent upon him on the lands thus settled on "under such regulations as the Secretary of the Interior may prescribe."

In pursuance of this act the Department, on March 8, 1889 (8 L. D., 314), issued its circular of instructions to registers and receivers of United States land offices directing them that:

> The applicant for such permission will be required to submit testimony to consist of his own affidavit, corroborated by the affidavits of disinterested wit-

nesses, executed before the register or receiver or some officer in the land district using a seal and authorized to administer oaths, setting forth in detail the facts on which he relies to support his application, and which must be sufficient to satisfy the register and receiver, who are enjoined to exercise their best and most careful judgment in the matter, that he is unable by reason of a total or partial destruction or failure of crops, sickness, or other unavoidable casualty to secure a support for himself or those dependent upon him upon the land settled upon. In case a leave of absence is granted the register and receiver will enter such action on their records, indicating the period for which granted, and promptly report the fact to this office, transmitting the testimony on which their action is based. In case of refusal the applicant will be allowed the right of appeal on the usual conditions.

(See also pages 16 and 17, General Land Office circular, issued January 25, 1904.)

From the above it will be observed that in conformity with the authority granted by the act in question, it is required that such an applicant's request must be based on showing in the form of his own affidavit, corroborated by the affidavits of disinterested witnesses, executed before the register or receiver or *some officer in the land district using a seal and authorized to administer oaths.* Examining the application in question it appears that claimant's affidavit was executed before a notary public in Cedar county, Iowa, but that that of the corroborating witnesses was properly executed before the clerk of the circuit court of Pennington county, South Dakota, an officer in the Rapid City land district. While the notary public before whom claimant executed her affidavit was an officer using a seal and authorized to administer oaths, yet he was not an officer in the above land district, nor in fact of the State in which her entry was located. For this reason, and not because her affidavit was executed before "an officer not qualified to act in homestead cases, under the act of March 4, 1904," *supra*, the Department is of the opinion that the application was not correctly executed.

As to the third specification of error it is sufficient to direct attention to the departmental circular issued under the authority of the act hereinbefore set out. It directed that the local officers pass upon such an application, but, in the event of its rejection by them, specifically grants the applicant a right of appeal on the usual conditions. And in case of its approval, further directs that they make proper record notation and promptly report the matter, transmitting the testimony on which their action was based, for the consideration of your office. The contention therefore that the authority granted the local officers by this act is purely discretionary, and subject to review by your office only in the event of manifest abuse, is not sound and can not be admitted.

In view of the holding herein that no properly executed application was presented, the Department might dismiss from further con-

sideration the question raised by the second and fourth assignments of error as to the sufficiency of the application, but inasmuch as the same is before the Department, the showing made by applicant has been examined. Upon full consideration thereof it is not believed that the facts alleged are sufficient to bring the application within the provisions of the act, and thus warrant its allowance. Claimant does not allege either failure of crops or sickness, and conceding the truthfulness of the allegations, even a most liberal interpretation would not warrant classing such showing under the head of "other unavoidable casualty." In this connection, see John Riley (20 L. D., 21), and Adele C. Leonard (22 L. D., 716).

For the reasons herein stated the judgment of your office is affirmed.

SECOND AND ADDITIONAL HOMESTEADS—ACTS OF APRIL 28, 1904.

FRANK DOLPH ET AL.

A homestead entry made and relinquished *after* the passage of the act of April 28, 1904 (33 Stat., 527), can not be made the basis for the restoration of the homestead privilege under that act.

Where one entitled to have his homestead right restored to him under the provisions of the act of April 28, 1904 (33 Stat., 527), and also entitled to make an additional entry under the provisions of section 2 of the act of April 28, 1904 (33 Stat., 547), exercises the latter privilege, he thereby exhausts his homestead rights and is not entitled to claim any benefits under the former act.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 25, 1906.* (E. O. P.)

Frank Dolph has appealed to the Department from your office decision of March 30, 1906, holding for cancelation, in part, his homestead entry allowed March 13, 1905, under the provisions of section 2 of the act of April 28, 1904 (33 Stat., 547), commonly known as the "Kinkaid Act," for the NW. ¼, S. ½ NE. ¼, NW. ¼ NE. ¼, Sec. 21, SE. ¼ SE. ¼, Sec. 20, NE. ¼, Sec. 29, T. 18 N., R. 31 W., North Platte land district, Nebraska, because of conflict with the prior application of one John T. Terpening, filed March 9, 1905, for the whole of said section 20.

The record further discloses that Frank P. Bateman made entry June 30, 1904, under the provisions of the act of June 17, 1902 (32 Stat., 388), for the S. ½ N. ½ of said section 20, it being at that time included in a withdrawal made June 21, 1904, for irrigation purposes. Said withdrawal was vacated and the land restored to entry February 14, 1905. April 4, 1905, Bateman was allowed to enter, as

additional to his former entry, presumably under the provisions of section 2 of the act of April 28, 1904, *supra*, the N. ½ N. ½, N. ½ SE. ¼, SW. ¼ SE. ¼, SW. ¼, Sec. 20, SE. ¼ SE. ¼, Sec. 19, same township and range.

By your office decision appealed from the entry of Dolph as to the SE. ¼ SE. ¼ of said section 20, was held for cancelation. This action, if correct, was incomplete, for by the cancelation of the entry as to this tract, it follows that the entry must then fail as to the NW. ¼, section 29, as said tract is hereby rendered noncontiguous to the lands included in that portion of the entry allowed to stand.

Your office decision held, with respect to the additional entry of Bateman, that it was illegal and unauthorized and must therefore be canceled.

As to the application of Terpening, it was held that it could be allowed only as to the S. ½ of said section 20, for the reason that the original entry of Bateman, having been properly allowed as to the S. ½ N. ½ of said section, defeated the application as to land embraced therein and likewise defeated it as to the N. ½ N. ½ of said section because of the noncontiguous character of the entry. The Department sees no reason for confining the selection of Terpening to the S. ½ of said section if it should develop that he preferred to take the other land described in his application, viz., N. ½ N. ½, section 20. However, the determination of this question will be unnecessary to a decision of the material questions presented by the appeal.

Neither Bateman nor Terpening appealed from your decision, but the whole matter is brought before the Department on the single appeal of Dolph. However, the facts connected with the respective entries of Bateman and Dolph and the application of Terpening are so intimately related as not to admit of separation, and a correct determination of the question raised by the appeal of Dolph renders necessary a decision defining the separate rights of the respective parties. An orderly disposition of the case requires at the outset a settlement of the rights of Terpening under his application presented prior to the allowance of the second entries of Dolph and Bateman.

In this connection the record discloses that Terpening made homestead entry, December 13, 1903, for the S. ½ NE. ¼, N. ½ SE. ¼, Sec. 20, T. 16 N., R. 24 W., and June 29, 1904, made additional entry under the provisions of section 2 of the act of April 28, 1904 (33 Stat., 547), for the N. ½ NE. ¼, E. ½ NW. ¼, NE. ¼ SW. ¼, S. ½ SE. ¼, S. ½ SW. ¼, Sec. 20, N. ½ NE. ¼, NE. ¼ NW. ¼, Sec. 29, same township and range. Both of said entries were canceled by relinquishment January 20, 1905. The application now under consideration

is made and can only be allowed, if at all, under the provisions of section 1, of the act of April 28, 1904 (33 Stat., 527), restoring the homestead right in certain cases. The action of your office allowing the application in part and rejecting it as to the remainder, in effect held that Terpening was entitled to claim the benefit conferred by said act. His affidavit filed in support of his application for restoration of the homestead right sets out that after making said original and additional entries, he cultivated a portion of the land and discovered that it was "wholly worthless for agricultural purposes and unfit for a home for this affiant and his family," and that he executed his relinquishment without consideration. Without at this time considering the sufficiency of the showing thus made with respect to applications of this character, it is first necessary to determine whether the benefits conferred by the last-mentioned act can be successfully asserted by those persons who have made and relinquished an entry subsequently to its passage, upon the relinquishment of which, under the conditions enumerated, the restoration of the homestead right depends. In the opinion of the Department the language of the act admits of but one construction, and limits the exercise of the right therein granted to those persons only who *made* the entry subsequently relinquished, prior to its passage. the term "heretofore," as used therein is one of limitation, and as to time has reference solely to the date of the passage of the act. It follows, therefore, that entries made and relinquished *after* its passage can not be made a basis for the restoration of the right under its provisions, however it may be as to entries made *before* and relinquished *after* its enactment. This precludes the assertion of any right in Terpening based upon the relinquishment of his additional entry made under the provisions of the so-called "Kinkaid Act," *supra*. He would not therefore, in any event, be entitled to a restoration of his homestead right except as to 160 acres, and this is dependent upon the relinquishment of his original entry made prior to the passage of the act. The determination of this question rests entirely upon the proper construction of the two acts under consideration and presents more difficulty.

The act providing for the restoration of the homestead right was intended to relieve those persons who had *theretofore* exercised and thereby exhausted the homestead privilege from the hardship resulting from an honest mistake as to the character of the lands or who were unable, because of unfortunate complications of personal or business affairs, to proceed under the right initiated and carry it to perfection.

The "Kinkaid Act" had for its object the enlargement of the area which might be entered under the homestead law, within the speci-

fied territory, because of the recognized inferior quality of the land. The act of April 28, 1904 (33 Stat., 527), has, as hereinbefore stated, no reference to the "Kinkaid Act," and to those persons entitled thereunder it operated to restore the homestead right *without qualification*, as tho the former entry had not been made. Under such a right an entryman is permitted to exercise the homestead privilege unimpaired or diminished. The act never intended to confer any lesser or different right. The possessor of an unrestricted homestead privilege is free to exercise it by entering not to exceed 160 acres under the general homestead law or 640 acres under the "Kinkaid Act." Even conceding the sufficiency of the showing made by Terpening in support of his application for the restoration of his homestead right based upon the relinquishment of his *original* entry (it having already been decided that he gained nothing in this respect by the relinquishment of his *additional* entry), would he then be in position to assert a right of entry in either of these two ways? It is clear that he would not. He would have no right which he could assert under the general homestead law, because of his entry under the "Kinkaid Act" of 480 acres, the relinquishment of which availed him nothing. The only right he might have would be under the first proviso of section 3 of the latter act and could amount to no more than the right to enter 160 acres within the territory prescribed. In the opinion of the Department the act restoring the homestead right is not to be thus construed. Terpening, by making his original entry the basis for an additional entry under section 2 of the "Kinkaid Act" will not now be heard to say that he relinquished his original entry for any of the reasons specified in the said act of April 28, 1904 (33 Stat., 527). By making his original entry the basis for an additional entry he merged his rights under the general homestead law with the rights acquired under the "Kinkaid Act." By reason of his election he is estopped from asserting any rights under the general homestead law, and as this is the only law to which the said act of April 28, 1904 (33 Stat., 527), has reference, he is not now in position to claim any benefit thereunder. It is clear therefore that Terpening is not entitled to the restoration of his homestead right, and his application to enter said section 20 must be rejected *in toto*.

This construction will not operate to in any manner determine the rights of persons who made entry under the general homestead law prior to the passage of the act of April 28, 1904 (33 Stat., 527), and relinquished the same under the conditions therein set out, *without making* said entries the basis of any rights granted by the "Kinkaid Act."

This disposition of the claim of Terpening, based upon his said application, makes it unnecessary to consider the other questions

raised by the appeal of Dolph, inasmuch as it is now wholly immaterial whether his application to enter additional lands under the "Kinkaid Act" be considered under the provisions of section 2 or section 3 thereof. The conflict having been removed, it can properly be allowed under the provisions of either section without prejudice to Dolph, and, in the absence of any objection, other than the one upon which your decision is based, should be allowed for all the tracts therein described.

The action taken by your office with respect to the application of Bateman is correct, regardless of the rejection of the application of Terpening. His original entry having been made after the passage of the "Kinkaid Act" can not be made the basis for additional entry under section 2 thereof (Robert Knoetzl, 34 L. D., 134). He might, however, upon the completion or relinquishment of his original entry, be entitled to the benefits conferred by the first proviso of section 3 of said act.

The decision appealed from is accordingly affirmed as to the action taken upon the application of Bateman and reversed as to the action taken with respect to the applications of Dolph and Terpening.

ABANDONED MILITARY RESERVATION—FOREST RESERVE.

OPINION.

The executive department of the government has no power to include within and as a part of a forest reserve lands within an abandoned military reservation turned over to the Secretary of the Interior, pursuant to law, for disposal under the acts of Congress providing for the disposition of lands in abandoned military reservations.

The Secretary of the Interior has no power, without express legislative authority, to prescribe rules and regulations for the protection of fish in the streams flowing thru and within the limits of a forest reserve.

Assistant Attorney-General Campbell to the Secretary of the Interior, October 26, 1906. (E. F. B.)

By reference of a letter from the Secretary of Agriculture dated July 27, 1906, my opinion is requested as to whether or not the action suggested on page 30 of a pamphlet transmitted with said letter entitled "The Golden Trout of the Southern High Sierras," can under existing law be carried into effect.

The action suggested on page 30 of said pamphlet is as follows:

In order that adequate protection be secured, it is recommended that the limits of the Mount Whitney Military Reservation be extended so as to include the whole of Volcano Creek. This can be done by extending the eastern boundary from the present southern boundary along the meridian of 118° 10′ to its

intersection with the parallel of 36° 20′, thence west on that parallel to Kern River, which should be made the western boundary. The northern boundary should be extended westward to the main fork of Kern River. This would include all of Volcano Creek, the headwaters of Cottonwood Creek, and South Fork of the Kern, as well as all of Rock Creek and Whitney Creek. When the boundaries have been thus extended, fishing within the limits of the reservation should be absolutely prohibited for three years, after which it might be permitted under certain restrictions. These restrictions should provide a minimum size, limit the number that may be caught, and prohibit all fishing during the spawning season.

There are two propositions involved in this inquiry: First, whether the executive department has authority to include within, and as part of a forest reservation, lands in an abandoned military reservation that has been turned over to the Secretary of the Interior, pursuant to law, for disposal under the acts providing for disposal of lands in abandoned military reservations; second, whether a reservation of such lands can thereafter be made for the propagation and protection of fish in the streams flowing thru and within the limits of such reservation by prohibiting fishing in such streams for a certain period with a view to permitting it thereafter under certain restrictions.

The power and authority of the executive department of the Government to use, control or dispose of the public domain is derived solely from acts of Congress, which, under authority of article IV, section 3, of the constitution of the United States, has the absolute and unlimited power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. (United States *v.* Gratiot, 14 Pet. 526; Gibson *v.* Chouteau, 13 Wall., 92.)

A land department, of which the Secretary of the Interior is the supervisory head, has been created by statute, as a special tribunal, to which has been confided the execution of the laws regulating the surveying and selling, and the general care and control of these lands. (Knight *v.* Land Association, 142 U. S., 161; Riverside Oil Company *v.* Hitchcock, 190 U. S., 316.) "Congress has also enacted a system of laws by which rights to these lands may be acquired and the title of the government conveyed to the citizen." (United States *v.* Schurz, 102 U. S., 378, 396.) The executive department can not exercise any power of control or disposition of the public lands except as Congress has directed, either by express enactment or by necessary implication, including the use and reservation of lands. It has no arbitrary power to reserve lands or withhold them from the operation of the general land laws, and altho it may, in virtue of the supervisory power and control vested in it, set apart portions of the public domain for public purposes as the exigencies of the public service may require, or to accomplish some end in the

performance of a duty enjoined upon that department in the execution of laws affecting the disposal, control and care of the public lands, it can not, in the exercise of such general power of supervision, infringe any limiting provision of a particular act in which the duty to be performed has been specifically provided for. (Instructions, 33 L. D., 104; see also opinion Attorney-General Knox, 23 Op., 589.)

By the act of July 5, 1884 (23 Stat., 103), Congress has provided a special system for the disposal of lands in abandoned military reservations. Such lands are placed under the control of the Secretary of the Interior for disposal in the manner provided by the statute to the exclusion of every other mode or manner, or under any other law. While the statute does not place such lands beyond the power of Congress to make such other disposition of them as it may deem proper, the authority of the executive department is absolutely limited and controlled by the provisions of the act. (State of Utah, 30 L. D., 301.)

The reservation of lands for military purposes is an appropriation of the land for use by the United States, and such reservation takes them out of the category of public lands, as that term is defined by the court in Newhall *v.* Sanger (92 U. S., 761, 763). When they are no longer needed for that purpose and have been turned over to the Secretary of the Interior, they are not restored to entry under the general land laws, which authorize the acquisition of inceptive rights to them as public lands, but the statute expressly provides that they shall be appraised and disposed of at public sale to the highest bidder at not less than the appraised value.

When Congress has made special provision for the disposal of any class or character of lands, as in the case of abandoned military reservations, it is an implied prohibition against their disposal in any other manner. (R. M. Snyder, 27 L. D., 82; Instructions, 33 L. D., 130; Opinion, Ib., 312.) Nor can it be accomplished indirectly by changing the character of the reservation.

From these well established principles it must be apparent that the executive department has no authority to vacate a military reservation or to convert it into a forest reserve, without special statutory authority, for the reason that it would indirectly violate the law by taking those lands out of the operation of the statute that makes special provision for their disposal.

If a military reservation is merged in a forest reserve it must necessarily lose its identity and character and if the lands should thereafter be restored to the public domain, they would be subject to entry under the general land laws, unless provision was made for

their disposal otherwise by Congress. Such action would therefore indirectly subvert the provision of the statute.

The purpose for which the reservation of the lands embraced in the military reservation is desired can be practically accomplished by temporarily withholding the lands from disposal until appropriate legislation can be had, by reserving them for such uses, and placing them under the control of the proper officials. But I am of the opinion that there is no authority in the executive department of the government to change the character of an abandoned military reservation, or to convert it to uses not contemplated by Congress.

The second question is answered by the opinion of Attorney-General Knox, reported in 23 Opinions, page 589, in which it is distinctly held that the Secretary of the Interior can not, without express legislative authority, prescribe rules and regulations by which the national forest reserves may be made refuges for game, or by which the hunting, killing, or capture of game thereon, may be forbidden, and that neither the act of June 4, 1897 (30 Stat., 11, 34), nor the act of March 3, 1899 (30 Stat., 1095), *nor any other provision of law*, confers upon the Secretary of the Interior this power. The Attorney-General states that unless hunting or fishing on forest reserves is made unlawful by either Federal or State law, the Secretary can not prohibit it. Such want of authority applies equally to all executive officers.

I am therefore of the opinion that the action contemplated can not lawfully be carried into effect.

Approved:

E. A. HITCHCOCK, *Secretary.*

HANSON *v.* GRAMMANCHE.

Motion for review of departmental decision of March 28, 1906, 34 L. D., 524, denied by Secretary Hitchcock, October 27, 1906.

APPLICATION TO ENTER—SECOND APPLICATION—WAIVER OF RIGHT.

B. FRANK ALLEN.

Where an application can not be allowed in the form presented, for the reason that it covers in part lands embraced within an existing entry, and the applicant subsequently files a new application embracing a part only of the vacant lands covered by the first application, he thereby waives all rights under the original application as to the remainder.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *October 29, 1906.* (E. O. P.)

B. Frank Allen has appealed to the Department from your office decision of January 25, 1906, denying his application to enter, under the provisions of section 1 of the act of April 28, 1904 (33 Stat., 547), the SW. ¼, Sec. 17, SE. ¼, Sec. 18, T. 2 N., R. 40 W., Lincoln land district, Nebraska.

The record discloses that Allen first made application at the McCook land office to enter, in addition to the tracts above described, the NE. ¼, Sec. 19, NW. ¼, Sec. 20, same township and range, which application was rejected *in toto* by the local officers, for the reason that the SW. ¼ of Sec. 17 was then covered by the homestead entry of another. On appeal, your office held that the application of Allen should have been rejected only as to the tract covered by the existing entry.

Pending Allen's appeal from the decision of the local officers, one William J. Hardman was permitted to make entry of the SE. ¼ of said Sec. 18, together with other lands. This action was erroneous and your office directed that Hardman be called upon to show cause why his entry as to the tract in conflict should not be canceled. Before action was taken by Hardman, Allen filed a new application describing therein only the NE. ¼ of Sec. 19 and the NW. ¼ of Sec. 20, which was properly allowed. Your office then held that Allen had thereby waived all his rights under his first application and his appeal taken from the rejection thereof by the local officers, and directed that the entry of Hardman be held intact.

Counsel for Allen contends that such effect should not be given to the second application of Allen, for the reason that it described a part of the lands first applied for, and that if favorable action should be taken on Allen's appeal from the action of the local officers rejecting his first application, he should be allowed to extend his second entry to include the other tracts. In support of this contention reliance is placed upon decisions of the Department which hold that the filing of a valid application to enter protects the rights of the applicant as against other claimants, as tho the entry had been allowed. Without controverting the correctness of this rule, it is clear the same has no application in the determination of this case. The first application of Allen included a tract not then subject to entry. As to such tract it could not be allowed. Neither could the local officers arbitrarily reject it in part and allow it as to the remainder without the applicant's consent. He could not be compelled to take only a portion of the land applied for and thereby exhaust his right. His application *as presented*, including therein

certain lands not subject to entry, could not be considered as equivalent to actual entry until corrected by the applicant and the tract not subject to entry eliminated therefrom. Before this was done Allen presented a new application, which was properly allowed. In the opinion of the Department he thereby waived his rights under his former application as effectually as tho he had withdrawn the same, as he had a right to do, and under a second application entered the full area allowed by statute.

It is not shown by the record that the homestead entry covering the SE. ¼, Sec. 17, at the time of the filing of Allen's first application, has been canceled, tho counsel in argument asserts that such action has been taken as the result of Allen's contest. If this be true, Allen might, in the absence of any intervening adverse claims thereto, be allowed to extend his existing entry to include this tract (Henry Hookstra, 34 L. D., 690).

The decision appealed from is accordingly hereby affirmed.

SETTLEMENT UPON UNSURVEYED LAND—NOTICE BY IMPROVEMENTS.

WALLING *v.* VAN PELT.

The improvements of a settler on unsurveyed public land are notice of his claim to the full extent of the technical quarter-section upon which they are found, upon survey, to be located, and he is not required to give additional notice of the extent of his claim, by improvements or otherwise, upon each forty acres of the tract claimed.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *October 29, 1906.* (G. C. R.)

This case involves the SW. ¼ section 4, T. 62 N., R. 19 W., Duluth, Minnesota, for which William J. Van Pelt made homestead entry October 18, 1904, being the day the plat of survey of said township was filed in the local office. Later, on the same day, Idell Walling applied to enter said tract, alleging settlement thereon May 15, 1903, and continuous residence thereafter. She asked for a hearing, which was duly had. The register and receiver, March 20, 1905, found that Mrs. Walling was the prior settler on the land, had made valuable improvements thereon, and that her residence had been continuous since date of settlement. They held, however, that her improvements extended only to the SE. ¼ of SW. ¼ of said section 4, and that she did not, until after survey, indicate what portion of the land around her dwelling she intended to claim as her 160-acre homestead. They further held that—"A settler on unsurveyed land is required to give some sort of public notice as to what land he desires," and that, "he must first pick out what he wants, designate it, and give others a chance;"

that the rule that a settlement on the public domain will carry with it the technical quarter section on which settlement is made applies only to surveyed land.

The register and receiver further found, altho stating the question admitted of some doubt, that Mrs. Walling, when she first settled, intended to take a claim in section 9—probably the NE. ¼ NE. ¼ of that section, which corners with the land in controversy.

From the decision of the register and receiver both parties appealed, and your office, October 11, 1905, reversed their action, held for cancelation Van Pelt's entry, and awarded the entire tract to Mrs. Walling.

The entryman's further appeal, filed January 20, 1906, brings the case here. The testimony has been carefully reviewed. The same is substantially stated in the decision appealed from.

The undisputed testimony is to the effect that Mrs. Walling settled on what, after survey, proved to be the SE. ¼ of SW. ¼ of said section; that her residence thereafter was continuous; and that her improvements, consisting of a dwelling-house, poultry-house, two barns, milk-house, hog-house, and several acres cleared, four acres being cultivated, are of the value of about $1,000.

Van Pelt, July 30, 1903, settled on what, after survey, proved to be the NW. ¼ of section 4, but fifty or a hundred yards north of the line between the NW. ¼ and SW. ¼ of said section. He stated that he posted notices, claiming the land in question (SW. ¼). Finding, after survey, his house was on the wrong tract, he built another house on the land he claimed (SW. ¼) and completed and moved into it October 22, 1903. He stated that his improvements were of the value of about $1,200 and his residence was continuous.

It is probably true that Van Pelt thought when he made settlement that Mrs. Walling had settled upon and claimed the NE. ¼ of section 9. After the survey, and about September 16, 1903, Mrs. Walling caused notices to be posted, claiming the land in question. Van Pelt removed these notices.

There is testimony to the effect that notices were put up signed by Mrs. Walling and by witnesses Barney Eden and James E. Means, stating: "I hereby claim the NE. ¼ of section 9, as my homestead, according to squatter's rights." But Mrs. Walling testified that she never authorized such notices and both Eden and Means testified that they had never seen them and were never authorized to post any such notices. It is in evidence that when Mrs. Walling, at her house and before survey, was asked what land she claimed, she pointed north and west, stating that her claim was located there. The tract pointed out is the land in question.

The evidence as a whole is hardly sufficient to show that Mrs. Walling claimed any land other than the land in question. She was

probably in doubt as to what would be, after survey, the description of the tract she had settled upon. Her improvements were not far removed from the SE. ¼ of section 4, nor from NE. ¼ section 9. It is, on the other hand, perfectly clear that until after the survey was made Van Pelt was not a settler on the land, and when he did settle there he knew or might have easily ascertained that Mrs. Walling's improvements were on that tract.

Reverting to the legal question, wherein, as above shown, your office differs from the local office, it may be said in general that the rule is well settled that after survey and before entry, notice and improvements go only to the extent of the technical quarter section on which such settlement and improvements were made. In other words, one who settles on land intending to enter a quarter section situated in two or more sections or two or more technical quarter sections, as defined by the public surveys, must, to protect his claim, give notice by improvements or otherwise of the full extent of his claim; otherwise, he may suffer loss of a part of his claim, if the same be settled upon by a subsequent settler, who had no notice of such prior claim. (Staples *v.* Richardson, 16 L. D., 248.)

The same rule applies to settlements made before survey, Luke *v.* Birdwell (20 L. D., 338); and the rule appears to be general in its application. Brown *v.* Howlett *et al.* (17 L. D., 522). To require a settler, before survey, to give notice of the extent of his improvements or otherwise on each forty acres of the 160-acre tract desired would be impracticable. It would impose conditions alike burdensome and difficult of fulfilment, and in its practical operations might, under certain conditions, compel him to post notices or make improvements on different parts of a circle, the circumference of which would be a mile from the particular place on which he had built his house, else be at much expense in ascertaining his exact location. He would know that he could not get all the land thus claimed, but to make sure of getting the quarter section settled on, he might take this precaution. Other and later settlers seeing the notices of the claim would be dissuaded, by fear of a contest, from settling on the lands apparently claimed by another; and thus the settler, while able to take but 160 acres of land, would actually, perforce of such a rule, prevent others from settling on any part of the four sections covered by his notices, until after the survey defined his claim.

Even tho Mrs. Walling actually designated the NE. ¼ of section 9 as the land she desired, her settlement and residence were actually on the land in question, and her right to enter the land she settled on was not defeated by her alleged designation of another tract. Akers *v.* Ruud (16 L. D., 56).

The action appealed from is affirmed.

SETTLEMENT CLAIM UPON LAND EMBRACED IN EXISTING ENTRY SUBSEQUENTLY CANCELED UPON RELINQUISHMENT.

KENFIELD *v.* MAGINNIS.

A claim resting upon settlement made in good faith and followed by the establishment and maintenance of residence upon a tract of land embraced within an existing entry attaches immediately upon the cancelation of the entry upon relinquishment, and is not defeated by the filing of a soldiers' additional application covering the same land, even tho the settler may not assert his claim until after the expiration of three months from the date of the cancelation of the entry.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *October 29, 1906.* (E. F. B.)

This controversy involves the right to lots 1 and 2, section 30, T. 56 N., R. 23 W., Duluth, Minnesota.

The material facts are as follows:

The land in question was entered by John P. Daly June 24, 1901, under the homestead law.

July 9th Minnie Kenfield applied to make homestead entry of the land, which was rejected for conflict with Daly's entry, but on August 26th thereafter she filed a second application, alleging settlement May 15, 1901, and asked for a hearing.

A hearing was granted and the case was called November 21, 1901, at 11 a. m., both parties being present, when contestant Kenfield asked for a recess until 2 p. m., for the purpose of raising money to pay the fee for taking the testimony. The contestant failing to appear at that time, the case was dismissed for want of prosecution and no appeal was taken from that decision.

The day following Daly relinquished his entry, and upon the cancelation thereof Charles H. Maginnis applied to make entry of the land as assignee of a soldiers' additional homestead right.

March 19, 1902, Minnie Kenfield filed with the register and receiver a corroborated affidavit, alleging that she established residence on the land prior to the filing of the application by Maginnis and has ever since resided upon the same, making valuable improvements thereon; that she is a married woman, but for more than a year she has been compelled by her own exertions to support her family, her husband being a victim of consumption and in such enfeebled condition as to require nursing and attention; that she made her settlement with the intention of claiming the land under the homestead law as the head of a family; and that for more than a month from November 23, 1901, she was held in quarantine in Grand Rapids, Minnesota, by the health authorities, and by such restraint was prevented from asserting her rights to the land. She asked for a hear-

ing to determine the right to the land as between herself and Maginnis.

You directed the local officers to order a hearing to determine the following questions: First, whether Minnie Kenfield was a *bona fide* settler and resident on the land at the time of the cancelation of Daly's entry and of the filing of the application of Maginnis and of the character and extent of her improvements on the land; second, whether she is qualified to make homestead entry; third, whether she has been guilty of laches in applying to enter the land; and fourth, whether the application of Maginnis to enter the land was made in good faith.

Upon the testimony taken at the hearing the local officers found: First, that Minnie Kenfield was a *bona fide* resident upon the land at the time of the cancelation of Daly's entry and the filing of Maginnis's application November 22, 1901, there being no evidence to disturb the showing that for about ten weeks prior to November 15, 1901, she had been actually living on the land with her family, having a house which she had furnished, and one cow; second, that she was qualified to make homestead entry as the head of a family, the proof clearly showing that for a year past down to the time of the hearing she was the sole support of the Kenfield family, her husband being badly affected and unable to do any work, except at times when he delivered washing for her; third, that she did not commence proceedings against Maginnis within three months from the cancelation of Daly's entry, and was therefore guilty of laches in not applying for the land earlier; and fourth, that the application of Maginnis must be presumed to have been made in good faith, there being no evidence to the contrary.

Your office upon the appeal of Mrs. Kenfield affirmed the findings of the local officers, upon every question, and by decision of March 25, 1904, you dismissed her contest upon the ground that she had failed to assert her claim within three months from the date of the cancelation of Daly's entry.

Mrs. Kenfield appealed from your decision, which you, by letter of August 9, 1904, refused to transmit for the reason that it was not filed in time. No further action appears to have been taken by her until June 13, 1906, when she filed in the local office an affidavit, in the nature of a petition for the exercise of the supervisory power of the Secretary, praying that the appeal from the decision of March 25, 1904, may be considered altho not filed within the time prescribed by the rules of practice.

She alleged that she lives on the land with her husband, Timothy Kenfield, who is bedridden, being unable to walk or in any way to contribute to his own or affiant's support; that she supports herself and husband by her own manual labor, which consists principally

of raising vegetables on the land applied for, which she sells at a town nine miles from her claim; that she has improved and cultivated the land with her own hands, grubbed stumps unaided, dug up the soil, planted crops, and now has a poor but comfortable house on the land; that her possession of the claim has been open and notorious to everybody since May, 1901, and her clearings and improvements, which are to a great extent the work of her own hands, are worth about $700. She alleges that she is uneducated and has always been informed and believed that her faithful performance of the law by living upon, cultivating and improving the land would fully protect her and that the land would sometime be awarded to her; that she has failed to get an entry thru some technical objection or default, which she does not understand, and she has never received notice of the rejection of either of her applications, and if notice was ever given to any one for her, she never received it, and has continued to live on, improve and cultivate the land; that she is informed that her attorney failed to file her appeal from the Commissioner's decision of March 25, 1904, in time, altho he informed her that he had filed it in ample time, and thru poverty she was unable to further pursue her rights at the time, having no money and her time having been taken up with hard labor to enable her to support her husband.

Replying to this petition, Maginnis insists that the case should not be reopened, for the reason that the petitioner has had every opportunity to present her claim to the Department and has repeatedly defaulted, no action having been taken upon the refusal to transmit her appeal until nearly two years after the case was finally closed by your office; that her assertion that she had no notice of the decision of your office of March 25, 1904, is contradicted by her own statement in her affidavit, "through poverty she was unable to further pursue her right at that time," and is refuted by the records of the General Land Office.

Upon the petition and the answer thereto the Department by its letter of July 18, 1906, directed that the papers be forwarded to the Department for examination, which has been done by your letter of July 25, 1906.

It is a well established rule that altho error may have been committed in refusing to transmit an appeal from a decision of your office, the supervisory power of the Secretary of the Interior will not be exercised upon a petition for certiorari unless it is clearly shown that a substantial right has been denied, and that the petitioner is entitled to relief by the exercise of such authority. So on the other hand it is equally well established that altho the right of appeal was not wrongfully denied, the Secretary of the Interior may nevertheless by virtue of his supervisory power in the disposal of the public

domain, grant appropriate relief in every case if upon full consideration of all the facts and circumstances it is shown that a substantial right has been denied to any claimant for public lands and that he is entitled to the relief sought. Oscar T. Roberts, 8 L. D., 423; Whiteford *v.* Johnson, 14 L. D., 67; Robert O. Collier, 19 L. D., 32; Blackwell Townsite *v.* Miner, 20 L. D., 544; Elfrink *v.* Lundell, 33 L. D., 160.

An examination into the merits of the case is therefore necessary in order to determine the relative rights and equities of these litigants and whether the petitioner was primarily entitled to the land, and, if so, whether she has by her laches or other conduct deprived herself of that right because of the infringement upon rights that have intervened and the injustice that would flow from a recognition of any right in her at this time. In other words, whether the facts are such that the equitable doctrine of estoppel should be applied and forbid the assertion of a right as against the claims of others who have acted upon a failure to protect such right properly and in due season.

Supervisory authority is conferred by the statute upon the Secretary of the Interior to control all proceedings, whether by appeal in the manner prescribed by the rules and regulations adopted by him or otherwise, "having for their ultimate object to secure the alienation of any portion of the public lands, or the adjustment of private claims to lands, with a just regard to the rights of the public and of private parties. . . . The rules prescribed are designed to facilitate the Department in the dispatch of business, not to defeat the supervision of the Secretary." Knight *v.* Land Association, 142 U. S., 161, 178, 181.

It makes no difference whether the appeal is in regular form according to the established rules of the Department, or whether the Secretary on his own motion, knowing that injustice is about to be done by some action of the Commissioner, takes up the case and disposes of it in accordance with law and justice. The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands.

The testimony clearly sustains the finding of the register and receiver, which was affirmed by your decision, that at the time of the cancelation of Daly's entry Mrs. Kenfield was actually residing upon the land with an invalid husband who was entirely dependent upon her for support. She was therefore a *bona fide* settler having the qualifications of a homesteader.

Under the rule announced in Dowman *v.* Moss (19 L. D., 526), which has been affirmed by the Supreme Court (176 U. S., 413), her settlement, existing at the time of the relinquishment of Daly's

entry, attached at once upon the filing of that relinquishment, and was not defeated by the application of Maginnis to make entry as assignee under the soldiers' additional homestead right. Nor did the temporary absence from the claim at the instant of the filing of the relinquishment affect or defeat her right, it being clearly shown that she had established a *bona fide* residence upon the claim for about three months prior to the cancelation of the entry, which was subsisting at the date of cancelation and has ever since been maintained by actual residence, cultivation and improvement.

The petitioner's right depends upon whether the claim to the land initiated by her settlement existing at the date of the cancelation of Daly's entry has been forfeited by her failure to take the proper steps to protect her claim against other appropriation within three months from that date, and whether it has been defeated or impaired by her failure to have her case presented to the Department in due time and in conformity with the rules of practice, and whether the respondent has, by reason of his application and the defaults of petitioner, a superior legal or equitable right to the land.

At the hearing, Mrs. Kenfield testified that she first settled on the land May 10, 1901, remaining two or three days. At that time the land was covered by the homestead entry of John Ross, which was canceled June 24, 1901, the day Daly made entry. She was again on the land in July, but it does not appear that Mrs. Kenfield had made actual residence on the land prior to the date of the cancelation of the Ross entry, or was actually present on the land at that time. As she could acquire no right by settlement on land covered by the entry of another she had no such right as could be successfully asserted against Daly, the subsequent entryman, by virtue of her settlement. But such settlement followed up as it was by an actual residence established the latter part of August or the first of September following, when she returned to the claim, taking with her "bedsteads, bedding, stove, sewing machine, chairs, table and all her household goods," and built a house in which she then moved and has since occupied as her home, may be considered as demonstrating her utmost good faith and the purpose of her settlement and to establish the fact of her actual residence upon the claim at the date of the cancelation of Daly's entry.

When she took her furniture upon the claim she took with her her invalid, helpless husband, and from that time they actually resided upon the claim until November, when she took him back to Grand Rapids, where she formerly lived, arriving there November 13th, and she went to Duluth to attend the trial of her contest against Daly, which was set for November 21st.

She testified that she took her husband to Grand Rapids on account of his infirm condition, but she left on the claim the cooking stove, sewing machine, carpet, and the cow, which was left in charge of her son who remained on the claim.

She left Duluth November 22nd to try to raise money to go on with the case and when she arrived at Grand Rapids that day, found her daughter ill with smallpox and was quarantined from that day to February 15, 1902. From December 6, 1901, to February 15, 1902, she nursed and boarded smallpox patients at the request and under an agreement with the county physician in the house in which she and her daughter were then living and which she had formerly occupied before residing upon her claim. She testified that she had never been paid for the service. The local office and your office held that the time in which she should have filed her application in order to protect her settlement right, which attached upon the cancelation of Daly's relinquishment, expired February 22, 1902, unless sufficient cause was shown for her failure to act within that time.

In this connection it may be stated that that provision of the preemption law fixing the time in which the declaratory statement must be filed to protect a settlement right, which was extended to the homestead law by the 3rd section of the act of May 14, 1880, declares that if the settler fails to file his declaratory statement within the time required by the act "his claim shall be forfeited and the tract awarded to the next settler, in the order of time, on the same tract, who has given such notice and otherwise complied with the conditions of the law."

In Johnson *v.* Towsley (13 Wall., 72, 90) the court, in construing this provision, said:

> If no other party has made a settlement or has given notice of such intention, then no one has been injured by the delay beyond three months, and if at any time after the three months, while the party is still in possession, he makes his declaration, and this is done before any one else has initiated a right of preemption by settlement or declaration, we can see no purpose in forbidding him to make his declaration or in making it void when made. And we think that Congress intended to provide for the protection of the first settler by giving him three months to make his declaration, and for all other settlers by saying if this is not done within three months any one else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right.

See also Gainer *v.* Paazig, 8 L. D., 346.

While the failure to make the claim of record or to take other proper steps to protect a settlement right within the time prescribed by the statute will not of itself cause a forfeiture of the right the Department will always take it into consideration in determining whether the settlement was made in good faith especially where there are adverse claimants for the land.

There appears to be no reason in this case why a forfeiture of this settler's right should be declared, in view of all the circumstances.

The filing of her claim to the land on March 19, 1902, within four months from the date of the attachment of her settlement right and a little more than a month after the discharge of her last smallpox patient, is certainly a reasonable time under the circumstances.

It was one of the series of efforts made by her to have her claim placed of record, and considered with the important fact of continuous actual residence, cultivation and improvement of the claim, it establishes beyond a doubt her *bona fide* intention to make the land a home. While she has been guilty of laches in not presenting her claim to the Department at an earlier date after the refusal to transmit her appeal from your decision of March 25, 1904, she has, nevertheless, continued to reside upon the land, as appears from her affidavit of May 7, 1906, asking that her appeal be considered, which tends to show that she has in all respects complied with the law. The element of good faith is the essential foundation of all valid claims under the homestead law (Lee *v.* Johnson, 116 U. S., 48, 52).

The application of respondent has not been allowed and when he filed his application he knew that petitioner was a settler upon the land and had made application to enter it under the homestead law.

The application of Maginnis is denied. You will instruct the local officers to allow petitioner to make entry of the land and to take such further steps as may be required by law.

VALENTINE SCRIP—LOCATION—OCCUPIED LANDS.

FREDERICK W. MCREYNOLDS.

Lands actually occupied by another are not subject to location with Valentine scrip; and whether the occupancy is such as meets the requirements of the homestead laws, or whether the occupant is qualified to assert and maintain a claim under those laws, will not be inquired into under an application to locate the land with such scrip.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *October 30, 1906.* (E. F. B.)

This appeal is filed by Frederick W. McReynolds from the decision of your office of May 29, 1905, rejecting his application to locate lot 5, Sec. 3, T. 57 N., R. 17 W., Duluth land district, Minnesota, with Valentine scrip.

The application was rejected because no affidavit was filed with it showing that the land applied for was not occupied.

Appellant filed a motion for review of that decision and with said motion he filed an affidavit alleging:

> That said land is occupied by a squatter, one John Shea; that affiant is informed and believes and therefore avers that said Shea is disqualified from making a homestead entry thereof, having performed acts and entered into contracts contrary to the homestead law, and that he is there purely for speculative purposes, and not with the intent of making a *bona fide* home for himself, said land being chiefly valuable for the heavy growth of timber thereon, and the iron ore supposed to be beneath its surface.

He asked that a hearing be ordered to determine the truth of the facts alleged.

By decision of December 11, 1905, you held that the affidavit as to the disqualification of the person occupying the land was not sufficient to warrant the revocation of your decision of May 29, 1905, or the granting of an order for a hearing, and your decision rejecting the application to locate the land with said scrip was adhered to.

Your decision is based upon the ruling of the Department in Litchfield *v.* Anderson (32 L. D., 298), construing the act of June 4, 1897 (30 Stat., 36), and holding that land actually occupied is not "vacant land opened to settlement," and that the question as to whether the occupant is qualified to assert and maintain a claim under the land laws of the United States will not be tried and determined under an application to select land under the act of June 4, 1897.

It is admitted by appellant that the land was occupied at the date of his application, but he alleges in his appeal that such occupancy is by a squatter who has no legal right to the land and that since his affidavit was filed a hearing has been ordered by the land office at Duluth, Minnesota, to determine all questions regarding claims to this land, and appellant was made a party thereto. He has filed an affidavit showing that at the time of his application he had no personal knowledge of any claim to the land. He also states he is advised that the testimony taken at said hearing shows that the squatter referred to, one John Shea, has abandoned his claim and moved away, and he insists that under the law his claim attached as soon as Shea abandoned.

He insists that the regulations governing the location of Valentine scrip and those governing forest lieu selections are radically different, the former merely calling attention to the fact that the scrip is locatable on any unoccupied public land, and the latter absolutely requiring an affidavit of nonoccupancy to be filed with and as part of the application.

It is not alleged that the hearing referred to was had upon this application, nor is it shown by the record, or otherwise, in what case

the hearing was had. It may be assumed from the statement in the appeal that it was between adverse claimants to this tract other than appellant. Such vague and indefinite statement as to the present status of the land can not be considered in determining this case, even if it be conceded that the subsequent abandonment of the land would inure to the benefit of the applicant to locate the scrip thereon, for the reason that it appears from the record that Shea is still asserting his claim as a settler, and in the appeal of Malinda Tanner from the decision of your office approving the survey of the meander line of Cedar Island lake, part of this tract was claimed by Tanner, under a settlement made long prior to and existing at the date of this appellant's application.

Therefore the material question presented by this appeal is whether land is subject to location with Valentine scrip if it is in fact occupied at the date of the application, irrespective of the qualifications of the occupant or of his right to acquire title to the land under any of the general land laws, and whether the rule announced in Litchfield *v.* Anderson (32 L. D., 298) is applicable to locations made with Valentine scrip.

If the rule announced in the case cited is applicable to this case, a hearing merely for the purpose of determining whether the occupant of the land was qualified to acquire title under any of the general land laws would be of no avail, as it was distinctly held in that case that "whether the occupancy is such as meets the requirements of the homestead 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 land under the act of 1897," expressly disapproving of the theory advanced by the local office "that unless the 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 opened to settlement, and subject to appropriation under the act of June 4, 1897."

No reasonable distinction can be perceived between these two laws in reference to the status of the lands that may be taken thereunder. The language of the act of June 4, 1897, is that the person relinquishing to the United States title to land "may select in lieu thereof a tract of vacant land opened to settlement." The act under which the Valentine scrip was issued provides that the claimant "may select, and shall be allowed patents for an equal quantity of the unoccupied and unappropriated public lands."

"To be vacant, the land must not be occupied by others." (Kern Oil Co. *v.* Clarke, 30 L. D., 550, 566.) Vacant lands are therefore unoccupied lands, and it does not appear from anything in the stat-

utes that Congress intended any distinction in the lands described by the respective terms.

The contention that the difference in the regulations under the two acts make decisions as to forest lieu selections inapplicable to Valentine scrip locations can not be sustained. The difference is only as to the time of production of the evidence required in either case to show that the land is subject to such location or selection. But the real question in the case is whether lands actually occupied by others are subject to location with this scrip.

Appellant contends that the word unoccupied, as used in the act providing for the issue of Valentine scrip meant "not legally occupied." Under the ruling of the Department in the cases cited, that contention can not be sustained, as there can be no distinction between the words "vacant" and "unoccupied" as used in the respective acts, and your decision refusing to order a hearing upon the affidavit furnished by appellant is affirmed.

No decision is hereby made as to the right of any other claimant to this land, but the papers are returned to your office for such action respecting their rights and claims as may seem proper.

ISOLATED TRACT—DISCRETION OF COMMISSIONER.

HENRY LAAKER.

The law relating to the sale of isolated tracts does not require the Commissioner of the General Land Office to sell such lands, but clothes him with discretion to offer them for sale whenever in his judgment it would be proper to do so; and the exercise of this discretion will not be controlled by the Secretary of the Interior unless his refusal to offer any such tract for sale would be prejudicial to the interest of the government or otherwise involve an abuse of the discretion resting in him.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *October 30, 1906.* (E. F. B.)

With your letter of June 21, 1906, you transmit the appeal of Henry Laaker from the rejection of his application to have lots 1, 2, 3 and 4, section 22, T. 12 N., R. 49 W., North Platte, Nebraska, ordered into market and sold as an isolated tract under section 2455, Revised Statutes, United States.

No right can be acquired under an application to have lands ordered into market and sold as an isolated tract under section 2455, Revised Statutes, and no appeal should be allowed from your refusal to entertain such application.

The law does not require the Commissioner of the General Land Office to sell such lands but clothes him with discretion to sell at

public outcry such isolated and disconnected tracts of lands as in his judgment it would be proper to expose to sale in such manner.

His refusal to exercise that discretion will not be controlled by the Department, except where such refusal will be prejudicial to the interest of the government, or otherwise involve an abuse of the discretion resting in him. This case presents no abuse of discretion or other reason for interference by the Department.

The appeal is dismissed.

DISPOSITION OF LANDS IN CAMP INDEPENDENCE ABANDONED MILITARY RESERVATION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 1, 1906.

REGISTER AND RECEIVER,
Independence, California.

GENTLEMEN: The appraisal of the unpatented portion of the hay reserve and of the unreserved portion of the post reserve of the abandoned Camp Independence military reservation, California, in Sec. 1, T. 13 S., R. 34 E., and Secs. 3, 4 and 6, T. 13 S., R. 35 E., M. D. M., containing 2,408.41 acres, has been approved by the Secretary of the Interior.

You are authorized and directed to allow homestead entries to go to record for lands therein. Said lands are subject to settlement and entry under the provisions of the act of August 23, 1894 (28 Stat., 491), as you were advised by letter of January 13, 1896.

I enclose you herewith a copy of the appraised list of the lands, which includes most of Secs. 3 and 4, T. 13 S., R. 35 E., and the W. ½ of lot 1 of the NW. ¼, Sec. 6, same township and range, excepting two acres in the SW. ¼ thereof, more particularly described in the appraised list.

Upon the request of entrymen you will inform them at what rate per acre the lands entered by them have been appraised.

In allowing entries for the lands in this reservation you will in each case endorse on the application "Camp Independence reservation, act of August 23, 1894," and make the same notation on your abstract of homestead entries.

Under the provisions of the homestead law an entryman has the right either to commute his entry after fourteen months from the date of settlement or offer final proof under section 2291, Revised Statutes. In entries under said act of August 23, 1894, he may, at his option, commute after fourteen months from date of settlement,

with full payment in cash, or after submitting ordinary five-year proof and after its acceptance, he may pay for the land the full amount of the appraised value thereof, without interest, or he may make payment in five equal instalments, the first payment to be made one year after the acceptance of his final proof and subsequent payments to be paid annually thereafter, interest to be charged at the rate of four per cent per annum from the date of the acceptance of the final proof until all payments are made.

In case the full amount is paid after fourteen months from date of settlement, you will, if the proof is satisfactory, issue cash certificate and receipt; and in the event that regular final proof is made and the full amount then paid you will issue final certificate and receipt; but when partial payments are made the receiver will issue a receipt only for the amount of principal and interest paid, reporting the same in a special column of the abstract of homestead receipts and at the time the last payment is made you will issue the final papers as in ordinary homestead entries.

In issuing final papers you will make the proper annotations thereon, as well as on the applications and abstracts, to show that the entry covers land in the Camp Independence reservation.

You are further advised that the same rule as to the allowance of credit for residence prior to entry and for military service applies to entries under said act of August 23, 1894, as to other homestead entries.

Where, upon submitting final proofs, the entrymen elect to make payment for the lands entered in five annual instalments, you are authorized to make the usual charges for reducing the testimony to writing, but as the final certificate and receipt can not be issued until the last payment is made, you can not charge the final commissions until said final certificate and receipt are issued.

Where the entrymen submit final proofs and elect to pay for the lands in instalments, you will not give said proofs current numbers and dates, but will, if they are acceptable to you, make proper notes on your records showing that satisfactory proof has been made, and the dates upon which the partial payments must be made, and then transmit such proofs to this office, in special letters and not in your monthly returns, for filing with the original entries.

There are no guarantees to be taken in order to secure the payment of the instalments, but if when each instalment is due any entryman fails to pay the same, you will report the matter to this office, when prompt action will be taken in the case.

Said act of August 23, 1894, did not repeal the act of July 5, 1884 (23 Stat., 103); hence parties qualified to make entries under the latter act may do so, in which event they will not have to make other

payment for the land than the usual fee and commissions. But in submitting proof on such an entry the party will be required to show that he settled on the reservation prior to its establishment or prior to January 1, 1884, and maintained continuous residence thereon from the date of settlement to the date of entry. See cases of Reynolds *v.* Cole, 5 L. D., 555, and Connelly *v.* Boyd, 10 L. D., 489.

Very respectfully,

G. F. POLLOCK,
Acting Commissioner.

Approved:
E. A. HITCHCOCK, *Secretary.*

RIGHT OF WAY—CANALS, DITCHES AND RESERVOIRS—ALASKAN LANDS—SECTIONS 18 TO 21, ACT MARCH 3, 1891.

MIOCENE DITCH COMPANY.

The provisions of sections 18 to 21, inclusive, of the act of March 3, 1891, granting rights of way thru the public lands for canals, ditches and reservoirs, have no application to lands within the district of Alaska.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *November 6, 1906.* (F. W. C.)

The Department has considered the appeal by the Miocene Ditch Company from your office decision of March 18, 1906, wherein it was held that the provisions of the act of March 3, 1891 (26 Stat., 1095), granting rights of way thru the public lands of the United States for canals, ditches and reservoirs, has no application to the lands within the district of Alaska, and, for that reason, declining to recommend the acceptance of the articles of incorporation filed by said company, the purpose of the filing of the same having been stated to be to obtain a right of way over certain lands in Alaska for ditches, under said act.

Your office decision is predicated upon the theory that the lands within the district of Alaska are not included within the general legislation relating to the public lands of the United States and that the privileges sought by the applicant have never been extended by special legislation to the lands within said district.

The appeal states that the provisions of section 18 of the act of March 3, 1891, granting rights of way for canals and ditches over the public lands, have been uniformly held applicable alike to the public lands within the States and Territories. Reference is then made to the decision of the supreme court in the case of Steamer Coquitlam *v.* United States (163 U. S., 346), as authority for the proposition advanced that Alaska is a Territory of the United States,

from which it is argued that as of necessity the grant contained in the act of 1891 should be held applicable to the lands in Alaska.

By the act of May 17, 1884 (23 Stat., 24), a civil government was provided for Alaska and by the eighth section of that act the district of Alaska was created a land district and the United States land office was located at Sitka, and the laws of the United States relating to mining claims and the rights incident thereto were, from and after the passage of that act, put in full force in said district, but it was specifically provided that "nothing contained in this act shall be construed to put in force in said district the general land laws of the United States."

By section 12 of the act of March 3, 1891, the townsite laws were extended to Alaska under the supervision of the Secretary of the Interior, and by sections 12 and 13 provision was made for the purchase, by qualified parties, of not exceeding 160 acres of land, for trade and manufacture, with certain exceptions provided for in section 14 of said act. The grant of right of way for canals, ditches and reservoirs is found in sections 18 to 21 of said act, the grant being found in section 18, and was made in the following language:

> But the right of way through the public lands and reservations of the United States is hereby granted to any canal or reservoir company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have been filed, or which may hereafter be filed, with the Secretary of the Interior, a copy of its articles of incorporation, etc.

This legislation has general application to the public lands of the United States but was not specifically extended to the lands in the district of Alaska, and while it may be conceded that the lands in the district of Alaska are a part of the public lands of the United States, generally speaking, it seems clear from the special legislation with regard to the lands in said district, enacted prior to the passage of the act of 1891, the portion included in the sections of the act of 1891, before referred to, as well as the subsequent legislation found in the act of May 14, 1898 (30 Stat., 409), extending the homestead laws and providing for rights of way for railroads in the district of Alaska, that the lands within said district were not intended to be included within the general legislation found in sections 18 to 21 inclusive, of the act before referred to.

In this connection it is noted that there does not seem to be before the Department any formal application for a right of way within said district, the present case arising upon the filing of the articles of incorporation of said company, which was organized under the laws of California, and as it does not appear from the articles of incorporation that the field of operation of said corporation is limited to said district, there would seem to be no reason for refusing to accept the same for filing, if the company has otherwise complied

with the regulations of the Department bearing upon this matter. For this reason the Department returns the papers without formally affirming the decision of your office.

DECLARATIONS OF INTENTION AND CERTIFICATES OF NATURALIZATION.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *November 6, 1906.*

REGISTERS AND RECEIVERS,
United States Land Offices.

GENTLEMEN: Your attention is called to the act of June 29, 1906 (34 Stat., 596), relative to the naturalization of aliens, and you are instructed not to receive declarations of intention or certificates of naturalization made or issued after September 27, 1906, or copies thereof, which are not substantially in the form prescribed by section 27 of that act, a copy of which is hereto attached.

The declarations of intention and certificates of naturalization made or issued prior to September 27, 1906, must be executed and certified in conformity with the laws in force at the date they were made or issued, before they can be received by you. (See circular of August 11, 1906, 35 L. D., 116.)

You are directed to furnish a copy of this circular to the clerks of courts authorized by said act to naturalize aliens, in your respective districts, and all clerks desiring information relative to their duties under this act should address their inquiries to the Secretary of the Department of Commerce and Labor, Washington, D. C.

Very respectfully,

G. F. POLLOCK,
Acting Commissioner.

Approved:
E. A. HITCHCOCK, *Secretary.*

NATURALIZATION ACT JUNE 29, 1906.

SEC. 27. That substantially the following forms shall be used in the proceedings to which they relate:

DECLARATION OF INTENTION.

(Invalid for all purposes seven years after the date hereof.)

—— —— *ss*:

I, —— ——, aged —— years, occupation ——, do declare on oath (affirm) that my personal description is: Color ——, complexion ——, height ——, weight ——, color of hair ——, color of eyes ——, other visible distinctive marks ——; I was

born in ——, on the —— day of ——, anno Domini ——; I now reside at ——; I emigrated to the United States of America from —— on the vessel ——; my last foreign residence was ——. It is my bona fide intention to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, particularly to ——, of which I am now a citizen (subject); I arrived at the (port) of ——, in the State (Territory or District) of ——, on or about the —— day of ——, anno Domini ——; I am not an anarchist; I am not a polygamist nor a believer in the practice of polygamy; and it is my intention in good faith to become a citizen of the United States of America and to permanently reside therein. So help me God.

(Original signature of declarant) —— ——.

Subscribed and sworn to (affirmed) before me this —— day of ——, anno Domini ——.

—— ——.

(Official character of attestor.)

CERTIFICATE OF NATURALIZATION.

Number ——.
Petition, volume ——, page ——.
Stub, volume ——, page ——.

(Signature of holder) —— ——.

Description of holder: Age, ——; height, ——; color, ——; complexion, ——; color of eyes, ——; color of hair, ——; visible distinguishing marks, ——. Name, age, and place of residence of wife, ——, ——, ——. Names, ages, and places of residence of minor children, ——, ——, ——; ——, ——, ——; ——, ——, ——.

—— ——, *ss:*

Be it remembered, that at a —— term of the —— court of —— held at ——, on the —— day of ——, the year of our Lord nineteen hundred and ——, —— ——, who previous to his (her) naturalization was a citizen or subject of ——, at present residing at number —— —— street, city (town), —— State (Territory or District), having applied to be admitted a citizen of the United States of America pursuant to law, and that the court having found that the petitioner had resided continuously within the United States for at least five years and in this State for one year immediately preceding the date of the hearing of his (her) petition, and that said petitioner intends to reside permanently in the United States, had in all respects complied with the law in relation thereto, and that ——he was entitled to be so admitted, it was thereupon ordered by the said court that ——he be admitted, as a citizen of the United States of America.

In testimony whereof the seal of said court is hereunto affixt on the —— day of ——, in the year of our Lord nineteen hundred and ——, and our independence the ——.

—— ——.

(Official character of attestor.)

J. C. MURPHY'S ADMINISTRATOR ET AL.

Motion for review of departmental decision of September 11, 1906, 35 L. D., 152, denied by Secretary Hitchcock, November 9, 1906.

SECOND HOMESTEAD—ACT OF APRIL 28, 1904.

ANDREW B. CURTIS.

An application to make second homestead entry filed subsequently to the act of April 28, 1904, must be denied where it appears that the applicant failed to make a *bona fide* effort to comply with the law as to his original entry.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 13, 1906.* (C. J. G.)

An appeal has been filed by Andrew B. Curtis from the decision of your office of December 30, 1905, requiring additional evidence in the matter of his application to make second homestead entry for lots 3, 4 and 5, Sec. 6, T. 142 N., R. 25 W., Cass Lake, Minnesota.

It appears that on June 18, 1898, Curtis made homestead entry for the NE. ¼ of Sec. 12, T. 156 N., R. 83 W., Minot, North Dakota, which was canceled April 25, 1901, as the result of a contest for abandonment filed by one Bella J. Taylor, default being made by Curtis at the hearing.

The application for second entry was filed November 6, 1905, Curtis alleging, after referring to his former entry, that—

He never resided upon said land and never cultivated and improved the same in any way or manner, and abandoned said land immediately after making homestead entry thereon and went to the harvest fields of southern North Dakota to work during the threshing season for the purpose of earning money with which to erect improvements upon said land and that he was unable owing to the wet season to earn sufficient money with which to build the same.

Affiant further says that he then went to the lumber woods of northern Minnesota to work and was then taken sick with the la grippe and confined in the Sisters Hospital in Old Superior, Wisconsin, and was discharged therefrom during the latter part of March, 1899, and that he then never returned to North Dakota or to said land and this affiant never knew what became of said entry owing to said absence.

Affiant further says that he never learned what became of said entry and that he never received any benefit from said entry in any way or manner either pecuniary or otherwise.

Affiant further says that he has on this 6th day of November, 1905, relinquished all right and title which he has in and to said land and does hereby and herewith relinquish all his rights thereto freely and voluntarily and that he receives no consideration or benefit therefrom, namely the NE. ¼, Sec. 12, Twp. 156 N., Rge. 83.

This affidavit was not corroborated and your office in the decision appealed from required Curtis to furnish the affidavits of two corroborating witnesses to the statements made by him. The appeal here is accompanied by two affidavits, in addition to a new one by Curtis himself, one of which is by the superintendent of the hospital where Curtis was confined during his sickness, the other by a person who was with him during the threshing season of 1898, and having

reference to applicant's financial condition at that time and when he went to the lumber woods of Minnesota. Curtis states that these affidavits constitute the only corroborating evidence he is able to furnish, as "the facts in this case extend over North Dakota, Minnesota, and into Wisconsin, and that he has lost track of all parties except those produced who can testify in this matter."

This application for second entry is claimed to be made under section 3 of the act of June 5, 1900 (31 Stat., 267), which provides (in part):

> 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.

It is urged in the appeal that as the application in question is made under the foregoing act, "no corroboration is required." This might possibly be the case were there no other legislation on the subject, as said act appears to allow without restriction any person who had theretofore made a homestead entry, but from any cause had lost or forfeited the same, to make a second homestead entry. However, section 1 of the act of April 28, 1904 (33 Stat., 527), provides:

> 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 law as though such former entry had not been made.

In the case of Cox *v.* Wells (33 L. D., 657) it is held (syllabus):

> Construing the acts of June 5, 1900, and April 28, 1904, relating to second homestead entries, together, the earlier act is held to be modified by the later, and all applications to make second homestead entry filed subsequently to the date of the later act should be disposed of thereunder, so far as the provisions of that act are applicable.

In the decision of that case it is said:

> That portion of the act of April 28, 1904, above set forth, like the third section of the act of June 5, 1900, relates to persons who had, prior to its passage, lost or forfeited their homestead entries, and were for either of said reasons unable to perfect the same. The act of 1904, however, imposes conditions or restrictions that were not imposed by the act of 1900, the earlier act providing merely that *any person* who had from any cause theretofore lost or forfeited his homestead entry should be entitled to the benefits of the homestead law, as though such former entry had not been made, while the latter act requires such a person, in order to entitle himself to the benefits of the homestead law, regardless of his former entry, to show to the satisfaction of your office that he was unable to perfect such former entry on account of some unavoidable complication of his personal or business affairs or a 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 such entry or abandon the claim for a consideration.

The application of Curtis as shown was filed subsequently to the act of April 28, 1904, and his qualifications to make second homestead entry must therefore be determined under section 1 of said act, which imposes conditions or restrictions not imposed by the act of June 5, 1900, under which said application is made. By his own admissions "he never resided upon said land and never cultivated and improved the same in any way or manner, and abandoned said land immediately after making homestead entry thereon." Consequently the apparent inability of Curtis to make a showing in compliance with this one condition alone of the act, namely, a showing "that he made a *bona fide* effort to comply with the homestead law" as to his former entry, is sufficient to bar him from the privilege of second entry. His application will therefore have to be denied, not merely suspended, and the decision of your office is hereby modified accordingly.

SURVEY—SUBDIVISION BY PROTRACTION.

WILLIAM LAURENTS ET AL.

Where the subdivision of a township is made by protraction and the areas are estimated, such action, if by proper authority, constitutes a public-land survey thereof, and upon approval of the plat of the survey so made the subdivisions thereby established are subject to disposal according to the areas estimated and as they appear upon the plat.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 13, 1906.* (E. F. B.)

The Department has considered the appeal of William Laurents and B. F. Rutherford from the decision of your office of July 25, 1906, requiring them to show cause why warrant location made by appellant upon fractional section 24, T. 15 S., R. 7 W., New Orleans land district, Louisiana, containing 162.46 acres, should not be canceled for the reason that said section has never been surveyed and the land has never been legally offered.

The records of your office show that this township was surveyed in 1875 and 1876 by Deputy Surveyor S. P. Henry, and the plat of said survey was approved by your office November 7, 1877, which shows fractional section 24 to contain 162.46 acres.

If, as stated in the decision appealed from, the subdivision of the township was made by protraction and the areas were estimated, the survey would nevertheless be effective as a public-land survey if done by proper authority. It is presumed that such manner of subdivision was directed by your office in view of existing conditions

and the approval of a plat of survey so made is valid and binding upon all persons seeking to acquire title to such lands. It does not appear from any statement in said decision that the deputy surveyor exceeded his authority or violated in any respect the instruction given him under his contract, and as no reason appears why the authority of your office in approving the plat of said survey should now be questioned, the subdivisions indicated thereby are subject to disposal according to the areas estimated and as they appear upon the plat.

The land having been surveyed was therefore legally offered under the act of July 4, 1876, and your holding to the contrary was error.

No decision is hereby made as to whether the land is subject to location in other respects, but the papers are returned to your office with instructions to pass upon the application in the light of the directions herein given.

MINING CLAIM—ADVERSE CLAIM—JUDICIAL PROCEEDING.

DENISS ET AL. *v.* SINNOTT.

Where an adverse claim is presented for filing within the period fixt by statute but is rejected by the local officers, appeal from such action does not relieve the adverse claimant from the obligation to commence judicial proceedings within the statutory period, and a failure to do so constitutes a waiver of his claim.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 14, 1906.* (G. N. B.)

November 10, 1904, Sue S. Sinnott filed application for patent to the Nettie S. placer mining claim, survey No. 14,636, Leadville, Colorado, land district. Notice thereof was regularly published and posted. The period of publication expired January 9, 1905.

It appears from the record that during the afternoon of the last named date Thomas Deniss *et al.*, by their attorney, offered for filing a purported adverse claim, which the local officers refused to accept, apparently because unaccompanied by a plat showing the boundaries and extent of the adverse claim, and that later in the same afternoon a deputy mineral surveyor presented a plat of the conflicting claims, which, also, the local officers held to be incomplete. Whether during that afternoon a proper adverse claim was offered for filing is a matter in dispute between the local officers and the adverse claimants, but in view of other facts disclosed by the record that question is immaterial.

January 10, 1905, Sinnott was allowed to make entry for the placer claim. It appearing by certificates of the clerks of the United States and State courts having jurisdiction in the premises, dated and filed

more than three months after the expiration of the period of publication, that no suit had been brought on the adverse claim (or otherwise against the owner of the Nettie S. claim), your office, upon appeal by Deniss *et al.*, held that the failure to commence suit in court within the statutory period was a waiver of the adverse claim.

Deniss *et al.* have appealed to the Department.

Section 2326 of the Revised Statutes, provides, in part:

> It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment, and a failure so to do shall be a waiver of his adverse claim.

In the case of Scott *v.* Maloney (22 L. D., 274), in discussing the failure of an adverse claimant to bring suit within the statutory period, the Department said:

> The time within which suit could be commenced in a court of competent jurisdiction to determine the question of right of possession, so as to stay proceedings for patent in this case, expired August 18, 1894. Delay by the adverse claimant beyond this date, which marked the close of the thirty days allowed him by the statute, was at his peril. The dismissal of his adverse claim for any cause by the local officers could not excuse such delay. . . . Having failed to commence suit, the question of the sufficiency or insufficiency of the adverse claim, as such, after that date was unimportant. Such failure the law expressly declares "shall be a waiver of the adverse claim."

In principle, the holding by the Department in the above case that the obligation of an adverse claimant to begin judicial proceedings within the statutory period is not suspended by favorable action taken on a motion to dismiss the adverse claim, and appeal therefrom, is the same in case the adverse claim is offered for filing and rejected for any reason by the local officers.

Suit by Deniss *et al.* on their adverse claim was not commenced in a court of competent jurisdiction within the thirty days mentioned in the statute. Their failure constitutes, therefore, a waiver of any adverse claim they may have had.

The decision of your office is affirmed.

FINAL PROOF—DESERT LAND ENTRY—CHARACTER OF EVIDENCE.

INSTRUCTIONS.

Desert-land entrymen in making proof of possession of a right to sufficient water to properly irrigate the land, should only be required to furnish the best evidence thereof obtainable at the time the final proof is submitted, which should also show that the entryman has done all that he is required by the laws of the State or Territory to do at that time for the maintenance of the right and that under the right he has actually used the water for the irrigation of the land embraced in this entry.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 16, 1906.* (E. O. P.)

The Department is in receipt of your office letter of October 25, 1906, transmitting communications from Clarence T. Johnston, State engineer of the State of Wyoming, dated July 27, and October 18, 1906, in which he urges a modification of existing regulations respecting the character of evidence required of desert-land claimants to establish their rights to sufficient water to properly irrigate the land entered by them. The modification is requested as to the State of Wyoming, but in view of the fact that "similar difficulty exists in other States, altho perhaps in less degree," a general recommendation is made by your office that—

> the regulations governing final proofs in desert-land entries be so modified as to require the entryman to show, in making final proof, that he then has acquired a right to the use of sufficient water to properly irrigate the irrigable land in his entry; that he had done all that he was required by the laws of the State or Territory to do at that time for the maintenance of that right, and that under that right he has actually used the water for the irrigation of the land in his entry.

An examination of the statutes of Wyoming discloses an admirable system for the conservation and economical distribution of the water supply, but the proper administration thereof absolutely prevents the claimant under the desert-land act from obtaining and submitting with the final proof prescribed the evidence required by the State law to establish his title to a water right.

The act of March 3, 1877 (19 Stat., 377), specifically requires—

> that the right to the use of water by the person so conducting the same on or to any tract of desert land . . . . shall depend upon *bona fide* prior appropriation.

This requirement remains unchanged in the amendatory act of March 3, 1891 (26 Stat., 1095). The existing regulations requiring the claimant to submit satisfactory proof that he has an "*absolute* right" to sufficient water to properly irrigate the land entered is in conformity with the terms of the statute. (David H. Chaplin, 35 L. D., 181.)

It is clear, however, that the desert-land act intended to impose no condition the compliance with which was not susceptible of satisfactory proof obtainable within the time fixt by the statute for the completion of the entry.

Where the adjudication of rights claimed under a State statute follows uniform rules of practice, proof that the State law had been complied with and the right claimed established thereunder might properly be required by the Department in the administration of a federal statute, of which the State law is in a manner supplemental. It does not follow, however, that the Department is bound to await

final action by the State, and it is clear that when the administration of the federal statute will be seriously impeded or absolutely defeated by reason of the procedure obtaining under a State statute, which prevents a claimant under an act of Congress from furnishing conclusive proof that his right has been finally established under a State law, other evidence of the possession of such right may properly be accepted by the Department.

The Department, while unwilling to change existing regulations requiring that the desert-land claimant shall show that he has a right to sufficient water to properly irrigate the land, is of opinion the entryman should only be required to furnish the best evidence obtainable at the time he submits his final proof that he is possest of such right. In the case of desert-land entrymen in the State of Wyoming, the certificate of the State engineer, based upon the report of the water commissioner, that the claimant is in *undisputed* possession of sufficient water to properly irrigate the land entered and is using the same in accordance with his permit, and the affidavit of the claimant that he has made a "*bona fide* prior appropriation" of the water, together with such other evidence as the particular case may require, should be accepted as sufficient proof of compliance with the statute and regulations issued thereunder.

Claimants in other States where a similar difficulty exists should be required to furnish the best evidence obtainable, and the recommendation made by your office in this regard is approved by the Department, and the local officers in those States and in the State of Wyoming should be instructed to receive and pass upon final proof submitted by desert-land entrymen in accordance with the recommendation made by your office, as modified herein, with reference to claimants in the State of Wyoming.

NOTICE OF DECISION—SERVICE BY MAIL.

SCHMIEDT *v.* ENDERSON.

Where notice of a decision is given by registered letter, the registry return receipt is the highest evidence of service thereof, and the date of delivery of the letter as shown by the receipt is the date of notice of the decision.

Where proof of service of notice by mail is supplied as required by rule 18 of the Rules of Practice, it will be presumed, after the expiration of the time specified in rule 67, that the notice was received in due course of mail, but service by mail will only bind the party served from the time the letter was actually delivered, as shown by the registry return receipt.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 17, 1906.* (E. F. B.)

With your letter of November 6, 1906, you transmit the record in the case of Julius Schmiedt *v.* Andres Enderson, in response to the

letter of the Department of October 26, 1906, directing that the record be transmitted for its consideration upon the petition for certiorari filed by said Andres Enderson.

The land in controversy is the SE. ¼ SE. ¼, section 7, and E. ½ NE. ¼ and NW. ¼ NE. ¼, section 18, T. 129 N., R. 69 W.,Bismarck, North Dakota, of which Enderson made homestead entry September 10, 1902. A contest was filed against this entry February 8, 1905, by Julius Schmiedt, charging abandonment, upon which a hearing was had. The local officers found that the entryman "did not make the claim his home or establish his residence on the land in controversy, and the evidence shows that he had a good home upon a preemption which he had proved up adjoining the village of Ashley, North Dakota; that the entry was made solely for the purpose of securing the meadow on said tract and not with the intention of making it his actual home. We find that he never at any time maintained an actual and constructive residence thereon, but that his actual and constructive residence was upon the aforesaid preemption."

Notice of that decision was mailed to claimant July 15, 1905, by registered letter, and was received by him August 2, 1905, as shown by the "Registry Return Receipt." On August 31st, within thirty days form notice of said decision, claimant filed an appeal therefrom which had been served upon the opposite party. You declined to entertain it and dismissed the same for the reason that it was not filed until after forty days from the date upon which notice of the local officers' decision was mailed to claimant. You then considered the case under Rule 48 of Rules of Practice, and the record failing to disclose any of the conditions specified in said rule, you concurred in their conclusions of law and closed the case by decision of February 16, 1906.

Claimant appealed from that decision, which you declined to transmit because of his failure to appeal from the decision of the local officers within the time prescribed by the rules of practice. Whereupon claimant filed his petition for certiorari, which was granted as above stated.

If notice of a decision is given by registered mail, the date of the delivery of such letter as shown by the registry receipt is the date of notice of the decision, and is the highest evidence of the fact of such service.

Rule 18, providing that "proof of service by mail shall be the affidavit of the person who mailed the notice, attached to the post-office receipt for the registered letter," and Rule 67, that "where the notice is sent by mail, five days additional will be allowed for the transmission of notice and five days for the return of the appeal," were only intended to charge the person addrest with service in the

absence of any proof to the contrary. Where the proof has been supplied as required by Rule 18, and after the expiration of the time specified in Rule 67, it will be presumed that the notice was received in due course of mail, but "service by mail, whether by registered or unregistered letter, will not bind the party to be served, if it be shown that such service failed to reach him" (John P. Drake, 11 L. D., 574), and will only bind him from the time the letter was actually delivered, as shown by the registry return receipt. That is the highest evidence of actual service.

Your office therefore erred in not considering the case upon claimant's appeal.

The petition in this case presented *prima facie* sufficient grounds for relief to justify the certification of the record, but upon an examination of the same, the decision of the local officers is fully sustained by the testimony—even by that of the claimant himself—which shows conclusively that if his occupancy of the land embraced in his homestead entry was sufficient under any circumstances to be considered as a *bona fide* residence, it was not to the exclusion of a home elsewhere, for the reason that he never abandoned his home upon his land that he acquired under the preemption law, where he had valuable improvements and upon which he continued to reside thru the entire period covered by the hearing.

This excerpt from his testimony indicates the character of the residence on the homestead. It was in answer to the question as to what move he made to break up his home on the preemption claim and take his goods to the homestead. He said:

> I thought I was a single man that I happened to go back and forth between both places I could not make any living on that place either the first or second year. I had to farm to make my living and therefore I changed from one place to the other after I farmed I had to take care of my grain, in this way I had my stock down there in the pasture and that claim is not farming land.

He also testified that he was trying to "prepare the place so he could go there and stay there" but it would take capital to do so and as the place was short of water it was impossible for him to stay there. I could not get help to dig a well.

The finding of the local officers, that the claimant never at any time maintained an actual or constructive residence upon the land, and that his actual residence was upon his preemption adjoining the village of Ashley, where he had a good home, is not only warranted by the testimony but is the only reasonable conclusion that can be deduced therefrom.

Your decision canceling the entry is affirmed.

AZTEC LAND AND CATTLE CO. *v.* TOMLINSON.

Motion for review of departmental decision of September 19, 1906, 35 L. D., 161, denied by Secretary Hitchcock, November 17, 1906.

MILITARY BOUNTY LAND WARRANT—PROOF OF ASSIGNMENT.

HOMER GUERRY.

Where one claiming ownership of a military bounty land warrant fails to show that his claim rests upon a "deed or instrument in writing" executed by the warrantee in compliance with section 2414, R. S., the land department may require full proof as to how, when and upon what considerations the warrant past from the warrantee, and is not precluded from requiring such showing by the assumption of jurisdiction of any court to adjudicate the ownership of the warrant in a proceeding wherein the warrantee, or those entitled by law to his succession, were not personally served.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 17, 1906.* (J. R. W.)

Homer Guerry appealed from your decision of June 7, 1906, refusing to approve assignment to him of military bounty land warrant No. 34015, one hundred and sixty acres, issued under the act of March 3, 1855 (11 Stat., 701), July 10, 1856, to William Smith, seaman, for service in the navy, in the Mexican War, on the ship Cumberland.

There is no assignment by Smith, or his heirs, or anything to show how or when he or his heirs parted with title or possession. For all that appears it may never have come to possession of the warrantee or of his heirs, or may have been stolen. Your decision does not state whether a duplicate has ever been applied for or issued, or that investigation was made to ascertain whether such was the case. Claimant's claim of title originates in an assignment on back of the warrant by W. D. Kilpatrick, December 16, 1904, acknowledged before and witnessed by Hazel Nordeman, notary public, District of Columbia, to Samuel D. Morrison, Jr., of Denver, Colorado, who, one week later, instituted suit in the district court, Denver county, Colorado, against "W. D. Kilpatrick and the unknown heirs of William Smith, deceased," in which suit service was made by publication against defendants as non-residents. The court found the proceeding to be one *in rem* against the warrant itself and that the service was good, and decreed, April 4, 1905, that:

William D. Morrison, Jr., his heirs and assigns, are the sole, legal, and absolute owners and holders of the said bounty land warrant No. 34015, issued by act of Congress approved March 3d, 1855, against the claims of said war-

rantee, William Smith, and the said W. D. Kilpatrick and their heirs and assigns, and against the claim or claims of any and all persons whatsoever.

A transcript of the decree being filed in your office, you denied approval of the assignment, holding that:

> The judgment of this court does not show a clear and indefeasible title in Morrison for several reasons. [1] It is not clear from the statutes of Colorado that a suit to quiet title to personal property is authorized to be brought in the manner pursued in this case; [2] nor is it clear that the parties were brought into court by proper service. . . . . No presumptions are indulged in as to the regularity of a judgment obtained upon such service, and it must be affirmatively shown that the statute has been followed. . . . . [3] There is no satisfactory showing made in this case as to how the warrantee or his heirs parted with their interest. [4] It is not shown whether or not the warrantee is dead . . . . . and if dead it is not shown whether he died testate or intestate, or whether there has been an administration upon his estate.

A proceeding to settle title to personal property to be in the possessor of it was wholly unknown to equity jurisdiction. Pomeroy, in his work upon equity jurisprudence, in discussion of the subjects of concurrent jurisdiction of equity and law courts, says (Sec. 177) that:

> The concurrent jurisdiction does not embrace suits . . . merely to determine the legal title to chattels between adverse claimants where the claim of neither party involves or depends upon any equitable interest or feature.

Possession of the chattel with claim of right was deemed adequate and sufficient for protection of its possessor until a better title could be shown and equity had no ground for procedure against one making no active assertion of title. It was a maxim that "equity acts *in personam*" by enforcing the obligation of conscience when a claimant asserted rights from which he was in good conscience barred. Proceedings *in rem* were unknown in chancery, and whatever jurisdiction of that character the courts of chancery have is wholly statutory, and no part of their original and general jurisdiction derived from the English high court of chancery, to which they are successors, in the jurisprudence of the American States springing from English colonies. The jurisdiction of the district court of Denver county, Colorado, by decree in equity to quiet title, or to adjudicate title, to chattel property in the plaintiff's possession, must rest upon some provision of the constitution or statutes of that State, and not upon the general powers of a court of equity under principles of equity jurisprudence. No such provision is pointed out by appellant's brief, nor has any been found by the Department.

But if such provision exist, another objection lies to this decree, rendering it inconclusive of the right asserted. It is a principle as old as English jurisprudence that no adjudication of right can be made until there has been personal service of process upon him whose rights are adversely affected, or such other proceeding for notice to

him as is authorized by some law of the place of the subject-matter affected, to be taken and held by the courts as a full substitute for such personal service. To confer jurisdiction on the court to hear, determine, and adjudge at all, there must be personal service, or that full and complete proceeding which the law authorizes to be substituted for it. Substituted service can be made in such cases only as the law authorizes, and only by strict compliance with its terms, together with some process or proceeding by which the property affected is itself "brought under control of the court by seizure or some equivalent act." Pennoyer *v.* Neff (95 U. S., 714, 727); Webster *v.* Reid (11 How., 437, 459); Hart *v.* Sansom (110 U. S., 151, 154–5); Arndt *v.* Griggs (134 U. S., 316, 320–1). There is no presumption of jurisdiction when judgments upon substituted service are offered in evidence, but "the facts essential to the exercise of the special jurisdiction must appear in such cases upon the record," and be proven by the one offering the judgment. Galpin *v.* Page (18 Wall., 350). And when proof is offered, the adverse party may by proof *aliunde* impeach the verity of the record upon which such judgment is founded. Thompson *v.* Whitman (18 Wall., 468). Your office may properly require proof that the court pronouncing such judgment had jurisdiction, for your action is administrative, and the United States is a party concerned, entitled to be relieved of obligation to the warrantee and his heirs before it recognize obligation to the claimant for the same demand.

Had there been complete proof of entire regularity of the proceeding there was no evidence that proper parties defendant were made, in that no one is heir to a person living; and when title is alleged to have devolved by the law of succession, proof of the death intestate is essential to show title of the heir, and without such proof there is no evidence of proper parties defendant to the proceeding.

The nature of the proceeding had in the Colorado court does not appear to be such as the law of that State provides for service by publication. Section 41 of the Civil Code, as amended by the act of April 5, 1893 (Sess. Laws, Colo., 1893, 77), so far as here material, provides that service by publication—

> shall be made only in cases of attachment, foreclosure, *claims*, and delivery, or other proceedings where specific property is to be affected, or the procedure is such as is known as a proceeding *in rem*.

The statute prior to amendment (Sess. Laws, Colo., 1887, 107) read—

> shall be made only in cases of attachment, foreclosure, *claim* and delivery, *divorce* or other proceedings where specific property is to be affected or the procedure is such as is known as a proceeding *in rem*.

Beyond the elimination of "divorce" the purpose of the amendment is not clear. It consisted in changing "claim" to the plural

form and insertion of a comma separating it from the word delivery. "Claim and delivery" were given a specific meaning by the act of 1887 (ib., 118), as what is generally known as the law action of replevin—a proceeding for recovery of specific chattels—so that by the original act, before amendment, "claim and delivery" clearly had relation to actions for recovery of specific chattels, in which they were taken by process of the court, reduced to judicial custody, and were "brought under control of the court by seizure" (Pennoyer *v.* Neff, *supra*), and constructive notice by publication can in such proceedings be authorized. Equity had no part in it, and the proceeding was one of law, tried by a jury. If by the amendment it was intended to give the courts of equity or law power to adjudicate any or every assertion of right to or interest in movable chattles which the court had not "seized" and over which it took no specific jurisdiction or control, the proceeding can not be styled one *in rem*, and the proceeding is *in personam* and the jurisdiction beyond legislative power to confer without personal service of process upon the adverse claimant. The claimant has therefore failed to comply with regulation 39, warrant circular of July 20, 1875, that:

> In default of an assignment from the warrantee a decree of title must be obtained from a court of *competent* jurisdiction.

But independently of the foregoing reasons, and were there full showing of regularity of the proceedings, your office may properly refuse to be concluded by adjudication of local courts upon ownership of military bounty land warrants, if not satisfied that the warrantee and those claiming under him have parted with interest therein. A land warrant is the bounty of the government in consideration of meritorious service, and in granting the bounty it is competent for Congress to fix the terms and conditions of assignment or devolution of the bounty it confers. Congress, among other things, provided (Revised Statutes, 2414) that land warrants shall be—

> assignable by deed or instrument of writing, made and executed according to such form and pursuant to such regulations as may be prescribed by the Commissioner of the General Land Office.

Without compliance with the statute by due execution of "deed or instrument in writing," your office is entitled to be fully advised of all facts necessary to show that one claiming a land warrant not regularly assigned derives his claim thru some voluntary act of the lawful owner by which he parted with all real interest, and if living would be bound in good conscience and fair dealing to make a regular assignment. Without such assignment there can be no *bona fide* purchaser or holder entitled to claim the warrant discharged of any equity that the true owner may assert thereto. The default of a regular assignment is in itself notice of any right of the owner therein.

The government is itself concerned and interested in knowing that the object of its bounty received the benefit intended to be conferred, and to be advised of facts enabling it to show that it discharged its obligation to him. It is therefore entirely proper to require full proof how and when and upon what considerations the first stranger claimant—in this case W. D. Kilpatrick—became possest of the warrant, and the right to require reasonable proof upon such matters is not precluded by the assumption of jurisdiction of any court to adjudicate the ownership of a warrant in proceedings wherein the warrantee, or those entitled by law to his succession, has not been personally served.

Your decision is affirmed.

HOMESTEAD—PREFERENCE RIGHT—KINKAID ACT.

FORAN *v.* CLARK.

The preference right of entry accorded claimants under the provisions of section 2 of the act of April 28, 1904, attaches immediately upon their becoming qualified to proceed thereunder, in the absence of any intervening adverse right; and where a claimant whose entry remains intact was not, at the date of the act, occupying the land embraced in his entry, but subsequently cured his default, his rights under the statute date from the time he commenced compliance with the law in good faith, but if prior to that time any other qualified claimant had *exercised* his preference right upon the lands subsequently applied for by the defaulting applicant, the rigths of the prior entryman will not be disturbed.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 21, 1906.* (E. O. P.)

Lawrence J. Foran has appealed to the Department from your office decision of March 17, 1906, affirming the action of the local officers dismissing his contest against the homestead entry of Hugh G. Clark, made June 30, 1904, under the provisions of section 2 of the act of April 28, 1904 (33 Stat., 547), for the N. ½ NE. ¼, SE. ¼ NE. ¼, Sec. 23, NW. ¼ NW. ¼, Sec. 24, SW. ¼, Sec. 14, T. 18 N., R. 24 W., Broken Bow land district, Nebraska.

The entry of Clark was based upon his former entry of an adjoining tract, which he owned and occupied at the date of filing his application. Foran's conflicting application was not presented until July 18, 1904, and the preferential right claimed by him is based upon a former entry of an adjoining tract, made December 12, 1901. At the time Foran made application to enter he failed to make affidavit that he owned and occupied the land embraced in his first entry at the date of the passage of said act, April 28, 1904. In the decision of the local officers it is stated he was advised that he

would be required to make such affidavit, and with this holding your office apparently concurs. It appears, however, that rejection of his application was because of the existing entry of Clark.

Instead of appealing from the action of the local officers in rejecting his application, Foran instituted contest against the entry of Clark, and alleged as grounds therefor the disqualification of the latter because of his ownership of more than 160 acres of land.

Your office found from the testimony offered that contestant had failed to establish the charge made, and in this finding the Department concurs. The further conclusion reached in your said decision, to the effect that "the ownership of more than one hundred and sixty acres of land acquired by a homestead entryman, after he had made the original entry, would not disqualify him from making additional entry under the Kinkaid Act," is in conflict with the recent departmental decision in the case of Arthur J. Abbott, on review, decided October 3, 1906 (35 L. D., 206), wherein it was held that—

> the former homestead entry should be entirely eliminated from the calculation and the right of the applicant determined as of the date of his application, without regard to any impediment thereto imposed under the general law by virtue of his prior entry, whether such entry was relinquished or perfected and the land thereby secured. In other words, if the applicant at the date of his application is not disqualified for some reason other than one arising under his former entry, his application should be allowed. If he owned other land exclusive of that embraced in his former entry, in excess of the amount which would disqualify him under the homestead laws, his application should be denied; otherwise it should be accepted, there being no other objections.

The failure of Foran to establish the charge made does not, of itself, however, warrant the holding of Clark's entry intact. If Foran was entitled to a preferential right of entry under the statute at the time Clark's entry was allowed, it follows that Clark's affidavit filed with his application, to the effect that the land entered did not adjoin the land of any other claimant entitled to a preference right, was untrue, and an adjustment of the existing conflict would have been necessary (Davis *v.* Whitesell, 35 L. D., 213).

In the case last cited it was held that:

> The preference right conferred vested in all claimants *entitled* to make entry under section 2 of said act, equally and at the same time, and the right to exercise it continued in all for the same period, and in the opinion of the Department the time of its exercise within the specified period in no way altered the rights of the applicant. The right was perfect until the expiration of the period allowed for its exercise, and could not be defeated or impaired by the earlier exercise of the right by another equally entitled.

Your office held that Foran was not an actual occupant of the land embraced in his first entry at the date of the passage of the act under

which his rejected application was made and was therefore disqualified to claim any rights thereunder.

By departmental circular of May 31, 1904 (32 L. D., 670), it is stated that:

> 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.

In the opinion of the Department the requirement imposed upon Foran by your office decision is unwarranted. Neither should the limitation as to the time of occupancy be confined to the date of the circular above referred to. The preference right accorded claimants under the provisions of section 2 of said act attached immediately upon their becoming qualified to proceed thereunder, in the absence of any other intervening adverse right. If a claimant whose entry remained intact was not occupying the land entered at the date of the passage of the act, but should subsequently cure his default, all his rights under the statute would date from the time he commenced compliance with the law in good faith. If, however, prior to the curing of such default any other qualified claimant had *exercised* his preference right upon lands subsequently applied for by the defaulting applicant, the rights of the prior entryman will not be disturbed. This is the rule laid down in departmental decision in the case of Puetze *v.* Moeller, decided October 19, 1906 (35 L. D., 256), in the following language.

> The preference right granted by the act in question vested only in persons qualified to exercise it, and if, prior to the vesting thereof, intervening rights have attached to the land subject to its exercise, they will not be disturbed. The general rule that an entryman's qualifications are to be determined as of the date of the presentation of his application to enter is subject to the modification that, where, prior to the removal of the disqualification which existed prior to such presentation, the adverse rights of others have intervened, they will be protected (Short *v.* Bowman, 35 L. D., 70, 74).

The testimony offered in the case under consideration clearly shows that at the date Clark made entry under his preference right Foran was not an actual *bona fide* occupant of the land originally entered by him and he was not therefore then entitled to any preference right granted to those persons entitled to make entry under the provisions of section 2 of the said act of April 28, 1904. The preference right did not attach until his default was effectually cured. It follows therefore the entry of Clark, based upon the affidavit that the lands applied for were not subject to the preference right of any other person, was properly allowed, in so far as any conflicting rights asserted by Foran were concerned.

The action of your office is, for the reasons herein stated, affirmed.

CONSTRUCTIVE RESIDENCE—CLIMATIC HINDRANCES—ACT MARCH 3, 1881.

ALLEN CLARK.

Under the provisions of the act of March 3, 1881, the Commissioner of the General Land Office may, in his discretion, allow a homestead entryman twelve months from the date of his entry within which to commence residence upon the land, where it is satisfactorily shown that on account of climatic conditions it is impossible to commence residence within six months; but in such case the entryman may be credited with constructive residence for a period of six months only, and actual residence for the remainder of the statutory period of five years must be made and shown as in ordinary homestead cases.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 21, 1906.* (C. J. G.)

An appeal has been filed by Allen Clark from the decision of your office of December 16, 1905, rejecting the final proof offered upon his homestead entry for the SE. ¼ SE. ¼, Sec. 30, N. ½ NE. ¼ and SW. ¼ NE. ¼; Sec. 31, T. 148 N., R. 29 W., Cass Lake, Minnesota.

The entry was made June 2, 1900, upon which the final proof in question was submitted July 20, 1905, final certificate being issued on that date. As said proof showed that Clark did not establish residence until in April, 1901, which was not within six months after entry, your office rejected the same, holding that "constructive residence for the first six months can only be allowed where residence is established within that time."

In the appeal here the proviso to section 2297 of the Revised Statutes, annexed to said section by the act of March 3, 1881 (21 Stat., 511), is invoked in behalf of Clark. That section, with the proviso, reads as follows:

> If, at any time after the filing of the affidavit, as required in section twenty-two hundred and ninety, and before the expiration of the five years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit has actually changed his residence, or abandoned the land for more than six months at any time, then and in that event, the land so entered shall revert to the government: *Provided*, That where there may be climatic reasons the Commissioner of the General Land Office may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe.

It is urged that Clark should be given credit for constructive residence from the date of his entry up to April, 1901, when, as shown by the proof, he established residence. It is alleged that it was error for your office to hold—

> That "constructive residence for the first six months can only be allowed where residence is established within that time," for the reason of the climatic hind-

rances that actually existed and prevented said Clark from establishing his residence on the land within the first six months, as was or should have been clearly brought out and shown in the final proof submitted, and which if not so shown can by additional proof be clearly shown, so as to entitle said claimant to the benefit of the exercise of the discretion of the Hon. Commissioner, extending the time in which said Clark effected his residence on said land to the extent of the period of nine or ten months that elapsed up to the time of such actual residence thereon. Thereby by the exercise of such discretion allowing said Clark such period of nine or ten months, by reason of climatic hindrances, as constructive residence on said homestead, rendering his said final proof sufficient.

In his final proof Clark states that his house on the land was built in March, 1901, and that he established residence thereon in April of that year. Neither of his final proof witnesses was able to say just when Clark established residence. In supplemental testimony of claimant, in answer to the question: "How many days during 1900 were you upon the land entered?" he replied: "Thirty-five days Aug. and Sept. 1900—14 days in November 1900—I stayed on the adjoining land, but worked on the homestead—on account of flood—excessive wet, making it impossible to get a team into the claim that year."

Q. How many nights during 1900 did you sleep upon the land in question?—A. I did not sleep there during 1900—couldn't, there was no house there.

Q. Describe the crops raised on said land each year, since 1900?—A. In 1900 there was no crop—there was no chance.

The foregoing is all the testimony bearing on the reasons for Clark's alleged inability to establish residence within six months from date of entry, and such testimony is not corroborated. The receipt and final certificate issued to Clark are indorsed, presumably by the local officers, "Refer to Board of Equitable Adjudication. Residence not established within six months from date of entry." In the general circular of January 25, 1904, page 18, referring to the amendatory act of March 3, 1881, *supra*, it is said:

In such case the settler must, on final proof, file with the register and receiver his affidavit, duly corroborated by two credible witnesses, setting forth in detail the storms, floods, blockades by snow or ice, or other hindrances dependent upon climatic causes, which rendered it impossible for him to commence residence within six months. A claimant can not be allowed twelve months from entry when it can be shown that he might have established his residence on the land at an earlier day, and a failure to exercise proper diligence in so doing as soon as possible after the climatic hindrances disappear will imperil his entry in case of a contest.

These instructions are a radical change in the way of liberality to the homesteader from the original ones of April 18, 1881 (8 C. L. O., 20), under said act of March 3, 1881, which provided:

At the expiration of six months from date of entry, the homestead party who has not been able to establish *bona fide* residence upon the homestead owing to climatic reasons must file with you this affidavit, duly corroborated by two

credible witnesses, giving in detail the storms, floods, blockades by snow or ice, or other climatic causes, which rendered it impossible for him to commence residence within six months.

It will be insisted in each case that the claimant shall exercise all reasonable diligence in establishing *bona fide* residence as soon as possible after the climatic hindrances have disappeared; and a failure to do so would imperil the entry in the event of a contest prior to the expiration of one year from date of entry. A claimant can not be allowed the latitude of twelve months, when it can be shown that he could have established his residence on the land at an earlier day. To the end that proper data may be placed on file, you will require each settler who seeks the remedy which said act trusts to my discretion, to furnish a supplemental corroborated affidavit as soon as residence is established by him, giving date of the completion of his house, its probable value, and the date of commencing residence therein.

It was clearly the duty of the local officers before issuing final certificate in this case, the final proof showing on its face that Clark did not establish residence within six months from date of entry, to require him to comply with the instructions contained in the general circular of January 25, 1904, by furnishing his affidavit, duly corroborated by two credible witnesses, showing in detail, the reasons for his failure to timely establish residence. The showing made by Clark along that line, which is hereinbefore referred to, was obviously insufficient to meet the requirements of said instructions.

It is prayed that Clark be given credit for constructive residence from date of entry up to the time he established residence in April, 1901, a period of nine or ten months. Your office holds that constructive residence for the first six months can only be allowed where residence is established within that time. This is undoubtedly the rule in ordinary cases. But a different rule is fairly applicable where an entryman brings himself within the provisions of the act of March 3, 1881, and the rules and regulations which said act authorizes the Commissioner of the General Land Office to prescribe. This act, in effect, authorizes the Commissioner in his discretion to extend the time, namely, six months, ordinarily granted an entryman in which to establish residence, to twelve months from the date of filing. If residence is in fact commenced within the twelve months and recognized causes are properly shown which rendered it impossible to commence residence within six months and that proper diligence was exercised upon disappearance of the climatic hindrances, then the entryman should be treated the same as if he had in fact established residence within six months and allowed constructive residence for that length of time. But it was apparently not contemplated that the act should extend further so as to allow credit for constructive residence beyond the first six months. The act of March 3, 1881, being annexed as it is as a proviso to section 2297 of the Revised Statutes, which permits contest against a homestead entry, on the ground of abandonment " for more than six months," was evidently

designed to protect such entryman from charges of abandonment for a period as long as twelve months from date of entry upon showing that he was prevented by climatic reasons from establishing residence within the first six months. In other respects the entryman is to be treated on the same footing as other entrymen, that is, he is to be allowed on final proof constructive residence for a period of six months only, actual residence for the remainder of the statutory period of five years to be made and shown as in ordinary homestead cases.

Applying the foregoing to the case in hand, it is apparent that Clark in order to avail himself of credit for constructive residence during the first six months of his entry must make the showing required by the instructions, *supra*, relative to climatic hindrances, and in addition, to complete his proof, must show residence for the full period of four and one-half years from the date his residence was commenced, to wit, in April, 1901. Not being able to show such residence, his proof was prematurely submitted, as found by your office decision, but for a different reason from the one stated therein.

In the case of McLeoud *v.* Weade (2 L. D., 145), cited on appeal, the entry was protected under the act of March 3, 1881, in face of contest, altho residence was not commenced within six months from date of entry, but the case is not in point as to the question of the credit to be given on final proof for constructive residence.

The decision of your office rejecting Clark's final proof is affirmed, and the papers are herewith returned in order that he may be given opportunity to comply with law in the matters indicated, if, upon further examination of said proof, the same is found by your office to be otherwise satisfactory.

TOWNSITE ENTRY—SECTION 2387 OF THE REVISED STATUTES.

TOWNSITE OF RIVERTON.

Where upon the opening of land for townsite purposes proceedings are promptly begun for incorporation of the town and for townsite entry by the corporate authorities, such proceedings can not be superseded by the application of the county judge to make townsite entry, as trustee, under section 2387 of the Revised Statutes, the provisions of that section giving preference to entry by the corporate authorities of a town and merely empowering the county judge to act for the occupants and claimants in towns which have no corporate authorities to act for them.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 26, 1906.* (P. E. W.)

With your letter of September 20, 1906, you transmitted the application of Charles E. Carpenter, as judge of the district court, second

judicial district, Wyoming, to enter, under section 2387 of the Revised Statutes, the NE. ¼, Sec. 34, T. 1 N., R. 4 E., Shoshone, Wyoming, and his notice of intention to make townsite proof therefor.

The application is submitted for consideration by the Department and for directions as to the allowance thereof, "whether it shall be entered under sections 2382 to 2386, or sections 2387 to 2389, United States Revised Statutes," and for direction as to making proof thereunder.

It is suggested that the application is one properly coming under sections 2387–9, and the Department concurs in that view.

Pending consideration of the application there was filed on September 26, 1906, an informal, and on October 17, 1906, a formal protest against its allowance. It appears that the land in question was surveyed, and was set apart as a government townsite by your office letter of August 8, 1906, and became subject to settlement for that purpose on and after the day of the opening, August 15, 1906.

Said section 2387 of the Revised Statutes prescribed, in the case of a townsite on public lands, that—

> it is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter . . . the land so settled and occupied in trust for the several use and benefit of the occupants thereof . . . the execution [of the trust] to be conducted under such regulations as may be prescribed by the legislative authority of the State.

Under a reference to said section 2387, section 755 of the Revised Statutes of Wyoming, 1899, provides that—

> When the corporate authorities of any city or town, or the judge of the district court for any county or district in this State in which any incorporated town may be situate, shall have entered at the proper land office the land, or any part of the land settled and occupied as the site of such city or town, . . . it shall be the duty of such corporate authorities or judge to dispose of and convey the titles to such land.

Thereunder a district judge in the State of Wyoming is a judge of the county court for each county in his district, and is the person entitled, in the proper case, to proceed under said section 2387. See the case of Bena Townsite (34 L. D., 24).

But it is observed that the said section 755 of the Wyoming statutes inadvertently mentions such judge as entitled, equally with corporate authorities, to make townsite entry for the land occupied as the site of "any incorporated town." There is thus not only a failure to provide for the case of an unincorporated town, but to the extent that it recognizes such judge as competent to make townsite entry of land occupied by an incorporated town, it is in conflict with said section 2387 of the Revised Statutes, which distinctly prescribes

that only "if not incorporated" it shall be lawful for such judge to make entry of public land occupied as a townsite.

This application must therefore be considered without reference to said section 755 of the Wyoming statutes, since it purports to be for the entry of the land occupied by a town not incorporated at its date.

In addition to the necessary formal averments descriptive of the land and his official capacity and of the trust purpose for which the entry is sought to be made, the judge in his said application sets forth that all the lands described have been settled upon as a townsite for the purposes of trade and business and were so occupied on August 15, 1906, by more than one hundred *bona fide* occupants, and have been "accurately surveyed and platted, and subdivided into lots and blocks, with streets and alleys; and the town is named Central City, and that "said town is not incorporated."

The formal protest is signed and sworn to by a committee of three appointed for that purpose at a mass meeting of the inhabitants on October 3, 1905, "called for the purpose of protesting against the appointment of Charles E. Carpenter, as trustee." The protest sets forth *inter alia* that prior to August 15, 1906, application was duly made by citizens for the setting apart of this land for townsite purposes, and that—

> On the 15th day of August, 1906, said land was duly surveyed and platted in accordance with law and the plat thereof filed in due time in the office of the county clerk. . . . Said townsite was platted under the name of Riverton and all of the present settlers and land owners in said town took possession and claim title in accordance with said survey and plat . . . Your petitioners are informed and believe that the application of Judge Carpenter to be appointed trustee . . . was made by him under a total misapprehension of the facts. We verily believe that no actual resident of the said townsite ever requested that said application be made by him. Said application is based upon a different survey and plat than that referred to above and one that was never authorized or recognized by the actual residents of the said townsite. It also designates said town by the name of Central City, a name that is not recognized or desired by the residents of said town. The name of Riverton is already widely known and recognized thruout the country, and a change of name at this time would cause much inconvenience and confusion . . . The appointment of Judge Charles E. Carpenter as trustee of said townsite under the application made by him would work a great hardship to the citizens of said town, and lot owners therein, and the business interests thereof, and would undoubtedly result in grave complications of titles, owing to the fact that the plat on which it is based varies materially from the one recognized by the settlers as above set forth.

The protest is accompanied by a certified copy of the order past by the Board of County Commissioners of the county of Fremont, Wyoming, in which said land is situate, formally approving the application for incorporation of the town of "Riverton" and appointing inspectors to call the election for the choice of corporate authori-

ties thereof. There is also filed a sworn report of the said inspectors showing that such election was held October 29, 1906, by the residents of the described land, at which sixty-nine votes were cast, of which fifty-eight were in favor of, and eleven against, incorporation.

It is further alleged that the survey referred to by the judge in his application was made on August 24, 1906. The date of the judge's application is August 31, 1906.

Under the circumstances, the Department will not direct the allowance of this application. In authorizing proceedings by such judge only in case the town is not incorporated, the law plainly gives preference to entry and trusteeship by corporate authorities, and in a case where, upon the opening of land for townsite purposes, proceedings are promptly begun for incorporation of the town and for townsite entry by the corporate authorities, such proceedings cannot be anticipated and barred by the application of such judge, whom the law has merely empowered to act for occupants and claimants in towns which have no corporate authorities to act for them and which, therefore, desire and request him to act. In the present case, assuming the facts to be as stated in the application and the protests, since incorporation is essential to a townsite application by corporate authorities, it must be held that the incorporation proceedings under the name "Riverton," begun by the inhabitants as soon as the land was opened for townsite purposes, and based on the townsite survey made on the day of such opening, August 15, 1906, are all preliminary steps in, and constitute the initiation of, an application for townsite entry to be made in the name of the corporate authorities. As such initiated application it cannot, while being followed up with due diligence, be anticipated, superseded, or barred by the application of the judge, made sixteen days after the date of the opening, and based on a survey made nine days later than the townsite survey on which incorporation was applied for.

For the reasons stated, the application must be rejected.

HOMESTEAD ENTRY—MARRIED WOMAN—QUALIFICATIONS—SECTION 2, ACT OF APRIL 28, 1904.

KIMBERLEY *v.* GINGRICH.

The qualifications of an applicant to make additional entry under the provisions of section 2 of the act of April 28, 1904, must be determined as of the date of the presentation of the application, and only those who on that date possess the requisite qualifications entitling them to make entry under the provisions of the general homestead law are qualified to make such additional entry: hence a married woman, living with her husband and not the head of a family, is not qualified to make entry under said section, notwithstanding such disqualification did not exist at the date her original entry was made.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 26, 1906.* (E. O. P.)

Sarah F. Gingrich, nee Fitzsimonds, has appealed to the Department from your office decision of May 2, 1906, holding for cancellation her homestead entry, made June 28, 1904, under the provisions of section 2 of the act of April 28, 1904 (33 Stat., 547), for the SE. ¼ NE. ¼, E. ½ SE. ¼, SW. ¼ SE. ¼, SW. ¼, Sec. 18, T. 19 N., R. 57 W., SE. ¼, Sec. 13, T. 19 N., R. 58 W., Sidney land district, Nebraska, upon contest instituted against said entry by Alfred H. Kimberley.

The contest affidavit contains several distinct allegations, one of which charges that the claimant at the time of making said entry was a married woman living with her husband, and not the head of a family, and therefore disqualified from making entry under the terms of said act.

At the hearing divers objections were made by counsel for defendant to the jurisdiction, which are urged in the present appeal. The decision of your office touching these matters is clearly correct and is hereby affirmed.

The marriage of the claimant, as alleged, is admitted, and it becomes necessary at the outset to determine the question of her qualifications to make the entry in question. Your office, in passing upon the matter of law thus raised, held that claimant, being qualified to make the former entry, upon which her right to make that now involved depends, it is immaterial that she subsequently by marriage became disqualified to make a homestead entry under the provisions of the general homestead law. In effect this amounts to a determination of the applicant's qualifications as of the date of the former entry, disregarding all matters arising thereafter, which would, under the homestead law, prevent allowance of the entry, thereby making the entry under section 2 of the act of April 28, 1904, *supra*, a purely additional one, the right to make which is dependent solely upon the right of the claimant to make the prior entry. In support of this your office cites as authority departmental decision rendered in the case of Miller *v.* Northern Pacific Ry. Co. (31 L. D., 129.)

The Department has refused to adopt the rule thus broadly stated in its administration of the act in question. In those cases where at the time of making application to enter under said act, the applicant was shown to be disqualified by reason of the ownership of more than 160 acres of land, exclusive of that embraced in his former entry, to make entry under the general homestead law, his application was denied or his entry, if allowed, canceled (Arthur J. Abbott, on review, 35 L. D., 206).

Unless the language used warrants a distinction between entrymen

of the class last mentioned and married women whose marriage took place subsequently to the time of making former entry, the same rule must be applied in both cases.

The Department has held that entries made under section 2 of the act of April 28, 1904, *supra*, are essentially of the same character as those made under sections 1 and 3 thereof (James Dinan, 35 L. D., 102, 104). All are in their nature *original*. The language of section 1 of said act is too plain to admit of quibble in construction. It leaves no room for inference or conjecture as to its meaning, and the qualifications of entrymen under its provisions are as clearly defined as tho section 2289 of the Revised Statutes had been incorporated therein. Entrymen thereunder must possess all the qualifications required by the general homestead law, as laid down in said section 2289. The character of entries made under said act is defined by the requirement contained in section 1 thereof that they be "made under the homestead laws." Section 2 requires that entries allowed thereunder must be "made under the provisions of this act and subject to its conditions." It must be conceded that this language subjects entries made thereunder to the conditions imposed by section 1, and all of the requirements of the homestead law not specifically abrogated by the remainder of said section 2 remain in full force and effect and must be complied with. Nothing contained therein or in the first proviso of section 3, amounts to a waiver of any of the qualifications required of homestead claimants generally, except such as grew out of a former entry. The disqualification resulting from marriage is not of this character, and is not waived either directly or inferentially by any reasonable construction of the language used. Herein lies the distinction between the case cited by your office (Miller *v.* Northern Pacific Ry. Co., *supra*) and the one under consideration. As was pointed out in departmental decision rendered in the case of Puetze *v.* Moeller (35 L. D., 256), there is no limitation imposed by section 5 of the act of March 2, 1889 (25 Stat., 854), similar to that contained in section 2 of the act of April 28, 1904, *supra*. The limitations imposed by said section 2 respecting the qualifications of entrymen are essentially the same as those provided in section 6 of the act of March 2, 1889, *supra*, and it has been settled by the Department that a married woman, not the head of a family, is not qualified to make entry under said section (Sarah J. Walpole, 29, L. D., 647).

In the opinion of the Department the entry of Gingrich was erroneously allowed, she not being at the date of filing her application qualified to make homestead entry under the provisions of section 2 of the act of April 28, 1904, *supra*, by reason of her marriage.

The action of your office holding her entry for cancelation is, for the reasons herein stated, hereby affirmed.

SWAMP LAND GRANT—ADJUSTMENT—FIELD NOTES OF SURVEY.

STATE OF MINNESOTA.

Where sketch maps are returned with the field-notes of survey, and the field-notes show intersections of swamp and overflowed lands with *one* line of a section only, the sketch maps will be taken into consideration in determining the character of the portion of the section lying upon the surveyed line, with reference to its swampy or nonswampy character; and in such instances, where the outline of the swamp or overflowed lands is shown by the diagram to extend from the section line fifteen chains or more within the section, the adjustment will be made upon the basis of the relative portions of the surveyed line shown to be swamp or dry by the field-notes of survey. If the diagram shows that the swamp or overflow thereby represented extends at any point fifteen chains or more across the section line, and within the section, the State will be entitled to such forty-acre subdivisions lying upon the section line as are shown by the field-notes of the major portion of said line to be of the character granted; but this rule shall have no application in the adjustment of a claim to the *interior* forty-acre subdivisions of a section.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 26, 1906.* (G. B. G.)

This is the appeal of the State of Minnesota from your office decision of April 14, 1906, holding for rejection the State's selection, per list No. 148, for 1974.68 acres of land, in the Duluth land district, Minnesota.

The action of your office is put upon the ground that the field-notes of survey being the *basis* of adjustment of the swamp-land grant made to the State of Minnesota by the act of March 12, 1860 (12 State., 3), the swampy or non-swampy character of the lands here involved must be determined by the *rule* of adjustment laid down in 1 Lester, 543, as follows:

Where the field-notes are the basis, and the intersections of the lines of swamp or overflow with those of the public surveys alone are given, those intersections may be connected by straight lines; and all legal subdivisions the greater part of which are shown by these lines to be within the swamp or overflow, will be certified to the State; the balance will remain the property of the government.

The *basis* of adjustment of the grant in question is, as said by your office, the field-notes of the government surveys of the townships involved. State of Minnesota (32 L. D., 65). It is also true that in all public land States having a grant of swamp and overflowed lands, "where the field-notes are the basis" of adjustment, the rule above set out governs to the extent of its applicability. But it is urged upon the appeal that the returns which constitute the field-notes in these townships show more than "the intersections of the lines of swamp or overflow with those of the public surveys" in relation to the character of the land involved; that said rule is therefore by its terms inappli-

cable; and further that, as to these lands, the surveys show intersection of the lines of swamp or overflow therewith upon one side of the section only, thus rendering the rule impossible of application.

There is much force in these contentions. While it may not be admitted that where the returns of the survey of a township give more information as to the character of the land than is shown by the intersections of the lines of swamp or overflow with those of the survey, the above recited rule is wholly without application, yet in such instances there would not seem to be any good reason either in the application of the rule itself, or in good administration, why the land department may not look to these surveyors' returns for such proof of the character of lands as may be found therein.

It is undeniably true, as contended, that in many instances the surveyor's return shows intersections of swamp and overflow lands upon one side of a section only, and it is absurd to say that the character of such lands must be determined only by connecting intersections with a straight line where such line when drawn would be the same as the section line, and therefore show nothing.

In the case of the State of Minnesota, *supra*, your office was directed to put all surveys in the hands of capable and honest surveyors, 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." In accordance with this direction your office issued special instructions to all deputies surveying in Minnesota, in part as follows:

> You must note in your field-notes the exact distance at which you enter or leave swamps, marshes or overflowed lands, or lands that are "wet and unfit for cultivation," and the course of the line bordering said lands and in your notation of said lands, you will state that they are "subject to overflow" or are "wet and unfit for cultivation." You will also, as far as possible from careful observation made while running the township and section lines, and according to your best judgment, *give in the diagram* to be returned with your field-notes *the outline and extent of all such swamp or overflowed lands in order that the rights of the State to the swamp lands may be properly adjusted.*

The surveys here in question were made under these instructions, and in accordance therewith the surveyor's return included a "diagram," which purports to give the "outline and extent of all such swamp or overflowed lands." These instructions evidently contemplated that such diagrams when made should be taken into consideration by the land department in determining the character of the lands. It does not follow, and the Department can not concede, that these diagrams are sufficient evidence of the swampy character of all lands falling within their outlines. In so far as they purport to certify that the represented swamp or overflow extends beyond the forty-acre subdivisions lying upon the section lines, they are not believed to be of much value. In running section lines the surveyor

had opportunity to judge of the character of these forty-acre subdivisions, but the inside lines of a section are not surveyed upon the ground, and any diagram made of the interior forty-acre subdivisions from observations in the field must of necessity be in large measure fanciful and unreliable.

While the Department is not disposed to modify the rule in 1 Lester, when capable of application, yet in view of the foregoing considerations, it is thought such rule should be supplemented, and it is directed, in instances where sketch maps have been returned, with surveys in the field, and the field-notes of survey show intersections of swamp and overflowed lands with *one* line of a section only, that these sketch maps be taken into consideration in determining the character of the portion of the section lying upon the surveyed line with reference to its swampy or non-swampy character, and in such instances, where the outline of the swamp or overflowed lands is shown by the diagram to extend from the section line fifteen chains or more within the section, the adjustment will be made upon the basis of the relative portions of the surveyed line shown to be swamp or dry by the field-notes of survey. That is, if the diagram shows that the swamp or overflow thereby represented extends at any point fifteen chains or more across the section line, and within the section, the State will be entitled to such forty-acre subdivisions lying upon the section line as are shown by the field-notes of the major portion of said line to be of the character granted, but this rule shall have no application in the adjustment of a claim to the *interior* forty-acre subdivisions of a section.

Inasmuch as it is satisfactorily shown that many of the tracts involved in this appeal may be subject to adjustment under this direction, the case is returned for further examination by your office.

SWAMP LAND GRANT—ADJUSTMENT—SURVEY—CONTEST—CHARGE.

WALLACE *v.* STATE OF MINNESOTA.[a]

General charges made in a contest involving a particular tract claimed by the State of Minnesota under its swamp-land grant, affecting the character of the government survey, are not sufficient to take the case out of the scope of the instructions of March 16, 1903 (32 L. D., 65), governing the adjustment of said grant.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 14, 1905.* (F. W. C.)

With your office letter of the 9th instant was transmitted a motion by William J. Wallace, which is denominated as a motion for review

[a] Not reported in volume 33.

of departmental decision of November 29 last (not reported), affirming the action of your office in dismissing his contest against the State of Minnesota and refusing to order a hearing upon his allegations attacking the survey of the NE. ¼ of SE. ¼ of Sec. 7, T. 55 N., R. 10 W., 4th P. M., Duluth land district, Minnesota, which tract is embraced in the swamp-land claim of the State.

A prior contest had been instituted by Wallace against the State's claim to this land, which contest was the subject of departmental decision of April 14, 1904 (not reported), wherein it was held that his contest must be determined in accordance with paragraph 2 of the regulations contained in departmental decision of March 16, 1903 (32 L. D., 65), that is, under the original plan of following the field notes of survey of the township in question. Thereafter Wallace filed a second application, in which he sought to secure a hearing, and thus take it out of the rules before referred to, upon the general allegation that the field notes of survey were false and fraudulent in the return of this land as swamp. Both your office and the local officers in acting upon this application held Wallace to be concluded by the decision of the Department upon his former contest. Upon appeal, however, in the decision complained of, the Department held that—

> A careful examination of the record submitted discloses no sufficient reason for taking this contest out of the rule heretofore announced and under which his previous contest was determined.

In the motion now under consideration it is urged that in his second contest Wallace assailed the title of the State, not as a claimant but as a citizen seeking to attack a fraudulent survey. Viewed in this light it is unhesitatingly held that the showing is not sufficient to warrant an investigation in the field with a view to ordering further survey of the township. This holding is without prejudice to the right of petition based upon specific charges and accompanied by satisfactory proof attacking the survey of the township, but it is deemed necessary to say that no consideration will be given to charges affecting the character of the survey in a contest involving title to a specific tract claimed by the State under the swamp land grant. If, upon a general charge of fraud or mistake in the survey of any particular tract, investigation should be ordered in the field, or the charge held to be sufficient to take the case out of the rules heretofore announced governing the adjustment of the swamp land grant in the State of Minnesota, the plan of adjustment heretofore determined upon could be readily defeated.

The entire matter considered, the motion is dismissed.

SETTLEMENT UPON UNSURVEYED LAND—RIGHT OF SETTLER TO DEMAND SURVEY.

L. W. CALLAHAN.

It rests in the discretion and judgment of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior, to determine whether the public interest demands the survey of a township, and a settler upon land in an unsurveyed township, however meritorious his claim may be, can not as a matter of right demand a survey of the tract settled upon.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 30, 1906.* (E. F. B.)

The Department is in receipt of a letter from Mr. L. W. Callahan, of Index, Washington, complaining of its decision of September 10, 1906 (not reported), affirming the action of your office refusing to have a survey made of township 28 N., R. 11 E., or a special survey made of certain claims in said township upon the application of said Callahan and others.

His letter has been accepted as an informal motion for review of said decision and the record has been reexamined.

The Department did not base its decision upon the ground that the appellant was not a *bona fide* settler, but affirmed your action because there was no sufficient ground for controlling your judgment and discretion in the matter of directing the public land surveys, even if the statement of appellant as to the *bona fides* of his settlement be accepted.

Upon the application of Callahan and others for the survey of this township, Examiner McCoy was directed to make an examination of the character of the settlements in said township, and reported as follows:

L. W. Callahan does not reside on tract. On account of ill health of his wife must live near a Dr.; so they live at Index, nine miles from the claim. Improvements: House of lumber 12 by 18; 1½ acres cleared. No fencing. Potatoes raised last year, strawberries, onions, etc. Timbered land, fir, cedar and hemlock. Bed, stove, table and chairs. No domestic animals. Value of improvements, $200.

Fred J. Lowe does not reside on tract. Resides with his parents at 2425 Chestnut street, Everett, Washington, where he is motorman on street car. Was on the place two days last fall. Can not live permanently on the place as he has to support his aged parents. The place is more valuable for its timber than for agricultural purposes. Improvements: Log cabin 12 by 14; slashing; no land cleared; no crops nor fencing. Timbered land, fir, cedar and hemlock. Bunk and stove. No domestic animals. Value of all improvements, $100.

H. R. Lowe does not reside on tract. Resides at 2620 Rucker Ave., Everett, Washington, where he is employed as a carpenter. He visited the place "last fall." Improvements: Log cabin 12 by 14; slashing. No crops, cultivated land, nor fencing. Timbered land, fir, cedar and hemlock. Bunk and stove. No live stock. Value of all improvements $100. . . .

Mr. L. W. Callahan, one of the applicants, comes nearer being a *bona fide* settler than most of the visiting varieties of residents. The others are very infrequent visitors.

I recommend that the survey be not made.

No further action was taken by the other settlers, but upon Callahan's application for a special survey of his claim, alleging residence upon the same, Examiner McCoy was instructed to make a reexamination of Callahan's claim, and reported as follows:

Mr. Callahan, wife and baby, went to the claim about two weeks ago and have been there since that time. They left the claim about September 30, 1905, he states. He visited the claim every month during the winter.

He has a split cedar house 12 by 18 feet and has begun a kitchen of same material, to be about 10 by 10 feet. It is ceiled inside, has a floor of split boards, one door and two small windows. They have a cook stove, utensils for cooking, table, chair and bed.

He has slashed an oblong patch about 3 by 4 chs. and cut down the underbrush and burned up the trash, but the large logs remain where they fell. He has cultivated by means of hand tools an aggregate of about fifty feet square, and is growing onions, radishes, potatoes, carrots and strawberries. Has no fence nor stock.

He has a house rented at Index, furnished, and resides there when not on the claim.

He objects strenuously to my appraisal of value of his improvements and will get some appraisers of his own and write your office. He has cut about fifty trees above 1 foot in diameter, which he admits three men could do in six days.

The cruisers estimate he has seven million feet of fir and cedar. Stumpage ranges from $1.00 to $2.00 per M., which would net him at least $7,000.00 for the timber. There may be fifty acres which could be cultivated if cleared.

He also stated that "these settlers appear to be honest and very poor and deserving, but if having a residence in the township to the exclusion of one elsewhere is to settle it, they are not *bona fide* settlers." His recommendation was favorable to a survey, but he submitted the question to your office whether the settlements are *bona fide*.

Affidavits have been submitted by Callahan showing the value and character of his improvements and of his residence upon the claim. When they are considered with the letters of Callahan, they do not appear to show a condition materially different from the conclusions arrived at by the special examiner as the result of his examination. In his letter of May 24, 1906, Callahan says: "McCoy stated in his last report that I have about fifty feet square under cultivation; in reality I have about twice that." This, according to his admission, is the extent of cultivation of a settler who claims that his settlement was made thirteen years ago and that there are one hundred acres of agricultural land in the claim. In the same letter he says: "I have a house rented in Index eight miles from the claim, and enclose a certificate from Dr. Hathaway, of Everett, Washington, who was my wife's physician before we were married, and who thoroughly under-

stands the trouble with which she has suffered for years. This will explain why I have the house in Index."

These statements are mentioned merely to show that the conclusion of the special agent is not altogether baseless.

But the action of your office refusing a survey in this case rests upon a more substantial foundation, and the question as to the *bona fides* of Callahan's settlement need not be considered.

The act making appropriation for the survey of the public lands provides that in expending such appropriation preference shall be given, first, in favor of surveying townships occupied in whole or in part by actual settlers, but the rights and interests of the public are to be considered primarily rather than the interests of the individual settler. The determination as to whether the public interest demands the survey of a township must rest in the discretion and judgment of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior.

Settlement upon unsurveyed public land is a privilege extended to persons qualified to acquire title to same, but it does not carry with it a right to demand a survey of the land. A survey is not essential to the protection of the inchoate right of a *bona fide* settler.

The report of the special agent shows that the general character of the township is mountainous and the land is chiefly valuable for the timber growing thereon, but a small portion of it being adapted to agriculture. No good reason is shown why a township of this character should be surveyed, merely for the purpose of enabling one settler to perfect his claim, however meritorious his settlement may be, and a special survey of the claim could not be made without the survey of a large portion of the township, or by a disregard of the established system.

You will serve Mr. Callahan with a copy of this letter and place his letter which is transmitted herewith in the proper files.

PRACTISE—RULE 42—SIGNATURE OF WITNESSES TO TRANSCRIPT OF TESTIMONY.

EVANS *v.* DAWES.

Rule 42 of Practice, requiring that the transcript of the testimony of witnesses who testify at a hearing before the local officers shall be "then and there subscribed by the witnesses and attested by the officer before whom the same is taken, unless the parties shall by proper stipulation in writing, filed with the record, mutually agree to the contrary," has all the force and effect of law; and where, in the absence of the required stipulation, the transcript is not so subscribed and attested, a certificate by the local officers that the several witnesses were sworn before testifying, together with a certificate by the stenographer who took the testimony that the transcript is a true and correct transcript of the testimony as given by the witnesses, are not sufficient to cure the defect, and such unsigned and unattested transcript can not be accepted as evidence in the case.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F L. C.) *November 30, 1906.* (G. C. R.)

This case involves the S. ½ SE. ¼, and the S. ½ SW. ¼, Sec. 26, T. 12 N., R. 6 W., Vancouver, Washington, for which Charles H. Dawes made homestead entry August 8, 1904. His application to make entry thereof was accompanied by his affidavit stating in substance that he settled on the land June 18, 1903, and thereafter continuously resided thereon; that he built a house on the land, eleven by sixteen feet, made of split lumber, cleared about one acre of the land, raised potatoes and other vegetables, and worked on a horse trail, one and one half miles long; that the improvements are of the value of about $300.

The land was surveyed in August, 1901.

November 17, 1904, John H. Evans filed a contest against the entry, alleging in substance that the land is absolutely unfit for cultivation in any part or portion thereof; that no part thereof could be rendered fit for cultivation or agricultural purposes; that it is all mountainous, cut up with deep ravines and covered with a dense and highly valuable growth of timber; that each subdivision thereof is fit only for its timber; that the land is remote from other *bona fide* settlements, and accessible only by rough mountain trails; that it has no valuable improvements thereon; that claimant's allegations as to settlement, etc., were not made in good faith, but solely for the fraudulent purpose of obtaining the land for its valuable timber.

Hearing was had before the register and receiver, under circumstances correctly set forth in your office decision of November 15, 1905, wherein your office affirmed the action of the register and receiver, and directed that a further hearing be had at which the defendant, by reason of his default at the hearing (due to sickness) will be allowed to introduce testimony. Your office, however, acting in harmony with the register and receiver, denied defendant's motion, after his said default, to have witnesses for plaintiff recalled for the purpose of cross-examination.

Claimant, thru his attorney, has duly appealed, contending, in substance, that the testimony is insufficient to show that claimant had not resided on and improved the lands in the manner set forth in his special affidavit (above noted) when he made entry thereof.

The testimony, including proceedings at the hearing, has been carefully reviewed; the same is substantially and in the main correctly stated in the decision appealed from.

The finding, however, by your office, that the testimony "indicates that the statements as to residence on the land since June 15, 1903, made in the defendant's special affidavit, are not true," is too strong; in fact, is not justified.

Witness George L. Davis, the photographer who obtained three very excellent likenesses of the shack and its surroundings, from three view points, and who gave a vivid description of the land and the difficulties in reaching it, was very indefinite as to the character of the cabin on the land. He did not "think" anything was in it on August 27, 1904, the day he visited the land; did not recollect that it had a floor, but did know it contained no stove; stated that there were indications that cooking had been done outside of the shack.

John Cain testified that "there was a little bedding in the house," but no stove. No witness testified that claimant did not actually reside there, as stated by him in said affidavit; nor were sufficient circumstances given to justify the statement that he swore falsely in that regard.

On the other hand, the testimony, in the manner taken, including surveyor's field notes, show that the land is covered with a heavy growth of merchantable timber and that its sole value is in the lumber that may be gotten therefrom; that it is cut up by ravines and canyons, is exceedingly rough and mountainous; has many rocks on its surface and very poor soil. The land is almost inaccessible; is wholly so with vehicles. It would cost more than $100 an acre to clear it of its timber and when so cleared would not be worth its taxes for one year. Such is the showing made by the plaintiff's testimony, as presented.

If these conditions exist, claimant would have to make a very strong showing as to good faith, etc., else his entry would necessarily have to be canceled.

Your office and the local office propose to accord him the privilege to show his good faith, and to that end ordered a further hearing.

As one of the grounds of error, it is contended that claimant has a right to cross-examine the witnesses who appeared against him, which right he failed to get by reason of his sickness.

The record shows that while the witnesses were sworn, in advance of giving their testimony, they were not sworn at its conclusion; nor does it appear that the testimony of any witness was "then and there subscribed by the witness," as required by practise rule 42.

There was no stipulation in writing entered into by the parties to the controversy to avoid the requirement of signing the testimony, for the very good reason that the defendant was neither present nor represented at the hearing. This neglect or oversight is clearly chargeable to the plaintiff. Said practise rule has the force and effect of law; its due observance goes directly to the very essence of orderly and legal procedure. Indeed, without the stipulation mentioned in said rule, the apparent statements of witnesses, as written out, do not have the force and effect of testimony, nor can they be considered testi-

mony unless signed and sworn to by the several persons making them. It is true the register and receiver appended their certificate stating the several witnesses were sworn before testifying, and the contest clerk certifies that the testimony, as recorded, "is a true and correct transcript of the evidence as delivered by the witnesses present." These certificates are not sufficient to cure the defect. The certificate of the contest clerk does not make valid testimony out of the unsigned and unsworn statements of witnesses, in the absence of the required written stipulation mentioned in the rule. This point, raised by appellant, is well taken.

Plaintiff will therefore be required to present his testimony anew. Witnesses hitherto testifying may have read to them that which purports to be their testimony, and if they make no suggestions as to corrections, amendments, etc., they may sign and swear to the same, unless the required written stipulation mentioned in the rule be entered into.

Other available testimony may be introduced. Defendant will be given the desired opportunity to cross-examine all witnesses. He may then introduce testimony in defense, and plaintiff will have the same right to cross-examine his witnesses.

At the conclusion of the hearing the register and receiver will again pass upon the case, either party having the right of appeal.

With this modification, the action appealed from is affirmed.

FINAL PROOF—PROTEST—COMPLIANCE WITH LAW BY HEIRS OF DECEASED ENTRYMAN.

MEEBOER *v.* HEIRS OF SCHUT.

Where the heirs of a deceased homestead entryman seek to perfect the entry, and have not themselves, after the death of the entryman, complied with the homestead law for the entire period required thereby, the question as to whether the entryman during his lifetime complied with the law for such a period as, when added to the period during which the heirs complied with the law, would amount in the aggregate to the required period, is a proper subject of inquiry, whether raised by protest or otherwise, at the time final proof is submitted by the heirs.

Case of Heirs of Stevenson *v.* Cunningham, 32 L. D., 650, cited and distinguished.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *November 30, 1906.* (E. P.)

November 3, 1899, Herman Schut made homestead entry of the SE. ¼ of Sec. 22, T. 12 N., R. 22 E., North Yakima land district, Washington, and on December 5, 1904, John Schut, claiming to be the father and heir at law of the entryman (the entryman, it appears, having died January 12, 1904, unmarried and without issue), gave

notice of his intention to submit final proof upon the entry January 24, 1905. Against the acceptance of the proof about to be offered by the said Schut, John Meeboer, on January 20, 1905, filed a protest, charging that the entryman had never established or maintained a *bona fide* residence on the land, and that "since the decease of the entryman his heirs have failed to improve or to cultivate said land as required by law."

Final proof was submitted by Schut before the local officers February 1, 1905, and by agreement between the parties a hearing on the protest was set for February 27, 1905, on which date both parties appeared and submitted testimony.

April 21, 1905, the local officers found and held that—

> In the case of Heirs of Stevenson *v.* Cunningham (32 L. D., 650), the Makemson *v.* Snider's Heirs case (22 L. D., 511) is overruled, and the precedent established that, "Upon the death of a homestead entryman the right of entry goes to his heirs free from defect on account of any default on the part of entryman in the matter of residence or otherwise;" also that heirs can complete the entry by their residing on the land or cultivating the same, but need not do both.
>
> The protest, therefore, as well as practically all the testimony introduced at the hearing, is irrelevant, save only that part of the protest which charges that since decease of said entryman, his heirs have failed to improve or cultivate said land as required by law.
>
> The only testimony which we can consider is that which bears strictly on the cultivation of the land in controversy during the year 1904, which would indicate that the heir of the deceased entryman elected to complete the entry by cultivation. Whether or not the cultivation of one and a half acres would be sufficient to establish good faith is somewhat doubtful, but with the Stevenson case before us, we see no other course open only to accept the final proof of John Schut, heir-at-law of Herman Schut, deceased, and dismiss the protest.

On appeal by the protestant from the action of the local officers, your office, by decision of October 31, 1905, found, that "entryman has not resided upon and cultivated the land at any time and only visited it two or three times between the date of entry and date of his death, and that there was never any furniture in the cabin," and said:

> It thus appears that the entryman was clearly in default as to residence upon the land at the time of his death, but in the light of the rule laid down in the case of Heirs of Stevenson *v.* Cunningham, *supra*, his heir is not chargeable with such default, since the entry came to him free from any defect on account of any default on the part of decedent.
>
> The only question therefore to be determined is that of compliance with law by the heir since the entryman's death.

As to the acts of the protestee after the death of the entryman, which occurred in January, 1904, your office found that they consisted merely in the plowing of about three-quarters of an acre of the land and the planting of a few potatoes in June, 1904; that it did not

appear from the showing made that these potatoes were ever cultivated or harvested, or even that any of the potatoes planted ever came up; that potatoes could not be successfully raised on any portion of the land without irrigation; that there was no evidence of such irrigation; and that, therefore, said planting was but a mere pretense at cultivation, made for no other purpose than to enable the heir to make proof. It was therefore held that—

> Planting a crop, as in this case, with no expectation or intention of securing a return, is not compliance with the law in the matter of cultivation. Reas *v.* Ludlow (22 L. D., 205).

For this reason the proof was rejected and the entry held for cancelation.

The protestee appeals to the Department.

The Department concurs in the finding of your office to the effect that the protestee did not make a *bona fide* attempt to comply with the requirements of the law in the matter of improving and cultivating the land in question after the death of the entryman, and that, therefore, his final proof was properly rejected and his entry canceled.

The Department cannot, however, give its assent to the view exprest in the decision of your office, and in the opinion of the local officers, to the effect that the heir of a deceased homesteader who, as such heir, is seeking to make ordinary five-year proof upon the entry of the deceased, and is relying upon an alleged compliance on his part with the requirements of the homestead law for a period of less than five years, is not chargeable with a total default on the part of the entryman to comply with the requirements of the law during his lifetime. Considered in the abstract, certain parts of the decision (Heirs of Stevenson *v.* Cunningham, 32 L. D., 650) cited by your office and by the local officers might seem to support that view. If, however, the same be read and considered in connection with all the facts in that case, it will be apparent that they were not intended by the Department to be so construed.

The material facts presented in that case were, briefly stated, as follows: October 26, 1892, Logan Burgess made homestead entry of a tract, and on December 24, 1894, died, leaving surviving him his widow, Elizabeth, who subsequently married one Cunningham. February 9, 1901, John Stevenson filed an affidavit of contest against said entry, charging that the entryman, Burgess, had never established a residence on the land, and that his widow had, at no time since the death of the entryman, resided upon or cultivated the land. Stevenson also filed a protest against the final proof offered by Mrs. Cunningham December 10, 1900, upon said entry. The Department found from the record that neither the entryman in his lifetime nor his widow after his death had ever resided on the land, but that the

land was cultivated by the widow each year from the death of the entryman to the date of the hearing, November 11, 1901, a period of considerably more than five years. The only question presented, therefore, was whether such cultivation of the land by the widow could be accepted as full compliance with the requirements of the homestead law in the face of the established fact that neither the entryman in his lifetime, nor the widow after his death, had ever lived on the land. It was insisted on behalf of the contestant that inasmuch as the entryman had died more than six months after making the entry and without having established 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, citing the case of Makemson *v.* Snider's Heirs (22 L. D., 511). In answer to that contention, however, the Department said, in effect, that the decision cited seemed to be based upon the theory that residence on the land is essential to the validity of a homestead claim; that where an entryman was in default as to residence at the time of his death his heirs take the land subject to all the consequences of his default; and that inasmuch as he could have cured his default only by establishing residence on the land prior to contest, it was necessary for his heirs to cure the default by doing what he would have been required to do had he lived. It was pointed out, however, that the establishment of residence has not, in all cases, been held to be an essential requirement to the perfection of an entry under the provisions of the homestead law. Reference was made to section 2291 of the Revised Statutes, wherein it is provided that in case of the death of a homestead entryman, 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 required period. And it was held that this statute plainly allows the widow or heirs of a deceased homestead entryman to perfect the entry either by residing on the land or by cultivating and improving it for the specified period; that they were not required to do both, but might adopt whichever of said methods they chose, and thus earn title to the land regardless of whether the entryman had resided on the land or not. Applying that rule to the case then under consideration, the Department said:

> 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.

After again stating that the evidence showed that the widow had cultivated the land each year since the death of the entryman (which was for a longer period than required by law) the Department said:

> That was all that was required of her by 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.

It was also said in the paragraph following the passage above quoted that it would be manifestly unjust and inequitable, for reasons stated, to permit a contest to be maintained against the heirs of a deceased entryman on account of a default of the entryman existing long before the heirs had any connection with the land, and of which default they had no knowledge, and that "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."

In that decision the Department intended to hold merely that where a widow, heir, or devisee of a deceased homestead entryman had, after the death of the entryman, cultivated the land for the required period of five years, the law had been fully complied with, notwithstanding the fact that the entryman had died more than six months after the date of the entry without ever having established residence on the land, and that under such circumstances the default of the entryman can not be charged against his widow, heir, or devisee.

In the case at bar, an entirely different situation is presented. Here it is shown that the entryman died a little more than four years after making entry, and that, about one year later, his heir sought to make final proof on the entry. It is obvious that the heir could have shown compliance with the law on his own part for a period of not more than one year. The rule applicable to a case like this is announced in the case of Schooley *v.* Heirs of Varnum (33 L. D., 45), wherein the Department held that in order that the heirs of a deceased homestead entryman might preserve their right to the entry it is necessary that they should, within a reasonable time after the death of the entryman—

> proceed to cultivate and improve the land, and continue such cultivation and improvement for such period of time as, when added to the time during which the entryman had complied with the law, would make five years' compliance with the law.

It follows, therefore, that where an heir seeks to perfect the homestead entry of a deceased entryman, and has not himself, after the death of the entryman, complied with the homestead law for the entire period required thereby, the question as to whether the entryman during his lifetime had complied with the law for such a period as, when added to the period during which the heir had complied

with the law, would amount in the aggregate to the required period, is a proper subject of inquiry, whether raised by protest or otherwise, at the time the heir comes up to submit final proof on the entry.

That portion of Meeboer's protest, therefore, wherein it is charged that the entryman had totally failed to comply with the law during his lifetime, and the testimony offered to support the same, might with propriety have been considered. However, in view of the finding of your office to the effect that the protestee had failed to comply with the law by cultivating the land after the death of the entryman, which finding is concurred in by the Department, the failure to consider the other charge and give effect to the testimony offered to support it, did not affect the result.

The action appealed from is affirmed.

DESERT-LAND ENTRIES WITHIN WITHDRAWALS UNDER RECLAMATION ACT—SECTION 5, ACT OF JUNE 27, 1906.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 30, 1906.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: Your attention is invited to section 5 of the act of June 27, 1906 (34 Stat., 520), a copy of which is hereto attached. This act provides that any desert-land entryman who has been or may be directly or indirectly hindered, delayed, or prevented from making improvements or from reclaiming the lands embraced in his entry by reason of any withdrawal under the reclamation act of June 17, 1902, will be excused during the continuance of such hindrance from complying with the provisions of the desert-land laws, and you are instructed as follows:

EFFECT OF STATUTE.

1. This act applies only to persons who have been directly or indirectly hindered, delayed, or prevented by the creation of any reclamation project or of any withdrawal of public lands under the reclamation act from improving or reclaiming the lands covered by their desert-land entries within the exterior limits of lands so withdrawn.

EVIDENCE OF HINDRANCES.

2. No entryman will be excused under this act from a compliance with all of the requirements of the desert-land laws until it has filed in the land office for the district in which his lands are situated an

affidavit disclosing in detail all of the facts upon which he claims the right to be excused. This affidavit must contain a statement as to the time when the hindrance began, the nature, character and extent of the hindrance, and it must be corroborated by the oaths of at least two disinterested persons who can testify to the facts stated from their own personal knowledge.

ACTION ON EVIDENCE OF HINDRANCE.

3. As soon as you receive any affidavit of the character mentioned you must at once forward the same to the engineer in charge of the reclamation project under which the lands involved are located, if the lands involved have been placed under the charge of an engineer, and the engineer to whom the affidavit is referred will at once report to you all facts within his knowledge which will aid this office in taking proper action. As soon as you have received the report from the engineer you will forward it, with the applicant's affidavit and your recommendations as to its approval, to this office, where appropriate consideration will be given, and if the affidavit is found sufficient the entryman will be excused from further compliance with the requirements of the desert-land laws for the period of one year from the date on which the affidavit was filed in your office, unless he is sooner notified of the removal of the hindrance complained of, but the entryman must, during the continuance of such hindrance, at the end of each year succeeding the filing of his affidavit, file a corroborated affidavit, and a statement from the engineer in charge of the reclamation project in which the lands are located, if the lands are in charge of an engineer, showing that the hindrance still continues, and any entryman who fails to file either of the affidavits required herein will be expected to comply with all of the requirements of the desert-land laws and his entry will be canceled if he fails to make the required annual or final proofs.

WHEN DESERT-LAND LAWS MUST BE COMPLIED WITH.

4. If the facts stated in the affidavits above referred to are not found to be such as to entitle the entryman to the benefits of this act, or if any hindrance which excused him from a compliance of the law shall be removed or discontinued, he will be at once notified of that fact and will thereafter be required to make the usual annual and final proofs of full compliance with the provisions of the desert-land laws, and upon failure to make such proofs his entry will be canceled.

CREDIT FOR COMPLIANCE WITH LAW BEFORE HINDRANCES.

5. In all cases where any hindrance of the character mentioned above has been removed thru the government's abandonment of a

reclamation project, or otherwise, all entrymen who have successfully claimed the protection of this act by presenting the required affidavits must proceed to acquire title by completing their compliance with the requirements of the desert-land laws, but they will be entitled to claim credit for the time during which they complied with the law before the hindrance began: For instance, if an entry was two years old at the time the hindrance began and the entryman had up to that time complied with all of the requirements of the law and made proper annual proof thereof, he will have one year after notice of the removal of such hindrance within which to make his third annual proof, and two years from the date of such notice within which to offer his final proof, but if he fail to continue his compliance with the law and make the required annual and final proofs his entry will be canceled.

WHEN DESERT-LAND ENTRYMEN MAY PROCEED UNDER THE RECLAMATION ACT.

6. All desert-land entrymen who have been hindered or delayed by the creation of any irrigation project which has been successfully carried into effect in such a manner as to make water available for the reclamation of the lands embraced in their entries may, if they have successfully claimed the benefits of this act in the manner prescribed herein, obtain water from such project for the irrigation of their lands by relinquishing all of the lands embraced in their entries, in excess of 160 acres, at any time when they are required to do so thru your office, and obtain title by complying with all of the requirements of the desert-land laws and of the reclamation act and regulations issued thereunder, relating to the irrigation of lands held in private ownership, but such entryman must, in good faith, maintain actual residence on the land not relinquished, or be an actual occupant thereof and an actual resident in the neighborhood of the land, and he must make the annual proofs of yearly expenditures required by the desert-land law, but in making these annual proofs he may take credit for any money paid by him on any annual instalment of the charges fixt against his land. Such entryman must also make the final proof and payment required by the desert-land laws, and his failure to make either such annual or final proofs and the payments required under both the desert-land laws and the reclamation act, or his failure to maintain the required residence and cultivation, will result in the cancelation of his entry and the forfeiture of all payments theretofore made.

ACTION ON FINAL DESERT-LAND PROOFS.

7. If any desert-land entryman makes the final proofs and payments mentioned in the preceding section at any time before he has

made all of the payments under his water-right application you should consider his proof and if you find it sufficient approve and forward it to this office, where appropriate action will be taken, of which the entryman will be duly notified thru your office, but no final certificate or patent will be issued under such proof until evidence has been received at this office that all of the payments required under the reclamation act have been made.

Very respectfully,

G. F. POLLOCK, *Acting Commissioner.*

Approved:

E. A. HITCHCOCK, *Secretary.*

(Section 5, act of June 27, 1906, 34 Stat., 520.)

AN ACT Providing for the subdivision of lands entered under the reclamation act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, ...

SEC. 5. That where any bona fide desert-land entry has been or may be embraced within the exterior limits of any land withdrawal or irrigation project under the act 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," approved June seventeenth, nineteen hundred and two, and the desert-land entryman has been or may be directly or indirectly hindered, delayed, or prevented from making improvements or from reclaiming the land embraced in any such entry by reason of such land withdrawal or irrigation project, the time during which the desert-land entryman has been or may be so hindered, delayed, or prevented from complying with the desert land law shall not be computed in determining the time within which such entryman has been or may be required to make improvements or reclaim the land embraced within any such desert-land entry: *Provided,* That if after investigation the irrigation project has been or may be abandoned by the Government, time for compliance with the desert-land law by any such entryman shall begin to run from the date of notice of such abandonment of the project and the restoration to the public domain of the lands withdrawn in connection therewith, and credit shall be allowed for all expenditures and improvements heretofore made on any such desert-land entry of which proof has been filed; but if the reclamation project is carried to completion so as to make available a water supply for the land embraced in any such desert-land entry, the entryman shall thereupon comply with all the provisions of the aforesaid act of June seventeenth, nineteen hundred and two, and shall relinquish all land embraced within his desert-land entry in excess of one hundred and sixty acres, and as to such one hundred and sixty acres retained, he shall be entitled to make final proof and obtain patent upon compliance with the terms of payment prescribed in said act of June seventeenth, nineteen hundred and two, and not otherwise. But nothing herein contained shall be held to require a desert-land entryman who owns a water right and reclaims the land embraced in his entry to accept the conditions of said reclamation act.

Approved, June 27, 1906.

FINAL PROOF—PLACE OF TAKING—CIRCULAR OF MARCH 24, 1905.

JOSEF SIKORSKI.

In case the officer named in the final-proof notice, before whom the proofs are proposed to be taken, has two or more established places for the transaction of business within the jurisdictional limits, and carries on his official business at such places at regular, fixed times, the requirement of paragraph 3 of the circular of March 24, 1905 (33 L. D., 480), that final proofs shall be made before the officer named at "his regularly established place of business and not elsewhere," will not prevent the proof being taken at any one of such established places of business that may be designated in the notice.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *December 4, 1906.* (E. O. P)

Josef Sikorski has appealed to the Department from your office decision of April 2, 1906, affirming the action of the local officers denying his application to submit final proof in support of his homestead entry made July 2, 1900, for the SE. ¼, Sec. 35, T. 32 N., R. 53 W., Alliance land district, Nebraska, before a United States commissioner at his office in Crawford, Nebraska.

The commissioner before whom the entryman desired to submit final proof resides at a place other than Crawford, Nebraska, and maintains an office at the place of his residence. It is clear, however, that he also maintains an office at Crawford, Nebraska, which is open for the transaction of business regularly one day in each week. The action of your office is based upon the construction given to the language of paragraph three of general circular approved March 24, 1905 (33 L. D., 480). It is therein directed that final proofs shall be made only before the officer designated and at "his regularly established place of business and not elsewhere." The Commissioner named by the applicant is apparently fully qualified to take final proof in homestead cases, and there is no objection to his designation by the local officers, but only to the place where he may transact official business of this character. Such a narrow construction of the language used in the said circular is not supported by sound reason nor is it in conformity with a broad and equitable administration of the homestead law, and is unwarranted. It is properly required that officers taking final proof should be allowed to act officially only during certain hours and at a fixed place in order that all persons interested may be fully informed of the time and place and have ample opportunity to appear and make any proper showing in the premises they may desire to offer. It does not follow however that one person may not have two or more established places for the transaction of official business, and so long as he keeps within jurisdictional limits and carries on his official business at the places *established* at *fixed times* the intent of said circular is satisfied.

The decision appealed from is accordingly hereby reversed and in the absence of any other objection than that stated the local officers should be directed to allow the application of Sikorski as presented.

APPLICATION TO ENTER—LOCAL OFFICERS.

WILLIAM J. HISKETT.

The local officers in assisting an applicant in the preparation of his application to enter are the agents of the applicant, and where error in description is made by them in the application the applicant can not set up such error to defeat the intervening rights of another acquired in ignorance thereof.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *December 4, 1906.* (E. O. P.)

William J. Hiskett has appealed to the Department from your office decisions of November 7, 1905, and February 26, 1906, rejecting his application to extend his homestead entry, made June 30, 1904, under the provisions of section 3 of the act of April 28, 1904 (33 Stat., 547), for lots 2 and 3, Sec. 3, T. 1 N., R. 41 W., SE. ¼, S. ½ NE. ¼, Sec. 34, T. 2 N., R. 41 W., Lincoln land district, Nebraska, to include the N. ½ NE. ¼ of said Sec. 34, and the SW. ¼ NE. ¼, S. ½ NW. ¼, of said Sec. 3.

By your said decision of November 7, 1905, the local officers were directed to notify applicant that he would be allowed sixty days from date of notice to submit further showing in support of his application or to appeal, in default of either of which his application would stand rejected "without further notice to him from this office." No response having been made by applicant, your office, upon report of this fact by the local officers, closed the case February 26, 1906, but directed that the local officers "so notify him and of his right of appeal" from said decision. This was clearly error on the part of your office, for had applicant had notice of your prior decision of November 7, 1905, his right of appeal expired at the termination of sixty days thereafter, exclusive of the time allowed for transmission of notice and appeal by mail.

It is contended however that applicant received no notice of said decision of November 7, 1905, and this appears to be the case, as the registered letter containing notice thereof addressed to the record-address supplied by applicant was returned unclaimed to the local office. Applicant alleges as excuse for his failure to receive notice the neglect of the postmaster. This allegation is not established by proper proof. However, applicant did receive notice of the final action taken by your office, and before considering further the question of practice involved the sufficiency of the application to extend the original entry will be determined.

In support of his right to enter the N. ½ NE. ¼, Sec. 34, T. 2 N., R. 41 W., applicant alleges error in the execution of his original application, which error he asserts was due to a failure on the part of one of the local officers to properly describe the land he desired to enter. It is clear from the statement of applicant that he relied upon said officer to correctly prepare his original application. In such case the local officer is the agent of the applicant, as it is the duty of entrymen to themselves prepare and present applications to enter, and they are bound by the statements and descriptions therein contained, and the fact that the preparation of the entry papers is entrusted to the local officers does not shift the burden. In such case such officers become the agents of the applicant. However, in the absence of intervening adverse claims there might be no serious objection to permitting a correction in such cases, but in the case under consideration the rights of another have attached to said tracts and the error having been committed by applicant he can not set it up to defeat the rights of another acquired in ignorance thereof, for in such cases it is well settled that the equities are with the party least at fault.

As to the SW. ¼ NE. ¼, S. ½ NW. ¼, Sec. 3, T. 1 N., R. 41 W., applicant asserts that at the time he made original entry these tracts were covered by the record entry of another and not subject to appropriation. This statement is borne out by the records of your office, but the further statement that applicant had instituted contest against said entry is not corroborated by the same record evidence and it is clear therefrom that the cancelation of said entry was not the result of a contest instituted and prosecuted by applicant. By reference to your office letter "C" of October 3, 1904, it appears that this entry, together with numerous others, was canceled by your office after notice to the entryman, for failure to submit final proof within the statutory period. Applicant can not therefore assert any right to the land by virtue of his alleged contest, and as it appears, and is admitted by him, that at the time he made his original entry there were other vacant lands contiguous to those entered which might have been included in his said original entry, no ground remains for the allowance of his pending application, upon the showing made, touching the last-described tracts, and as the entry of another has been allowed for said tracts the same will not now be disturbed.

Even had no adverse rights intervened, the application in question, as presented, could not be allowed, and though the Department might, in the absence of such rights, permit the applicant to make a further showing in support of said application, such action will not be taken when the result thereof might be to disturb or defeat an equitable right superior to that of the applicant.

The decision appealed from is accordingly hereby affirmed.

PASTURE AND WOOD RESERVE LANDS IN THE KIOWA, COMANCHE, AND APACHE INDIAN RESERVATION IN OKLAHOMA.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 7, 1906.

Register and Receiver,
United States Land Office, Lawton, Oklahoma.

SIRS: The regulations approved by the Secretary October 19, 1906 (35 L. D., 239), issued in accordance with the President's proclamation dated September 19, 1906, in conformity with the act of June 5, 1906 (34 Stat., 213), providing for the sale of the pasture and wood reserve lands in the former Kiowa, Comanche and Apache Indian reservation, situated in the counties of Kiowa, Caddo and Comanche, in your district, are amended and modified as follows:

Section 3. No bid will be considered that is received by you before 9 o'clock a. m. on Monday, the 3d day of December, or after 4 o'clock p. m. on Saturday, the 15th day of December, 1906.

Section 7. Each bidder must inclose with his bid a draft or check issued by a national bank, or his individual check duly certified by a proper officer of a national bank, for one-fifth of the highest amount bid by him for any tract; but bidders who bid for more than one tract are not required to inclose more than one check or draft. The draft or check should be made payable to the order of "The Secretary of the Interior," but checks or drafts made payable to the order of the register and receiver, or to either of them, may be accepted and endorsed to the Secretary of the Interior.

Section 14. Beginning at 9 o'clock a. m. on Monday the 17th day of December, 1906, and continuing thereafter, Sundays and holidays excepted, from 9 o'clock a. m. until 4 o'clock p. m., so long as may be necessary, you will publicly, under the supervision of such person or persons as the Secretary of the Interior may designate, open the box or boxes in which the bids have been deposited and take therefrom and thoroughly mix and distribute all of the envelopes containing bids in such a manner as to prevent their being opened in the order in which they were received by you, and after they have been so mixed and distributed you will proceed to publicly open the bids indiscriminately and at once cause the name of the bidder, the lands bid for, and the amount of his bid, to be publicly announced as soon as the bid is open.

The regulations approved October 19, 1906, in conflict herewith are annulled and vacated; otherwise, such regulations remain in full force and effect.

Very respectfully,

W. A. RICHARDS, *Commissioner.*

Approved:

E. A. HITCHCOCK, *Secretary.*

OKLAHOMA SCHOOL LANDS—SECTION 8, ACT OF JUNE 16, 1906.

TERRITORY OF OKLAHOMA.

Section 8 of the act of June 16, 1906, making a grant to the future State of Oklahoma for various educational institutions mentioned, reserves and grants to the State not only the sections 13 theretofore reserved for such use, but also all sections 13 of the lands theretofore opened remaining undisposed of at the date of the passage of said act, as well as all sections 13 of lands thereafter to be opened.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *December 15, 1906.* (F. W. C.)

The Department has considered a letter from the Governor of the Territory of Oklahoma, requesting a construction of section 8 of the act of Congress of June 16, 1906 (34 Stat., 267), relative to the extent of the grant of sections 13 in the Territory of Oklahoma to the State of Oklahoma, in connection with your letter of report thereon dated the 16th instant. Said section in part reads as follows:

> That section thirteen in the Cherokee Outlet, the Tonkawa Indian Reservation, and the Pawnee Indian Reservation, reserved by the President of the United States by proclamation issued August nineteenth, eighteen hundred and ninety-three, opening to settlement the said lands, and by any act or acts of Congress since said date, and section thirteen in all other lands which have been or may be opened to settlement in the Territory of Oklahoma, and all lands heretofore selected in lieu thereof, is hereby reserved and granted to said State for the use and benefit of the University of Oklahoma, and the University Preparatory School, one-third; of the normal schools now established or hereafter to be established, one-third; and of the Agricultural and Mechanical College and the Colored Agricultural Normal University, one-third. . . . .
>
> That section thirty-three, and all lands heretofore selected in lieu thereof, heretofore reserved under said proclamation, and acts for charitable and penal institutions and public buildings, shall be apportioned and disposed of as the legislature of said State may prescribe.

Prior to the President's proclamation of August 19, 1893 (28 Stat., 1222), referred to in said section 8, provision had been made for the opening to settlement of the following portions of the Territory of Oklahoma without provision for the reservation of section 13, namely:

April 22, 1889, Old Oklahoma, under act of March 2, 1889 (25 Stat., 1004).

May 2, 1890, Public Land Strip, act of May 2, 1890 (26 Stat., 81, 90).

September 22, 1891, Sac and Fox, and Iowa lands, act of February 13, 1891 (26 Stat., 749, 758).

September 22, 1891, Pottawatomie lands, act of March 3, 1891 (26 Stat., 1016).

April 19, 1892, Cheyenne and Arapahoe lands, act of March 3, 1891 (26 Stat., 989, 1022).

The Kickapoo lands were not opened until May 23, 1895, under the provisions of act of March 3, 1893 (27 Stat., 557, 562).

The first reservation of section 13 in the Territory is found in the proclamation of the President, dated August 19, 1893, *supra*, providing for the opening of the lands within the Cherokee Outlet and Tonkawa and Pawnee reservations. Therein section 13 in each township was reserved for university, agricultural college and normal schools, "subject to the action of Congress." May 4, 1894 (28 Stat., 71), Congress ratified the reservation made of said section 13. Act of January 18, 1897 (29 Stat., 490), provided for the opening of the lands within Greer County, and in that act section 13 was reserved "for such purposes as the legislature of the future State of Oklahoma may prescribe." Act of March 2, 1895 (28 Stat., 897), provided for the opening of the Wichita lands and the act of June 6, 1900 (31 Stat., 679), provided for the opening of the Kiowa, Comanche and Apache lands, and in both these acts was provision made for the reservation of section 13 in each township.

The real question presented by the letter from the Governor of the Territory of Oklahoma, is: Did section 8 of the act of June 16, 1906, before quoted, merely grant to the new State and appropriate the sections 13 previously reserved in the Territory, as above set forth, or did it reserve for and grant to the new State in addition to those sections 13 previously reserved the sections 13 elsewhere within the Territory remaining undisposed of at the date of the passage of said act?

The section in question first refers to section 13 in the Cherokee Outlet, the Tonkawa and Pawnee reservations reserved by the proclamation of August 19, 1893, opening said lands to settlement. Then follows the clause: "And by any act or acts of Congress since said date." The first question arises as to what lands are embraced in this clause. Does it refer and is it limited to the sections reserved by the President's proclamation? This could hardly be its purpose, for while the reservation made in said proclamation was subsequently ratified by Congress, the lands were not, strictly speaking, reserved, and the most reasonable construction would interpret said clause as referring to section 13 elsewhere in the Territory reserved by act or acts of Congress of a date subsequent to said proclamation. Following said clause the section proceeds: "And section 13 in all other lands which have been or may be opened to settlement in the Territory of Oklahoma." The determination of the entire matter must rest upon the effect given to the language just quoted. This language in itself is comprehensive enough to include not only the

sections 13 previously reserved in the Territory but section 13 anywhere within the Territory whether previously opened or yet to be opened, and being thus plainly expressed I know of no rule of construction that would limit its operation by reason of the reference to the lands previously reserved, which is the preceding portion of said section.

The section next refers to "all lands heretofore selected in lieu thereof." This could have application only to those lands which had been previously selected in lieu of the sections 13 intended to be reserved in the President's proclamation and acts later in date. The section then provides that all of the land previously described "is hereby reserved and granted to said State for the use and benefit," etc.

It will be noticed that provision is again made for the reservation of the lands and for the granting of the same to the new State. If it had not been intended to include within the descriptions preceding lands that had not been previously reserved there would have been no necessity for a provision in this act for the reservation of the lands, but if the intention had been to grant to the State other lands than those previously reserved it was necessary to reserve the additional lands, for the grant to the State would not become effective until the State should be admitted into the Union.

A most careful analysis of the section leads irresistibly to the conclusion that it was intended to reserve for the new State those sections 13 remaining undisposed of at the date of the passage of the act anywhere within the Territory, and to grant such lands to the new State to be apportioned in the manner provided by said act. In this connection a fact is noted in the report made by your office that in the reservation by the President in the proclamation of August 19, 1893, and in each and every one of the acts passed at a subsequent date providing for the disposal of lands in said Territory, section 33 in each township was coupled with section 13 in the reservation, and the further fact that the section now under consideration in providing for the appropriation of section 33 clearly limits the grant and appropriation to that previously reserved in the proclamation and acts subsequent in date. While this is true, it in no wise makes against the construction of the plain letter of the statute with regard to the sections 13.

Arriving at this conclusion, I have to direct that you take appropriate steps to respect the reservation and grant for the new State and that appropriate instructions be issued to the local officers to that end.

SECOND HOMESTEAD—QUALIFICATIONS—SECTION 2, ACT OF APRIL 28, 1904.

WALLACE *v.* DUNCAN.

In determining whether an applicant is disqualified to make additional entry under the provisions of section 2 of the act of April 28, 1904, by reason of the ownership of more than 160 acres of land exclusive of that embraced in his original entry, actual acreage is the test that must govern; and where he in fact owns more than 160 acres exclusive of the land in his original entry, he must be held disqualified, notwithstanding such land comprises a technical quarter-section and that title thereto was not acquired under a homestead entry made by him, but through purchase from the original entryman.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *December 15, 1906.* (E. O. P.)

Charles E. Duncan has appealed to the Department from your office decision of October 10, 1905, reversing the action of the local officers and holding his homestead entry made June 11, 1904, for the S. ½ NE. ¼, lot 2, SE. ¼ NW. ¼, Sec. 7, T. 32 N., R. 17 W., Valentine land district, Nebraska, subject to the right of John C. Wallace to make entry thereof under the preference right accorded by the second proviso of section 3 of the act of April 28, 1904 (33 Stat., 547), to persons entitled to make homestead entry under the provisions of section 2 of said act. The application of Wallace to make entry of said tracts was filed June 28, 1904.

It is not disputed that at the time Wallace filed his said application he was the owner of more than 160 acres of land exclusive of that embraced in his original homestead entry made the basis of the right sought to be asserted by him under said section 2, but he contends that inasmuch as the excess land owned by him was secured under the homestead entry of his grantor it should be held to aggregate no more than a technical quarter section, though it does in fact contain 171 acres.

Your office held that because Wallace was qualified to make his original homestead entry it was immaterial that he might have subsequently become disqualified as an entryman under the general homestead law, and he was therefore qualified to make entry under the act of April 28, 1904, *supra*. The rule thus stated is contrary to that fixed by the Department in the case of Arthur J. Abbott, on review (35 L. D., 206).

Neither does the fact that the 171 acres owned by Wallace, which was not acquired under a homestead entry *made by him*, but by purchase, operate to relieve him from the burden of the rule announced in the decision cited, simply because his grantor obtained title thereto by the completion of a homestead entry thereof. Actual acreage was the test imposed by the Department in construing the limitation im-

posed by the act of May 2, 1890 (26 Stat., 91), and the reasons governing such construction apply with equal force to entries made under the provisions of the act of April 28, 1904, *supra* (Mason *v.* Cromwell, on review, 26 L. D., 369, 371). By this method of calculation it is clear that Wallace was not at the date Duncan's application was allowed or at the date of filing his application, a qualified entryman under the provisions of section 2 of said act. Duncan's rights having attached prior to the removal of the disqualification of Wallace will not be disturbed. (Puetze *v.* Moeller, 35 L. D., 256.)

The decision appealed from is accordingly hereby reversed and the entry of Duncan will be held intact and the application of Wallace for the lands described therein rejected.

FINAL PROOF—DESERT-LAND ENTRY—CHARACTER OF EVIDENCE.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 17, 1906.

Registers and Receivers,
United States Land Offices.

GENTLEMEN: By circular letter "G" of July 22, 1904, the local officers in Wyoming and Idaho were authorized to accept final proof on desert-land entries where the claimant showed a strict compliance with the desert-land laws, but was unable to furnish the certificate of the State authorities of the appropriation of water sufficient for the permanent irrigation of the land embraced in his entry, because of the failure of the State officers to act. In such cases the proof was to be forwarded to this office without receiving final payment or the issuance of final papers.

October 25, 1906, this office recommended to the Department that—

the regulations governing final proofs in desert-land entries be so modified as to require the entryman to show, in making final proof, that he has acquired a right to the use of sufficient water to properly irrigate the irrigable land in his entry; that he had done all that he was required by the laws of the State or Territory to do at that time for the maintenance of that right, and that under that right he has actually used the water for the irrigation of the land in his entry.

November 16, 1906, the Department held (35 L. D., 305):

In the case of desert-land entrymen in the State of Wyoming the certificate of the State engineer, based upon the report of the water commissioner, that the claimant is in *undisputed* possession of sufficient water to properly irrigate the land entered and is using the same in accordance with his permit, and the affidavit of the claimant that he has made a "*bona fide* prior appropriation" of the water, together with such other evidence as the particular case may require, should be accepted as sufficient proof of compliance with the statute and regulations issued thereunder.

Claimants in other States where a similar difficulty exists should be required to furnish the best evidence obtainable and the recommendation made by your office in this regard is approved by the Department, and the local officers in those States and in the State of Wyoming should be instructed to receive and pass upon final proof submitted by desert-land entrymen in accordance with the recommendation made by your office, as modified herein with reference to claimants in the State of Wyoming.

The local officers in the States of Wyoming and Idaho, after receipt hereof, will require in all cases where it is shown by affidavit of the claimant that a certificate of appropriation can not be procured from the State authorities, because of the failure of the State to act, the evidence mentioned in said ruling of the Department, and upon such showing being made and the final proof in other respects being satisfactory, the local officers are authorized to accept same and issue final papers.

Cases in said States held under suspension in this office under circular of July 22, 1904, will be taken up and the claimant in each case be given opportunity to now furnish the required evidence.

The local officers in States other than Wyoming and Idaho will be governed by the recommendation of this office to the Department, as approved by the Department, in all cases where, through no fault of the claimant, an *absolute right* to the use of the water for irrigation can not be shown.

Very respectfully,

G. F. POLLOCK, *Acting Commissioner.*

Approved:

E. A. HITCHCOCK, *Secretary.*

RESIDENCE—LEAVE OF ABSENCE—CONTEST.

MATICS *v.* GILLIDETT.

While a leave of absence protects an entryman from contest on the ground of abandonment during the period covered thereby and for six months thereafter, it does not cure any default in the matter of residence existing prior thereto, and affords no immunity from contest for failure to establish residence within the statutory period, which had elapsed prior to the granting of the application for the leave of absence.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *December 21, 1906.* (E. O. P.)

Charles W. Gillidett has appealed to the Department from your office decision of January 12, 1906, affirming the action of the local officers holding for cancelation his homestead entry, made June 23,

1902, for the SE. ¼, Sec. 34, T. 32 S., R. 30 W., Dodge City, Kansas, upon contest initiated by Jacob Matics.

September 4, 1903, Gillidett filed application for leave of absence for one year and assigned as reasons therefor matters apparently satisfactory to your office and the local office, as said application was granted. It was not directly averred by Gillidett in his sworn application that he had prior to the filing thereof established residence on the land, and the weight of the testimony offered at the hearing establishes his default in this particular. During November, 1904, Gillidett applied for second leave for one year and in support thereof alleged that he had established residence on the land June 3, 1902. Contest was initiated January 10, 1905.

Contestant alleges as basis for the cancelation of the entry in question failure of the claimant to establish residence on the land "and that said tract is not and never has been settled upon and cultivated, as by law required, by the said Charles W. Gillidett." It is further alleged that the said applications for leave of absence were obtained through fraudulent misrepresentations of the claimant.

The action of your office is apparently based upon the finding that the ground set out in the second count above referred to was established. As to the second leave of absence this finding is undoubtedly correct, inasmuch as the evidence discloses the failure of defendant to establish residence on the land at any time prior to initiation of contest. But a similar finding as to the first application for leave of absence can not be sustained by a reasonable construction of the language in which the grounds therefor are recited. Claimant did not therein, either in terms or by direct implication, aver that he had established residence on the land, and the allowance of his first application as presented was erroneous.

Counsel for claimant urge that no contest should be entertained against this entry within six months from the expiration of the first leave of absence, and for that reason the second application, though the recitals therein contained are false, should be disregarded. It is also contended, and the Department concurs in the view, that though the first leave of absence was erroneously allowed, claimant was entitled to rely thereon.

While it is true that a leave of absence duly allowed and unrevoked protects the entryman *during the period* covered thereby from all default on his part, and defeats a contest brought within six months from the expiration thereof upon the charge of *abandonment*, the rule has never been further extended and the authorities cited and relied upon by counsel do not so hold, nor does the statute under which leaves of absence are obtained warrant any broader interpretation. Disregarding, then, all consideration of the second application

for leave of absence, does the first ground alleged as basis for the contest state a good and sufficient cause of action?

The plain language of section 3 of the act of March 2, 1889 (25 Stat., 854), in providing for the effect to be given to leaves of absence, reads as follows:

> Such settler so granted leave of absence shall forfeit *no rights* by reason of such absence: *Provided*, That the time of such actual absence shall not be deducted from the actual residence required by law.

It is to be observed that the first count of the contest affidavit alleged a total failure of claimant to establish residence on the land at any time *prior* to the granting of the first leave of absence, as well as at any time subsequent thereto. This period covered more than one year from date of entry and there is no sufficient proof that defendant has ever cured this default prior to notice of contest. The statutory period within which claimant should have established residence had expired, and to this the first allegation of the contest affidavit is directed. The case of Quein *v.* Lewis (20 L. D., 319) held no more than that a contest could not be entertained within six months from the expiration of leave of absence, there being no proof that the same was fraudulently obtained, where the charge was *abandonment*. The rule announced in the case of McCalla *v.* Acker (29 L. D., 203), touching this particular matter, was not disturbed by the subsequent action of the Department upon review (30 L. D., 277), as the case was then decided upon another point. See also Silva *v.* Paugh (17 L. D., 540).

The statute confers no additional benefits upon a claimant to whom a leave of absence is granted, and conceding in the present case that the application under consideration was honestly obtained by defendant, it did not cure defaults existing prior to the granting thereof, and even though entitled to rely thereon, it could afford no protection against matters arising prior thereto, nor did it remove any liability to contest by reason thereof. It only afforded immunity by way of excuse for failure to comply with the law during the period covered thereby and prevented contest for *abandonment* for six months thereafter. It no more cured the default arising out of failure to establish actual *bona fide* residence within the statutory period, which had elapsed prior to the granting of the application, than it would have operated to remove a disqualification to enter existing prior thereto which might have been removed prior to the contest. In the case at bar the particular default was failure to establish residence on the land and this was directly charged in the contest affidavit and is established by a preponderance of the evidence, and for the reasons herein stated the action taken by your office is hereby affirmed.

RESIDENCE—EXTENSION OF TIME ON ACCOUNT OF CLIMATIC CONDITIONS.

VENING *v.* COLWELL.

An extension of time beyond the six-month period accorded by statute within which to establish residence upon a homestead claim will not be allowed, on the ground of climatic conditions, unless it appear that the same conditions also prevailed and prevented the establishment of residence during that period.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *December 22, 1906.* (E. O. P.)

William A. Colwell has appealed to the Department from your office decision of January 12, 1906, affirming the action of the local officers holding for cancelation his homestead entry, made November 21, 1904, for the W. ½ NE. ¼, Sec. 30, T. 1 N., R. 5 W., S. B. M., Los Angeles land district, California, upon contest instituted by Raymond J. Vening.

The defaults alleged as grounds for the cancelation of the entry are sufficient, unless excusable, to warrant such action and are clearly established by the admissions of the entryman.

It is urged as excuse for his failure to establish residence on the land that climatic conditions were such in the spring of 1905 as to render cultivation and improvement of the land impracticable, and claimant relies upon the six months after entry allowed by statute for the establishment of residence as full immunity during that period. While it is true the statute accords this privilege to entrymen, yet it in no manner prevents compliance with the law in this respect and affords no basis for the allowance of a further extension of time because of climatic conditions arising after the expiration of such period unless it also appears that the same conditions prevailed during the first six months after entry, thereby preventing the establishment of residence within the statutory period. Postponement in the matter of complying with the law is, to this extent at least, at the risk of the entryman. The testimony offered in the case under consideration utterly fails to sustain the claim of immunity advanced by claimant.

Other matters are set up involving alleged irregularities of procedure committed by the local officers at the hearing. An examination of the record discloses no attempt on the part of the claimant to bring these matters to their notice at that time and they can not be advanced for the first time on appeal. The proper time to make objection to the disqualification of counsel is at the time he enters his appearance in the case or in any event before proceeding with the taking of testimony.

The question as to contestant's preference right of entry is not one properly determinable at this time, it being a matter for consideration when he seeks to assert such a right by making application to enter. If objection is then made this issue will be raised and determined.

The decision appealed from is hereby affirmed.

FEES AND COMMISSIONS—APPLICATIONS FOR WATER RIGHTS—RECLAMATION ACT.

OPINION.

Registers and receivers are not entitled to fees and commissions in connection with the filing of applications for the right to use water from irrigation works constructed under the reclamation act, but are entitled to commissions of one per cent on all moneys received from water users at the office for which they are appointed, to the extent of the maximum salary fixed by statute.

Assistant Attorney-General Campbell to the Secretary of the Interior, December 26, 1906. (E. F. B.)

By reference of a letter from the Director of the Geological Survey, my opinion is requested as to whether registers and receivers are entitled to fees and commissions in connection with the filing of applications for rights to the use of water supplied by irrigation works constructed under the reclamation act, their duties in this respect being prescribed by regulations approved April 4, 1906 (34 L. D., 544).

It may be stated as a general proposition that registers and receivers are not entitled to any fees or to charge for any service in the performance of their duties pertaining to the disposal of the public lands except such as are specifically provided for.

They are required to perform many services with reference to the public lands for which no special fee or compensation is provided. The annual salary of $500 allowed to each of such officers is intended to compensate for such services as may be performed by them at the local office where no special fee or compensation has been fixed or allowed by the statute.

Every application to enter land withdrawn for disposal under the reclamation act is an application for the water right incident thereto and appurtenant to the land entered. The right of entry and the right to the use of water are inseparable (Instructions, 35 L. D., 29, 31). The Department, has, however, by regulation (34 L. D., 544) required that all homestead entrymen shall file an application for the water right that is to attach to such land and such application is to all intents and purposes a part of the homestead application, as no person can make homestead entry of any public lands within the

limits of an irrigating project without acquiring the right to the use of water for the irrigation of such land which is an incident to the homestead right.

The regulations also provide that private owners of lands within the irrigable area of a project who may be entitled under the provisions of the act and the regulations of the Department to the use of water from the project, and who may desire to avail themselves of such benefits, shall file with the register and receiver an application for such right.

This is not a service relating to public lands and is not a part of the official duties required of registers and receivers unless it is incident to the duty imposed upon such officers by the provisions of the reclamation act.

The only duty specifically imposed upon receivers by the reclamation act is contained in the fifth section, which also allows to both officers commissions on money received in payment of water rights, and is in these words—

> The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this act.

A literal interpretation of this would indicate that the payments to be made to the receivers are limited to payments made for and on account of public lands *entered* under the homestead law, and that the commissions allowed to "registers and receivers" is only "on all moneys paid for lands entered under this act."

But construing the statute as a whole and with reference to its scope and purpose, it is made apparent that the intention of Congress was to impose upon receivers at the local land offices the duty of receiving and accounting for all sums paid by the users of water from irrigation projects constructed under the act, whether paid by entrymen of public lands or by the owners of private lands.

It is declared in section 5 that, as to the right to the use of water for land in private ownership, "no such right shall permanently attach until all payments therefor are made," and as to entries of public lands, that "a failure to make any two payments when due, shall render the entry subject to cancelation," and, immediately following and in this connection, that "all money received from the above sources shall be paid into the reclamation fund."

To construe the statute as having reference alone to moneys received from public lands would leave it without special provision for the collection of the moneys to be paid into the reclamation fund

from the other source. While the Secretary of the Interior in the absence of such special provision would have ample authority to designate a person to receive such payments, it is not reasonable to suppose that Congress intended to make any discrimination as to the payment of moneys due from the different sources, but rather that it was the purpose to have all moneys due for water rights from both sources paid to the receiver of the local land office.

The most reasonable construction of the statute is that Congress intended to impose upon registers and receivers additional duties in carrying out the provisions of the reclamation act and fixed as compensation for such services commissions on all moneys received for water rights from users of water under the government irrigation projects to the extent of the maximum salary allowed by law.

I am therefore of the opinion that registers and receivers are not entitled to fees in connection with the filing of applications for water rights, but are entitled to commissions of one per cent on all moneys received from water users at the office for which they are appointed, to the extent of the maximum salary as fixed by the statute.

Approved:

E. A. HITCHCOCK, *Secretary.*

RAILROAD GRANT—CONFLICTING SETTLEMENT CLAIM—ADJUSTMENT—ACT OF JULY 1, 1898.

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

A settlement claim to unsurveyed lands within the primary limits of the Northern Pacific land grant, existing at the date of the definite location of the line of road opposite thereto, thereafter maintained, asserted through the usual form of entry, and patented, after the elimination of all claim under the grant by formal decision of the land department, long prior to the passage of the act of July 1, 1898, providing for the adjustment of conflicting claims to lands within the limits of the Northern Pacific land grant pending on January 1, 1898, will not be reopened and adjusted under the provisions of said act upon the ground that the settler was in laches in not making timely assertion of his claim upon the filing of the township plat of survey.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *December 31, 1906.* (F. W. C.)

The Department has considered the appeal by the Northern Pacific Railway Company from your office decision of June 4, 1906, wherein it was held that there was no such pending or existing contest involving the N. ½ of NW. ¼ and lot 1, Sec. 9, T. 28 N., R. 40 E., Spokane land district, Washington, on January 1, 1898, as was subject to adjustment under the provisions of the act of July 1, 1898 (30 Stat., 597, 620).

From your office decision it appears that the tract in question is within the primary limits of the Northern Pacific land-grant as adjusted to the line of definite location shown upon the map filed October 4, 1880. The lands were at that time unsurveyed and plat of the survey of the township was not filed until May 9, 1884.

January 7, 1887, Gideon Peone made homestead entry for this land, upon which final proof was made and final certificate issued March 1, 1887, and in the proof it was shown that Peone settled upon this land in the spring of 1871 and that he had resided there continuously up to the date of the offer of his final proof. Further, that the patent of the United States issued to him upon said homestead entry May 26, 1888, after the claim of the company to the land had been eliminated by the formal decision of your office, in which it was held that Peone's settlement claim, existing at the date of the definite location of the line of the company's road opposite the line in question, was sufficient to defeat the operation of the railroad grant. Thus the matter has stood. Peone having parted with his title, which is now vested in one George Lapray, until the recent application filed by the railway company for the adjustment of the conflicting claims to this land under the provisions of the act of July 1, 1898, *supra*.

In the opinion of this Department this was a settled controversy long prior to the passage of the act of July 1, 1898, and there is no reason at this late day for the reopening of the case for the purpose of making an adjustment under the provisions of the act of July 1, 1898, in order to confer upon the railway company the special and advantageous features of such an adjustment.

The only reason assigned in support of the application filed by the railway company for such adjustment is that Peone was in laches in the filing of notice of his claim in the local land office. It is admitted that a *bona fide* settlement, made with intention of acquiring title to the land under the provisions of the homestead law, prior to definite location, is fully protected even though the survey of the land does not occur until many years after the definite location of the road, but it is urged that even though the settlement claim is fully maintained, all rights thereunder are at an end if the settler fails to give notice of his claim by the filing of a formal application in the local land office within three months after the filing of the township plat of survey, which, it is urged, Peone failed to do.

The third or granting section of the act of July 2, 1864 (13 Stat., 365), under which the company lays claim to this land, grants only the lands to which the United States has full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights at the time the line of the road was definitely fixed, and provides further that whenever, prior to that time, any of

the odd-numbered sections granted shall have been granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of, other lands shall be selected by said company in lieu thereof. Peone's settlement claim is clearly protected by the plain terms of the grant of 1864, and while it was necessary that he should perfect title to the land in the manner provided by the homestead law, yet his continued occupancy, open and notorious, was sufficient notice of his claim, which was asserted and perfected, as hereinbefore stated, after a contest with the railway company in which he was successful. His mere occupancy of the land may not of itself have been sufficient to defeat the grant, and had he abandoned the land it might have been held to have passed to the company under its grant unincumbered by his settlement claim. No one else could have succeeded to his right as against the company, but the question as to the timely assertion of his claim, fully maintained, as before stated, was, in the absence of another settlement claimant, solely between himself and the government. This has been the uniform holding of the Department and it was in view thereof that his claim was permitted to be patented, as before stated, May 26, 1888.

It may be worthy of note that the company never formally listed this land for the purpose of securing a patent under its grant, such act being necessary on its part for the purpose of paying the fees required by law. From this it may be fairly presumed that it had full and actual knowledge of Peone's claim and did not as against him intend to assert a right under its grant.

In the opinion of this Department it was not intended by the act of 1898, before referred to, to reopen controversies of this sort, long since settled, and the decision of your office denying the application of the company for an adjustment under that act is affirmed and said application will stand rejected.

MINING CLAIM—EXPENDITURE—COMMON IMPROVEMENT.

JAMES CARRETTO AND OTHER LODE CLAIMS.

Where several contiguous mining claims are held in common and expenditures are made upon an improvement intended to aid in the common development of all the claims so held, and which is of such character as to redound to the benefit of all, such improvement is properly called a common improvement.

Each of a group of contiguous mining claims held in common and developed by a common improvement has an equal, undivided interest in such improvement, which is to be determined by a calculation based upon the number of claims in the group and the value of the common improvement.

There is no authority in the law for an unequal assignment of credits out of the cost of an improvement made for the common benefit of a number of mining claims, or the apportionment of a physical segment of an improve-

ment of that character to any particular claim or claims of the number, such an arbitrary adjustment of credits, as the exigencies of the case may seem to require, being utterly at variance with the essential idea inherent in the term, a common improvement.

In any patent proceeding where a part of a group of mining claims is applied for and reliance is had upon a common improvement, the land department should be fully advised as to the total number of claims embraced in the group, as to their ownership, and as to their relative situations, properly delineated upon an authenticated map or diagram. Such information should always be furnished in connection with the first proceeding involving an application of credit from the common improvement, and should be referred to and properly supplemented in each subsequent patent application in which a like credit is sought to be applied.

Case of Zephyr and Other Lode Mining Claims, 30 L. D., 510, cited and distinguished.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 4, 1907.* (E. B. C.)

December 28, 1904, the Bisbee Queen Development Company made entry (No. 852) for the James Carretto, Columbia Gold Hill, Gold Hill Mine, Remember the Maine, Piedmont and Puzzle lode mining claims, survey No. 1958, Tucson (now Phoenix), Arizona, land district.

In the Surveyor-General's certificate accompanying the field notes of survey, in order to show the requisite expenditure, and in addition to certain individual improvements upon each location, there is credited to the James Carretto claim the value of $150, to the Columbia Gold Hill location the value of $200, and to the Puzzle Claim the value of $400, all from the cost of a tunnel four feet by six feet by sixty feet in length, valued at $750, situated upon the Gold Hill Mine location (the course of said tunnel being in a direction away from said three claims), and to the Remember the Maine claim "an undivided interest," valued at $300, in a certain tunnel four feet long, and in three open cuts, all upon the Gold Hill Mine location and of a value of only $300. Your office directed that the claimant company be required to show cause why the entry, as to the four claims to which the above workings had been accredited, should not be canceled for insufficiency of the improvements. Showing was made, consisting of affidavits and a map, substantially to the effect that a certain fault crossed the group of claims and that the tunnels and cuts referred to were constructed to explore and determine the formation along the fault, it being expressly disclaimed that such workings were intended for the extraction of mineral.

August 9, 1905, your office found the showing to be insufficient and held the entry for cancellation as to these four claims. The company filed a motion for review and also other affidavits which tended to show, as an available improvement for these claims, an interest in

the cost of a shaft valued at $4,600, upon the adjoining June Bird claim, owned by the company.

For the stated reasons that no certificate of the Surveyor-General as to the additional improvements had been submitted and that satisfactory documentary evidence of the company's title to the June Bird and other claims for which a part of the cost of the shaft was claimed as an improvement, was not filed, your office, on September 21, 1905, declined to favorably consider the further showing and denied the motion for review.

An appeal now brings the case before the Department. Since taking its appeal the company has filed a supplemental certificate, as to improvements, by the Surveyor-General, dated January 16, 1906, whereby it is made to appear that upon the June Bird lode mining claim is a main working shaft, 6 feet by 17.7 feet by 62 feet deep, sunk at a cost of $4,600, for the development of all the claims of the group owned by the company; that this shaft is practically in the center of the group and will be available for the convenient and economical extraction of ores at a depth from all the claims; that it was completed to the depth stated prior to the expiration of the period of publication; that said shaft is situated about 500 feet westerly from the west end center of the Columbia Gold Hill claim; that a 14/23 portion of the cost thereof has been accredited to surveys 1953 and 2019, and that the remaining 9/23 part of the same is accredited to the six claims of this survey—a 3/46 part, valued at $300, being credited to each claim—and that no portion thereof has been accredited otherwise than as above stated.

Upon the record presented before your office, the decisions appealed from were correct. It is not easily conceivable, nor does appellant here contend that it has been shown, that the two tunnels and three cuts upon the Gold Hill Mine location are improvements tending to facilitate the extraction of minerals contained in the claims to which the cost of said workings, or portions thereof, were sought to be accredited. The additional improvements now certified are relied upon to satisfy the requirement of the statute.

By an examination of the records of your office it is found that survey No. 1953, embracing eight claims, was patented to the company applicant on December 20, 1905, and that survey No. 2019, which described the June Bird and five other lode claims, was patented to the company July 27, 1906. In the case of survey No. 1953 the certified abstract of title was brought down to December 26, 1904, and in the record with survey No. 2019 the abstract was continued to August 7, 1905. These dates are both subsequent to the time of the filing of the application for patent herein, namely: October 26, 1904. The above abstracts and accompanying record of the fourteen claims therein involved show ownership of the same

in the applicant company when the application herein was made. No additional showing as to ownership of these claims is necessary.

In survey No. 2019, the mineral surveyor, under date of July 24, 1905, certified that the shaft upon the June Bird claim—

> was sunk at a cost of $4600 for the purpose of developing the whole Bisbee Queen property. This property embraces 23 mining claims as follows: survey No. 1953, 8 claims, survey No. 1958, 6 claims, survey No. 2019, 6 claims, and 3 unsurveyed fractional claims, and a 1/23 interest in the value of this shaft has been accredited to each of the 23 claims.

Under the same date the Surveyor-General certified that the June Bird shaft "is to be the main working shaft, and is properly credited as an improvement for the development of all the claims in the group." In survey No. 1953 the surveyor certified that the shaft had been sunk for the purpose of developing the underground ore deposits of the entire property of the Bisbee Queen Development Company, and consequently an undivided 1/23 interest in the shaft had been credited to each claim of that survey. In survey No. 1958 no reference is made to the number of claims comprising the group. From the plats of the three surveys it is apparent that the twenty claims delineated thereon constitute a group of contiguous lode mining claims. The other three claims, referred to as being fractional and unsurveyed and part of the company's property benefited by the shaft, are not identical by name, nor is their position fixed either by description or diagram. No satisfactory evidence of the company's ownership, such as a certified abstract of title, has been submitted.

Where several contiguous mining claims are held in common and expenditures are made upon an improvement which is intended to aid in the development of the claims so held, and which is of such character as to redound to the benefit of all, such a general improvement is properly called a common improvement. In legal contemplation these terms import a single, distinct entity, not subject to physical subdivision or apportionment in its application to the claims intended to be benefited by it. The entire body of claims held in common, the group as it is ordinarily denominated, not the individual claims separately considered, is the beneficiary on the one hand, while on the other the common improvement in its entirety is the means or agency effecting the common development or the community benefit. Such benefit accrues and attaches to, and becomes available for, the claims as a body, not individually, by the very reason of the construction of the common improvement and as soon as the construction takes place. The physical act of sinking a shaft, or driving a tunnel, which is a common improvement, makes this so; not the certificate of the surveyor-general to that effect.

Where two or more persons own property in common each owner

has only an undivided interest therein, represented by no physical or tangible part of the property itself, but extending and attaching to the whole thereof. By a simple computation the value of such interest, based upon the value of the entire property, is easily ascertained. Likewise each claim of a group developed by a common improvement has an undivided, but nevertheless a beneficial and ascertainable, interest in the common development work. By a calculation, based upon the number of claims in the group and upon the value of the common improvement, it is readily ascertained whether the equivalent of the required expenditure in labor and improvements for the benefit of each claim is represented in the common improvement, and whether more or less, and also what credit is available to such claims as are embraced in any particular patent proceeding.

The following language used by the Department in the case of the Copper Glance Lode (29 L. D., 542, 550), although employed with reference to non-contiguous claims, is clearly appropriate and persuasive in this connection:

> Nor can any part of either of said improvements be apportioned to the Copper Glance Claim, in satisfaction of the statute, for the reason that both were constructed and intended for the benefit of all the claims. Each and every part of said road, and each and every part of said smelting furnace, as well as each of said improvements as a whole, was, according to the showing made, intended for the common benefit of the nine claims. The law makes no provision for the apportionment of an improvement made for the common benefit of several non-contiguous mining claims, so as to apply different parts thereof exclusively to the use of different individual claims.

In the case at bar twenty-three claims are embraced in the group involved, and the common improvement is valued at $4600, as is shown by the record. Fourteen of these claims have been accredited with the sum of $200 each, derived from the value of the common shaft, six claims with $300 each, from the same source, and three claims are accredited with nothing from this source. Such a method of arbitrarily adjusting the credit to be derived from a common working shaft, merely as the exigencies of the case seem to require, is destructive of the essential idea inherent in the term, a common improvement. To undertake to set apart or apportion a physical segment or section, or an arbitrary fractional part, of a common improvement and accredit the value thereof to a particular claim is in violation of the theory of a common benefit accruing from a common improvement. The scheme here invoked for adjusting the monetary worth of the benefit derived from a common improvement is, on its face, unreasonable and leads to a result but little short of absurd. The Department is of opinion that it is unwarranted and unauthorized by, and contrary to, the law.

While certain expressions used by the Department in the narration of the history of the case of the Zephyr and Other Lode Mining Claims (30 L. D., 510) may perhaps appear to suggest that at that time the Department entertained views contrary to those herein set forth, in that it would seem that, in the decision mentioned, a 150-foot section of a tunnel constructed as a common improvement for a group of fifteen claims was applied as a credit for two of such claims, nevertheless, an examination of the record in that case shows that the Surveyor-General, in addition to certain individual improvements, certified as an improvement "an interest in a tunnel" which was particularly described and shown to be 1746 feet in length and that the interest applied was of the value of $1500.

The language of the Surveyor-General's certificate is clearly indicative of an intent to in fact accredit the value of an interest in the cost of the tunnel to the claims. The language of the decision itself is to the effect that each claim of a group is entitled to credit for "its due share of the value" of the common improvement. Also it is obvious that in the cost of the common tunnel, then constructed to a length of over 1700 feet, there was represented far more than the necessary $500 expenditure required to be made for each of the fifteen claims of the group. It is to be noted that the question discussed and determined in that decision was whether or not claims held in common and developed by a common improvement might be applied for and entered singly, in pairs, or otherwise, and at different times, without in any way impairing the right to have accredited to each claim its interest in the value of the common improvement. No question as to the sufficiency or availability of a segregated portion, as such, of the common improvement was discussed or adjudicated and, consequently, considering the language employed with reference to the question actually at issue and as well to the state of facts there involved, there is nothing contained in the decision in the Zephyr case opposed to the views here expressed as to the specific question now presented and decided.

Accordingly, if there be accredited to each of the six claims of this survey the sum of $200 accruing by reason of the construction of the June Bird shaft at an expense of $4600, for the common benefit of the twenty-three claims of the group, and the same added to the individual improvements shown, the following amounts of expenditure are made to appear after eliminating the value of the insufficient improvements first mentioned: upon the James Carretto claim $550; upon the Columbia Gold Hill $500; upon the Remember the Maine $400, and upon the Puzzle $300. The individual improvements upon the Piedmont location were certified at $675, and upon the Gold Hill Mine at $530, and the sufficiency of such improvements was not questioned by your office. They appear to be sufficient and satisfactory.

While your office has already passed to patent entries embracing fourteen claims of the company's group without any definite showing as to the three unsurveyed fractional locations mentioned, yet in this or in any similar patent proceeding where a part of a group is applied for and reliance is had upon a common improvement, the land department should be fully advised as to the total number of claims embraced in the group, as to their ownership and as to their relative situations, properly delineated upon an authenticated plat or diagram. Such information should always be furnished in connection with the first proceeding involving an application of credit arising from a common improvement and should be referred to and properly supplemented in each subsequent patent application in which a like credit is sought to be applied. In the case at bar, therefore, before a credit of $200—representing each location's proportionate interest in the value of the common improvement—for any claim of this survey can be accepted and approved, the company must furnish within a reasonable time satisfactory evidence showing the ownership of, and identifying and locating the position of, the three unsurveyed fractional claims which are asserted to be a part of the group benefited by the common shaft.

In any event, however, although the Puzzle and the Remember the Maine claims should be accredited each with its proportionate share, to wit, the sum of $200, derived from the value of the common shaft, the certified expenditures upon and for the benefit of these two claims, which are acceptable, would still be insufficient, as is shown above, and as to them the entry can not be sustained.

The decisions of your office, except as herein modified, are accordingly affirmed. The papers are herewith returned with directions that proceedings be had in accordance with the views herein expressed.

PRACTICE—CONTEST NOTICE—JURISDICTION.

STEPHENS *v.* COLT.

Where a deceased homesteader is named as sole defendant in a contest against his entry, and notice of the contest is directed to and served upon his widow, who was not made a party but who appeared and participated in the hearing, no jurisdiction is thereby acquired, and the contest and all proceedings had thereon are absolutely void and of no effect.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 5, 1907.* (E. O. P.)

August 7, 1906, motion for review of departmental decision of June 15, 1906 (unreported), affirming the decision of your office hold-

ing for cancellation homestead entry of Joseph H. Colt, made May 26, 1900, for the SE. ¼, Sec. 9, T. 1 N., R. 38 E., La Grande land district, Oregon, upon contest instituted by John W. Stephens, was entertained.

The basis of said motion is the alleged want of jurisdiction.

The record discloses the death of the entryman in the month of February, 1901, nearly four years prior to the initiation of contest. The original entryman was made the sole defendant, though it appears the notice issued was directed to and served upon Phoeba Colt, his widow, and that upon this hearing was had at which testimony was offered by the parties cited to appear.

Your office, in passing upon the question of jurisdiction, held that inasmuch as appearance was made on behalf of the widow she voluntarily submitted to the jurisdiction and became bound by the proceedings. It is clear the only proper party defendant was the widow of the deceased entryman, his death having occurred prior to the initiation of contest, and no decree rendered upon the proceedings had is binding upon one not a party to the record, and the record affords the only competent evidence of the parties to the proceeding Osborn *v.* U. S. Bank (9 Wheat., 737, 854). Had the widow been named as a defendant and there been a failure to serve her with notice, her voluntary appearance would have been sufficient to subject her to the jurisdiction, but the Department knows of no rule whereby a person not named and against whom no charge is preferred can become a party merely by appearance. It is equally clear that no action can be maintained against one deceased. Rohrbough *v.* Diggins (9 L. D., 308, 310). It follows, therefore, that the said contest and the proceedings had thereon were utterly void *ab initio* and the decisions heretofore rendered are without force and effect.

Counsel for Phoeba Colt suggests that inasmuch as hearing has been had the Department would be justified in considering all the testimony and if it shows a substantial compliance with the law on the part of the said Colt, the contest should be dismissed. This suggestion is so utterly inconsistent with the claim of want of jurisdiction as to need no argument to support a denial thereof; and while the contest must be dismissed, such action is taken without giving any consideration whatever to the merits of the case and without prejudice to the contestant to renew the same in an original proceeding against the proper party or parties as the case may be. Kendig *v.* Dean (97 U. S., 423).

Departmental decision of June 15, 1906, is hereby recalled and vacated, and the decision of your office reversed. The entry in question will be held intact and the contest of Stephens dismissed.

DECLARATIONS OF INTENTION AND CERTIFICATES OF NATURALIZATION.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 10, 1907.

Registers and Receivers, United States Land Offices,

GENTLEMEN: Referring to circular approved November 6, 1906 (35 L. D., 299), wherein you are instructed not to receive declarations of intention or certificates of naturalization made or issued after September 27, 1906, or copies thereof, which are not substantially in the form prescribed by section 27 of the act approved June 29, 1906 (34 Stat., 596), you are further directed to accept, if duly authenticated, plain copies of the record, not imitating or resembling the form or design of the original certificate of naturalization or declaration of intention, and all such duly authenticated copies may have written or stamped across the face thereof, over the official seal and signature of the clerk of the court out of which the certificate of naturalization issued or before which the declaration of intention was made, a legend or endorsement declaring in substance that such certified copies may be used only in proving claims to the public lands.

The foregoing instructions are supplemental to and not in substitution of the instructions approved November 6, 1906.

Very respectfully,

W. A. RICHARDS, *Commissioner.*

Approved:

E. A. HITCHCOCK, *Secretary.*

AZTEC LAND AND CATTLE CO. *v.* TOMLINSON.

Motion for re-review of departmental decision of September 19, 1906, 35 L. D., 161 (adhered to on motion for review, 35 L. D., 310), denied by Secretary Hitchcock, January 10, 1907.

RIGHT OF WAY—STATION GROUNDS—ACTS OF MARCH 3, 1875, AND FEBRUARY 12, 1889.

BIG HORN SOUTHERN RAILROAD COMPANY.

The special grant to the Big Horn Southern Railroad Company through the Crow Indian reservation by the act of February 12, 1889, is limited to a grant of right of way for one station only for each ten miles of road, and a like limitation is placed upon rights of way granted by the general right-of-way act of March 3, 1875. *Held:* That upon the termination of the reserva-

tion the number of stations can not be increased under the general act of 1875, nor can the location of stations at the extreme ends of the ten-mile sections, reckoned from the initial point of the road, be made the basis for the taking of a station on account of an intermediate ten miles between the middle points of the ten-mile sections.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 12, 1907.* (F. W. C.)

The Department has considered the appeal by the Big Horn Southern Railroad Company from your office decision of October 12, 1906, rejecting its application filed under the provisions of the act of March 3, 1875 (18 Stat., 482), for station grounds covering approximately twenty acres on the east half of northwest quarter and northeast quarter of Sec. 15, T. 1 S., R. 31 E., Billings land district, Montana, the same being assigned on account of that section of the road between the 65th and 75th mile posts.

The land selected for station grounds was formerly within the Crow Indian reservation. By act of February 12, 1889 (25 Stat., 660), there was granted to this company a right of way through the Crow Indian reservation in Montana, the second or granting section of the act being as follows:

That the right of way hereby granted to said company shall be seventy-five feet in width on each side of the central line of said railroad, as aforesaid, and said company shall also have the right to take from said lands adjacent to the line of said road material, stone, earth, and timber necessary for the construction of said railroad; also ground adjacent to said right of way for station buildings, depots, machine-shops, side-tracks, turn-outs, and water stations, not to exceed in amount three hundred feet in width and three thousand feet in length for each station, to the extent of one station for each ten miles of its road, except at the terminus of said road at a point on the Northern Pacific Railroad in the vicinity of the mouth of the Big Horn River, Yellowstone County, Montana, and at such point not to exceed one hundred and sixty acres, or so much thereof as the Secretary of the Interior shall decide to be reasonably necessary for terminal facilities.

It will be noted that this act grants station grounds "not to exceed in amount three hundred feet in width and three thousand feet in length for each station, to the extent of one station on each ten miles of its road." Under this act the company located its line of road opposite the land in question and the same received departmental approval May 17, 1893. It also appears that under said act two "depot grounds," each three hundred feet by three thousand feet, were selected and approved between the 60th and the 80th mile posts. These depot grounds are located at the extreme end of the sections so that there is no station between the 65th and the 75th mile posts.

The general right of way act of March 3, 1875, under which the present application is filed, grants to railroad companies generally, under certain conditions, grounds adjacent to the 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." It will be seen that this general right of way is like the special act of 1889 granting this company a right of way through the Crow Indian Reservation, limited to one station for each ten miles of its road.

The company, in its appeal, urges that its present application should be approved: first, because under the special act it was obliged to purchase the lands taken for right of way including its depot grounds, and as a consequence that a right asserted thereunder should not affect its right under the act of 1875. In effect, that the rights were cumulative. It is further urged that even if the amount taken under the special act can be considered in determining its rights under the general act, as the amount taken thereunder did not equal the quantity permitted under the general act, further lands might be taken under the general act after the Indian reservation was extinguished. The Department is unable to grant this contention. Without further considering the question at this time, it is sufficient to say that as the two acts limited the grant to one station for each ten miles of road, the number of stations that may be taken by any company can not be enlarged, and, further, that the location of the stations at extreme ends of the ten-mile sections, reckoned from the initial point of the road, can not be made the base for a selection on account of an intermediate ten miles reckoned, as in this instance, from the 65th to the 75th mile post.

The decision appealed from is affirmed and the application will stand rejected.

HOMESTEAD ENTRY—COMMUTATION PROOF—RESIDENCE.

FRED LIDGETT.

The distinction between commutation and final proof in relation to the element of time within which full compliance with law may be shown demands a higher degree of proof of good faith on the part of an entryman who elects to complete his entry and acquire title within the limited period allowed by commutation than is required in the case of ordinary proof after five years' compliance with the law.

A homestead entryman by his election to commute assumes the burden of showing full compliance with law in the matters of residence, improvement and cultivation, and the proof will not be accepted by the land department unless it shows the substantially continuous presence of the claimant upon the land for the required period.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 12, 1907.* (E. O. P.)

Fred Lidgett has appealed to the Department from your office decision of June 5, 1906, rejecting commutation proof offered in support

of his homestead entry made October 12, 1903, for the NW. ¼, Sec. 26, T. 4 N., R. 25 E., B. H. M., Pierre land district, South Dakota, and holding for cancelation cash certificate issued thereon, but allowing the entry to remain intact subject to future compliance with law.

The proof in question was rejected because of the insufficiency of the showing made as to residence.

The facts disclosed by the final proof are substantially as set forth in your said decision. Proof was offered August 11, 1905, less than two years after entry. Residence was not established on the land until near the expiration of the six months period allowed therefor, and the claimant's absences from the land were such as to preclude the allowance of credit for constructive residence (James A. Hagerty, 35 L. D., 252), and the proof offered must therefore show that a *bona fide* residence was actually established and maintained for the full statutory period of fourteen months prior to the submission of final proof.

It is admitted that entryman's presence on the land from the date he alleges residence was established was interrupted by absence from July 15, 1904, to December 5, 1904, and from December 23, 1904, to March 1, 1905. Out of a total of but little more than sixteen months of actual residence claimed by entryman he was absent from the land more than six months, and he was not actually on the land for six months at any one time.

It is contended, however, that the continuity of residence was not broken by the entryman's absences from the land, inasmuch as they were rendered necessary because of his financial circumstances, and as no different kind or quality of residence is essential to support commutation proof from that required in the case of ordinary final proof, your office erred in rejecting the proof offered.

While it is true the Department recognizes but one character of residence in all cases, and in this respect follows the general rules of law, the distinction between commutation and final proof in relation to the element of time within which full compliance with law may be shown demands a greater degree of proof of good faith on the part of the claimant who elects to complete his entry and acquire title within the limited period allowed by commutation. His election in this particular is voluntary, and by making it he assumes the burden of showing full compliance with law in the matters of residence, improvement, and cultivation by the submission of the most satisfactory evidence. The best evidence of residence is the substantially continuous presence of the claimant on the land, and where the entryman seeks to perfect his entry within a shorter period than that allowed for the submission of ordinary final proof, the Department will refuse to accept any other.

In the case under consideration your office allowed the entry to

remain intact subject to future compliance with law and the submission of satisfactory final proof within the lifetime of the entry, and the claimant is not upon the showing made entitled to any greater relief. The decision appealed from is accordingly hereby affirmed.

PRACTICE—MOTION TO DISMISS CONTEST—RESIDENCE.

CUMMINGS *v.* CLARK.

Where the testimony in a contest case is taken elsewhere than before the local officers, and the contestee, after moving to dismiss the contest on the ground of insufficiency of the evidence submitted on behalf of contestant, proceeds to submit testimony on his own behalf, he thereby, notwithstanding the officer before whom the testimony was being taken was without authority to pass upon the motion, waives the benefits of the motion, and is not entitled to have the case remanded for further hearing after final decision by the land department that the motion to dismiss was not well taken, but must stand or fall on the record as made.

There is no provision of law authorizing an extension of the time fixed for the establishment of residence by homestead entryman, on account of sickness or ill health, and failure to commence residence within the statutory period can not be excused on that ground in the face of a contest charging such failure, where the default was not cured prior to initiation and notice of the contest.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 17, 1907.* (E. O. P.)

Lewis C. Clark has appealed to the Department from your office decision of January 19, 1906, reversing the action of the local officers and holding for cancellation his homestead entry made July 18, 1904, under the provisions of section 3 of the act of April 28, 1904 (33 Stat., 547), for the W. ½, W. ½ E. ½, Sec. 32, T. 2 N., R. 41 W., Lincoln land district, Nebraska, upon contest brought by John L. Cummings.

Hearing was had before a county judge at Benkleman, Nebraska, June 26, 1905. At the close of the submission of testimony on the part of contestant, motion to dismiss on the ground of insufficiency of evidence was interposed by contestee, after which the latter offered testimony in his own behalf.

The local officers sustained said motion and directed a dismissal of the contest. Counsel for contestee contends in argument, though no error is assigned upon that ground, that your office erred in considering the merits of the case upon the whole record, and that the action of the local officers in sustaining the motion being reversed, the case should have been remanded for further hearing. This technical objection is unsound. While it is true the officer before whom the testimony was taken was without authority to pass upon

said motion, the contestee, if he wished to rely upon it, should have rested on the record as then made. By proceeding to put in his case, he waived the benefit thereof, and your office, having the complete record before it, very properly refused to remand the case for further hearing, and was fully warranted in proceeding with the consideration thereof upon the merits.

Counsel further contends that error was committed in not accepting the plea of sickness, when established, as sufficient to excuse the *establishment* of residence on the land within the time fixed by law, and asserts that—

> There is not only an act of Congress which makes sickness or climatic reasons grounds for excuse for failure to establish residence, but decisions of the Department contain numerous cases where such excuses have been accepted when the condition of the homestead was as shown to have been in this case.

Neither the act of Congress nor any of the numerous cases mentioned is cited by counsel. The Department knows of no statute which permits an extension of the time fixed for the *establishment* of residence by a homestead entryman on account of sickness or ill health. Section 2297 of the Revised Statutes, as amended by the act of March 3, 1881 (21 Stat., 511), excuses default in this particular where it is occasioned by climatic hindrances. Other reasons may be accepted as warranting leaves of absence under section 3 of the act of March 2, 1889 (25 Stat., 854), but the benefits of said section are conferred only upon entrymen who have established residence on the land, and the time within which residence must be *commenced* is unchanged. This requirement of the homestead law is specific and mandatory and the Department is without authority, in the face of a contest, to excuse compliance therewith, except for the single reason specified in said section 2297, as amended (*supra*).

An examination of departmental decisions fails to disclose any sanction for the assertion of counsel in relation thereto. Where *bona fide* residence is established prior to notice of contest, even though after the expiration of the statutory period, this has been uniformly held by the Department as sufficient to cure the default. The same rule applies in those cases where the issue is solely between the entryman and the government and good faith is apparent. But the rule can not, in the absence of statute, be extended to defeat contests initiated and of which the entryman had notice prior to the curing of the default upon which the contest is based. (Mason *v.* Wilson, 25 L. D., 44; Silva *v.* Paugh, 17 L. D., 540; Renshaw *v.* Holcomb, 27 L. D., 131.)

The preponderance of the evidence clearly establishes the existing default on the part of the claimant to establish *bona fide* residence

on the land prior to notice of contest. The decision appealed from must therefore be affirmed.

The appeal having been disposed of on its merits, no further consideration of the motion to dismiss the same because of insufficiency of the errors specified is necessary.

HOMESTEAD ENTRY—ADDITIONAL—SECTION 1, ACT OF APRIL 28, 1904.

THEODORE GOLLE.

The right of entry conferred by section 1 of the act of April 28, 1904, is not limited to those who theretofore made and abandoned or relinquished but *one* homestead entry.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 17, 1907.* (E. O. P.)

Theodore Golle has appealed to the Department from your office decision of April 30, 1906, rejecting his application to make entry, under the provisions of section 1 of the act of April 28, 1904 (33 Stat., 527), of the NW. ¼, Sec. 4, T. 19 N., R. 29 E., Waterville land district, Washington.

It appears from your office decision that this entry, if allowed, will be the third made by this applicant. The land which Golle alleges he abandoned for the reason stated is embraced in homestead entry made by him February 20, 1903, which entry is still of record.

The matters alleged as a basis for the allowance of the pending application clearly establish the mistake of claimant as to the character of the land abandoned by him and tends strongly to show a *bona fide* attempt to comply with the homestead law with respect thereto, before abandonment. At the time the case was before your office for consideration the showing made as to abandonment of the former entry was indefinite and was in a measure weakened by the record evidence that it remained intact. Filed with the appeal is a supplemental affidavit of applicant, duly corroborated, to the effect that the land has in fact been abandoned since "the spring of 1904."

Your office considered, in connection with the other circumstances disclosed, the fact that the entry alleged to have been abandoned was a second entry. In the opinion of the Department, this fact is not material. Section 1 of the act of April 28, 1904, *supra*, does not limit the right thereby conferred, either directly or by reasonable intendment, to those who have theretofore made and abandoned or relinquished but one homestead entry. It refers only to the "former entry" abandoned or relinquished for the reasons specified. No good reason appears for placing such limitation upon the language used,

as the circumstances under which such former entry may have been abandoned or relinquished may arise as well whether it be a first or second entry. The former entry referred to in the act is an independent transaction and where it appears that said entry was legally made in good faith and has been abandoned or relinquished only because of the reasons specified, the rights of the applicant are not prejudiced because he may have made another entry prior thereto.

In the opinion of the Department the showing made sufficiently establishes the honest mistake of the entryman as to the character of the land and his *bona fide* attempt to comply with the law with respect to his abandoned entry, but the showing as to the time of actual abandonment thereof is not specific and it does not clearly appear that it was *prior* to April 28, 1904. This fact must also be established before the pending application can be allowed (Cox *v.* Wells, 33 L. D., 657, 659; Circular of September 1, 1905, 34 L. D., 114). However, inasmuch as the other essential matters incident to the successful assertion of the right have been shown, the applicant will be allowed a reasonable time, to be fixed by your office, to make further showing with respect to the time of his abandonment of his former entry, and, in the event such showing is sufficient to show abandonment prior to the date named, his application will be allowed, and the local officers directed to cancel the abandoned entry.

The decision appealed from is modified accordingly.

RESIDENCE—MAINTENANCE—TEMPORARY ABSENCES.

SMITH *v.* HUSTEAD.

Temporary absences of a homestead entryman from his claim, when necessary to procure a livelihood, may be excused, where it clearly appears that actual residence is being maintained in good faith; but failure to *maintain residence* can not be excused on the ground that the entryman can not make a living on the land.

Secretary Hitchcock to the Commissioner of the General Land Office.
(F. L. C.) *January 17, 1907* (E. O. P.)

J. Y. Smith has appealed to the Department from your office decision of January 12, 1906, affirming the action of the local officers dismissing his contest against the homestead entry of Columbus C. Hustead, made November 14, 1903, for the SE. ¼ NW. ¼, SW. ¼ NE. ¼, NE. ¼ SW. ¼, NW. ¼ SE. ¼, Sec. 4, T. 2 N., R. 24 W., Mangum land district, Oklahoma.

Contest affidavit, alleging abandonment, was filed May 15, 1905. Hearing was had July 20, 1905, at which both parties appeared and

submitted testimony. The local officers in their decision, rendered July 24, 1905, found as follows:

> The charge is abandonment. The evidence of contestant is of but little value because of its not being definite and certain. The testimony of contestee practically admits the charge but seems to justify the same by the sickness of his wife during the time of such absence. While the excuse given is not entirely satisfactory, which may be owing to the manner given, yet from the evidence of the attending physician, who advised against going on the claim on account of the danger to his wife's health, we are inclined to the opinion that the reason for not going back on the land with his wife should be considered sufficient. He was on his claim himself residing and improving the same in January, 1905, for a short time.

The finding that the default charged is established by the admission of claimant is fully warranted.

Your office found that:

> There was no abandonment of the land nor was there any intent to make an actual change of residence. Whatever default existed seems to have been due to sickness, poverty, and circumstances over which the defendant had no control.

Unless the excuse offered for defendant's absence from the land be satisfactory, the finding of your office, to the effect that there was no abandonment of the land, can not be sustained. While it is perhaps true claimant never abandoned it in the sense that he relinquished all control over it, yet by his own admission it is clear that he was maintaining a domicil elsewhere, and unless it be affirmatively shown that this was rendered absolutely necessary because of the circumstances under which he was placed, his continued absence from the land can only be construed as an abandonment of his residence thereon.

Claimant left the land in March, 1904, after having resided thereon about three months, moving to a rented place over twenty miles distant, where his wife remained up to the date of hearing, though there is some evidence tending to show that she made one attempt to return to the land. Claimant visited the land at intervals and assisted in the cultivation thereof. He asserts that he left the land because he was unable to profitably cultivate the same during the crop season of 1904, and also on account of the ill health of his wife, for whom he sought better medical attention.

In view of the facts disclosed by the testimony of the physician who attended claimant's wife, her alleged condition is not shown to have prevented the maintenance of residence on the land by claimant prior to January, 1905, nearly a year after his removal therefrom. Prior to said date said physician states he was not called upon to attend the wife of claimant, and her condition at that time, as testified by him, affords no evidence of her condition at the time her residence on the land was discontinued, and the advice by the physician, to the effect that it would not be advisable for her to return to the

land, must have been given, if at all, nearly a year after leaving it. The physician further admitted that he believed proper medical attention could be obtained for claimant's wife in the vicinity of the land.

The Department has never held that failure to *maintain residence* on the land is excused because the entryman is unable to make a living thereon, though temporary absences therefrom made necessary to procure a livelihood have been excused, where it clearly appears that actual residence on the land was maintained in good faith. The doctrine announced in the case of Ruth McNickle (11 L. D., 422), that:

> While temporary absences on account of sickness or other exceptional circumstances have been and may be excused, such absences must be the exception, and not the rule governing residence on homestead claims—

is in accord with a liberal interpretation of the law, and is not to be extended to condone absences for protracted periods by one whose acts clearly evidence the establishment of a residence elsewhere. (Johnson *v.* Easter, 22 L. D., 140.)

The default charged having been clearly established was not cured by the visits of the claimant to the land, nor his cultivation and improvement thereof, and the excuse offered for his failure to maintain a *bona fide* residence thereon to the exclusion of a home elsewhere is, as stated by the local officers, not only unsatisfactory, but wholly insufficient in the absence of a better showing of good faith on his part.

The decision appealed from is therefore hereby reversed. The entry of Hustead will be canceled.

INSANE ENTRYMAN—REINSTATEMENT OF CANCELED ENTRY—SUBMISSION TO BOARD OF EQUITABLE ADJUDICATION.

DELLAGE *v.* LARKIN.

Where a homestead entryman on account of mental incapacity to understand the necessity therefor fails to submit final proof within the seven-year period provided by statute, and the land department, in ignorance of the reason for such failure, cancels his entry because of the expiration of its statutory life, and another, not in good faith, but with full knowledge of the entryman's long-continued compliance with law in the matters of residence, cultivation and improvement, and of his mental incapacity, thereupon makes entry of the land with intent to acquire title thereto for his own use and benefit, such entry, upon the land department becoming fully advised as to the true facts and circumstances of the case, will be canceled and the entry of the insane entryman reinstated with a view to submission to the Board of Equitable Adjudication for confirmation.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 17, 1907.* (G. C. R.)

This case involves the SW. ¼, Sec. 14, T. 143 N., R. 50 W., Fargo, North Dakota, for which Patrick Larkin made homestead entry April

8, 1897. Said entry was canceled January 5, 1905, for the reason that the entryman failed to submit proof within the seven-year statutory period.

January 13, 1905, Henry Dellage made homestead entry for the land.

July 10, 1905, David Cadigan filed a petition in your office, setting forth in substance that he had been duly appointed guardian to the entryman, Patrick Larkin, and submitted a certified copy of the letters of guardianship "of the person and the estate" of the entryman, under the hand and seal of the judge of the county court of Barnes county, North Dakota, dated July 5, 1905, the appointment having been made June 19, 1905.

The petition alleged that the said guardian had been well acquainted with the entryman since 1895; that the entryman had continuously resided on the land since 1895 and had erected on the land a small house and granary; had dug a well and had broken and cultivated practically all of the tillable land, viz., about 125 acres; that the entryman is a single man, aged about 65 years, and had, to petitioner's knowledge, no relatives; that he had lived alone on the land; that petitioner and other neighbors had endeavored to get the entryman to make final proof in support of his entry within the seven years provided by law, but had been unable to make him understand the necessity of so doing or to get him to submit proof; that when approached and told the importance of offering proof within the required time, he said in substance:

> That a certain lady possessed of wisdom had told him at or about the time of his filing, that she, acting for the government, was the owner of the counties of Cass, Barnes and Steele, and that he could have any portion of any of said counties he could find.

The petition further alleged that none of the neighbors were able to obtain from the entryman any rational conversation; hence it was deemed necessary to get a guardian appointed of his person and estate, on account of his mental incompetency; that owing to his mental defect, the entryman failed to make final proof; that having no relatives or friends, the neighbors did not particularly interest themselves, until the entry was canceled and another allowed to make entry of the land.

Petitioner asked the reinstatement of Larkin's entry and that he, as guardian, etc., be allowed to submit final proof, etc. Your office, September 20, 1905, directed the register and receiver to order a hearing. The same was duly had before a commissioner, November 15, 1905. Both parties were present. The register and receiver, on the testimony given, recommended that Dellage's entry be canceled, Larkin's reinstated, and the guardian be allowed to submit

final proof. On appeal, your office, May 28, 1905, affirmed that action, and Dellage's further appeal brings the case here.

The testimony taken at the hearing has been carefully reviewed. The same is substantially set forth in the decision complained of. The testimony sustains the allegation in the guardian's petition above referred to; indeed, it goes beyond those allegations, and establishes most remarkable conditions.

It clearly shows that Larkin, the entryman, established his residence on the land as early as 1894, and that he continuously lived thereon and still lived there at date of hearing; that his improvements were even better than the petition alleged.

At the hearing it was clearly and conclusively shown, from the testimony of some twelve or fourteen witnesses, neighbors and acquaintances of the entryman, that he had been mentally irresponsible since about 1902 or 1903; that several of these witnesses did all they could to induce him to make final proof before the expiration of the seven years, and were unsuccessful; that the entryman's expressed reasons for not doing so showed that he was insane; utterly incompetent to appreciate the necessity of making the proof, his explanations being preposterous and silly.

The only testimony tending to show the contrary was that given by the present entryman, Dellage, who stated that he only considered Larkin to be "ignorant and bull-headed, without an education and the ways of doing business throughout the country." Dellage's two witnesses, introduced to show Larkin's sanity, testified to nothing material.

Larkin seemed to know that Dellage had built a shack on the land, but was mentally incompetent to know why he had done so. Dellage knew that Larkin had lived on the land for some ten years, and that he still lived there; knew the character of the improvments and the value of the land (about $2500). Dellage knew, or might have known, that Larkin was insane and that the reason final proof was not made in seven years was because of such insanity.

Dellage, it appears, overheard a conversation between two gentlemen to the effect that Larkin's time for submitting final proof had about expired; through an attorney Dellage learned the date when it did expire, and soon thereafter filed an affidavit of contest, alleging such default. The affidavit of contest was rejected by the local officers, the seven years having expired (Jackson *v.* Jackson, 1 L. D., 112). Thereupon Dellage applied to enter the land. His application was rejected and he appealed.

Larkin's entry was canceled January 5, 1905, by reason of the government's proceedings, and eight days thereafter Dellage's application was allowed.

The contention made in the appeal is, in substance, that Larkin's

entry was properly and necessarily canceled because he failed to make proof within seven years from date of entry, and that further time can not now be given him to submit final proof, because there is an adverse claim, being no less than an entry of record, regularly and legally allowed; that if the entry of Larkin were reinstated and proof submitted, the same, under the established rules, would have to be referred to the Board of Equitable Adjudication for confirmation, and that such reference could not be made under the statutes giving such powers (sections 2450 to 2457, R. S.) because there is an "adverse claim." In the main, these positions are correct. Neither your office nor the local office understood the facts in the case as brought out at the hearing, when Larkin's entry was canceled. He failed to make proof and failed to take any action when notice of his default was served on him. Without knowing the facts, of which your office in the nature of things had no means of ascertaining, the action directing the cancelation of Larkin's entry was proper.

Appellant's position is based upon the assumption that he was acting in good faith. This, the Department is not willing to concede. The facts in the case forbid it. Dellage knew that Larkin had lived on the land more than nine years; that his residence had been continuous, his improvements valuable, and that some 130 acres of the land had been cultivated. He knew, or might have known (and it is believed he actually did know), that Larkin's failure to make final proof was because of mental impairment. Notwithstanding this knowledge, he sought to take advantage of the old entryman's feeble condition and obtain a tract of land, the value of which had been greatly enhanced by years of toil and labor.

He obtained his first hint of the situation by overhearing a conversation between two gentlemen, who in his presence and hearing (as shown by the evidence) stated that Larkin's seven years had nearly expired and that he was then mentally unbalanced. From that time on, Dellage, by the aid of learned counsel, was working to obtain benefits as the outcome of his neighbor's lamentable misfortune—a misfortune most pitiable, calling, as it has been and is doing, for the most tender ministration of modern civilization, and in this case for the sympathy and the assistance of many neighbors, who seek to prevent the perpetration of a serious wrong.

There is not one element of good faith in all Dellage's efforts. There can be no good faith in such a wrongful attempt. To be sure, he was allowed to make entry of the land, but in consideration of the subsequently discovered facts, he will not, for reasons given, be allowed to reap the fruits of his uncharitable deed in securing that entry.

It is therefore directed that Dellage's entry be canceled. That will

dispose of the adverse claim. Larkin's entry will then be reinstated and the guardian will be allowed to submit final proof.

The entry will then be submitted to the Board of Equitable Adjudication for confirmation.

The action appealed from is affirmed.

CROW INDIAN LANDS—RESIDENCE—ACT OF JANUARY 8, 1907.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 17, 1907.

Register and Receiver, Billings, Montana.

SIRS: The act of Congress approved January 8, 1907 (Public—No. 3), provides:

> That the homestead entrymen on lands which were heretofore a part of the Crow Indian reservation, within the counties of Yellowstone and Rosebud, in the State of Montana, opened under the act of April twenty-seventh, nineteen hundred and four, be, and they are hereby, granted an extension of time in which to establish their residence upon the lands so opened and filed upon until the fifteenth day of May, nineteen hundred and seven: *Provided, however*, That this act shall in no matter affect the regularity or validity of such filings, or any of them, so made by the said settlers on the lands aforesaid; and it is only intended hereby to extend the time for the establishment of such residence as herein provided, and the provisions of said acts are in no manner to be affected or modified.

This act is effective as to all entries made of said lands prior to November 15, 1906.

Soldiers and sailors who filed declaratory statements under section 2309 of the Revised Statutes, come within the spirit of the relief granted by the act, and where such declaratory statements were filed prior to November 15, 1906, are entitled to the extension both as to settlement and entry.

Very respectfully,

W. A. RICHARDS,
Commissioner.

Approved:
E. A. HITCHCOCK, *Secretary.*

UINTAH INDIAN LANDS—MINING CLAIMS—ACT OF MAY 27, 1902.

RAVEN MINING COMPANY.

In the exercise of the right granted the Raven Mining Company by the act of May 27, 1902, to locate, under the mining laws, one hundred mining claims upon the unallotted lands of the Uintah and White River tribes of Ute Indians, the company is not confined to the lands formerly embraced within its lease.

Secretary Hitchcock to the Commissioner of the General Land Office.
(F. L. C.) *January 18, 1907.* (F. W. C.)

Several protests having been filed in this Department against the patenting of mineral locations made by the Raven Mining Company in the former Uintah Indian reservation in the State of Utah, under the provisions of the act of May 27, 1902 (32 Stat., 245, 263), the matter was orally heard before the Assistant Attorney-General for this Department on May 8, 1906, after due notice to the several protestants and the mining company. No decision was rendered in the matter at the conclusion of the hearing for the reason that the question presented was strongly urged on the part of the protestants to be similar to that raised in connection with the location made by Asmus Boysen upon lands within the Wind River reservation in the State of Wyoming, under the second article of the amended agreement with the Shoshone and Arapahoe tribes of Indians occupying the said reservation. The amended agreement under which said selection was made provided—

> That nothing herein contained shall impair the rights under the lease to Asmus Boysen, which has been approved by the Secretary of the Interior; but said lessee shall have for thirty days from the date of the approval of the surveys of said land a preferential right to locate, following the government surveys, not to exceed six hundred and forty acres in the form of a square, of mineral or coal lands in said reservation; that said Boysen at the time of entry of such lands shall pay cash therefor at the rate of ten dollars per acre and surrender said lease and the same shall be canceled.

Under this agreement it was contended on the part of the United States that Boysen's selection in making this location must be confined to the lands formerly embraced within his lease made with said Indians. He sought to make his location from lands without the limits of said lease and later filed a bill in equity to enjoin the Indian agent and superintendent from interfering with him in making his location from lands within said Indian reservation, to which demurrer was filed by the United States, which was overruled and a temporary injunction granted. Upon appeal to the United States circuit court of appeals for the eighth circuit, the decree of the circuit court below was affirmed, and this Department has been recently advised by letter from the Attorney-General, dated the 9th instant, enclosing copy of the opinion of the circuit court of appeals, that upon careful examination of said decision and the entire case he is of opinion that the government can not hope to obtain a reversal, and that it would be inadvisable to take an appeal to the supreme court. It follows, therefore, that, so far as the Boysen case is concerned, no further action will be taken on the part of the United States, and the adjudication heretofore had therein may be considered final.

The act of May 27, 1902, *supra*, under which the locations in question were made by the Raven Mining Company, provides:

> That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: *Provided*, That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre: *And provided further*, That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease; but any person or company having so obtained such approved mineral lease or such permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are restored to the public domain as aforesaid, shall have in lieu of such lease or permit the preferential right to locate under the mining laws not to exceed six hundred and forty acres of contiguous mineral land, except the Raven Mining Company, which may in lieu of its lease locate one hundred mining claims of the character of mineral mentioned in its lease; and the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians. And the sum of seventy thousand and sixty-four dollars and forty-eight cents is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid to the Uintah and the White River tribes of Ute Indians, under the direction of the Secretary of the Interior, whenever a majority of the adult male Indians of said tribes shall have consented to the allotment of lands and the restoration of the unallotted lands within said reservation as herein provided.

It will be noted that provision is first made for allotment of lands to the Indians and for the restoration to the public domain of the lands remaining unallotted within the reservation on October 1, 1903. With regard to the disposition of the restored lands, which are, as before stated, the unallotted lands, persons entering the same under the homestead law were to be required to pay for the same at the rate of $1.25 per acre. The act further provided that nothing therein contained should impair the rights of any mineral lease which had been approved by the Secretary of the Interior, or any permit theretofore issued by direction of the Secretary to negotiate with said Indians for a mineral lease, and that any person or company having so obtained such approval of a mineral lease or such permit to negotiate with the Indians for a mineral lease on said reservation, should, in lieu of such lease or permit, have a preferential right to locate, under the mineral laws, not to exceed 640 acres of contiguous mineral land at any time up to thirty days before said unallotted

lands were to be restored to the public domain, "except the Raven Mining Company, which may in lieu of its lease locate one hundred mining claims of the character of mineral mentioned in its lease." The proceeds of the sale of the lands so restored to the public domain were to be applied, first, to the reimbursement of the United States for moneys advanced to the Indians to carry into effect the provisions of said act, and the remainder, under the direction of the Secretary of the Interior, was to be used for the benefit of said Indians.

The time for opening the unallotted lands in the Uintah reservation, as provided for in the act of May 27, 1902, was extended by act of March 3, 1903 (32 Stat., 982, 998), again by act of April 21, 1904 (33 Stat., 189), and finally to the first of September, 1905, unless the President should determine that the same might be opened at an earlier date, by act of March 3, 1905 (33 Stat., 1048, 1070). By this latter act it was provided:

> That the Raven Mining Company shall, within sixty days from the passage of this act, file for record, in the office of the recorder of deeds of the county in which its claims are located, a proper certificate of each location; and it shall also, within the same time, file in office of the Secretary of the Interior, in the city of Washington, said description and a map showing the locations made by it on the Uintah reservation, Utah, under the act of Congress of May twenty-seventh, nineteen hundred and two (Statutes at Large, volume thirty-two, page two hundred and sixty-three); and thereupon the Secretary of the Interior shall forthwith cause said locations to be inspected and report made, and if found to contain the character of mineral to which said company is entitled by the act of Congress aforesaid and that each of said claims does not exceed the size of a regular mining claim, to wit, six hundred by fifteen hundred feet, he shall issue a patent in fee to the Raven Mining Company for each of said claims.

Under this latter act the Raven Mining Company duly filed in this Department a map showing the locations made by it on the Uintah reservation, under the act of May 27, 1902. An agent from your office was directed to inspect and report thereon, which report showed the locations made contained mineral of the character mentioned in the company's lease, and upon consideration of said report your office was of opinion that before patent should issue the company should make payment for the lands located at the rate required in the location of other like mineral lands. This demand for payment the company resisted and its appeal from the decision of your office making the same was considered in departmental decision of December 19, 1905 (34 L. D., 306), in which the position taken by your office was sustained. Payments were thereafter made, as demanded, but prior thereto protests had been filed alleging invalidity in the locations upon the ground that the great majority of them were upon lands not embraced within the limits of the lease formerly made with said Indians, and it was upon these protests that the matter was heard before the Assistant Attorney-General.

As before stated, when the case was on hearing it was earnestly urged by protestants that the grants to Boysen and the Raven Mining Company were the same. The two grants were lined up in parallel columns for comparison and, barring what was then claimed to be certain minor immaterial differences of expression, the two were claimed to be identical.

Since the decision in the Boysen case, favorable to Boysen, what is known as the Yetter protest has been withdrawn by telegram. On the part of the W. O. Butler protest, however, it is now urged that a decision upon the Raven Mining Company's locations is unaffected by the decision in the Boysen case, for the reason that the provisions in the act of March 3, 1905 (33 Stat., 1016), which gave to Boysen a preferential right to locate not to exceed 640 acres of mineral or coal land, specifically provided that the location might be made "in said reservation," thus showing on the face of the proviso that he might go without the territory covered by his lease, while no such affirmative declaration appears in the act of 1902, hereinbefore quoted, under which the Raven Mining Company's locations were made, and in this connection reference is made to that part of the decision of the circuit court of appeals wherein it is said:

> Clearly enough it is apparent on the face of the proviso itself that the leasehold interst of the appellee was to be intercepted and ended, and in lieu thereof the preferential right was accorded to him to select anywhere within the ceded territory 640 acres.

The act of 1902 provided for the termination of the Raven Mining Company's lease, so that the leased land became an integral part of the unallotted lands. As hereinbefore stated, the act of 1902, after providing for the allotments to be made to Indians specifically provided for the restoration to the public domain of the *unallotted lands*, and for their disposition, granting preferential rights to claims therein, including those under consideration.

After a most careful consideration of the entire matter, especially in the light of the decision of the circuit court of appeals in the Boysen case, the Department is clearly of opinion that the right granted the Raven Mining Company was not limited in its exercise to the lands formerly embraced within its lease. This is without consideration of the fact that in the Boysen case the lease had been actually canceled before the passage of the act granting him a preferential right of selection, while in the case of the Raven Mining Company its lease was in existence, large sums of money had been expended on account thereof, and large royalties had accrued to the Indians by reason of mining operations conducted thereunder. Also, that on February 17, 1905, this Department reported favorably, on reference from the Chairman of the Senate Committee on Indian Affairs, upon an amendment intended to be proposed by Mr. Teller to H. R. Bill

17474, making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June 30, 1906, and for other purposes, by which amendment it was proposed to confine the Raven Mining Company in its locations made under the act of 1902, to that portion of the reservation covered by its lease with the Indians, which amendment was not adopted in the passage of said bill, March 3, 1905, wherein provision is made for the patenting of the Raven Mining Company's locations, in the language hereinbefore quoted.

The protests against the locations made by said company are therefore denied.

Herewith are the protests, together with the record of the hearing had before this Department, for the files of your office.

PRACTICE—NOTICE—TRANSFEREES AND INCUMBRANCERS—RULES 8½ AND 102.

CHARLES H. BABBITT,

Rule 8½ of the Rules of Practice, providing that transferees and incumbrancers, by filing notice of their interest, become entitled to the same notice of "any contest or other proceeding" affecting the entries under which they hold as is required to be given the original claimant, is not limited to contest cases or causes where there are adverse parties, but is equally applicable in an *ex parte* proceeding.

Transferees or incumbrancers, in filing notice of their interest under rule 8½ of the Rules of Practice, should furnish satisfactory evidence of their real interest in the premises, agreeably to the requirements of rule 102.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 19, 1907.* (C. J. G.)

An appeal has been taken by Charles H. Babbitt, attorney, from the decision of your office of December 18, 1906, declining to accept letters of appearance as filed by him in behalf of The C. A. Smith Timber Company of Minneapolis, Minnesota.

Under date of December 11, 1906, the said attorney executed and filed in your office an affidavit entitled, "Affidavit disclosing interest in lands," in which he set forth that he had been retained by said company and authorized to represent it before the land department; "that he is informed by his said client, and he verily believes, that said company has purchased, in whole or in part," from the selectors the lands embraced in some sixty-nine selections, in the Roseburg, Oregon, land district, made under the act of June 4, 1897 (30 Stat., 36), and now pending in the General Land Office for adjudication; that he has filed in said office a letter of appearance on behalf of said company in each of said selections for the purpose of entitling

him, as counsel, to receive notice of all orders issued, requirements made, and action taken, in respect to said selections, to the end that the rights and interests of his client may be protected and conserved; that he executes and files said affidavit for the purpose of disclosing the interest of The C. A. Smith Company, in whole or in part, in the lands embraced in the several selections enumerated, to the end that the letters of appearance filed as aforesaid may be received and "treated in such manner as the Rules of Practice provide and in accordance with official regulations governing matters of the kind."

Replying to the attorney's letter transmitting said affidavit, your office, in the decision under consideration, stated—

that it does not appear from the records in said selections that the C. A. Smith Timber Company is interested either as transferee, or in any other way, in the said selection.

If, as stated in your affidavit, the C. A. Smith Timber Company is the owner of the lands embraced in the selections in question, as transferee from the selector under the act of June 4, 1897 (30 Stat., 36), and as such transferee desires notice of action taken relating to the said selection, the company is required to proceed under rule 8½, Rules of Practice, in order to entitle them to notice as desired.

As the matter now stands before this office, the C. A. Smith Timber Company is not a party of record as relating to the said selections, and this office must decline to accept your appearance as entered for the said company.

In his appeal here the attorney states that about two and a half years ago he was retained by The C. A. Smith Timber Company—

to represent it in matters before the Department pertaining to public lands in which it may be or become interested.

November 21, 1906, I received from the secretary of said company a list of lands in the Roseburg land district, Oregon, accompanied by a letter stating that the company was interested in the lands described in said list, having purchased or contracted to purchase the same in whole or in part from the record claimants or their transferees, and requesting me to examine the records of the General Land Office relating thereto and "kindly look after our interests in connection with the lands."

Pursuant to the foregoing the attorney was proceeding to examine the records of your office relating to the lands embraced in the list furnished him, when, he says, he was unofficially informed that in order to entitle him to be recognized before your office as agent or attorney for the transferee in such cases, it would be necessary for him to make or cause to be made some formal showing of the interest of his clients in the lands other than that evidenced by the filing of mere letters of appearance in their behalf as transferee. He accordingly furnished the affidavit hereinbefore referred to, which your office has held to be insufficient. The attorney contends, however:

1. Rule 8½ of the Rules of Practice has no application to matters of the character here presented.

2. The showing of interest contained in my letters of appearance and the accompanying affidavit is sufficient to entitle me to receive for my client the notification and information requested therein.

Rule 8½ of the Rules of Práctice reads as follows:

Transferees and encumbrancers of land, the title to which is claimed or is in process of acquisition under any public-land law, shall, upon filing notice of the transfer or encumbrance in the district land office, become entitled to receive and be given the same notice of any contest or other proceeding thereafter had affecting such land which is required to be given the original claimant. Every such notice of a transfer or encumbrance must be forthwith noted upon the records of the district land office and be promptly reported to the General Land Office, where like notation thereof will be made.

It is true, as claimed, that this rule is not mandatory, but at the same time, to entitle parties to its benefits, it is incumbent upon them to make known the transfer or encumbrance under which they claim. That is made a condition precedent to receiving notice of "any contest or other proceedings" affecting the lands involved, and where their interest is not thus made known transferees or encumbrancers may not plead want of notice. The officers of the land department are not, in the nature of things, required to search the proper offices to ascertain whether any transfer or encumbrance of the land has been made. Cyrus H. Hill (5 L. D., 276); William W. Waterhouse (9 L. D., 131); Van Brunt *v.* Hammon *et al.* (9 L. D., 561); John J. Dean (10 L. D., 446); Otto Soldan (11 L. D., 194); Robinson *v.* Knowles (12 L. D., 462); and Charles C. Ferry (14 L. D., 126). However, under Rule 8½ transferees or encumbrancers who have given notice of their interest become entitled to notice of every action affecting the entries under which they hold. The rule says such parties shall, upon filing notice of the transfer or encumbrance, become entitled to receive and be given notice of "any contest or other proceeding" affecting the land. This language appears to be sufficiently broad to include a case like the present one, as it is not limited, as claimed, to contest cases or causes where there are adverse parties. But even if it were so limited, the attorney in his argument brings himself within the rule. He says:

It is not asked, nor intended, by the letters of appearance which I have presented in the cases here under consideration that the C. A. Smith Timber Company shall be made an actual party to proceedings relating to them, but merely that notice or information may be given it from time to time of the action taken, or requirements made respecting such entries, to the end that it may be in position in the event of favorable action to complete the acquirement of title; to urge compliance by its vendors with requirements made; or, in the event of contest or other adverse proceeding against an entry, to see that its vendor makes a proper defense, and to enable it, should the entryman make default, to intervene and protect its own interest in such manner as may be considered proper and necessary, either by presenting formal application to be made a party to the case, or by proceeding to recover purchase money paid.

The request made of your office to be notified of "all orders issued, requirements made, and action taken," with respect to the selections enumerated, is based upon an alleged interest in The C. A. Smith Timber Company by purchase, or contract to purchase, from the various selectors. The notice as to this alleged interest might just as properly have been filed in the district land office, and the fact that the cases are not now in that office can make no material difference. for the rule requires that such notice shall be properly reported to your office. While it would perhaps not be entirely correct to say that Rule 8½ consitutes the only recognized method by which transferees or encumbrancers may insure receiving notice, yet it furnishes a sure, simple and definite plan, and generally in the interest of regular and orderly procedure should be followed and enforced. It is manifestly to the best interests of such parties to promptly file notice of the transfers or encumbrances under which they hold. Such course would undoubtedly tend to facilitate the prosecution of the rights of parties and possibly might avoid complications. The rule is of comparatively recent promulgation (June 17, 1901, 30 L. D., 622), prior to which there was no specific recognition in the Rules of Practice of transfereees and encumbrancers in the matter of notice. But, in the case of Van Brunt *v.* Hammon *et al.*, *supra*, referring to the case of American Investment Company (5 L. D., 603), it was said:

> In that case it was held that an assignee or mortgagee may file in the local office, under oath, a statement showing his interest in any pending entry, and have the same noted on the records of the office; and thereafter he will be entitled to notice of any adverse action in reference to such entry.
>
> If this rule were strictly followed in every case of sale and transfer before patent issues, the transferee would always be in a position to require service of notice whenever the entry of the claimant from whom he purchased is attacked and thus secure himself the right to be heard in defense of his interests. It is a wise provision, intended for the protection of purchasers prior to patent, by securing to them notice of any proceedings affecting their interests, and it would be well if all such purchasers would take advantage of it. Otherwise they must take the risk of having cases in which they are interested, heard and finally determined without their knowledge.

While transferees and incumbrancers who file notice of their interests are thus recognized as being entitled to notice of any action affecting the entries under which they claim, still the sufficiency of the showing to entitle them to such notice presents another and different question. Rule 102 of the Rules of Practice, which is somewhat analogous to the one under consideration, provides:

> No person not a party to the record shall intervene in a case without first disclosing on oath the nature of his interest.

While the attorney here disclaims any intention to ask by his present application that his client be made an actual party in these cases, yet he does invoke a similar practice as to notice, and in disclosing

his client's interest should be governed by practically similar rules. The C. A. Smith Timber Company is not a party to the record in the cases enumerated, not having heretofore filed notice of its claimed interest in said cases. In the case of Elmer E. Bush (9 L. D., 628), it was said, with respect to rule 102 of practice:

> The wording of the rule would seem to require that the affidavit should be made by the party in interest in person, or in case of corporations by the proper officer. If an oath made by an attorney could be accepted in any case as a compliance with that rule, it could only be after a full statement of his means of knowledge and of such facts as would show affirmatively and positively that the party seeking to intervene had at that time a present interest in the subject-matter involved.

See also case of Julia E. Quironet (11 L. D., 365).

In the case of Hiram Brown *et al.* (13 L. D., 392), it was said:

> A stranger to the record is not entitled to be heard as an intervener, without first disclosing *under oath* the nature of his interest. United States *v.* Scott Rhea (8 L. D., 578).
>
> A general statement even under oath, by the intervener's attorney, that said intervener is the present owner of the land can not be accepted as a satisfactory compliance with rule 102 of Rules of Practice.

In case of Romance Lode Mining Claim (31 L. D., 51), it was said:

> A transferee or mortgagee claiming under an entry, if his interest or claim is known to the land department, is entitled to notice of any action by the government affecting the entry, whether the fact of his interest is made known to the land officers by a statement under oath or in some other manner. Before he can be recognized as a party to the controversy, however, he is required to disclose on oath the *nature* of his interest.

This question of notice to strangers to a record is one largely within the discretion of your office to be exercised of course in accordance with existing regulations. The matters set out above clearly imply that to entitle claimed transferees or encumbrancers to notice, even though not applying to become parties, something more is required than such a showing as is made herein. The attorney files a general statement of his own, based on information alleged to have been furnished him by the secretary of The C. A. Smith Timber Company, to the effect that said company is interested in lands embraced in certain enumerated selections now pending in your office for adjudication. Nothing is furnished from the company, the attorney merely stating that he received from the secretary a list of lands accompanied by the statement of the secretary that the company was interested in said lands, "having purchased or contracted to purchase the same in whole or in part from the record claimants or their transferees." There is nothing to indicate which of the selections enumerated have actually been purchased by the company or which they have merely contracted to purchase. Nor

again, which of the selections have been purchased in whole and which in part. Altogether the information furnished is of too indefinite a nature upon which to act intelligently, or to justify the notification requested in these numerous cases. There ought to be a satisfactory disclosure by the company in each one of these cases of its real interest in the premises. And this requirement does not carry with it the slightest element of reflection, or discourtesy to, the attorney in question; but is merely a reasonable demand rendered necessary by the large and varied interests with which the land department has to deal, and frequently involving too a multiplicity of parties.

The action of your office herein is affirmed.

SECOND HOMESTEAD ENTRY—SEC. 2, ACT OF JUNE 5, 1900, AND SEC. 2, ACT OF JUNE 15, 1880.

BJORN E. HAUGEN.

Purchase under section 2 of the act of June 15, 1880, exhausts the homestead right; and as such purchase is not the equivalent of commutation under the provisions of section 2301 of the Revised Statutes, the purchaser is not entitled to make a second entry under the provisions of section 2 of the act of June 5, 1900, which grants such privilege to any person who had theretofore made an entry under the homestead laws and commuted the same under the provisions of said section 2301.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 21, 1907.* (A. W. P.)

An appeal has been filed on behalf of Bjorn E. Haugen from your office decision of February 26, 1906, holding for cancelation his homestead entry No. 33669, made April 17, 1905, for the SW. ¼, Sec. 23, T. 149 N., R. 77 W., Devils Lake, North Dakota, land district.

It appears from an examination of this case that Haugen's homestead affidavit supporting the above application contained the statement "that I have not heretofore made any entry under the homestead laws, except the SE. ¼ of Sec. 6, Twp. 147, Range 53, N. Dak., which I commuted prior to June 5, 1900;" and that as the records of your office failed to show an entry made for said land in the name of Bjorn E. Haugen, you directed the local officers, by letter of June 2, 1905, to call upon him to identify his former entry. In compliance therewith the local officers, by letter of July 13, 1905, transmitted Haugen's affidavit, wherein he alleged that he made entry as stated in his affidavit, but made it in the name of Brant Ellingson; that he changed his name for the reason that there was another Ellingson who was continually getting his mail; and that affiant is the iden-

tical person who now goes by the name of Bjorn E. Haugen and formerly by name of Brant Ellingson.

Upon receipt of this identification affidavit your office by decision of August 23, 1905, directed that Haugen be called upon to show cause why his homestead entry No. 33669 should not be canceled for illegality, for the reason that:

> The records of the office show that Brant Ellingson made H. E. No. 1044, April 2, 1878, for SE. ¼, Sec. 6, T. 147 N., R. 53 W., Fargo, North Dakota, and purchased the same under the second section, act of June 15, 1880 (21 Stat., 237), Jan. 21, 1881, cash certificate No. 2057, and patent issued thereon May 15, 1883.
>
> It appears from the foregoing that Haugen has as ("Brant Ellingson") exhausted his homestead rights. The act of June 5, 1900 (31 Stat., 267), makes no provisions for parties who have perfected a homestead entry under the act of June 15, 1880 (21 Stat., 237), whereby they may make a second homestead entry.

In compliance therewith the local officers, by letter of December 21, 1905 transmitted Haugen's showing, wherein he urged substantially that as a matter of right he had never exhausted his homestead right, and that he comes squarely within the provisions of the act of June 5, 1900, *supra*, and under that act and under the laws he is entitled to the benefit thereof; that the act of June 15, 1880, *supra*, was a remedial act, and only referred to the amount required as payment for land within the prescribed limits and has no reference to anything else; that it does not refer to the manner or method of making proof, which accordingly must have been made pursuant to the regulations of section 2301 of the Revised Statutes; that in the absence of that section he could not have made such commutation proof; and that if the act of June 5, 1900, *supra*, does not cover his case by direct language, it certainly does by implication.

By decision of February 26, 1906, upon consideration of his showing, your office held Haugen's entry for cancelation for illegality, on the ground that:

> The department has ruled that a purchase under section 2 of the act of June 15, 1880 (*supra*), exhausts a further right of entry under the homestead laws. Joseph H. Nixon (13 L. D., 257), John Lindell (14 L. D., 616).

The case is now before the Department upon the appeal of Haugen. The matters embraced in the showing before your office are again set out, and it is further urged that, while the decisions cited by your office support the doctrine therein announced, yet both were rendered prior to the passage of the act of June 5, 1900, *supra*, and are not therefore directly in point.

As to the latter contention it is sufficient to state that the Department has uniformly held that such a purchase under section 2 of the act of June 15, 1880, *supra*, exhausted the homestead right. See Samuel S. Montgomery (25 L. D., 327); John M. Rankin (28 L. D., 204); and John M. Longyear (32 L. D., 348). Having thus ex-

hausted his homestead right, Haugen's present entry must be canceled, unless the right to make such a second homestead entry was conferred by subsequent legislation.

The right to make second or additional homestead entries upon certain conditions is conferred by the act of June 5, 1900, *supra;* and also by the act of April 28, 1904 (33 Stat., 527), which does not repeal the provisions of the former act, but modifies them only to the extent of imposing the additional restrictions therein named, and with this limitation the two acts are construed together (Cox *v.* Wells, 33 L. D., 657). The later act makes no reference to persons who have completed a prior entry for the full area allowed by law, either by commutation under the provisions of section 2301 of the Revised Statutes, or otherwise. The right of such persons generally to make another entry depends entirely upon section 2 of the act of June 5, 1900, *supra.* By the terms thereof the right to make a second homestead entry by those who have previously made and completed an entry for the full area of one hundred and sixty acres is specifically limited to those persons who perfected such entry under the provisions of section 2301 of the Revised Statutes. Unless Haugen falls within the class designated, it is clear he is not entitled to make a second homestead entry. It is equally clear that unless purchase made under the act of June 15, 1880, *supra*, is identical with commutation under the provisions of section 2301, *supra*, there is no warrant for so construing the language of the act of June 5, 1900, *supra*, as to extend the privilege thereby granted to such purchasers.

It is urged by counsel for Haugen, however, that such purchase was a commutation, and that proof therefor must have been made pursuant to the regulations of section 2301, *supra.* But this contention fails when we consider the essential elements which go to make up the commutation proof required by said section 2301, at the time Haugen perfected his said entry by purchase. In addition to payment of the sum named, proof of settlement upon and cultivation of the land "as required by law, granting preemption rights," was also necessary. This was not required by the act of June 15, 1880, *supra.* In fact, no showing as to residence, improvement, cultivation, or non-alienation was demanded thereunder. It was only necessary to show that the entryman was duly qualified; that the land was properly subject to homestead entry; that such entry had been made therefor prior to the passage of the act by the applicant or one through whom he claims; and the absence of intervening adverse rights. In the circular of instructions relating to this act, approved October 9, 1880 (1 C. L. L., 497), it is said: "Applications to purchase under the second section will be made . . . . as in the case of ordinary cash entry." "Final homestead proof not being

required in these cases, no advertisement or notice of intention to make final proof is necessary and no final homestead fees are to be paid or collected." These same instructions were repeated in several subsequent circulars of the General Land Office. In this connection it may be observed that even the actual cancelation of the original entry was no bar to such a purchase in the absence of a valid intervening right (John R. Choate, 7 L. D., 281, and cases therein cited).

In the opinion of the Department, a purchase made under the provisions of the act of June 15, 1880, *supra*, does not either actually or in effect amount to commutation of the original entry, and Haugen is not, therefore, by virtue of any provision of the act of June 5, 1900, *supra*, entitled to make a second homestead entry.

The judgment of your office is accordingly affirmed.

COAL LANDS—WITHDRAWAL—RIGHTS EXISTING AT DATE OF WITHDRAWAL.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 21, 1907.

Registers and Receivers, United States Land Offices.

SIRS: January 15th the Secretary issued the following order:

By direction of the President, all orders heretofore issued withdrawing public lands from entry under the coal-land laws are hereby amended as follows:

Nothing in any withdrawal of lands from coal entry heretofore made shall impair any right acquired in good faith under the coal-land laws and existent at the date of such withdrawal.

The above order merely permits the completion of all filings made prior to the withdrawal, and which had not expired at the date thereof. These filings must be completed within the prescribed time, less that covered by the withdrawal. It also permits all persons who had within sixty days prior to such withdrawal opened and improved a coal mine upon public surveyed lands, and who were prevented from filing their claims because of such withdrawal, to file declaratory statements. Claims upon unsurveyed lands within such withdrawals must be placed of record within sixty days after the filing of the plat of survey in the local land office. In no other case will any person be permitted to initiate a filing or make an entry upon such lands.

Any person seeking to perfect a right alleged to have been existent at the date of the withdrawal must, in addition to the showing now required by the regulations, submit his affidavit or that of his duly authorized agent setting forth specifically the conditions under

which the claim was made and the different steps taken to perfect the same.

You will receive all the proofs submitted in support of any claim asserted under the above order, placing any money accompanying the same to the credit of the unearned fee account. But you will not issue final certificate on any claim asserted under the above order except upon the report of a special agent showing full compliance with law. In order that the agent may be enabled to make such report, you will at the time the offer to purchase is made furnish such agent a memorandum or statement of the claim and thereafter await his return.

In any case sought to be perfected under the above order which does not come within the above requirements, you will reject the same with the right of appeal to this office. In such cases, notice to the special agent will not be required.

You will follow, so far as applicable, the circular of December 7, 1905, defining the action to be taken on final proofs generally. You will give the utmost publicity hereto, and advise all persons who had existing coal declaratory statements pending at the date of the withdrawals.

Very respectfully, W. A. RICHARDS,
Commissioner.

Approved:
E. A. HITCHCOCK, *Secretary.*

INDIAN ALLOTMENTS—NOTICE TO COMMISSIONER OF INDIAN AFFAIRS OF ACTION AFFECTING.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 21, 1907.

Registers and Receivers, United States Land Offices,

SIRS: On November 27, 1906, the Secretary of the Interior directed this office, in order to better safeguard the rights of Indian allottees, to instruct the local officers to serve copies of any action looking to the cancelation of Indian allotments not only on the Indian allottees but on the Commissioner of Indian Affairs as well.

This direction, it is understod, does not relate to allotments made in severalty of tribal lands, action in regard to which is always directed by the Department, on the recommendation of the Commissioner of Indian Affairs, but to allotments made to Indians on the public lands.

You will, therefore, when any action is taken by this office which requires such an allottee to take any action whatever in regard to his allotment, notify both the party in interest and the Commissioner of Indian Affairs, at the same time, by registered letters, of the action required, and furnish to each a copy of the letter of this office making the requirement.

With your report you will forward proper evidence of service of such notice upon both the Commissioner of Indian Affairs and the party in interest.

Very respectfully,

W. A. RICHARDS,
Commissioner.

Approved:
E. A. HITCHCOCK, *Secretary.*

SHOSHONE AND WIND RIVER INDIAN LANDS—RESIDENCE—ACT OF JANUARY 17, 1907.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 25, 1907.

Register and Receiver, Lander, Wyoming.

SIRS: The act of Congress approved January 17, 1907 (Public—No. 16), provides:

> That homestead entrymen on lands formerly embraced in the Wind River or Shoshone Indian reservation, in Wyoming, which were opened to entry under the provisions of the act approved March third, nineteen hundred and five, shall have six months after the date of filing upon their lands, or until May fifteenth, nineteen hundred and seven, to establish residence upon the lands entered by them.

This act is effective as to all entries made of said lands prior to November 15, 1906.

Soldiers and sailors who filed declaratory statements under section 2309 of the Revised Statutes come within the spirit of the relief granted by the act, and where such declaratory statements were filed prior to November 15, 1906, are entitled to the extension both as to settlement and entry.

Respectfully,

W. A. RICHARDS,
Commissioner.

Approved:
E. A. HITCHCOCK, *Secretary.*

PUETZE *v.* MOELLER.

Motion for review of departmental decision of October 19, 1906, 35 L. D., 256, denied by Secretary Hitchcock, January 30, 1907.

OKLAHOMA LAND—PASTURE RESERVE NO. 3—PREFERENCE RIGHT OF LESSEE—ACT OF JUNE 28, 1906.

WILLIAM R. RAY.

The provision in the act of June 28, 1906, granting to persons then in possession of lands in Pasture Reserve No. 3, under leases approved by the Secretary of the Interior, a preference right to purchase the same, has reference only to the original lessee, and can not be extended to include sublessees.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 31, 1907.* (C. J. G.)

An appeal has been filed by William R. Ray from the decision of your office of October 13, 1906, sustaining the action of the local officers in rejecting his application to purchase under the act of June 28, 1906 (34 Stat., 550), the SW. ¼ of Sec. 3, T. 1 S., R. 8 W., in Pasture Reserve No. 3, Lawton, Oklahoma.

Said act, entitled "An act giving preference right to actual settlers on pasture reserve numbered three to purchase land leased to them for agricultural purposes in Comanche County, Oklahoma," provides, among other things—

> That persons who are now in possession of land under leases approved by the Secretary of the Interior on pasture reserve numbered three . . . be given a right to purchase said lands . . . said lands to be appraised without regard to any improvements that have been placed thereon, except such as are required by the provisions of said leases, and the said lessee to have the privilege to purchase at its appraised value the amount of land covered by his lease within sixty days after notice of said appraisement.

The circular instructions of September 1, 1906 (35 L. D., 139), issued under said act, prescribe in paragraph 3 thereof that in applying to purchase—

> the lessee will be required to swear from his own personal knowledge that the applicant was on June 28, 1906, in possession of all of the lands described in his application, under a valid, unexpired, uncanceled, and unforfeited lease theretofore approved by the Secretary of the Interior, and that no part of said lands have been subleased or sublet in any manner whatever by said applicant to any other person without the proper consent of the Indians interested or the approval of the Secretary of the Interior.

The application of Ray was rejected for the reason that his name does not appear on the list of lessees of lands in pasture reserve No. 3, and the land applied for is shown by said list to have been leased to one Yokly Sowers. The applicant admits that he is what is called a

sublessee, the original lease not having been made to him, but claims the right to purchase by reason of the alleged fact that he was "in possession" of the land at date of the act of June 28, 1906, and has continued in possession. In the Sowers lease it was provided:

> It is expressly agreed between the parties hereto that the lands covered by this lease, or any part thereof, shall not be subleased or sublet in any manner whatever without the written consent of the council speaking for the tribe and the approval thereof by the Secretary of the Interior, and that any violation of this provision shall *ipso facto* work a forfeiture of the lease.

There is nothing in the record to show under whom Ray claims, and your office holds that if Sowers sublet the land his lease became thereby forfeited. The act of June 28, 1906, was passed at a time when leases containing the foregoing provision were outstanding. Said act, both in its title and the enacting clause, clearly indicates that it was only intended to confer a preference right to purchase personal to the original lessee. In other words, the person "in possession" of land in Pasture Reserve No. 3, at date of the act, and the person named in the lease "approved by the Secretary of the Interior," covering said land, must, in contemplation of the act, be one and the same person. No other persons were meant, and apparently in the nature of things could have been meant, than those who were at the date of the act in possession of lands under leases entered into by them and made *to them*. No equitable considerations, however strong, can properly be permitted to modify or interfere with the administration of the plain provisions of the law in this case, especially in view of the express stipulation against subletting contained in the lease entered into by the original lessee under whom Ray presumably is claiming.

The decision of your office herein is affirmed.

HOMER GUERRY.

Motion for review of departmental decision of November 17, 1906, 35 L. D., 310, denied by Secretary Hitchcock, January 31, 1907.

MILITARY BOUNTY LAND WARRANTS—CERTIFICATES OF LOCATION—SECTION 3, ACT OF JUNE 2, 1858.

LAWRENCE W. SIMPSON.

Military bounty land warrants and certificates issued under the act of June 2, 1858, may be located only upon lands subject to private cash entry at the date of the location.

All locations or applications to locate military bounty land warrants or certificates issued under the act of June 2, 1858, heretofore made, or locations of such warrants or certificates hereafter made by innocent purchasers who acquired their title after the ruling of the Department in the cases of Victor H. Provensal (30 L. D., 616), J. L. Bradford (31 L. D., 132), and Charles P. Maginnis (31 L. D., 222), to the effect that such warrants and certificates might be located on lands subject to such location at the date of the act of March 2, 1889, will be allowed to proceed in accordance with the ruling in said decisions, but all certificates hereafter issued under the act of June 2, 1858, and all bounty land warrants assigned after the date hereof, will be confined in the location thereof to lands subject to location at the date of the location.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 31, 1907.* (E. F. B.)

The sole question presented by this appeal is whether a military bounty land warrant can be located upon any lands except such as have first been subject to private cash entry. In support of your decision you cite the case of Charles P. Maginnis (31 L. D., 222), upon which authority you held for cancelation the location made by appellant of the SW. ¼ SW. ¼, SW. ¼ SE. ¼, Sec. 27, and the NE. ¼ NW. ¼, Sec. 34, T. 37 N., R. 8 E., Susanville, California, with a military bounty land warrant.

It is contended by appellant that under the ruling of the Department in the case of Roy McDonald (34 L. D., 21), the land in controversy is subject to location with such warrants whether it had or had not been offered, and that the principle announced in the case cited, if applied to the case at bar, would authorize this location.

The following excerpt from the case cited is relied upon by appellant to sustain his contention:

> The restriction of the right of location to land subject to private entry was, as the law then stood, for protection of the United States against appropriation of public lands before it had opportunity to realize a better price by offering its lands at public sale. What was intended was to grant as a bounty so much land as was expressed in the warrant of lands subject to private appropriation generally at the minimum or lower graduated price.

This statement had reference to that provision of the act under which the warrants were issued, and which is expressed on the face of the warrants, that they may be located "upon any lands of the United States subject to private entry at the time of such location at the minimum price."

It will be observed that the location in the case cited was allowed under the provisions of the act of July 4, 1876 (19 Stat., 73), and that the inadvertence of the land office to reoffer the land, as directed by that act, was purely a technical objection, which could be cured by reference to the Board of Equitable Adjudication. It did not an-

nounce the rule that such warrants are locatable upon any lands subject to disposal under the general land laws, as contended by appellant, although there is much force in the contention that the logic of the statement in that case virtually removes the restriction upon location and that such restriction must cease to be operative with the reason therefor.

At the time of the passage of the acts under which these warrants were issued, no public lands could be disposed of under the general land laws until after a public offering. The purpose of this, as stated in the case cited, was to enable the government to obtain the highest price by offering the lands at public auction and then dispose of the offered lands remaining unsold at private cash entry at the minimum price. The value of the warrant was fixed at $1.25 per acre, which was expressed on its face, and it could only be located on lands subject to private cash entry at that price.

By the act of March 22, 1852 (10 Stat., 3), these warrants were made receivable from preemptors in payment for their lands at the price of $1.25 per acre, and when located on lands subject to a greater minimum than $1.25 per acre, the locator is required to pay in cash the difference between the value of the land and the value of the warrant. Subsequently this privilege was extended to homestead entries.

It will be observed that while the warrant could be used in payment for lands applied for under the preemption and homestead laws, the holder in locating it is placed upon the same footing, and may exercise the same privilege, and no other, than is by law accorded to citizens of the United States to purchase lands at private cash entry. The location of a warrant is a purchase of lands at private cash entry.

By the act of March 2, 1889 (25 Stat., 854), all public lands, except in the State of Missouri, were withdrawn from private cash entry. As the holders of such warrants can only enjoy the same privilege in locating them that is accorded to all citizens of the United States, the warrant is not now, under a strict construction of the act of March 2, 1889, locatable on any lands except in the State of Missouri.

Subsequently, by the 9th section of the act of March 3, 1891 (26 Stat., 1095), it was provided that no public lands except abandoned military and other reservations, isolated tracts, mineral lands, and lands which have been authorized by Congress to be sold at auction, shall be sold at public sale.

The policy of the government to offer its lands at public sale was thus abandoned, and thereafter no addition could be made to the class of lands known as offered lands.

The attention of Congress was called to the condition of these outstanding warrants as affected by the act of March 2, 1889, and a bill was introduced in the Fifty-third Congress, entitled, "A Bill to pro-

vide for the location and satisfaction of outstanding military bounty land warrants and certificates of location under section 3 of the act approved June 2, 1858." The bill as originally introduced provided:

That from and after the passage of this act it shall be lawful for the holder of any valid military bounty land warrant, issued or to be issued under the laws of the United States, or any valid indemnity or certificate of location, issued or to be issued under section 3 of the act of Congress approved June second, eighteen hundred and fifty-eight, to locate in satisfaction of the same any public land of the United States, in any State or Territory, which was subject to such location, on or before the fourteenth day of May, anno Domini eighteen hundred and eighty-eight, being the day on which the joint resolution was approved suspending in certain States the entries of public lands at private entry.

The bill was amended by striking out all after the enacting clause and substituting the following, which became the act of December 13, 1894 (28 Stat., 594):

That in addition to the benefits now given thereto by law, all unsatisfied military bounty land warrants under any act of Congress, and unsatisfied indemnity certificates of location under the act of Congress approved June second, eighteen hundred and fifty-eight, whether heretofore or hereafter issued, shall be receivable at the rate of one dollar and twenty-five cents per acre in payment or part payment for any lands entered under the desert land law of March third, eighteen hundred and eighty- [*seventy-*] seven, entitled "An act to provide for the sale of desert lands in certain States and Territories," and the amendments thereto, the timber-culture law of March third, eighteen hundred and seventy-three, entitled "An act to encourage the growth of timber on the Western prairies," and the amendments thereto; the timber and stone law of June third, eighteen hundred and seventy-eight, entitled "An act for the sale of timber lands in the States of California, Oregon, Nebraska, and Washington Territory," and the amendments thereto, or for lands which may be sold at public auction, except such lands as shall have been purchased from any Indian tribe within ten years last past.

The Senate Committee on Public Lands, in reporting upon this bill, which report was adopted by the House Committee, said, with reference to the effect of the provisions of the act of March 2, 1889, in restricting the location of these warrants to public lands subject to private cash entry:

The effect of this provision was to repeal the provisions of the former laws making the foregoing land warrants and scrip receivable in the entry of public lands subject to private entry at $1.25 per acre, except in the one State of Missouri, and left the holders of such obligations of the Government no other mode of locating or satisfying the same than such as might result from the demands or requirements of pre-emptors and homesteaders and locations in the State of Missouri.

* * * * * * *

By the passage of the acts referred to these warrants and certificates of location were rendered almost valueless, while it had been at all times the intention of Congress to make them good for the location of unoccupied public lands subject to private entry at $1.25 an acre, or for the payment of land entered under the preemption and homestead laws.

By the passage of the bill justice will be done the holders of the bounty warrants and certificates of location, yet these warrants and certificates can not become the subjects of speculation, for their greatest value will be at the rate of $1.25 an acre, as was originally intended by Congress.

Here was a direct legislative expression as to the effect of the act of March 2, 1889, upon these outstanding warrants.

The bill as originally drafted authorized the location of these warrants upon any public lands that were subject to such location on or before May 14, 1888. That was the date of the passage of a joint resolution, withdrawing from private sale lands in certain States until the disposition of the then pending legislation or the adjournment of that Congress. The legislation referred to resulted in the passage of the act of March 2, 1889.

The Department, in reporting upon the bill, called attention to its decision holding that certificates of location issued under the act of June 2, 1858, could only be located upon lands subject to private cash entry, and that since the passage of the act of March 2, 1889, such scrip can not be located on any lands except in the State of Missouri. It recommended that provision be made authorizing the location of this and all scrip of like character on any public lands of the United States rated at $1.25 per acre.

Congress, however, refused to make this scrip and military bounty land warrants locatable upon any land not then subject to location with such scrip and warrants, but as a relief to the holders thereof it provided that "in addition to the benefits now (then) given thereto by law"—that is, the right to use such scrip and warrants in payment for lands taken under pre-emption and commuted homestead entries—they may be receivable at the rate of $1.25 per acre in payment, or part payment, for any lands entered under the desert land law, the timber culture law, the timber and stone act, and any lands sold at public auction except Indian lands.

Furthermore, in the act of May 18, 1898 (30 Stat., 418), abolishing the distinction between offered and unoffered lands, its operation is confined to lands disposed of under subsisting pre-emption claims, the homestead laws, and the timber and stone act.

The Department has held, in the cases of Victor H. Provensal (30 L. D., 616), J. L. Bradford (31 L. D., 132), and Charles P. Maginnis (ib., 222), that bounty land warrants and certificates of location issued under the act of June 2, 1858, may be located on lands that were subject to such location at the date of the passage of the act of March 2, 1889.

That construction cannot be sustained in the light of the plainly-expressed purpose of Congress, as above indicated, to confine the location of bounty land warrants and certificates issued under the act of June 2, 1858, to land subject to private cash entry at the date of the location and to give them a cash value by authorizing the use of them

in the purchase of lands entered under the general land laws, and for lands sold at public entry.

As property rights may have been acquired in the purchase of such warrants and certificates upon the faith of those decisions, all locations or applications to locate such warrants and certificates heretofore made, or locations of such warrants or certificates hereafter made by innocent purchasers who acquired their title after the date of those decisions, will be allowed to proceed in accordance therewith, but all certificates hereafter issued under the act of June 2, 1858, and all bounty land warrants assigned after the date hereof, will be confined in the location thereof to lands subject to location at the date of the location.

Your decision is affirmed.

PRACTICE—NOTICE—PUBLICATION—DISCRETION OF REGISTER—NEWSPAPER.

B. B. WELDY.

The Department has full authority to review the action of registers of local offices in designating the newspapers in which notices under the public-land laws shall be published, *after the register shall have exercised his discretion in any particular case*, and, if abuse of such discretion appear, to take such action as may be necessary for the correction thereof; but it will not, in advance of action by the register, give general directions as to which of several newspapers published in any locality shall be recognized as the proper medium for the publication of notices relating to claims to public lands in that vicinity.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 1, 1907.* (G. J. H.)

B. B. Weldy, publisher of the "Chester Signal," a weekly newspaper published at Chester, Montana, has appealed from your office decision of November 6, 1906, declining to disturb the action of the register of the Greatfalls, Montana, land office, in refusing to recognize said publication as being a newspaper of such established character and general *bona fide* circulation as to entitle it to recognition in the publication of final-proof and other notices under the public-land laws.

Mr. Weldy contends that his publication is such a newspaper of general circulation in the vicinity of Chester as entitles it to be recognized by the register in the publication of notices relating to public-land claims in that locality and asks that he be given what he terms "a just portion of the land office printing" "rightly belonging to this paper."

Without considering the standing and character of the newspaper

in question, and without discussing in detail the various classes of notices published under the public-land laws, and the requirements of the statutes, rules and regulations governing the publication thereof, it is sufficient to say, in a general way, that the designation of the newspaper in which such publication shall be made rests primarily in the sound discretion of the register, to be exercised within such limitations and under such restrictions as may be fixed by statute or the rules and regulations of the Department; and in all cases it will be presumed that he acts honestly and in good faith in making such designation, and his discretion will not be controlled or in any wise interfered with unless it be clearly shown that there has been an abuse of the power vested in him. In certain classes of cases—for instance, final-proof notices under the act of March 3, 1879 (20 Stat., 472), and notices of applications for patent to mining claims under section 2325, Revised Statutes—the register is by statute specifically required to designate the newspaper in which the notices shall be published. In such cases neither your office nor the Department has authority to control, in advance, the action of the register in the exercise of the authority and discretion specifically conferred upon him by law. Both your office and the Department have full authority to review the action of the register in designating the newspaper in which notice shall be published, *after he shall have exercised his discretion* in any particular case, and, if abuse of such discretion appear, to take such action as may be necessary for the correction thereof. The Department can not, however, undertake to investigate the comparative merits of the several newspapers that may be published in any locality and, in advance of action by the register, give him general directions as to which paper shall be recognized as the medium for the publication of notices relating to claims to public lands in that vicinity. If the Department could with propriety pass upon the merits of the paper here in question, without its right to recognition being in issue in any particular case, and direct that the register designate it, rather than some other paper having a general circulation in the same vicinity, as the proper medium for the publication of notices relating to claims in that locality, it might with equal reason be called upon to pass upon the merits of all the various newspapers published in the many land districts throughout the public-land states. Manifestly this determination must be left, in the first instance at least, to the judgment and discretion of the register, who is presumed to be more familiar with local enterprises and to be in a position to act with knowledge of the situation in designating the newspaper in which any particular notice shall be published. If in any particular case the legality of the publication of the notice is put in issue, on the ground that the register erred in the designation of the newspaper in which it should be published, the action of the register

in making such designation will be reviewed and such action taken in the premises as the facts may warrant.

The decision of your office, declining to interfere in advance in the exercise of discretion on the part of the register in the matter of designating the newspapers in which final-proof and other notices under the public-land laws shall be published, is affirmed.

CONTEST—MOTIVE OF CONTESTANT.

McCOY *v.* SEARS.

The government has no interest in the motive which influences a contestant in bringing the contest; and while a collusive or speculative intent may be set up to defeat the rights accorded a successful but *mala fide* contestant, it can have no bearing upon the rights of the entryman, whose entry must stand or fall upon the facts presented.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 1, 1907.* (E. O. P.)

Stillman F. Sears has appealed to the Department from your office decision of January 26, 1906, affirming the action of the local officers holding for cancelation his homestead entries, made April 19, 1899, and August 9, 1904, respectively, for the S. ½ SE. ¼, S. ½ SW. ¼, Sec. 17, T. 27, R. 19, and N. ½, N. ½ SE. ¼, N. ½ SW. ¼, Sec. 17, same township and range, Valentine land district, Nebraska, second entry being made under the provisions of section 2 of the act of April 28, 1904 (33 Stat., 547).

Contest was instituted March 9, 1905, by C. K. McCoy, upon the grounds of failure of claimant to establish and maintain residence on the land, and disqualification to make second entry, because of ownership of more than 160 acres of land.

Your office found in favor of the contestant upon the ground first stated and no consideration of the second ground set up was, under this finding, necessary to a determination of the issue.

Counsel for claimant urges with much persistency that the action of your office and the local officers is based upon a strained and technical construction of the homestead law and that by your decisions the inherent equity of the statute is ignored.

An examination of the testimony of claimant himself clearly reveals his default in the matter of residence. He admits that during a period of four years he had not slept on the land ten nights, though he had been during the greater part of that time in the immediate vicinity of the land. He states further that he believes he has spent at least one night thereon during each six months since making his original entry.

Counsel asks:

> I stop to enquire: Is it possible that the spirit of equity and fairness has been entirely lost in the blind rush to oppress the people by a technical construction of the law?

Surely counsel, upon the statements of claimant alone, will not seriously contend that the Department would be warranted in a conclusion that this entryman had maintained his actual residence on the land entered to the exclusion of a home elsewhere. If he has not done so, he has failed to comply with the law in one of its most essential particulars. (Gibbs *v.* Kenny, 16 L. D., 22.) The law requires, in specific terms, both residence upon, and cultivation and improvement of, the land entered. The conditions imposed upon homestead entrymen are not in the alternative, but in the conjunctive. All must be fully met. Where, then, the default on the part of the entryman is admitted with respect to one of the essential requirements, what is there in "equity and fairness" to warrant the Department in ignoring such default in the face of a contest brought for the specific purpose of establishing it? The answer is plain. While the frank admission of the entryman of his default is more commendable than a denial of the truth, yet it is, after all, the facts presented, and not the manner of their presentation, that must determine. No right is gained by a claimant simply because he refuses to perjure himself.

Counsel also asks that the case be reopened and opportunity afforded claimant to show that the contest is speculative and collusive. This request must be denied, for the reason that the government has no interest in the motive which influences a contestant. The entry must stand or fall upon the facts presented. A collusive or speculative intent may be set up to defeat the rights accorded successful but *mala fide* contestants, but it can have no bearing upon the rights of the entryman. These matters can only be determined in proceedings brought against the contestant directly when he seeks to assert a preference right of entry.

The decision appealed from is hereby affirmed.

SECOND HOMESTEAD ENTRY—RELINQUISHMENT—ACT OF APRIL 28, 1904.

GRIFFITH *v.* SIMMS.

The right to make a second homestead entry accorded by the act of April 28, 1904, having once been exhausted, is not restored by relinquishment of the second entry.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 1, 1907.* (E. O. P.)

Samuel Simms has appealed to the Department from your office decision of March 22, 1906, refusing to adopt the recommendation of

the local officers and denying his application to make third homestead entry under the provisions of the act of April 28, 1904 (33 Stat., 527), for the NW. ¼ NE. ¼, N. ½ NW. ¼, S.W. ¼ NW. ¼, Sec. 27, T. 20 N., R. 5 E., Greatfalls land district, Montana, against which protest had been filed by Elias D. Griffith, who alleged that said Simms was not qualified to make the entry in question.

A hearing was ordered upon the protest, which, in the opinion of the Department, was unnecessary. The issue presented is one of law alone and the statements made by Simms in his affidavit filed with his said application, together with the official records, are sufficient for its correct determination.

It appears therefrom that Simms made homestead entry August 6, 1900, for 160 acres, which he subsequently relinquished in the face of a contest, to which he offered no defense.

April 16, 1904, he filed application to enter, as a homestead, the NE. ¼ SW. ¼, NW. ¼ SE. ¼, Sec. 27, T. 20 N., R. 5 E., same land district, which application was allowed by your office September 14, 1904, under the provisions of said act of April 28, 1904, *supra*. It is noted that this application was filed prior to the passage of said act and at a time when there was no authority for allowing the same, his first entry having been made after the passage of the act of June 5, 1900 (31 Stat., 267; James Potter, 32 L. D., 242). The second entry of Simms must therefore be considered as one made solely under the provisions of the act of April 28, 1904, *supra*, and though the relinquishment of an entry in the face of a contest is generally considered as an admission of the charges made, and such action ordinarily would prevent the applicant from making the showing required under the act of April 28, 1904, *supra*, it must be presumed in this case that a satisfactory showing was made to your office before the entry was allowed. The second entry of Simms having been allowed only by virtue of the provisions of the said act of April 28, 1904. must therefore be considered as having been made upon an application presented after its passage. It follows, therefore, that by the making of said second entry he exhausted all his rights thereunder, and a relinquishment of the second entry could not restore them. The act of April 28, 1904, applies only to entries made prior to its passage (Frank Dolph, 35 L. D., 273; Circular of September 1, 1905, 34 L. D., 114). It is therefore clear that as a matter of law the third application of Simms cannot be allowed.

This renders unnecessary any consideration of the errors alleged touching questions arising from the hearing before the local officers, the same having been wholly unnecessary so far as determining the qualifications of Simms to make the entry in question is concerned.

The collusion alleged by counsel for Simms to exist between protestant and another has no bearing upon the issue presented. If the

facts stated be true and are established in a direct proceeding against the entry a cancellation thereof would be warranted. This matter, however, is one properly determinable by a contest.

The decision appealed from is, for the reasons stated, hereby affirmed.

CONFLICTING APPLICATIONS TO ENTER—PRIORITY OF RIGHT.

HETER *v.* LINDLEY.

An application to enter presented in person at the local office at the hour of opening is entitled to precedence over a conflicting application received at the same hour by mail; and if part only of the land covered thereby is subject to entry, it should be allowed as to that part and rejected as to the remainder.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 1, 1907.* (E. J. H.)

The land involved in the above-entitled case is the SE. ¼ of NE. ¼ and E. ½ of SE. ¼ of Sec. 35, T. 9 N., R. 39 E., Walla Walla, Washington, land district, and the case is before the Department upon the appeal of Archie C. Lindley from your office decision of February 6, 1906, holding for cancelation his homestead entry covering this land, for conflict with the prior rights of Willis C. Heter, under his homestead application.

It appears from your office decision that on April 6, 1905, James A. Hanger made application under the timber and stone act of June 3, 1878 (20 Stat., 89), to purchase the E. ½ of NE. ¼ and E. ½ of SE. ¼ of said section 35; that he submitted proof thereon which was, on August 24, 1905, rejected upon the ground that from the showing the land was chiefly valuable for agricultural purposes and not for the timber thereon; that September 11, 1905, the homestead application of Lindley for the land covered by Hanger's application was received at the local office through the mail, and on the same day Heter tendered in said office a like application for the S. ½ of NE. ¼ and E. ½ of SE. ¼ of said section; that these applications were held by the local office to be "simultaneous" and both were suspended pending Hanger's right of appeal from the rejection of his application to purchase under the timber and stone act; that Heter procured from Hanger a waiver of his right of appeal, which he presented at the local office on September 14, 1905, and thereupon the applications of Heter and Lindley were taken up for consideration; that upon examination it was found that Lindley's application correctly described the land theretofore included in Hanger's timber and stone application, while that of Heter only covered three forty-acre tracts thereof, and in place of the NE. ¼ of NE. ¼, described the SW. ¼ of NE. ¼, which last-named tract was found to be not subject to entry but already pat-

ented; that "for this reason Heter's application was rejected and Lindley's placed of record," from which action Heter appealed.

February 6, 1906, your office decision found that it was apparent from the record that the local officers first acted upon the application of Heter; that in view of the principle laid down in the case of Barnes *v.* Smith (33 L. D., 582), his application was entitled to precedence over that of Lindley, and should have been allowed for the three tracts not in conflict with the patented entry, and only rejected as to such patented tract. The decision of the local officers was reversed and Lindley's entry held for cancelation as to the SE. ¼ of NE. ¼ and E. ½ of SE. ¼ for conflict with the prior rights of Heter; from which Lindley appealed to the Department.

November 19, 1906, the Department, upon examination of the case, directed that the local officers be called upon for a detailed and specific statement as to when the respective homestead applications of Heter and Lindley were received by them, the order in which the same were acted upon, and what action was taken; and that the same, together with the rejected application of Heter, be forwarded to the Department for its use in rendering decision in the case.

January 18, 1907, your office forwarded to the Department the report of the local officers, made in obedience to the foregoing call, which states that the applications of Lindley and Heter were both received at the hour of 9 o'clock, a. m., on September 11, 1905, upon the opening of said office for business; that of the former by mail and the latter by tender in person at the office; that both were suspended pending Hanger's right of appeal, and taken up again for consideration upon the filing of Hanger's waiver of such right, on September 14, 1905.

Thereupon, as shown by said report—

> the application of Heter having been presented in person, the same was ordered by the register to be placed of record.
>
> The clerk in entering the application discovered that the land described in the application was the S. ½ NE. ¼ and E. ½ SE. ¼, said section, township and range, and that the SW. ¼ NE. ¼ of said Sec. 35 is embraced in the timber and stone cash entry No. 1366 of Charles Robertson.
>
> The application of Lindley was then examined, and the description of the land being properly given for the E. ½ NE. ¼ and E. ½ SE. ¼, Sec. 35, T. 9 N., R. 39 E., W. M., the same was placed of record and the application of Heter was rejected.

In view of the report of the local officers as to the receipt of the applications in question, upon the opening of the office on the morning of September 11, 1905, it would seem that under departmental rulings Heter was entitled to have his application first acted upon. This question was quite fully considered in the case of Lewis *v.* Morris (27 L. D., 113), wherein it was held, in effect (page 118), that parties in line, or waiting at the local office at the time applications

are received by mail, should be allowed to present their applications and have the same acted upon by the local officers prior to their taking up those contained in said mail.

In this case, however, the applications in question were tendered before the expiration of Hanger's right of appeal from the rejection of his proof, and the local officers rightfully suspended the same. Subsequently, upon the filing of Hanger's waiver of such right, it appears that said officers directed that Heter's application be placed of record, but upon discovering that said application only described three of the four forty-acre tracts embraced in Hanger's application (SE. ¼ of NE. ¼ and E. ½ of SE. ¼ of said Sec. 35), and therewith a forty-acre tract (SW. ¼ of NE. ¼ of the same section) which was not subject to entry, while the application of Lindley correctly described the same lands embraced in Hanger's application, Heter's application was rejected and Lindley's allowed. This action was erroneous. The Department concurs in the finding of your office that Heter's application should have been allowed for said three forty-acre tracts, and Lindley's entry canceled as to the same. It has been held in numerous cases that if a part of the land covered by an application to enter is subject to entry, and a part is not, the application should not be rejected as an entirety but should be allowed as to the land subject thereto. Duncanson *v.* Duncanson (25 L. D., 108); Lindsey *v.* Adams (21 L. D., 444).

Your office decision is accordingly affirmed.

ISOLATED TRACT—RAILROAD LAND—PRICE WITHIN RAILROAD LIMITS.

EDWIN J. MILLER.

Where a complete system has been adopted for the disposal of lands of a particular character, it will not be presumed that Congress intended by subsequent legislation to supersede such system and to dispose of those lands in a different manner, unless such purpose is clearly expressed or indicated, or unless the two statutes are irreconcilable.

The act of March 6, 1868, directing that the even-numbered sections of lands theretofore withdrawn for the benefit of certain railroads be restored to settlement and entry under the preemption and homestead laws only, does not in anywise affect the authority of the Commissioner of the General Land Office, under the provisions of section 2455 of the Revised Statutes, as amended by the act of February 26, 1895, to offer at public sale any isolated or disconnected tract of public land within any such section.

Section 2455 of the Revised Statutes, as amended by the act of February 26, 1895, does not operate to reduce the minimum price of isolated or disconnected tracts in alternate reserved sections within the limits of a railroad grant from two dollars and fifty cents to one dollar and twenty-five cents per acre.

Cases of Charles Tyler, 26 L. D., 699, and Thomas J. O'Donnell, 28 L. D., 214, overruled.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 5, 1907.* (E. F. B.)

This motion is filed by Edwin J. Miller for review of the decision of the Department of November 2, 1905 (not reported), affirming the decision of your office holding for cancelation his cash entry of the SE. ¼ SW. ¼, Sec. 10, T. 5 N., R. 66 W., Denver, Colorado, upon the ground that said tract is not subject to disposal as an isolated tract under section 2455, Revised Statutes.

Upon the application of Edwin J. Miller, your office, by letter of January 11, 1903, directed that the SE. ¼ SW. ¼ of said section 10, and the SE. ¼ SW. ¼, section 15, and SW. ¼ SW. ¼, section 29, T. 5 N., R. 65 W., Denver, Colorado, be sold at public outcry as isolated tracts, under authority of section 2455, Revised Statutes, as amended by the act of February 26, 1895 (28 Stat., 687). Edwin J. Miller was the purchaser of the land at said sale, at the price of $1.25 per acre.

When these entries came before your office for examination and approval, you found that all of said lands, being within the twenty-mile limit of the Union Pacific railroad, were withdrawn by the Department for the benefit of the road, and that the even-numbered sections so withdrawn were afterward restored by direction of the act of March 6, 1868 (15 Stat., 39), and made subject to entry under the preemption or homestead laws only. You also found that all of said lands, when disposed of, are subject to the double-minimum rate of $2.50 per acre.

Upon this finding you held that the entry as to section 10 should be canceled, for the reason that there was no authority to dispose of said land except under the preemption or homestead laws, and as to the tracts in the odd-numbered sections, which were excepted from the railroad grant, the purchaser was required to pay an additional sum of $1.25 per acre, as said lands were held to be subject to disposal only at the double-minimum rate.

Upon Miller's appeal, the Department, in the decision now under review, affirmed your decision, holding for cancelation the entry of the tract in the even-numbered section (section 10), sustaining your opinion that the act of March 6, 1868, directing the restoration to entry of the even-numbered sections within said limits, subjected them to disposal under the preemption and homestead laws only, and that such lands were not subject to disposal under any other law, but it reversed your decision so far as it demanded the additional payment of $1.25 per acre for the tracts in the odd-numbered sections, holding, under authority of the decisions of this Department in Charles Tyler (26 L. D., 699) and Thomas J. O'Donnell (28 L. D., 214), that section 2455, Revised Statutes, as amended by the act of February 26, 1895, fixes the minimum price of isolated tracts within

the limits of a railroad grant at $1.25 per acre and that Congress intended by that legislation to establish a minimum price for all isolated and disconnected tracts.

This motion is for review only of so much of the decision as affirmed the decision of your office holding for cancelation the entry of the tract in section 10, but the motion having been entertained, the entire decision will be reviewed.

The ruling that the even-numbered sections restored by the act of March 6, 1868, were not subject to disposal under the provisions of section 2455, Revised Statutes, rested upon the principle that where Congress has provided for the disposal of lands under one or more of the public-land laws, it is an inhibition against the disposal of those lands, by executive authority, in any other manner or under any other law.

The error in the decision was the application of that principle as a limitation upon the power and authority conferred upon the Commissioner of the General Land Office, under section 2455, Revised Statutes, to offer lands for sale at public outcry, and in not confining its application to laws technically known as the "public-land laws" provided by Congress for the acquisition of inchoate rights to non-mineral public lands, by qualified entrymen.

Without entering into a discussion of the cases cited as authority for the decision under review, it is sufficient to say that most of them have no application, as the question now under consideration was not involved. In some of the cases there was an absolute conflict between the law providing for the disposal of the land and the law under which the entry was sought to be made. To have allowed an entry under the latter law would have subverted the purpose of the statute providing for the disposal of the lands. In others, the statute expressly provided for the disposal of the lands in question under one or more of the general or *public land laws*, which necessarily excluded them from disposal under any other of the *public land laws*, and the rule was properly applied. The remaining cases of H. R. Saunders (27 L. D., 45), W. D. Harrigan (29 L. D., 153), Joseph S. White (30 L. D., 536), and James M. McComas (33 L. D., 447), were appeals from rejected applications to have lands ordered into market and sold at public outcry under section 2455, Revised Statutes. Those cases should have been disposed of upon the ground that no right can be acquired under such application, as the disposal of lands under that section rests in the judgment and discretion of the Commissioner of the General Land Office. The rejection of the application violated no right, and the right of appeal should not have been allowed. T. L. Chamberlin (8 L. D., 421), Lizzie Steffen (10 L. D., 615), State of Idaho (16 L. D., 496), Jacob Schutz (25 L. D., 146), Charles S. Stevens (29 L. D., 347).

All of the cases cited in the original decision herein were correctly decided with reference to the facts and the question at issue in each particular case, although the principle announced in those specially mentioned herein was misapplied.

The distinct issue in this case is whether the act of March 6, 1868, and acts of similar character, directing that lands within certain limits shall be disposed of under one or more of the public-land laws only, is a limitation upon the authority of the Commissioner of the General Land Office to offer at public sale any isolated or disconnected tract of public land within those limits.

There was never any general statutory authority for the sale of public lands at public outcry. Such authority was specially conferred by statute in each particular case, and was confined to the territory mentioned in the particular act. (J. C. Lea, 10 L. D., 652.)

The act of August 3, 1846 (9 Stat., 51), authorized the establishment of the Board of Equitable Adjudication and provided for the adjustment of suspended preemption entries and the arrangement of such entries into two classes, the second class to embrace such entries as the board may reject. The fifth section of the act, which is embodied in the Revised Statutes as section 2455, provides as follows:

> It may be lawful for the Commissioner of the General Land Office to order into market, after due notice, without the formality and expense of a proclamation of the President, all lands of the second class, though heretofore unproclaimed and unoffered, and such other isolated or disconnected tracts or parcels of unoffered lands which, in his judgment, it would be proper to expose to sale in like manner.

The original purpose of this legislation was chiefly to avoid the formality and expense of a proclamation of the President for the sale of lands of the second class provided for by said act, and of such isolated and disconnected tracts or parcels of public lands as, in the judgment of the Commissioner of the General Land Office, it would be proper to expose to sale, but it has remained a part of the public-land system, even after the adoption of the general policy that the public lands shall not be disposed of either at private or public sale.

Since the passage of the homestead law there has been a gradual tendency to the policy of disposing of the agricultural public lands under the settlement laws only, but in all the changes tending to that end, the authority conferred by the statute upon the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior, to order into market such isolated and disconnected tracts or parcels of land "which in his judgment, it would be proper to expose to sale," has never been disturbed, and the wisdom of that policy has not been questioned.

The purpose of the statute was to invest the Commissioner with authority to determine when a tract of public land is isolated or disconnected within the meaning of the statute and should be offered

for sale. His exercise of judgment and order of sale under the power and authority thus conferred has all the force of a proclamation by the President as to the particular land and takes it out of the operation of other general laws governing the disposal of the public lands. The statute establishes a complete system for the disposition of such lands and it can not be presumed that Congress intended by a subsequent statute embracing the same subject-matter to limit its operation by mere implication, if each statute can perform its distinct functions within the sphere designed by Congress without the interference of one with the provisions of the other.

This principle was applied by the court in Frost *v.* Wenie (157 U. S., 46), where the question was whether the act of December 15, 1880 (21 Stat., 311), directing the Secretary of the Interior to cause the lands in the Fort Dodge military reservation north of the right of way of the Atchison, Topeka and Santa Fe railroad to be surveyed and "to offer the said lands to actual settlers only, under and in accordance with the homestead laws of the United States," embraced Osage trust lands lying within such reservation. The court held that although the words of the act of December 15, 1880, are broad enough, if literally interpreted, to embrace all the restored lands within the abandoned Fort Dodge military reservation, it can not be assumed that Congress intended to prescribe a different rule for the disposal of the Osage trust lands than that prescribed by the act of May 28, 1880 (21 Stat., 143), which required payment for said lands by actual settlers having the qualifications of preemptors, and as the subsequent legislation does not indicate any intention to disregard the obligations imposed by the treaty with the Indians, the act of December 15, 1880, should not be so construed, unless such construction is unavoidable.

> It must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that is was intended to cover the whole subject, and, therefore, to displace the prior statute. [Page 58.]

To the same effect is the ruling of the court in United States *v.* Gear (3 How., 120), where the question was whether the 4th section of the act of June 26, 1834 (4 Stat., 686), creating additional land districts in the States of Illinois and Missouri, and authorizing the President to cause to be offered for sale—

> all the lands lying in said land districts, ... reserving only section sixteen in each township, the tract reserved for the village of Galena, such other tracts as have been granted to individuals and the State of Illinois, and such reservations as the President shall deem necessary to retain for military posts, any law of Congress heretofore existing to the contrary notwithstanding—

embraced within its provisions and authorized the sale of lands containing lead mines, which the act of March 3, 1807 (2 Stat., 448),

declared "shall be reserved for the future disposal of the United States," the court held that the reservations in the 4th section of the act of 1834 are limitations upon the authority to sell and not an enlargement of the general power of the President to sell lands which by law he never had power to sell, and that authority to sell all the lands in the districts, given by the act of 1834, though coupled with the concluding words of the 4th section, can only mean all lands not prohibited by law from being sold, or which have been reserved from sale by force of law.

The principle upon which the decision rested is (page 131)—

> that a perpetual statute (which all statutes are unless limited to a particular time) until repealed by an act professing to repeal it, or by a clause or section of another act directly bearing in terms upon the particular matter of the first act, notwithstanding an implication to the contrary may be raised by a general law which embraces the subject-matter, is considered still to be the law in force as to the particulars of the subject-matter legislated upon. . . . In this case, there are two acts before us, in no way connected, except in both being parts of the public-land system. Both can be acted upon without any interference of the provisions of the last with those of the first—each performing its distinct functions within the sphere, as Congress designed they should do.

See also United States *v.* Healey (160 U. S., 136, 147).

This principle is illustrated by reference to the special system provided by Congress for the disposal of the mineral lands and to the acts providing for the sale of lands in abandoned military reservations. These systems control exclusively the disposal of all lands of the character indicated by the respective acts, unless they are taken from under the operation of the system by express statutory authority.

In the grant to the State of California of the 16th and 36th sections, for school purposes, made by the act of March 3, 1853 (10 Stat., 244), no express exception is made of lands containing minerals, but the court, in Mining Company *v.* Consolidated Mining Company (102 U. S., 167, 174), involving the title to a section 36 containing minerals that was surveyed in 1870, held that such lands were by the settled policy of the government excluded from all grants and that Congress, by the act of July 26, 1866 (14 Stat., 251), adopted "a complete system for the sale and other regulation of its mineral lands, so totally different from that which governs other public lands as to show that it could never have been intended to submit them to the ordinary laws for disposing of the territory of the United States."

The cardinal principle announced in this decision is that where a complete system has been adopted for the disposal of lands of a particular character, it will not be presumed that Congress intended by subsequent legislation to supersede such system and to dispose of those lands in a different manner, unless such purpose is clearly expressed or indicated, or unless the two statutes are irreconcilable.

A special system for the disposal of lands in abandoned military reservations has also been provided by the acts of July 5, 1884 (23 Stat., 103), and August 23, 1894 (28 Stat., 491). Such lands are set apart for disposition in a particular manner in pursuance of a defined policy (State of Utah, 30 L. D., 301), which impliedly prohibits the disposal of them in any other manner (Instructions, 33 L. D., 130; Opinion, Ib., 312). The reservation of lands for military purposes takes them out of the category of "public lands" as that term is defined by the Supreme Court in Newhall *v.* Sanger (92 U. S., 761, 763), and when they are no longer needed for that purpose they are not restored to entry under the general land laws, but are to be offered for sale to the highest bidder at public outcry at not less than the appraised value. See also opinion (35 L. D., 277).

Confirmation of this view may be found in the action of Congress forbidding, by the 9th section of the act of March 3, 1891 (26 Stat., 1095), the disposal of any public lands either at public or private sale, except the lands authorized to be sold under the special systems named therein. That section is as follows:

> SECTION 9. That hereafter no public lands of the United States, except abandoned military or other reservations, isolated and disconnected fractional tracts authorized to be sold by section twenty-four hundred and fifty-five of the Revised Statutes, and mineral and other lands the sale of which at public auction has been authorized by acts of Congress of a special nature having local application, shall be sold at public sale.

Here is an express declaration by Congress of its purpose to continue in force the special systems for the sale and disposal of the lands excepted from the operation of said section, and a distinct recognition and confirmation of the authority of the Commissioner of the General Land Office to determine when any isolated tract of public land, although subject to disposal under rights or claims initiated in conformity with one or more of the general land laws, shall be offered for sale.

Applying these principles, we find nothing in the act of March 6, 1868, to indicate that it was the intention of Congress to withhold from the Commissioner the authority conferred by section 2455, Revised Statutes, to offer for sale any isolated and disconnected tract within the limits described, and no such interpretation can be given to the statute unless it is so broad and explicit in its terms as to make the operation of the two statutes within the territory named irreconcilable, which does not appear, but, on the contrary, each act can perform its distinct functions within the sphere, as Congress designed it should, without interference with the provisions of the other.

One act confers authority upon the officers charged with the supervision and disposal of the public lands to sell all lands covered by its

provisions at public sale to the highest bidder. The other restricts the disposal of lands to qualified entrymen under one of the public-land laws to the exclusion of every other law under which inchoate rights to the public lands may be acquired.

As to the lands in the odd-numbered sections excepted from the grant to the railroad company, it was held that they were subject to sale under authority conferred by section 2455, Revised Statutes, at the minimum price of $1.25 per acre, following the ruling in the case of Charles Tyler (26 L. D., 699), which held that section 2455, Revised Statutes, as amended by the act of February 26, 1895, operates to reduce the minimum price of isolated and disconnected tracts in alternate reserved sections within the limits of a railroad grant from two dollars and a half to one dollar and twenty-five cents per acre.

At the time of the passage of the act of August 3, 1846, the fifth section of which was incorporated in the Revised Statutes as section 2455, the minimum price at which the public lands could be offered for sale, as provided by the act of April 24, 1820, was $1.25 per acre. So that the act of August 3, 1846, merely conformed to the general law in fixing the minimum price applicable to all public lands.

In the grants subsequently made to aid in the construction of railroads the minimum price of all alternate reserved lands within the limits of railroad grants was fixed at $2.50 per acre. These were afterwards known as double-minimum lands and, when appropriated by individuals, the amount to be paid or the quantity to be taken is controlled by such valuation.

It thus became "the settled policy of the government to hold for sale, at a price not less than double the minimum price of public lands, all alternate reserved sections on the lines of railroads constructed with the aid of the United States." United States *v.* Healey (160 U. S., 136, 139).

The provision in the act of April 24, 1820, that "the price at which the public lands shall be offered for sale shall be one dollar and twenty-five cents an acre," was carried in the Revised Statutes as section 2357, and the fixed policy of the government to hold reserved lands in railroad limits at double the minimum price was recognized by adding as a proviso to said section "that the price to be paid for alternate reserved sections of land along the lines of railroads within the limits granted by any act of Congress shall be two dollars and fifty cents per acre."

The law fixing the price of public lands is general in its application, and every act providing for the disposal of the public lands must be construed with reference to that section and administered in conformity therewith, unless the statute is so broad in its terms and so clear and explicit in its words as to show that it was intended

to cover the whole subject and to supersede the provisions of section 2357.

The statutes seem to be so free from ambiguity as to leave no room for doubt, but if any doubt has previously been entertained it must be effectually removed by the decision of the Supreme Court in United States *v.* Healey (160 U. S., 136) and in United States *v.* Ingram (172 U. S., 327), in which the act of March 3, 1877, providing for the disposal of desert lands, was construed with reference to the provisions of section 2357, Revised Statutes, the contention in both cases being as to the price to be paid for lands in alternate reserved sections within railroad limits, entered under the desert-land laws.

The act of March 3, 1877, fixed the price of desert lands at $1.25 per acre, without condition or qualification, but the court held that the act of 1877 did not supersede the proviso to section 2357 as to the price to be paid for the land and that to hold that lands in alternate reserved sections within railroad limits could be entered under the desert-land laws at $1.25 per acre would be to modify the previous law by implication merely. It said that the proviso to section 2357 does not conflict with the act of 1877 as to the price to be paid for desert lands, but that "each has a separate and appropriate field of operation, the former regulating the price of desert lands reserved to the United States along railway lines, and the latter the price of desert lands not so located." United States *v.* Ingram (172 U. S., 331).

The proviso to section 2357, fixing the price of lands in railroad limits, is equally applicable to lands sold under section 2455, and both sections must be construed and administered as parts of the same system. The minimum price of lands in railroad limits is fixed by section 2357, and that price must be paid in every case, whatever may be the law under which they are disposed of, unless express provision is otherwise made.

Such was the accepted construction of section 2455, as it was in force prior to the act of February 26, 1895 (28 Stat., 687), amending said section, and prior to the decision in the case of Charles Tyler, which held that the section as amended operates to reduce the minimum price of isolated tracts in railroad limits from $2.50 to $1.25 per acre and that it was the purpose of the amendment to provide a simple, comprehensive and exclusive plan for the public sale of isolated tracts and to subject all such tracts to the same condition as to price.

The effect of such construction is to leave the law as to the price or valuation of public lands in force whenever such lands are disposed of under any other law, except under section 2455, Revised Statutes, but to reduce by force of the statute the price of double-minimum lands if they are disposed of under that section.

It is not apparent from anything contained in the amendment that it was the intention of Congress to make the sale of lands under that system an exception to the rule that all public lands must be offered for sale at the minimum price fixed by the general law. The entire scope and purpose of the amendatory act of February 26, 1895, was to define what are isolated and disconnected tracts subject to sale under said section. It operated as a limitation upon the power of the Commissioner previously conferred by prohibiting the sale of any land as an isolated tract under authority of said section until it has been subject to homestead entry for a period of three years after the surrounding land had been entered, filed upon, or sold by the government, and limited the rights of purchase by any one person to one hundred and sixty acres.

When the bill that became the act of February 26, 1895, was originally passed by the House of Representatives, it contained the words, "for not less than two dollars and fifty cents per acre." In the Senate the words "two dollars and fifty cents" were stricken out and "one dollar and twenty-five cents" inserted in lieu thereof, and as so amended the bill was passed. In the decision of the case of Charles Tyler, this circumstance was accepted as a confirmation of the view that the same condition as to price was intended to apply in the sale of all isolated tracts without regard to locality.

That action rather indicates a purpose to preserve the harmony of the land system by continuing in full force the provisions of section 2357 as to all land sold under section 2455. The provision that it shall be lawful to sell "for not *less* than one dollar and twenty-five cents per acre" is retained, thus fixing the minimum in conformity with the general law controlling, as to price, the sale of the public lands under every system and leaving the proviso to that section in full operation as to lands upon which the law has fixed a higher valuation.

Any other interpretation of the statute would violate the rule announced by the court in United States *v.* Healey, *supra*, directly applicable to this case, that (page 147)—

> where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute.

In Thomas J. O'Donnell (28 L. D., 214) the rule announced in Charles Tyler was followed without discussion. These cases, so far as they hold that the price of an isolated tract of land in alternate

sections within railroad limits is one dollar and twenty-five cents an acre, are overruled.

The decision of the Department of November 2, 1905, is hereby recalled and vacated, and you will be governed by the ruling herein announced.

KIOWA, COMANCHE AND APACHE LANDS—ACT OF JUNE 5, 1906.

BENJAMIN F. ROBINSON.

Lands within the Kiowa, Comanche and Apache pasture reserve, opened to settlement and sale under the provisions of the act of June 5, 1906, are not subject to entry under the mining laws.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 7, 1907.* (W. C. P.)

Benjamin F. Robinson has appealed from your office decision of January 3, 1907, rejecting his application for reclassification and to purchase as mineral land part of the SE. ¼, Sec. 13, T. 2 S., R. 15 W., I. M., Lawton, Oklahoma, land district.

The land involved is within the Kiowa, Comanche and Apache pasture reservation opened to settlement and sale under the provisions of the act approved June 5, 1906 (34 Stat., 213). In the President's proclamation of September 19, 1906 (35 L. D., 238), it was declared that the lands in said pasture reserve would be opened to settlement and disposition under the provisions of said act of June 5, 1906, "and under the rules and regulations adopted by the Secretary of the Interior at such time and in such manner as the said Secretary of the Interior may fix and prescribe." Rules and regulations were adopted October 19, 1906 (35 L. D., 239), wherein it was prescribed that all of said lands should be disposed of under sealed bids to the highest bidder. The act of June 5, 1906, provides that these lands shall be opened to settlement by proclamation of the President and be disposed of upon sealed bids or by public auction, at the discretion of the Secretary of the Interior, "to the highest bidder under the provisions of the homestead laws of the United States and under the regulations adopted by the Secretary of the Interior, and such purchaser must be duly qualified to make entry under the general homestead laws." The money arising from the sale is to be placed to the credit of the Indians. The lands are to be sold at not less than $5.00 per acre; one-fifth to be paid at the time the bid is made and the balance in four equal annual installments.

Robinson claims that the lands applied for by him contain valuable deposits of building stone and are therefore subject to entry

under the provisions of August 4, 1892 (27 Stat., 348), which authorizes the entry of land chiefly valuable for building stone under the placer mining laws, and that there is nothing in the act of June 5, 1906, that takes these lands out of the provisions of said act of 1892 or that requires that they be disposed of under the homestead laws.

This question was carefully considered when the regulations of October 19, 1906, were in process of preparation and it was then decided that the provisions of the act of 1906 excluded these lands from the provisions of the mineral laws and therefore it was provided that neither the nonmineral nor nonsaline affidavit would be required of applicants who entered these lands. Upon further consideration the Department is satisfied that the correct conclusion was then reached. The act of 1906 specifically provides that all these lands shall be disposed of under the provisions of the homestead laws at not less than $5.00 per acre, payments to be made in installments. These provisions all controvert the theory that it was intended that any of said lands should be subject to entry under mineral laws.

The decision of your office, affirming that of the local officers rejecting this application for the reason that "these lands are only subject to entry under the act of June 5, 1906," is affirmed.

SOLDIERS' ADDITIONAL ENTRY—EFFECT OF INVALID ENTRY OF RECORD—SUBSTITUTION OF RIGHT.

FREDERICK L. GILBERT ET AL.

An entry under section 2306 of the Revised Statutes, although allowed upon an invalid soldiers' additional right, while of record segregates the land, and no rights are acquired under a subsequent application covering the same land which will prevent the substitution of a valid right as a basis for the entry.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 12, 1907.* (E. O. P.)

Mary E. Coffin, assignee of Frank Mitchell, administrator of the estate of Jonathan Wood, deceased, has filed motion for review of departmental decision of October 31, 1906, directing that Frederick L. Gilbert and Edwin T. Buxton be allowed to substitute a valid right under section 2306 of the Revised Statutes, to support the entry of Samuel V. Gilbert, allowed March 21, 1905, for lot 6 and the NW. ¼ SW. ¼, Sec. 5, T. 62 N., R. 1 W., Duluth land district, Minnesota, upon which final certificate issued May 25, 1903.

The entry in question was based upon a right asserted by Samuel V. Gilbert, as assignee of Adaline Hall, widow of Martin C. Hall. The death of Samuel V. Gilbert, April 28, 1903, is alleged. Prior

thereto he transferred to Frederick L. Gilbert and Edwin T. Buxton all his rights under his said application, which had not been allowed. Said entry was suspended May 20, 1905, because of its alleged fraudulent character, though so far as the record now discloses the same has never been finally canceled, probably for the reason that the said transferees applied, January 3, 1906, to substitute a valid right for the one alleged to be fraudulent.

October 9, 1905, more than two years after the allowance of the entry of Samuel V. Gilbert, Mary E. Coffin applied to enter said tracts under the provisions of said section 2306, which application was, as stated by your office, received as a junior application and held subject to the rights of Samuel V. Gilbert.

Counsel for Coffin now contends in support of the pending motion, that the Department failed to consider the adverse claim initiated by the filing of her application, and, relying upon unreported departmental decisions of September 7, 1906, in the case of Northern Pacific Railroad Company *v.* C. P. Maginnis and Northern Pacific Railroad Company *v.* John G. Ryding, decided June 23, 1906, asserts that it was error to allow said substitution in the face of such adverse claim. An examination of the record discloses that the departmental decision complained of was rendered upon the appeal of the transferees and that no brief was filed on behalf of Coffin bringing the matters now set up as basis for the pending motion to the notice of the Department. Neither does it appear that Coffin had notice of said appeal. In the event she was entitled thereto the contention of counsel for the transferees that said motion should be dismissed can not be sustained.

In the opinion of the Department, Coffin was not a party properly before the Department and entitled to notice of said appeal. To sustain this finding the distinction between the cases cited and relied upon by Coffin and the one under consideration must be carefully noted. It is clearly marked and the facts upon which the cited decisions rest disclose a material and fundamental difference in this, that in said cases the entry *had not been allowed* at the time of the filing of the adverse application or at the date of the application to substitute, while in the present case there was at such time and, so far as the record shows, is now, an entry of record. At the date Coffin's application was presented the land applied for was segregated by the record entry of Samuel V. Gilbert and it was error on the part of the local officers to accept and hold the same "as a junior application." It should have been rejected.

It is a well settled principle that lands embraced in an entry of record are not subject to further disposition, and that an application to enter the same confers no rights upon the applicant. [United States *v.* Puget Mill Co., 13 L. D., 386, 387.]

This doctrine is well settled and the fact that the record entry may have been erroneously allowed or that it was invalid does not alter the case. Ludwig May (13 L. D., 297); Clancy *et al. v.* Hastings & Dakota Ry., on review (20 L. D., 135, 136); Gallagher *v.* Jackson (ib., 389). Had Coffin begun proceedings against the record entry prior to the filing of the application to substitute and prosecuted the same to a successful termination and thereby acquired the status of a successful contestant, she would have been in position to assert the right now claimed by her (Cooke *v.* Villa, on review, 19 L. D., 442), but she took nothing by the mere filing of her application.

The rule laid down in the cases cited and relied upon by counsel for Coffin grows out of the practice prevailing in the case of applications of this character. The local officers being without authority to act upon them they are permitted to accept them when presented *prior to the allowance of entry by your office* and all rights thereunder attach in the order of the filing of the respective applications in the local office. It would therefore be manifestly inequitable in those cases where applications were *properly* filed and accepted to permit a substitution of rights to the prejudice of the rights of applicants attaching subsequently to the filing of the original application but prior to the filing of the application to substitute another right in lieu thereof, and the broad language used in departmental decision in the case of Robeson T. White (30 L. D., 61, 63), went beyond the question there presented and is not to be accepted as the rule applicable in cases where the first application is in fact invalid and adverse rights have attached prior to the filing of an application for substitution, *where* each of the respective rights asserted is based upon *naked applications* independent of any superior or controlling equity. But after entry has been allowed by your office, until the same is canceled no rights are gained by the filing of other applications therefor and the local officers should refuse to accept them. Ludwig May (13 L. D., 297).

It follows therefore that Coffin gained no rights by the filing of her said application and it was error on the part of the local officers to accept the same. The case is one solely between the government and the claimants under the record entry and there can be no question respecting the authority of the Department in such a case to direct the cancellation of the record entry upon such terms as equity and justice may demand, and in the absence of bad faith on the part of the applicant or the present parties in interest, their rights should be protected. Joseph W. Jones (9 L. D., 195). If the same end can be attained by substitution of a valid right for one found to be defective, without actual cancellation of the record entry, there appears to be no reasonable objection thereto.

The motion for review is accordingly hereby denied. The application of Coffin as to the tracts in question will be finally rejected and the directions contained in the departmental decision complained of carried into execution.

APPLICATION TO ENTER—EXECUTION—QUALIFICATIONS OF APPLICANT.

MARTA HENRIKSEN.

The mere execution of an application to make homestead entry confers no rights upon the applicant; and where an application was executed by an unmarried woman, but was not filed until after she had become disqualified to make entry by reason of her marriage, entry thereon can not be allowed.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 11, 1907.* (E. O. P.)

Marta Henriksen, a married woman, formerly Marta Henriksen, unmarried, has appealed to the Department from your office decision of April 20, 1906, rejecting commutation proof offered in support of her homestead entry made July 19, 1901, for the SE. ¼ NW. ¼, Sec. 17, T. 150 N., R. 70 W., Devils Lake land district, North Dakota, and holding said entry and final certificate issued thereon for cancellation.

The entry in question was allowed under the provisions of section 6 of the act of March 2, 1889 (25 Stat., 854), as additional to a former entry made by appellant for the E. ½ SE. ¼, Sec. 9, same township and range, in support of which commutation proof was submitted June 4, 1901.

The application for the entry in question was executed before the clerk of the court of Wells county, North Dakota, July 16, 1901, two days before the same was filed in the local office and three days before entry was actually allowed by it. The same day the said application was *executed* applicant was married to Halvor Henriksen, who at that time had an unperfected entry of record, upon which final proof was submitted April 7, 1903. No settlement upon the land last entered by her prior to entry is alleged, and in commutation proof testimony and the affidavit filed therewith it appears no settlement was established on the land prior to the fall of 1901, and possibly not until after the submission of final proof by her husband, on the land covered by his homestead entry, April 7, 1903.

Counsel for claimant contends that her application to enter having been *executed* prior to her marriage, though not filed nor her entry allowed until afterwards, her right should be determined as of the date of the execution of her application, at which time she was quali-

fied to make the entry in question. While the statute permits the execution of the affidavits and papers required in connection with a homestead entry before certain officers other than the register and receiver, it gives no effect to applications thus executed until actually filed or tendered for filing in the proper local land office. The mere execution of an application to enter confers no rights upon the applicant. The right attaches only when the entryman has performed all the acts necessary to be done by him to segregate the land from the unappropriated public domain. The execution of the required application to enter before a qualified officer residing at a distance and the transmission of the same to the local land office is solely at the risk of the applicant, whose rights thereunder attach only upon receipt thereof by the local officers.

It is clear that at the date of the receipt of Henriksen's application at the local office she was disqualified to make homestead entry under the provisions of section 6 of the act of March 2, 1889, *supra*. The act of June 6, 1900 (31 Stat., 683), in no manner relieves the claimant from the effect of her disqualification under the circumstances disclosed, as she bases her right upon a naked application and not upon settlement upon the land prior to entry (Sarah J. Walpole, 29 L. D., 647).

The decision appealed from is accordingly hereby affirmed.

MINING CLAIM—SALINE LANDS—IMPROVEMENTS.

LOVELY PLACER CLAIM.

It is only with respect to the actual production of salt, by the usual processes, that a saline spring or deposit may be regarded as within the purview of the mining laws; and the installation, upon a mining claim containing saline springs, of bath houses and appurtenances and the use of the water for bathing purposes is not in any respect or feature mining, and those utilities can not be regarded as in any sense mining improvements.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 13, 1907.* (F. H. B.)

This is an appeal by Henry Lovely from the decision of your office of September 20, 1905, whereby he was allowed sixty days from notice within which to show cause why his entry (No. 41, March 20, 1905) for the Lovely placer mining claim, survey No. 591, Juneau, Alaska, should not be canceled, inasmuch (among other things) as it is made to appear from the record that the object of the placer claim is not the production of salt therefrom, but that the claim is used as a sort of health resort where patients may enjoy the benefit of the saline baths there provided.

The descriptive report embraced in the transcript of the field notes

of the survey, and in the course of which it is stated that "there are four buildings on the premises described in the foregoing field notes, three of which are bath houses and one a blacksmith shop," includes the following paragraph:

> The surface work consists of one trail about 1200 ft. long and 5 ft. wide, well constructed and corduroyed. There are two principal springs as shown on the plat and given in the field notes, which have been thoroughly cleared and connected with the bath houses by conduits. About ½ acre of ground in the vicinity of upper bath house has been cleared of timber and brush. Bath houses built by claimant.

The only material question raised by the appeal is embodied in the first assignment of error, which is directed to the above-stated objection taken by your office to the placer entry.

The location was made under authority of the act of January 31, 1901 (31 Stat., 745), "extending the mining laws to saline lands," whereby the unoccupied public lands containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, are made subject to location and purchase under the provisions of the law relating to placer-mining claims.

In the recent case of Territory of New Mexico (35 L. D., 1) the legislation covering the public saline lands was reviewed, with particular reference to the character of the springs and deposits in contemplation thereunder, and their intended utilization as manifested in the legislative policy was remarked.

Adding to those special considerations the well known purpose reflected in the general mining laws, and the conclusion seems plain. The primary and principal purpose of those laws is the development of the mineral resources of the public domain, by adequate rewards to the individual explorers, for the general good and benefit. Salt is a commodity of universal culinary and table use, and the Department is without doubt that it was principally in that view that the legislation upon the subject was enacted. Only with respect to the actual production of salt, by the usual processes, could a saline spring or deposit be consistently regarded as within the purview of the mining laws.

The installation of bath houses and appurtenances, to which the salt water of the springs is led by conduits and there used for bathing purposes, can not be said to be in any respect or feature mining, and those utilities can not be regarded as in any sense mining improvements.

A further objection to the entry lies in the non-conformity of the claim to the system of the public-land surveys and rectangular subdivisions. Roman Placer Mining Claim (34 L. D., 260) and decisions cited in that case.

Upon these considerations the entry must be canceled, and, with this modification, the decision of your office is affirmed.

CHIPPEWA INDIAN LANDS—WITHDRAWAL—ACT OF JUNE 21, 1906.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 15, 1907.

Registers and Receivers,
Cass Lake, Crookston, and Duluth, Minnesota.

GENTLEMEN: By departmental order of November 10, 1906, all of the unsold lands ceded by the Chippewa Indians in the State of Minnesota are withdrawn from sale, occupation, or any disposition whatever, pending the completion of the drainage survey authorized by act of Congress, approved June 21, 1906 (34 Stat., 325, 352).

The withdrawal made under the above order does not defeat or adversely affect any valid entry, location, or selection which segregated and withheld the lands embraced therein from other forms of appropriation at the date of such withdrawal; and all entries, selections, or locations of that character should be permitted to proceed to patent or certification upon due proof of compliance with the law in the same manner and to the same extent to which they would have proceeded had such withdrawal not been made, except as to lands needed for construction purposes and concerning which you may be otherwise directed.

Any entry embracing lands included within such withdrawal may be contested and canceled because of entryman's failure to comply with the law or for any other sufficient reason, and any contestant who secures the cancellation of such entry and pays the land office fees occasioned by his contest will be awarded a preferred right of making entry in the event said order of withdrawal is revoked and the land restored to entry under existing laws; provided, that if legislation is enacted by Congress directing the manner of disposition of the lands involved, the preference right of entry will be subject thereto.

When any entry for lands embraced within said withdrawal is canceled by reason of contest, or for any other reason, such lands become subject immediately to such withdrawal and cannot, thereafter, so long as they remain so withdrawn, be entered or otherwise appropriated, either by a successful contestant or any other person; but you will make proper notes on your records and notify the contestant of the cancellation, the withdrawal of said lands and the suspension of his right of entry. In case of revocation of said order, you will notify each contestant who has gained a preference right that the lands involved have been released from such withdrawal and made subject to entry and that he will be allowed thirty days

from notice to enter said lands under the terms and provisions of the order of restoration.

Very respectfully, W. A. RICHARDS,
Commissioner.

Approved:
E. A. HITCHCOCK, *Secretary.*

VALENTINE SCRIP—ASSIGNMENT IN BLANK—OWNERSHIP.

FREDERICK W. MCREYNOLDS.

The owner of Valentine scrip may by an assignment in blank and delivery of the scrip convey all his right, title, and interest in the same to the lawful possessor, who may thereafter insert his name in the assignment; and while the land department may, before approving the location of such scrip, require the locator to show that he is the true and lawful owner thereof, such requirement should not be made in advance of location.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 18, 1907.* (E. F. B.)

This appeal is from the action of your office of November 30, 1906, holding that Valentine scrip No. 2,288 E, for forty acres, purporting upon its face to be the property of Frederick W. McReynolds, as assignee of W. C. Hill, can not be located and the assignments can not be approved unless a full explanation of the assignment presumably executed in blank be given, showing by whom delivery of the scrip to McReynolds was made.

This scrip had been located and the location was rejected by your office on the ground that no affidavit of non-occupancy of the land located had been filed. The locator thereupon requested the delivery of the scrip, but did not invoke the ruling of your office as to the validity or non-validity of the assignments or that they be approved.

Exception is taken to your ruling by appellant upon the ground that it raises the question as to "whether or not the owner of a piece of Valentine scrip which has been assigned in blank and so delivered to him has the right to insert his name in said assignment."

The Department does not understand from the decision that it was intended to hold that the owner of Valentine scrip may not by an assignment in blank and delivery of the scrip convey all his right, title, and interest in the same to the lawful possessor, who may thereafter insert his name in the assignment. If it was intended so to hold, it was error.

When the scrip is located your office may before approving the location require the locator to show that he is the true and lawful owner of the scrip, if you have any reason to doubt the *bona fides* of

the transaction by which the locator came into possession of the scrip, but such doubt should not arise simply from the fact that the assignment was made in blank, and the locator's name was thereafter inserted, and such requirement should not be made in advance of location. McDonald *v.* Hartman (19 L. D., 547, 563).

The scrip should be delivered to appellant without condition.

HOMESTEAD—SECTION 2, KINKAID ACT—"OWN AND OCCUPY."

LIBOLT *v.* SNIDER.

The term "own and occupy" as employed in section 2 of the act of April 28, 1904, referring to those entitled to a preference right to enter contiguous land under that section, is held to mean such possession of and dominion over the land embraced in an entry as is required by the provisions of the general homestead law; that is, such residence on the land entered as would defeat a contest based upon a charge of abandonment.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 20, 1907.* (E. O. P.)

Martha Libolt has appealed to the Department from your office decision of January 30, 1906, affirming the action of the local officers dismissing her contest against the homestead entry of Cyrus O. Snider, made July 14, 1904, under the provisions of section 2 of the act of April 28, 1904 (33 Stat., 547), for lot 4, SE. ¼ SE. ¼, Sec. 23, lots 1, 2 and W. ½ SW. ¼, Sec. 24, T. 35 N., R. 19 W., O'Neill land district, Nebraska.

Contest is based upon the ground that a portion of the land described is subject to the preference right conferred upon contestant by the second proviso of section 3 of said act (*supra*).

Libolt made entry September 25, 1900, for lots 3 and 4, N. ½ SE. ¼, Sec. 24, T. 35 N., R. 19 W., and July 24, 1904, made application to enter the SW. ¼, lots 1 and 2, Sec. 24, and lot 4, Sec. 23, which application was rejected because of conflict with the prior entry of Snider. She then instituted her contest.

Two hearings have been had before the local officers and from the testimony submitted thereat it is clearly established that contestant had never, prior to the allowance of Snider's second entry, established and maintained a residence on the land embraced in her original entry to the exclusion of a home elsewhere. In other words, she had failed to meet this essential requirement of the homestead law. It is asserted, however, that contestant complied with the law as she understood it and should, therefore, be given favorable consideration. The Department is without authority to overlook the plain provisions of the homestead law and it would be grossly

inequitable to favorably consider such a plea to the direct injury of one whose rights would thereby be disturbed.

Counsel for contestant contends that it is not essential to the assertion of the preference right claimed by Libolt that she should have resided upon the land at the date of the passage of said act of April 28, 1904, *supra*, or at the date of the filing of her application. He asserts that the words "own and occupy" used in the statute do not warrant the construction placed thereon by your office.

In the administration of this statute the Department has uniformly construed the words "own and occupy" to mean such possession of and dominion over the land embraced in an entry as is required by the provisions of the general homestead law. The term occupancy, thus considered, means nothing short of such residence on the land entered as would defeat a contest based upon a charge of abandonment. (Graves *v.* McDonald, 34 L. D., 527.)

Contestant has not, upon the showing made, brought herself within the provisions of said section 2, and her contest was therefore properly dismissed. The action of your office is accordingly hereby affirmed.

The record discloses that Snider had, prior to June 5, 1900, made and relinquished a homestead entry and that with his application upon which his present entry was allowed he failed to file a sufficient affidavit showing that said entry was not relinquished or abandoned for a consideration, etc., as required by the act of April 28, 1904 (33 Stat., 527), which, as construed by the Department, is a modification of the act of June 5, 1900 (31 Stat., 267). All applications to enter filed subsequently to the passage of the former act can only be allowed subject to the provisions of the act of June 5, 1900, *supra*, as modified by the act of April 28, 1904, *supra*. (Cox *v.* Wells, 33 L. D., 657.) The attention of your office is called to this feature of the case to the end that appropriate action may be taken with respect to the entry of Snider.

PHOEBE N. BUCKMAN.

Motion for review of departmental decision of October 19, 1906, 35 L. D., 253, denied by Secretary Hitchcock, February 20, 1907.

FOREST RESERVE—INDIAN LANDS—ACT OF JUNE 11, 1906.

The lands ceded by the Blackfeet Indians under the agreement ratified by the act of June 10, 1896, and subsequently included within the Lewis and Clarke forest reserve, are subject to the provisions of the act of June 11, 1906, relating to the entry of agricultural lands within forest reserves.

Secretary Hitchcock to the Secretary of Agriculture, February 21, 1907.
(F. L. C.) (W. C. P.)

By letter of February 7, 1907, the Assistant Commissioner of the General Land Office informs this Department that he is in receipt of a letter dated January 2, 1907, from the Acting Forester of your department, "desiring to know whether or not the lands ceded by the Blackfeet Indians, described in said act June 10, 1896, 29 Stat., 353, 358, will be formally opened to settlement and entry under the provisions of the homestead laws as modified by the act of June 11, 1906 (34 Stat., 233)."

The land office is of opinion that the act of 1906 is a general declaration of intention by Congress to dispose of agricultural lands in all forest reservations, other than those specifically excepted from its operation, regardless of the method by which they were included in the reserve, and regardless of what laws were applicable to the lands prior to such inclusion, and that it is applicable to agricultural lands in the ceded portion of the Blackfeet Indian reservation, and that they can be listed and disposed of under the provisions of said act.

The act of 1896, *supra*, approving the agreement with the Indians belonging on the Blackfeet reservation, by which a portion of that reservation was ceded to the United States, provided that—

> the lands so surrendered shall be open to occupation, location, and purchase under the provisions of the mineral land laws only, subject to the several articles of the foregoing agreement.

These lands inquired about are within the boundaries of the Lewis and Clarke forest reserve as defined by proclamation of June 9, 1903 (33 Stat., 2311). The agreement with the Indians reserved to them the right to cut and remove from the ceded lands wood and timber for agency and school purposes and for their personal uses and also the right to hunt upon the ceded lands and to fish in the streams thereof, so long as they remain public lands of the United States, and those rights were specifically recognized and protected in the proclamation including a portion of the ceded lands in a forest reserve.

The act of 1906, *supra*, authorized the Secretary of Agriculture to ascertain as to the location and extent of lands within permanent or temporary forest reserves, except in certain counties in California, which are chiefly valuable for agriculture and which may be occupied for such purposes without injury to the reserve, and which are not needed for public purposes, and file lists thereof with the Secretary of the Interior, with request that the lands "be opened to entry in accordance with the provisions of the homestead laws and this act." It then provides that the Secretary of the Interior shall declare said lands open to homestead settlement and entry in the manner therein prescribed.

The expression in the land office letter "regardless of the methods

by which they became included in the reserve," would seem to indicate a doubt as to the regularity of the proceedings establishing this reserve. The proclamation does not, however, disclose any such irregularity or lack of authority in the premises. The act of March 3, 1891 (26 Stat., 1095), authorizes the President to set apart "public lands wholly or in part covered with timber or undergrowth," as public reservations. These lands, immediately upon the extinguishment of the Indian right therein, became a part of the public domain. The Indians were paid for their rights and have no interests left, except those specifically reserved at the time of the cession and protected by the proclamation of 1903, and have no interest in the proceeds to be derived from the sale or disposition thereof. That is, there is no question of trust involved. Neither had these lands been devoted to or set aside for any public purpose or use prior to the proclamation of June 9, 1903. They were at the date of that proclamation "public lands" within the meaning of those words as used in the act of 1891, and therefore subject to inclusion within a forest reserve.

The act of 1906, *supra*, was of general application, save in the territory specifically excepted from its operation, and this reserve is not in that territory. Congress must have been aware that these lands, and probably others, were not subject to homestead entry before inclusion in forest reserves, but made no exception in respect of them. The executive is not permitted to read into the law an exception.

This Department concurs in the conclusion of the General Land Office that the act of June 11, 1906, operates upon the lands ceded by the Blackfeet Indians and subsequently embraced in the Lewis and Clarke forest reserve.

HOMER GUERRY.

Motion for re-review of departmental decision of November 17, 1906 (adhered to on review, January 31, 1907), 35 L. D., 310 and 399, denied by Secretary Hitchcock, February 21, 1907.

OKLAHOMA LANDS—PASTURE RESERVE NO. 3—RECEIVER'S RECEIPTS

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 21, 1907.

Register and Receiver, Lawton, Oklahoma.

GENTLEMEN: Rule 5 of the rules and regulations adopted September 1, 1906 (35 L. D., 139), in regard to Pasture Reserve No. 3, in your district, is amended to read as follows:

When any lessee presents a proper application and makes the advance payment on the purchase price, the receiver will issue to him a receipt therefor on

the blank form herewith transmitted; but no final certificate will be issued until all of the purchase price has been paid. The receipts issued by you should bear new serial numbers beginning with number 1, and a receipt bearing the current number and date should be issued at the time each of the deferred payments is made on the tract of land described in the first receipt, reference being made on the paper to the number of the first receipt.

Very respectfully,

W. A. RICHARDS, *Commissioner.*

Approved:

E. A. HITCHCOCK, *Secretary.*

MINING CLAIM—APPLICATION FOR PATENT—OATH BY AGENT—ACT OF JANUARY 22, 1880.

CROSBY AND OTHER LODE CLAIMS.

There is no authority of law for an agent to make oath to an application for patent to a mining claim, except under the act of January 22, 1880, which provides for such oath by an agent only where the applicant is not at the time a resident of or within the land district where the claim applied for is situated; and where an agent makes oath to an application for mineral patent under conditions not within the terms of said act the application and proceedings thereon are invalid, and the invalidity can not be cured by filing a new application sworn to by the applicant, nor can entry allowed upon such invalid application and proceedings be submitted to the Board of Equitable Adjudication under sections 2450 to 2457 of the Revised Statutes.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 28, 1907.* (G. N. B.)

March 28, 1905, upon an application for patent to the Crosby, Illinois, and Emerald lode mining claims, survey No. 177, Seattle, Washington, filed in the name of David Kellogg, on behalf of Michael Earles and William Pigott, and sworn to by Kellogg and not by the applicants, or by either of them, entry was allowed by the local officers embracing said claims.

When the record came, in due course, to be examined by your office it was found to appear therefrom that at the time the application for patent was filed both the applicants were residents of the Seattle land district, wherein the mining claims are situated, and in view thereof, on August 2, 1905, your office directed that the applicants be called upon to explain why their application for patent had been sworn to by an agent and not by themselves.

The call was accordingly made and by way of answer thereto the applicants filed their joint affidavit wherein they undertake to explain why Kellogg was appointed their agent to look after the patent proceedings, but they do not aver that they were non-residents of or were without the land district at the time the application for patent was filed.

By decision of October 13, 1905, your office found the showing to be insufficient and held the entry for cancelation.

The applicants have appealed to the Department.

It is not disputed that the applicants were residents of and within the Seattle land district when the application for patent was filed, and in the disposition of the case that matter must be accepted as a settled fact.

It is contended in the first place that the omission of the applicants to swear to the application for patent does not render the patent proceedings void as a whole, but merely defective, and that the defect is one which may be cured by filing a new and properly executed application, *nunc pro tunc*.

Prior to the act of January 22, 1880 (21 Stat., 61), the only authority for the execution and filing of an application for mineral patent was contained in section 2325 of the Revised Statutes, which provides that any person, association, or corporation, authorized to locate a mining claim, having claimed and located a piece of land for mining purposes, and having in respect thereof fully complied with the mining laws, may file in the proper land office an application, under oath, for patent to such mining claim.

This provision, from its earliest history, has been uniformly held by the land department to mean that the required oath must be by the applicant. (Sickels' Mining Laws and Decisions, p. 84; Topsy Mine 7 C. L. O., 20; Mining Regulations of 1872 and 1881, especially paragraph 31; Mining Regulations of 1901, 31 L. D., 474, 481, particularly paragraph 41.)

By the act of 1880 section 2325 was amended by adding thereto the following words:

> *Provided*, That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits.

It was not until this amendatory act was passed that an agent could make the oath to an application for mineral patent in any event; and under the amendment, according to its explicit terms, an agent can make such oath only in a case "where the claimant for patent is not a resident of or within the land district" wherein the claim sought to be patented is located. The provisions of the section and of the amendment, construed together, are so plain as to leave little room for construction. The original provision is general, and prior to the amendment was applicable to all cases. The amendment provides that under certain conditions the application for patent may be made by an authorized agent instead of by the applicant himself

as under the original provision. These conditions are stated in specific terms, and unless they exist in a given case there is no authority for an agent of the applicant in such case to make oath to the application for patent.

Under the facts of this case the application for patent having been sworn to by one having no authority under the statute to make the oath, must be treated as though it had never been sworn to at all. There was no more authority for filing the application under the oath of an agent than there would have been if the amendatory act had never been passed. The application, therefore, was invalid for any purpose, and the proceedings had upon it were necessarily equally invalid and of no avail. The invalidity is fatal to the application and to the subsequent proceedings (Rico Lode, 8 L. D., 223), and it can not be cured by filing after entry a new application sworn to by the applicants.

A further and alternative contention is that the entry should be submitted for equitable consideration and action under sections 2450 to 2457, inclusive, of the Revised Statutes.

Entries directed by those sections to be decided "upon principles of equity and justice as recognized in courts of equity" are only those entries "where the law has been substantially complied with, and the error and informality arose from ignorance, accident or mistake which is satisfactorily explained." In this case, in the filing of the application for patent, the law was not substantially complied with and the omission is not one that may be denominated a mere "error or informality." In fact, in this respect, the law was not complied with at all. The case therefore does not come within the provisions of the sections referred to. See Alaska Placer Claim (34 L. D., 40).

The decision of your office is affirmed, without prejudice, however, to the right of the applicants to begin patent proceedings *de novo*.

The attention of your office is called to the fact that the improvements certified by the surveyor-general to be for the benefit of the Emerald Claim do not seem to be sufficient to satisfy the statutory requirement.

PROOFS, AFFIDAVITS, OATHS—EXECUTION BEFORE DEPUTY CLERKS OF COURTS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 1, 1907.

Registers and Receivers, United States Land Offices,

SIRS: You are directed not to receive proofs, affidavits or oaths of any kind whatsoever required to be made by applicants and entry-

men under the homestead, pre-emption, timber culture, desert land, and timber and stone acts, executed and sworn to after May 1, 1907, before deputy clerks of courts.

Very respectfully,

W. A. RICHARDS, *Commissioner.*

Approved:

E. A. HITCHCOCK, *Secretary.*

ALASKAN LANDS—ALLOTMENTS TO INDIANS OR ESKIMOS—ACT OF MAY 17, 1906.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *February 11, 1907.*

REGISTER AND RECEIVER,
Juneau, Alaska.

SIRS: The act of May 17, 1906 (34 Stat., 197), provides:

> That the Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres.

Appropriate forms for the use of applicants under this act have been prepared and are herewith transmitted.

The application must be signed by the person applying, but need not be sworn to. If the signature is by mark, the same must be witnessed by two persons.

The affidavit must be sworn to by the person applying, and if claiming under the preference right clause the date of the beginning of his occupancy must be given, and its continuous nature stated. The corroborative affidavit must be signed by two witnesses, who may be Indians or Eskimos. The nonmineral affidavits must be signed by the person applying.

The affidavits may be sworn to before any officer authorized to administer oaths and having a seal. If the application is made by a woman she must state in her affidavit whether she is single or married, and if married must show what constitutes her the head of a

family, as it is only in exceptional cases that a married woman is entitled to an allotment under this act.

You will give a separate series of numbers to allotments made under this act, placing the same upon abstracts, and forward to this office with your regular monthly returns.

You will assist the applicants in any feasible manner, and as the act makes no provision for any fees for filing you will make no charge in any of these cases.

The allotments when found correct in form, and without valid adverse claims, will be placed on a schedule which will be submitted to the Department for approval, and thereafter, as no provision is made for issuing patents, the same will be kept on file in this office.

As the act seems to intend that allotments may be made for unsurveyed lands you will require, in such cases, as accurate a description as possible, by metes and bounds and natural objects, of the lands applied for. The lines must be run, unless bounded by bodies of water of sufficient size to make the meandering of the same evidently necessary, north and south, and east and west.

Very respectfully,

W. A. RICHARDS,
Commissioner.

Approved:
E. A. HITCHCOCK,
Secretary.

APPLICATION FOR ALLOTMENT OF LANDS IN ALASKA BY NATIVE INDIANS OR ESKIMOS.

(Act May 17, 1906, 34 Stat., 197.)

LAND OFFICE AT _____,
_____, 190__.

Application No. __.

I, _____ _____, of[1] _____, do hereby apply to have allotted to me,[2] _____ _____, under the act of May 17, 1906 (34 Stat., 197), the[3] _____ containing _____ acres.

_____ _____

Witnesses:

_____ _____
_____ _____

UNITED STATES LAND OFFICE,
_____ _____,
_____, 190__.

I, _____ _____, Register of the Land Office, do hereby certify that the above application is for[4] _____ lands of the class which the applicant is

legally entitled to select under the act of May 17, 1906 (34 Stat., 197), and that there is no prior valid adverse right to the same.

_____ _____,
Register.

ALLOTMENT AFFIDAVIT.

I, _____ _____, having filed my application No. __ for an allotment of land, under the act of May 17, 1906 (34 Stat., 197), do solemnly swear that I am a [5]_____Indian or Eskimo, born and now residing in the District of Alaska, and that I am [2]_____ _____, and that I have occupied the land so applied for since [6]_____, and that I have not heretofore made application under this act.

(Signed:) _____ _____

Sworn to and subscribed before me this __ day of _____, 190__

_____ _____

CORROBORATIVE AFFIDAVIT.

We, _____ _____ and _____ _____, do solemnly swear that we are well acquainted with _____, and know that he is a native-born Indian or Eskimo of full or mixed blood, now residing in the District of Alaska, and is [2]_____, and has occupied the land described in the foregoing application since [6]_____

_____ _____
_____ _____

Sworn to and subscribed before me this __ day of _____, 190__

_____ _____

NOTE.—The affidavits may be made before either the Register or Receiver of the land district in which the land is situated, or before the judge or clerk of any court of record having a seal, or before any officer authorized to administer oaths and having a seal, in the land district where the land is situated. United States court commissioners must attach their seal, and notaries public or justices of the peace, besides their seal, must attach to each application at least one certificate by the clerk of the proper court that they are duly qualified to administer oaths.

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[1] Insert post-office address.

[2] Insert "the head of a family" or "single person over twenty-one years of age," as the case may be.

[3] Insert the description, by legal subdivisions if surveyed; if unsurveyed, by metes and bounds, beginning with some permanent natural object that can be readily identified or some permanent monument set for the purpose

[4] Insert "surveyed" or "unsurveyed."

[5] Insert "full blood" or "mixed blood."

[6] Insert date, if occupied, or strike out the clause, if not occupied.

NON-MINERAL AFFIDAVIT.

This affidavit can be sworn to only on personal knowledge, and can not be made on information and belief.

The Non-Mineral Affidavit accompanying an entry of public land must be made by the party making the entry, and only before the officer taking the other affidavits required of the entryman.

DEPARTMENT OF THE INTERIOR, UNITED STATES LAND OFFICE.

_____ _____

_____, 190__

_____ _____; being duly sworn according to law, deposes and says that he is the identical _____ _____ who is an applicant for Government title to the _____; that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that the land contains no salt spring, or deposits of salt in any form sufficient to render it chiefly valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that his application therefor is not made for the purpose of fraudulently obtaining title to the mineral land, but with the object of securing said land for agricultural purposes, and that his post-office address is_____

_____ _____

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by _____ _____), and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in _____, within the _____ land district, on this ____ day of _____, 190__

_____ _____

NOTE.—The officer before whom the deposition is taken should call the attention of the witness to the following section of the Revised Statutes, and state to him that it is the purpose of the Government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law:

Revised Statutes of the United States. Title LXX.—Crimes.—Chap. 4.

SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall,

moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See Sec. 1750.)

LAND DEPARTMENT—JURISDICTION—RES JUDICATA.

BROOKS *v.* MCBRIDE.

Adjudication by the land department of a controversy involving public lands is no bar to its jurisdiction to inquire into any question affecting the right to the lands, so long as the legal title remains in the government, whenever necessary for the protection of the rights of the government or of parties seeking to acquire title thereto; but where equity and justice demand it, and to prevent vexatious litigation, the doctrine of former adjudication as an equitable bar between the parties to the controversy will be applied.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 2, 1907.* (E. F. B.)

The Department has considered the appeal of John W. Brooks from the decision of your office of January 29, 1906, dismissing his contest against the homestead entry of George E. McBride for the W. ½ NW. ¼ and W. ½ SW. ¼, Sec. 29, T. 15 N., R. 18 W., Guthrie, Oklahoma.

The land in controversy was formerly embraced in the homestead entry of Laura L. Adams, made October 20, 1898, which was canceled April 30, 1901, upon the contest of George E. McBride, defendant herein, charging abandonment, who was awarded the preference right of entry.

McBride, failing to receive notice of the cancelation of Adams's entry, did not apply to make entry within the statutory period, and August 23, 1901, John W. Brooks, the contestant herein, was allowed to make homestead entry of the land.

September 7, 1901, McBride applied to make homestead entry, submitting affidavits stating that he had not received notice of the cancelation of Adams's entry until September 4, 1901, and thereupon a hearing was ordered to determine the respective rights of the parties.

This controversy between Brooks and McBride resulted in the decision of your office of October 13, 1903, in favor of McBride, in which it was found that—

> McBride settled on the land sometime in October, 1900, built a dugout, 9 by 14 feet, a half-window, sloping roof covered with dirt, worth about fifty dollars, broke twenty-six acres, on which he has raised one crop. He transplanted an orchard of 18 apple trees, 6 plums, 1 peach, 1 apricot, 90 grape vines and 25 maple trees in the spring of 1901. The breaking is worth $1.25 per acre, the orchard is worth $50.00, and he has lived on the land continuously ever since he made settlement.

Your decision was affirmed by the Department April 13, 1904, and a motion for review was denied June 30th following. Brooks's entry was canceled July 14, 1904, and McBride made entry of the land August 2, 1904, in virtue of his preference right.

The day following, Brooks contested McBride's entry, alleging priority of settlement, to wit, October 1, 1901; that McBride's entry was not made in good faith but for the purpose of selling the same to the highest bidder; and that he was disqualified from making entry.

At the hearing, November 14, 1904, McBride moved to dismiss the contest for the reason that it was not corroborated and that the questions raised therein were *res judicata.*

The hearing was continued from time to time until February 20, 1905, when Brooks filed an amendment to his affidavit of contest, charging that McBride had failed to make settlement upon the land within six months from the date of his entry.

Although the local officers at the session of the hearing November 14, 1904, denied the motion of McBride to dismiss the contest on the ground that the matters alleged had been formerly adjudicated, they refused to consider any testimony touching the charges contained in the affidavits that had been filed up to that date, for the reason that those charges had been determined adversely to contestant in your decision of October 13, 1903, which was affirmed by the Department.

They held that the only question to be considered and determined was the charge made in the amended affidavit filed February 20, 1905, to wit, failure to establish residence upon the land within six months from date of his entry.

Upon this charge they held that McBride could not claim any right by settlement, cultivation, improvement or residence upon the land until after the date of his entry made August 2, 1904, and that whatever was done by him upon the land pending the contest against the Adams entry was as an intruder and conferred upon him no right. They found that he did not establish residence upon the tract within six months from the date of his entry and that no sufficient excuse was shown for such failure.

Former adjudication can not be pleaded by any party to a controversy before the land department as a bar to its jurisdiction to reexamine and inquire into any question affecting the right to the public lands, whenever it may be necessary for the protection of the rights of the government or of parties seeking to acquire title to the public lands. Such power rests in the Secretary of the Interior, whose duty it is to see that the land is properly disposed of, so long as the legal title remains in the government. Knight *v.* Land Association (142 U. S., 161); Parcher *v.* Gillen (26 L. D., 34).

The Department will, however, apply the doctrine of former adjudication as an equitable bar between parties to a controversy who are seeking to acquire title to the public land, where equity and justice demand it, and to prevent vexatious litigation.

The charges preferred by Brooks against the entry of McBride the day after it was made, related solely to questions that had been inquired into on the hearing ordered upon the application of McBride to make entry. No sufficient reason is shown why those matters should again be considered, and the local officers properly refused to consider the testimony touching upon those charges. Their refusal to grant the motion to dismiss served to hold the matter in abeyance until after the expiration of six months from the date of entry, and it enabled the contestant to prefer the charge of failure to settle within the statutory period.

McBride's right to the land was acquired by virtue of his preference right as a successful contestant. It did not depend upon an act of settlement, nor was he required to establish and maintain a settlement upon the land prior to the cancelation of the entry of Brooks and the allowance of his own entry in virtue of his preference right.

But it does not follow that he could not have established and maintained a valid settlement on the land after the entry of Adams had been canceled and before his entry had been allowed. While he could not have acquired any right by settlement upon or improvement of the land during the continuance of the entry of Adams, his presence upon the land and his improvements made thereon during that period would ripen into a valid settlement immediately upon the cancelation of the entry if he was actually upon the land at that time. Moss *v.* Dowman (176 U. S., 413).

On the other hand, Brooks did not acquire any right by his entry, nor could he acquire any right by settlement after the entry of Adams had been canceled, as against the right of McBride, for the reason that every act of his, whether by settlement or entry, was subject to the superior right of McBride, acquired by his successful contest against the entry of Adams.

The testimony shows that every act of Brooks was an intrusion upon the claim and right of McBride, of which he had full knowledge. Whether Brooks's conduct was or was not such as should have given McBride reasonable cause for alarm, it was evidently intended to intimidate him and there is positive evidence that it did.

McBride testified that he was living upon the land for two years before Brooks came there. In the decision of your office of October 13, 1903, it was stated that McBride settled on the land in October, 1900, built a cabin, transplanted an orchard of fruit trees, had some

breaking done, and has lived on the land continuously ever since he made settlement.

Brooks testified that when he went on the land October 1, 1901, he found McBride occupying it and knew that McBride had settled upon and improved it, claiming the right to do so in virtue of his preference right as a contestant.

Brooks's residence upon the land and the improvements placed thereon were not only made with full knowledge of the rights and claim of McBride, but in the face of the positive assertion of it and the warning to Brooks not to settle on the land.

Although McBride does not appear to have maintained a continuous residence upon the land from the time a right attached under his settlement made in 1900, there is not the slightest indication of a purpose to abandon the land, but, on the contrary, it is shown that he frequently endeavored to obtain exclusive possession of it and that Brooks, by his persistent infringement upon McBride's rights, was instrumental in preventing it. Whether Brooks's conduct was such as to intimidate McBride or not, it is apparent that the presence of these parties upon the land at the same time was apt to engender strife and conflict between them and that McBride sought to avoid it by his absence.

Your decision is affirmed.

INDIAN LANDS—BITTER ROOT VALLEY—MINING LAWS.

DAYTON AND FREEMAN AND OTHER PLACER CLAIMS.

Lands within the Bitter Root Valley above the Lo-Lo fork of the Bitter Root River, ceded to the United States under the treaty with the Flathead and other Indians, ratified March 8, 1859, are not subject to entry under the mining laws.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 2, 1907.* (E. P.)

March 12, 1903, Joseph T. Pardee and Samuel Watson were permitted by the local officers to make mineral entry, No. 128, for the Dayton and Freeman, Garden City, Fausett, Estella No. 2, and Corda placer mining claims, embracing the NE. ¼ of the NE. ¼, the NE. ¼ of the SW. ¼, the N. ½ of the NW. ¼ of the SE. ¼, the SW. ¼ of the NW. ¼ of the SE. ¼, the W. ½ of the NE. ¼, the NW. ¼ of the SE. ¼ of the SW. ¼, the SE. ¼ of the NW. ¼, the E. ½ of the NW. ¼ of the SW. ¼, Sec. 24, and the SE. ¼ of the SE. ¼ of the SE. ¼, Sec. 13, T. 10 N., R. 19 W., Missoula land district, Montana.

February 6, 1905, your office, pursuant to its decision of April 5, 1904, adhered to on motion for review June 1, 1904, canceled the

entry on the ground that the lands upon which the claims are situate, being a portion of those lying within the Bitter Root valley, above the Lo-Lo fork of the Bitter Root river in Montana, ceded to the United States under the treaty with the Flathead and other Indians, ratified March 8, 1859 (12 Stat., 975), are not subject to disposition under the mining laws.

Appeal from your office decision was subsequently filed, but was denied by your office because not taken in time. The Department, however, on May 26, 1905, upon petition of the mineral claimants, directed that the records be certified here, and the case is now before the Department for consideration.

The tracts here in question comprise a portion of the land 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 are within one of the fifteen townships in the Bitter Root valley above the Lo-Lo fork of the Bitter Root river—as shown by the map or diagram approved by the Department April 14, 1894—opened to settlement under the provisions of the act of June 5, 1872 (17 Stat., 226).

By section 2 of the said act it is provided:

> That as soon as practicable after the passage of this act, the surveyor-general shall cause to be surveyed as other public lands of the United States are surveyed, the lands in the Bitter Root valley lying above the Lo-Lo fork of the Bitter Root river; and said lands shall be open to settlement, and shall be sold in legal subdivisions to actual settlers only, the same being citizens of the United States, or having declared their intention to become such citizens, said settlers being heads of families, or over twenty-one years of age, in quantities not exceeding one hundred and sixty acres to each settler, at the price of one dollar and twenty-five cents per acre . . . Townsites in said valley may be reserved and entered as provided by law. . . . *And provided further*, That none of the lands in said valley above the Lo-Lo fork shall be open to settlement under the homestead and pre-emption laws of the United States.

By the second section of the act of February 11, 1874 (18 Stat., 15), it is provided:

> That the benefit of the homestead act is hereby extended to all settlers on said [Bitter Root Valley] lands who may desire to take advantage of the same.

These are the only provisions made by Congress for the sale or entry specifically of any of the lands (save such as had been allotted to Indinas) lying within the Bitter Root valley. The methods of disposition so provided are (1) that they shall be open to settlement and shall be sold in legal subdivisions to actual settlers only, in quantities not exceeding one hundred and sixty acres to each settler, at the price of one dollar and twenty five cents per acre; (2) that townsites in said valley may be reserved and entered as provided

by law; and (3) that settlers on said lands may, if they desire to do so, acquire title thereto under the homestead law.

It is in effect contended by the mineral claimants that, while no provision is made in the acts quoted from for the disposition of any of the lands in the Bitter Root valley under the mining laws, such thereof as are chiefly valuable for mineral, being public lands of the United States, are, under the provisions of sections 2318 and 2319 of the Revised Statutes, specifically made subject to disposition under the mining laws and reserved from disposition under any other law. In other words, that the acts of 1872 and 1874 should be held to have reference only to such of said lands as are agricultural, or non-mineral in character, leaving the mineral lands to be disposed of under the mining laws only.

If this were an application to make an agricultural entry of mineral land within the Bitter Root valley, to the allowance of which, for instance, the applicant herein were objecting, it would be necessary to meet the above contentions. But this case involves a mineral entry. The decisive consideration here, therefore, is that the only methods of disposition, by sale or entry, of any of those lands which the land department is authorized to recognize are those prescribed by the acts of 1872 and 1874. In further support of the view that Congress intended to confine such sales and entries as should be made to the provisions of those acts may be cited the later act of March 25, 1904 (33 Stat., 151), which Congress evidently deemed necessary to protect rights under certain desert-land, pre-emption, mining, and timber and stone entries theretofore erroneously or inadvertently allowed by the land department, covering lands within the valley, and upon which patents had issued, that act being as follows:

> That all patents heretofore issued for lands in the Bitter Root Valley, State of Montana, above the mouth of the Lo-Lo fork of the Bitter Root River, designated in the act of June fifth, eighteen hundred and seventy-two, in desert entries, pre-emption entries, mining entries, entries under the act of June third, eighteen hundred and seventy-eight, as extended to all the public land States by the act of August fourth, eighteen hundred and ninety-two, commonly known as the timber and stone law . . . are hereby confirmed and said patents validated, to all intents and purposes the same as if the law under which said patents were issued was applicable to said lands.

This act clearly constitutes, in the opinion of the Department, a legislative declaration to the effect that the methods of disposition by sale or entry specified in the acts of 1872 and 1874 were intended to be exclusive, pending further legislation.

Without expressing an opinion as to whether mineral lands (if any such there be) in the Bitter Root valley are subject to disposition under those acts, the Department is constrained to hold that there

is no present authority to permit the sale or entry of lands within that area under the mining laws, and that the entry must be canceled.

The decision of your office is accordingly affirmed.

SECOND HOMESTEAD ENTRY—RELINQUISHMENT FOR CONSIDERATION—SECTION 1, ACT OF APRIL 28, 1904.

THOMAS *v.* MORGAN.

A homestead entryman who secured a valuable right in return for the relinquishment of his entry, relinquished for a consideration within the meaning of section 1 of the act of April 28, 1904, and is therefore not entitled to make second entry under the provisions of that section.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 2, 1907.* (E. O. P.)

William C. Thomas has appealed to the Department from your office decision of February 5, 1906, affirming the action of the local officers and dismissing his contest against the homestead entry of William H. Morgan made May 6, 1905, for the NE. ¼, Sec. 30, T. 6 S., R. 1 E., Salt Lake land district, Utah.

The contest of Thomas was based upon the allegation that Morgan's affidavit, filed in support of his aplication to make the entry in question, which could only have been allowed under the provisions of section 1 of the act of April 28, 1904 (33 Stat., 527), to the effect that a former homestead entry made by him was not relinquished for a consideration, was false.

Concerning the first entry of Morgan, the record discloses that the same was made August 10, 1897, and canceled by relinquishment February 8, 1898, and on the same date the land embraced therein was selected by the State (Agricultural College List No. 16.)

The relinquishment of this entry was executed February 1, 1898, and was conditioned upon the State making selection of the land and that Morgan be allowed to purchase the same from the State, under an agreement entered into with it. The relinquishment was placed in the hands of the State to be filed in the local office at the time of the presentation of its selection list. This arrangement was fully carried out.

It appears also that Morgan at the time of executing his relinquishment executed to his agent or attorney an assignment in blank of his contract with the state. About November 5, 1898, Morgan, at the request of his attorney, executed a second assignment of his contract to purchase to Anna H. Meik, who paid to said attorney $180 therefor, for which receipt was given. There is no evidence that Mor-

gan ever actually received the money paid by Meik for this assignment and there is nothing to show, nor is it intimated that he received any money consideration from anyone at the time he placed his relinquishment in the hands of the State.

Your office found that the money paid by Meik was not a payment made for the relinquishment but for the assignment of the contract to purchase from the State. In this the Department concurs. Your office, for this reason, dismissed the contest upon the ground that no consideration for the relinquishment had been proved.

In the opinion of the Department, Morgan received a consideration for his relinquishment when he secured the agreement of the State to purchase the lands relinquished. His relinquishment is not, by its terms, an unconditional one, but dependent upon a compliance by the State with the conditions therein expressed. Under this arrangement he secured a valuable right, in this particular instance the value of that right is shown to have been at least $180. Surely this is a consideration within the meaning of the statute. The mere fact that the consideration received for a relinquishment is not a money consideration does not exempt the party receiving it from the class mentioned in the act of April 28, 1904, *supra*. The language is not thus limited and so narrow a construction thereof would be unwarranted. The acquisition of a valuable right may be as much a consideration as the receipt of money.

The decision appealed from is accordingly hereby reversed and the entry of Morgan will be canceled.

NORTHERN PACIFIC GRANT—ADJUSTMENT—ACT OF JULY 1, 1898.

WILLIAM H. WILCOX.

Where the conflicting claims of the Northern Pacific Railway Company and a homestead entryman are subject to adjustment under the provisions of the act of July 1, 1898, and the entryman, after patent, conveys a portion of his claim to another, by legal subdivisions, the conflicting claims of the company and the purchaser to the portion so transferred are subject to adjustment under said act.

Secretary Garfield to the Commissioner of the General Land Office,
(F. L. C.) *March 6, 1907.* (F. W. C.)

The Department has considered the appeal by William H. Wilcox from your office decision of September 14, 1906, refusing to accept his relinquishment of the S. ½ of NW. ¼, Sec. 11, T. 3 N., R. 3 E., Vancouver land district, Washington, filed 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 by the joint resolution of May 31, 1870 (16 Stat., 378), in aid of the construction of the branch line of the Northern Pacific railroad extending northward from Portland to Puget Sound. It was selected on account of said grant October 24, 1888, and the selection was erroneously canceled March 5, 1894, for supposed conflict with the grant appertaining to the unconstructed main line of the Northern Pacific railroad *via* the valley of the Columbia river to a point at or near Portland.

June 8, 1891, one Herman Wachs made homestead entry for the entire northwest quarter of said section 11, upon which final proof was made and certificate issued July 14, 1896, the patent of the United States being issued thereunder December 22, 1896. Following the decision of the supreme court in the case of the United States *v.* Northern Pacific Railway Company (193 U. S., 1), and under departmental instructions of June 3, 1904, the cancellation of selections similarly situated was rescinded, and where the lands so selected had been theretofore patented to individuals, it has been held that the company's selection should be recognized so far as might be necessary for the purpose of adjustment of conflicting claims to the land under the provisions of the act of July 1, 1898, *supra.*

It seems that after receiving patent for the land covered by his homestead entry Wachs transferred the S. ½ of NW. ¼ to Wilcox and on January 16, 1905, the local officers transmitted an election by Wilcox to relinquish his claim to the tract purchased from Wachs and his formal relinquishment in support thereof, to the end that he might transfer his claim to other lands as provided in said act.

With regard to the balance of the land included in said homestead entry it seems that the NW. ¼ of NW. ¼ was transferred to Emil Balmer and on May 3, 1906, the local officers forwarded his formal election to retain said tract. The remaining tract covered by said entry, to wit, the NE. ¼ of NW. ¼, seems to be still in the entryman, Wachs, and notice was forwarded him under direction to your office allowing him sixty days from notice within which to file an election under the act of 1898, it being the purpose of your office to adjust the entire tract embraced in the original entry, if possible, under said act. No response was received from Wachs.

Under these circumstances your office decision appealed from held that an adjustment was not possible under the act of 1898 because the claimants to one-half of the land embraced in the entry seem to want to retain the land while the owner of the remaining half desired to transfer, and, for this reason, Wilcox's relinquishment was refused, the unreported decision of this Department of October 3, 1903, in the matter of Supplemental Relinquishment No. 37, State of Washington

(L. and R. Press Copybook 494, 370), being referred to as authority for the action taken.

The case under consideration in the departmental decision referred to was of this sort: One James W. Dyer had made homestead entry for lots 1, 2, 3 and 4, Sec. 5, T. 17 N., R. 46 E., Washington, upon which final certificate and patent had issued. Election having been filed to retain the tract embraced in said entry, it was listed for relinquishment under the act of July 1, 1898, *supra*, as extended by act of March 2, 1901 (31 Stat., 950), and upon being advised thereof the railway company filed what was denominated as supplemental relinquishment No. 37, embracing lots 3 and 4 of said section 5, included in the individual claim of Dyer, and assigned as its reason for not including lots 1 and 2, that said lots had been sold by the Northern Pacific Railroad Company January 25, 1887. In disposing of said supplemental relinquishment it was said in the decision of the Department referred to—

> With regard to supplemental relinquishment No. 37, being of a portion only of the land included in the individual claim of James W. Dyer, the Department must refuse to accept the same, it having been repeatedly held by this Department in the matter of adjustments under the act of 1898, that the individual claim is not divisible. Said relinquishment is, therefore, returned without departmental approval.

As before stated, in that case the company had been invited to relinquish the entire tract embraced in Dyer's entry and the Department refused to receive a relinquishment of only a portion thereof. Thereafter the company secured a reconveyance to itself of the land it had reported sold and made relinquishment of the entire tract, and the adjustment was permitted. The holding in said case was not intended to, nor does it, control a case like that now under consideration. Wachs, after receiving patent under his homestead entry, transferred eighty acres of the land to Wilcox. He had a right to make such a transfer and by the transfer the original claim was divided and Wilcox has a claim in his own right for adjustment under the act of 1898. That act provides:

> That the Secretary of the Interior shall from time to time ascertain and, as soon as conveniently may be done, cause to be prepared and delivered to the said railroad grantee or its successor in interest, a list or lists of the several tracts which have been purchased or settled upon or occupied as aforesaid, *and are now claimed by said purchasers or occupants, their heirs or assigns, according to the smallest government subdivision.*

The transfer to Wilcox was according to the smallest legal subdivision and he is clearly entitled to invoke the provisions of the act of 1898. The separate claims of Emil Balmer and Herman Wachs, claiming through the original homestead entry of Wachs, are also subject to adjustment as separate and independent claims.

The decision of your office must therefore be reversed and the matter remanded for your further action in accordance with the holding herein made. It is not intended herein to determine what would be the effect of a transfer of a tract after patent of less than the smallest legal subdivision.

FORT BERTHOLD INDIAN RESERVATION—ACT OF FEBRUARY 18, 1907.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 6, 1907.

Registers and Receivers,
Dickinson, Minot, and Williston, North Dakota.

GENTLEMEN: Your attention is called to the provisions of an act of Congress, approved February 18, 1907 (Public—No. 91), entitled, "An act to define the status of certain patents and pending entries, selections and filings on lands formerly within the Fort Berthold Indian Reservation in North Dakota," which reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all patents heretofore issued on entries and selections made without fraud under any of the laws providing for disposal of the public lands on lands formerly within the Fort Berthold Indian Reservation in North Dakota, which were opened to settlement by the President's proclamation dated May twentieth, eighteen hundred and ninety-one, pursuant to the provisions of an act entitled "An act making appropriations for the current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and ninety-two, and for other purposes," approved March third, eighteen hundred and ninety-one, shall have the same effect, and all pending entries, selections, or filings embracing such lands made prior to December first, nineteen hundred and six, shall be disposed of in the same manner and under the same restrictions and limitations, as if the lands included in such patents, entries, selections, or filings had been subject to disposition under the general provisions of the public-land laws.

Approved, February 18, 1907.

You will observe that, by this act, all patents issued prior to its approval, on entries and selections made without fraud under any of the laws providing for disposal of the public lands on lands in said reservation, shall have the same effect, and all pending entries, selections, or filings embracing such lands made prior to December 1, 1906, shall be disposed of in the same manner and under the same restrictions and limitations, as if the lands included in such patents, entries, selections, or filings had been subject to disposition under the general provisions of the public land laws.

In accordance with instructions contained in letter "C" of November 14, 1906, to your office, you will not allow filings, entries or selections, of any kind, for these lands, except as provided by the act of March 3, 1891 (26 Stat., 1032), and in the case of commutation, subsequent to December 1, 1906, of a homestead entry, the entryman will be required to pay the price of $1.50 per acre, as fixed by the act of March 3, 1891, *supra*.

Very respectfully,

W. A. RICHARDS, *Commissioner*.

Approved:

JAMES RUDOLPH GARFIELD, *Secretary*.

ISOLATED TRACT—CLAIM OF RECORD—SECTION 2455, REVISED STATUTES.

A. SCOTT HERSHEY ET AL.

While the Commissioner of the General Land Office, in the exercise of the authority conferred upon him by section 2455 of the Revised Statutes, should not offer at public sale any tract of land that does not appear by the records of his office to be free from all claim or right, yet where a tract has been sold under said section while covered by a claim of record, he has ample authority to clear the record of such claim, if invalid, and to ratify and confirm the sale and convey to the purchaser the legal title by patent.

Secretary Garfield to the Commissioner of the General Land Office,
(F. L. C.) *March 6, 1907.* (E. F. B.)

By decision of March 29, 1906, you held for cancelation public cash entry made April 19, 1905, by A. Scott Hershey and Stephen Karl Hershey, of the SE. ¼ NE. ¼, Sec. 21, T. 2 N., R. 68 W., 6th P. M., Denver, Colorado, from which they have appealed.

The land in question was sold at public outcry by direction of your office, as an isolated tract, under authority of section 2455, Revised Statutes, and at said sale these appellants became the purchasers, at two dollars and fifty cents per acre, and received final receipt therefor. You held the entry for cancelation for the reason that it is within the limits of the grant to the Union Pacific Railroad, and was selected by that company, with other subdivisions, May 16, 1882, which selection has never been canceled.

It is alleged in the appeal, and it so appears upon the plats in your office, that the tract in question is also covered by two preemption declaratory statements filed in 1866. It is contended by appellants that by reason of these filings existing at date of definite location the tract was excepted from the grant to the company and the sale should therefore be ratified and a patent should issue to the purchasers.

The mere fact that the tract was covered by an uncanceled selection by the Union Pacific Railroad Company at the time of the sale will not prevent the United States from disposing of the land at public sale under the authority conferred upon the Commissioner by section 2455, Revised Statutes, and conveying to the purchaser a legal title by patent, if the land was excepted from the grant, and the title to the land was in the United States and no valid claim to the land existed which it was bound to recognize.

Although it would be injudicious to offer at public sale under said section any tract of land that does not appear by the records of your office to be free from all claim or right, if such sale has, nevertheless, been made, you have ample authority to clear the record of such claim if it has no validity and to ratify and confirm the sale and to convey to the purchaser the legal title by patent.

The case is therefore remanded to your office to take such action as may be necessary to determine the validity of said selection, after due notice to the railroad company, and to take such other action as may be necessary.

MILITARY BOUNTY LAND WARRANT—ASSIGNMENT IN BLANK—OWNERSHIP.

JAKE SALMEN.

The original owner of a military bounty land warrant may convey all his right, title and interest therein by a blank assignment, and the assignee may convey his right, title and interest in the same by mere delivery; but when the warrant is located the assignment must be complete and perfect, showing *prima facie* that the locator is the true owner thereof.

Secretary Garfield to the Commissioner of the General Land Office,
(F. L. C.) *March 8, 1907.* (E. F. B.)

A military bounty land warrant for forty acres issued under the act of September 28, 1850, in the name of Baxter M. Garrison, was located August 2, 1904, upon the NW. ¼ NE. ¼, Sec. 9, T. 9 S., R. 14 E., St. Helena Meridian, New Orleans, Louisiana, by Jake Salmen, as assignee of the original owner.

The assignment of the warrant was executed May 29, 1852, and the name of the assignee was written therein with a typewriter. You held the entry for cancelation for the reason that it did not appear from the papers that there was a valid assignment of the warrant, it being indicated from the facts above stated that the assignment was executed in blank and that the name of the assignee was inserted afterward.

It is admitted by the locator that he purchased the warrant from

Charles T. Johnson, and that before it was sent to the local office his name was written in the assignment that had been executed in blank.

You refused to recognize the title of Salmen to the warrant, under authority of paragraph 4 of the circular governing assignments of warrants (27 L. D., 219), which is as follows:

> Blank assignments are *void*, and will not be recognized by this office. The name of an assignee should be written in the assignment before the warrant is sent to the *local or General Land Office*.

It was not intended by this rule to declare that no title can be conveyed out of the original owner by an assignment executed in blank, or that the purchaser of a warrant so assigned could not acquire the absolute right and title of the original owner and convey such right to others by the mere delivery of the warrant. The word "void" was improperly used. The rule merely intended to declare that warrants assigned in blank would not be recognized in the location of lands unless the name of the assignee was written in the assignment before it was presented for location, so that it would appear *prima facie* that the locator or entryman is the owner of the warrant.

Confirmation of this view may be had by reference to the circular of instructions issued October 17, 1853 (1 Lester, 592), as a guide for the action of local officers in regard to locations of military bounty land warrants made by assignees. This circular was issued with reference to the act of March 22, 1852 (10 Stat., 3), declaring such warrants assignable "according to such form and pursuant to such regulations as may be prescribed by the Commissioner of the General Land Office, so as to vest the assignee with all the rights of the original owner of the warrant or location."

In the circular reference is made to the numerous instances of defective and incomplete assignments of warrants under the act of March 22, 1852, that had been located and returned to the General Land Office. Among the classes enumerated of imperfect locations the 9th is "upon assignments where the blank is not filled with the name of the assignee who locates."

The local officers were instructed to require every applicant to have his warrant perfected in every respect, so that no subsequent action may be necessary for that purpose, and "in all instances herein enumerated, except the eighth and tenth, the mere statement of the defect carried with it the requisite knowledge of the method of amendment, viz., *by supplying the omission.*" See also McDonald *v.* Hartman (19 L. D., 547, 563).

This was an express recognition of authority in the original owner to convey all right, title and interest in the warrant by a blank assignment and to invest such assignee with the right to transfer the title

to the same by mere delivery. The warrant can not, however, be located unless the assignment is complete and perfect, showing *prima facie* that the locator is the true owner of the warrant.

The assignment of this warrant was made after the passage of the act of March 3, 1852, and prior to the circular of October 17, 1853, and the validity of this assignment was clearly recognized and provided for in the circular.

As stated in the case of Frederick W. McReynolds (35 L. D., 429), it is not intended to prevent your office from requiring proof as to the ownership of any warrant or scrip that may be offered for location or entry, whenever you have reason to believe that the person applying to make location or entry is not the true and legal owner of the warrant or scrip, but merely to hold that the original owner of such warrant or scrip may convey all his right, title and interest in the same by a blank assignment and such assignee may convey his right, title and interest in the same by mere delivery.

The case is remanded to your office for further consideration in the light of the views herein expressed.

MINING CLAIM—APPLICATION FOR PATENT—OATH—SECS. 2325 AND 2335, REVISED STATUTES.

NORTH CLYDE QUARTZ MINING CLAIM AND MILL SITE.

The provision of section 2325 of the Revised Statutes, that an application for patent to a mining claim shall be "under oath," and the provision of section 2335, for the verification of such application "before any officer authorized to administer oaths within the land district" where the claim is situated, are mandatory, and their observance is essential to the jurisdiction of the local officers to entertain the patent proceedings.

Secretary Garfield to the Commissioner of the General Land Office,
(F. L. C.) *March 5, 1907.* (E. B. C.)

October 13, 1904, the Kennedy Mining and Milling Company filed application (No. 2306) for patent to the North Clyde quartz mining claim and mill site, survey No. 4207–A and B, in the Sacramento, California, land district, and on December 31, 1904, made entry (No. 1934) for the same.

The application for patent was sworn to by the company's secretary before a notary public of the city and county of San Francisco, an officer not authorized to administer oaths within the land district where the claims are situated. The plat shows that the mill site lies along the easterly side of the lode claim and is contiguous thereto.

Your office required the applicant to show cause why the entry

should not be canceled because of the following defects, among others: verification of the application before an officer not authorized to administer oaths in the land district, and contiguity of the mill site with the lode claim.

A showing was submitted in response, and therewith was filed the secretary's affidavit taken before the receiver of the Sacramento land office, in which the affiant in effect avers that, of his own knowledge, each and all the statements contained in the application filed were true and correct. December 2, 1905, your office decided that the showing was insufficient and held the entry for cancelation.

The company has appealed to the Department. Counsel contends that the defect in the application is cured by virtue of the secretary's affidavit, and that your office erred in not following the directions contained in case of the Brick Pomeroy Mill Site (34 L. D., 320) as to the contiguous mill site. If the entry were not otherwise objectionable it does appear that the mill site in question would fall within the saving directions found in the case cited, but that decision, bearing date December 26, 1905, was subsequent to your office decision herein.

Section 2325 of the Revised Statutes requires that the applicant seeking a patent under the mining laws shall file "an application for a patent, under oath," showing compliance with such laws. Section 2335 of the Revised Statutes contains the following provision: "All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated." See Mattes *v.* Treasury etc. Co. (34 L. D., 314). These statutory provisions are mandatory, and their observance is among the essentials to the jurisdiction of the local officers to entertain the patent proceedings.

In the case at bar, the application is fatally defective because not sworn to before a proper officer within the purview of the statute. The case is not one of mere irregularity, or which presents defects that may be cured by supplemental proceedings. The application being invalid, the proceedings had thereunder, looking to the acquisition of patent, are without the requisite legal basis and therefore a nullity, and the entry must be canceled. This, of course, without prejudice to the right of the company now to file application for patent and prosecute proceedings thereunder, if it so desires.

In the event that new proceedings for patent are instituted, including the adjoining mill site, it is obvious that the saving directions above mentioned will be inapplicable.

The decision of your office is accordingly affirmed.

NORTHERN PACIFIC GRANT—ADJUSTMENT—ACT OF JULY 1, 1898.

WETZSTEIN *v.* NORTHERN PACIFIC RY. CO.

Where any part of a settlement claim is in conflict with the claim of the Northern Pacific Railway Company under its grant, and otherwise subject to adjustment under the provisions of the act of July 1, 1898, the settler may relinquish his entire claim and transfer the same to other lands.

Secretary Garfield to the Commissioner of the General Land Office,
(F. L. C.) *March 11, 1907.* (F. W. C.)

The Department has considered the appeal of August Wetzstein from your office decision of April 25, 1906, refusing to accept, for the purpose of adjustment under the provisions of the act of July 1, 1898 (30 Stat., 597, 620), the relinquishment of his homestead claim to the W. ½ of SW. ¼ of Sec. 3, T. 3 N., R. 1 E., Vancouver land district, Washington.

The claim which Wetzstein seeks to transfer under the provisions of the act of 1898 is a homestead settlement claim predicated upon a settlement made as early as 1888 and since maintained by residence and improvement upon the SW. ¼ of said section 3. It is gathered from your office decision and the record upon appeal that said SW. ¼ was within the limits of the withdrawal made on account of the main line of the Northern Pacific railroad *via* the valley of the Columbia river, to a point at or near Portland, which road was never constructed and the grant appertaining thereto was forfeited by the act of September 29, 1890 (26 Stat., 496). It is also within the primary limits of the grant made by the resolution of May 31, 1870 (16 Stat., 378), in aid of the construction of that portion of the Northern Pacific railroad extending northward from Portland to Puget Sound, which was duly constructed. The W. ½ of the SW. ¼, being the part of the claim which your office denied the right of relinquishment under the act of 1898, is also within the primary limits of the grant of May 4, 1870 (16 Stat., 94), in aid of the construction of the Oregon Central, now the Oregon and California railway, which was duly constructed.

Following the forfeiture act of September 29, 1890, this Department gave recognition to the grant for that portion of the main line of the Northern Pacific *via* the valley of the Columbia River to a point at or near Portland, as located under the grant of July 2, 1864 (13 Stat., 365), and as thus recognized entitled it to precedence over the subsequent grants by the resolution of May 31, 1870, and the act of May 4, 1870, in aid of the construction of the branch line of the Northern Pacific and the Oregon and California railways, respectively. See Spaulding *v.* Northern Pacific Railroad Company (21 L. D., 57). Had the holding made in the decision last referred to

prevailed, the entire tract in question would have been subject to the settlement claim of Wetzstein.

Cases were prosecuted in the courts resulting in a decision favorable to the Oregon and California Railroad Company (176 U. S., 28) and the branch line of the Northern Pacific railroad (193 U. S., 1), under which the claims under these grants were respected and the E. ½ of the SW. ¼ in question was on May 27, 1895, patented to the Northern Pacific Railroad Company, the NW. ¼ of the SW. ¼ patented to the Oregon and California company, October 9, 1895, and the SW. ¼ of the SW. ¼ patented to the same company January 21, 1896.

Following the passage of the act of July 1, 1898, Wetzstein first elected to retain his land in conflict with the Northern Pacific grant, but, evidently seeing that under such an adjustment he would be restricted to the eighty acres, the E. ½ of the SW. ¼ patented to said company, he thereafter filed his election to transfer his *claim* under the act of 1898 and filed his relinquishment of the entire SW. ¼ preliminary to such an adjustment. It was upon this application that the decision of your office appealed from was rendered.

The sole question presented by this record is: Can the entire claim of an individual be transferred under the provisions of the act of July 1, 1898, if otherwise within the terms of said act, where only a portion of the claim would upon such adjustment inure to the Northern Pacific land-grant? It is clear upon this record that had Wetzstein adhered to his first election to retain the land as against the Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, only the E. ½ of the SW. ¼ could have been listed for relinquishment by that company. This fact, however, should not interfere with or in any wise control the disposition of the application under consideration. The act of 1898 is a remedial statute passed primarily for the protection of the individual claims in conflict with the Northern Pacific land-grant and its purpose was evidently to secure to the individual his full claim. It is his "entry" or "claim" that the act permits to be transferred and if his claim is in any part in conflict with the grant, that is, lands claimed under the grant, he is entitled under the provisions of the act of 1898 to transfer the entire claim. When transferred, all conflict is eliminated and the adjustment of the Northern Pacific grant is thereafter in no wise affected thereby.

The decision of your office refusing to accept Wetzstein's relinquishment of his entire claim for the reasons stated therein, for the purpose of transfer under the act of 1898, is reversed, and if his claim is otherwise subject to adjustment under said act, as it appears your office has already found, you will permit the transfer of his entire claim.

RECLAMATION ACT—WITHDRAWAL—HOMESTEAD ENTRY—COMPENSATION—EVIDENCE OF TITLE.

AGNES C. PIEPER.

The rights of an entryman, as to the measure of compensation and the character of the action that may be taken by the government in acquiring or appropriating the land embraced in his entry for use in the construction and operation of irrigation works under the reclamation act, must be determined by the status of the entry at the time of the withdrawal of the lands for such purposes.

Where the entryman at the time of the withdrawal had earned title to the land by full compliance with the homestead law, he is entitled to compensation for the land and the improvements thereon as fully as if the legal title had passed to him, but no evidence of title, either equitable or legal, will be issued.

Secretary Garfield to the Commissioner of the General Land Office,
(F. L. C.) *March 11, 1907.* (E. F. B.)

With your letter of February 16, 1907, you transmit a motion by Agnes C. Pieper for review of the decision of the Department of November 16, 1906 (not reported), refusing to direct the issuance of patent to said Agnes C. Pieper upon her homestead entry for the NW. ¼, Sec. 8, T. 21 N., R. 14 E., North Yakima, Washington.

By letter of January 27, 1906, the Department, upon information furnished by the Reclamation Service, notified the Commissioner of the General Land Office that the land covered by the homestead entry of Agnes C. Pieper was needed for reservoir purposes, and in compliance with the recommendation of the Director of the Geological Survey, the Commissioner of the General Land Office was instructed to notify her that because of such appropriation the entry will be canceled and that she will be paid by the government for the improvements, as provided by sections 8 and 9 of the circular of June 6, 1905 (33 L. D., 607), unless sufficient cause is shown within sixty days from date of notice.

In answer to the rule to show cause, respondent averred that she had earned title to the land by full compliance with the homestead law for five years after entry and had submitted proof thereof upon which final certificate had issued prior to the order of withdrawal. She insisted that the title to the land should be perfected in her by the issuance of a patent.

In the decision of the Department of November 16, 1906, it was tacitly admitted that the claimant had earned title to the land by complying with the homestead law prior to the date of the withdrawal and it was not questioned that the equitable title to the land, evidenced by the final certificate, had vested in her prior to the withdrawal which entitled her to a patent. But as the government had

the right to acquire the land by purchase or by condemnation under authority of the 7th section of the reclamation act, the patent was refused for the reason that no useful purpose can be subserved by the issuance of it to respondent, as the rights of an entryman are as fully protected by the final receipt as by the patent.

Considering that her ground of complaint was the refusal to issue the patent, and that no question was involved as to the measure of compensation, it was said—

> In either case the government has the right to acquire the land by compensating the entryman, or owner, the only difference being, in the one case the legal title remains in the government, while in the other case it would be necessary for the government to reacquire the title after the issuance of the patent. The right to compensation is the same in both cases.

In the motion for review attention is called to the fact that the Department, in its letter of January 27, 1906, directed that the entry shall be canceled and that the "improvements will be paid for by the government as provided by sections 8 and 9 of the circular of June 6, 1905."

She insists that "the Secretary of the Interior has no jurisdiction to withdraw and appropriate land covered by a perfected entry or to cancel a perfected entry of land under the laws of Congress for irrigation purposes, where the entryman's rights have become vested to the land, as in this case, except by purchase or condemnation proceedings;" that the United States holds the legal title for her as the owner of the equitable title and even Congress has not the power to dispossess her without full compensation for the value of the land.

It was not intended to hold otherwise in the decision complained of, nor to deny to claimant the right to compensation for the full value of the land and the improvements thereon to the same extent that she would be entitled if the legal title had been issued to her.

The only question that was considered was whether the legal title to the land should pass from the government in view of the fact that it was the purpose to reacquire it.

It was an oversight in not noting that the circular of June 6, 1905, had no application to this case, as it was not intended to apply the provisions of that circular to cases where a final certificate had been issued at the date of withdrawal.

The rights of the entryman as to the measure of compensation and the character of the action that may be taken by the government in acquiring or appropriating the land must be determined by the status of the entry at the time of the withdrawal of lands needed for use in the construction and operation of irrigation works.

If the entryman at the time of the withdrawal had earned title to the land by full compliance with the homestead law, he is entitled to compensation for the land and the improvements thereon as fully

as if the legal title had been issued to him, but no evidence of title, either equitable or legal, will be issued.

The question as to whether local officers should accept final proofs offered for lands needed for use in the construction of irrigation works, but to issue no final certificate thereon, or whether entries upon which final proofs had not been made at the date of withdrawal should be canceled, and the entryman compensated in the manner provided by the 8th paragraph of the circular of June 6, 1905, was considered in an opinion by the Assistant Attorney-General rendered January 25, 1906, which was approved by the Department.

With reference to such entries it was stated that those instructions did not contemplate that claims occupying that status could be perfected, but on the contrary it was evidently intended that the status existing at the date of withdrawal should be maintained and the rights of all parties should be adjusted upon that basis.

Afterward the question was submitted to the Assistant Attorney-General as to the status of a homestead entry upon which final proof has been submitted, but where no final certificate has been issued thereon.

In his opinion of June 21, 1906, which was approved by the Department, it was held that "a homestead entry upon which final proof has been made showing compliance with the law up to the date thereof, but where final certificate has not issued, has the same status as an entry upon which final certificate has issued so far as it may be affected by any withdrawal under the reclamation act."

As stated in that opinion, the homesteader earns his right to a title by residence upon and cultivation and improvement of the tract for the period prescribed by the statute, and when he submits proof showing that the law has been complied with, he is invested with the right of ownership, although the evidence of it in the form of the final certificate has not been issued.

The question was again considered in an opinion rendered by the Assistant Attorney-General January 4, 1907, approved by the Department, explaining a seeming inconsistency in the action ordered to be taken with reference to the homestead entries of Horace J. Dresser and Jordan H. Moberly, respectively, both entries occupying the same status. In each case the entryman had earned title to the land and had made final proof, but no final certificate had issued. In the one case the entryman protested against any appropriation of the land, while in the other case the claimant insisted that having earned the title to the land, it was the duty of the Department to issue to him the final certificate showing his right to a patent. It was held that although the right to a title existed, if it was the purpose of the government to reacquire the land, it "will not complicate matters by issuing to claimant the evidence of a title, either

legal or equitable, but the proceedings must be the same as if the final certificate or the patent had issued."

The opinion of January 25, 1906, had reference to entries where the right to a title had not been earned at the date of the withdrawal. The opinions of June 21, 1906, and January 4, 1907, had reference to entries where the right to a title had been earned and final proof had been made but no final certificate had been issued.

In both classes the legal and equitable title were in the United States, but in the latter class the right to a title was in the entryman. There would seem to be no obstacle to the application of the circular of June 6, 1905, in both classes, inasmuch as no evidence of title has been issued, although the measure of compensation may be different. In the one case, however, it is simply a homestead right that is canceled. In the other, it is the taking of private property to which a right of ownership had been acquired by compliance with the law, and it can not be appropriated by the government except by consent of the claimant, or in the manner provided by law.

In the case now under consideration the equitable title has been issued and the land can not be reacquired by the United States except in the manner that would be pursued in acquiring any other private property. But, as in the other cases, the United States will not issue the patent, as the right of the respondent as the owner of the land can be fully protected under her equitable title.

The order of the Department of January 30, 1906, to cancel the entry, and directing that claimant will be paid for her improvements, as provided by sections 8 and 9 of the circular of June 6, 1905, is modified accordingly.

PRACTICE—NOTICE OF CONTEST—SERVICE BY PUBLICATION—RULE 11.

WALKENSHAW *v.* BURNS.

Rule 11 of Practice, which provides for service of notice of a contest by publication where it is "shown by affidavit that due diligence has been used and that personal service can not be made," contemplates that such affidavit shall be made by the person or persons who made the search and inquiries in the endeavor to ascertain the whereabouts of the defendant with a view of making personal service; and where notice is published upon an affidavit made by another, upon information furnished by the person who made the effort to obtain personal service, such notice is fatally defective and no jurisdiction is acquired thereunder.

Secretary Garfield to the Commissioner of the General Land Office,
(F. L. C.) *March 14, 1907.* (A. W. P.)

An appeal has been filed on behalf of James Walkenshaw from your office decision of April 2, 1906, wherein you reverse the action

of the local officers and remand for proceedings *de novo* his contest against James D. Burns's homestead entry No. 10391, made February 17, 1902, for the E. ½ of the NW. ¼ and the NW. ¼ of the NW. ¼, Sec. 24, and the SW. ¼ of the SW. ¼, Sec. 13, T. 2 S., R. 19 E., The Dalles, Oregon, land district.

The material facts in this case have been sufficiently stated in your office decision and need not be here repeated. The only question presented for consideration is one of jurisdiction. Service herein was attempted by publication, the order therefor being based on an affidavit executed and filed by contestant's attorney. It was not alleged therein that the entryman was a non-resident, but only that he was absent from the State, to which he appears to have returned prior to the date set for hearing; hence it was necessary to show fully and to the satisfaction of the local officers that, after diligent effort, personal service could not be made. Contestant's attorney did not personally make such diligent search and inquiry, but based his affidavit on statements, as to efforts made to locate the defendant, contained in letter from plaintiff to his counsel. Was such affidavit sufficient upon which to predicate service of notice by publication?

Rule 11 of Practice provides that:

> Notice may be given by publication only 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. The affidavit must also state the present post-office address of the person intended to be served, if it is known to the affiant, and must show what effort has been made to obtain personal service.

This rule as now worded was approved May 26, 1898 (26 L. D., 710). Prior to that date Rule 11 provided that the required showing must be made by affidavit of the contestant. But in the case of Bradford *v.* Aleshire (15 L. D., 238) even that rule was construed to mean that the contestant must show certain facts "by affidavit," and that the affidavit may be made by any person or persons who possess the required information. This is clearly the intention of the present rule. As was said in the instructions of May 27, 1905 (33 L. D., 578), such affidavit must contain the averment "that the affiant has . . . . endeavored" to ascertain the whereabouts of the defendant by diligently making the search and inquiries indicated." In other words, that while any qualified person may make the inquiry with view to personal service of the notice of contest, yet only a party making careful search and inquiry can execute an affidavit sufficient upon which to base substituted service.

The Department has very frequently, as well as uniformly, held that, where service of notice by publication is substituted for a personal service, a strict compliance with the rules of practice

applicable thereto is requisite to confer jurisdiction over the person of the defendant. And as herein indicated, there was no such observation of the requirements of said Rule 11 of Practice on behalf of plaintiff. This is a fatal jurisdictional defect.

The decision of your office is therefore affirmed, and you are directed to remand the case to the local officers, with instructions to proceed as indicated in your said decision. In the event contestant fail to apply for a new notice for personal service or to file sufficient affidavit upon which to again predicate service of notice by publication within the time indicated, the contest will be dismissed and the case closed.

GRASS ISLAND ABANDONED MILITARY RESERVATION—SALE OF LANDS

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 15, 1907.

Register and Receiver, Olympia, Washington.

GENTLEMEN: The land in the Grass Island abandoned military reservation, the designation of which by legal subdivision is lot 5, Sec. 18, T. 16 N., R. 11 W., and containing 27.91 acres, will be offered for sale at your office on June 18, 1907. At 10 o'clock, a. m., of the day fixed you will offer said tract for sale.

Said land is to be sold to the highest bidder at not less than the appraised value. Upon payment by the purchaser of the amount bid, the receiver will issue his receipt, in duplicate, and the register a cash certificate, said certificate and receipt to be designated on the papers and abstracts as No. 1, Grass Island series.

Upon conclusion of the sale, you will make a report to this office and return the inclosed appraised list.

Further instructions will be given you in regard to your monthly and quarterly reports, and your disbursing and other accounts in connection therewith.

Notices of the offering have been sent to the weekly edition of the "Bulletin," Aberdeen, Washington, the "Chehalis County Vidette," Montesano, Washington, and the "Ledger," Tacoma, Washington, for publication.

Very respectfully,

R. A. BALLINGER,
Commissioner.

Approved:

JAMES RUDOLPH GARFIELD, *Secretary.*

RIGHT OF WAY—WATER RIGHT—ACT OF JUNE 30, 1906.

MONO POWER COMPANY.

Directions given relative to the disposition of applications for rights of way involving the use of water in the territory indicated in the act of June 30, 1906, authorizing and directing the Secretary of the Interior to sell to the city of Los Angeles, California, certain lands in that State.

Secretary Garfield to the Commissioner of the General Land Office,
(F. L. C.) *March 15, 1907.* (F. W. C.)

With your office letter of October 29, 1906, were forwarded copies of articles of incorporation and proofs of organization of the Mono Power Company, together with a certain map and accompanying field notes, constituting an application under the provisions of the act of February 15, 1901 (31 Stat., 790), for permission to use a right of way over the public lands for a tunnel, pipe line, and power plant, all located in sections 21 and 22, township 5 south, range 31 east, M. D. M., Independence land district, California, and in your said letter you considered the protest filed by the city of Los Angeles, against the granting of the permission as applied for, your recommendation being that the protest be dismissed and that the permission be granted. Action has been heretofore suspended upon this application, involving as it does the use of water in the territory indicated by the act of June 30, 1906 (34 Stat., 801), entitled "An act authorizing and directing the Secretary of the Interior to sell to the city of Los Angeles, California, certain public lands in California; and granting rights in, over, and through the Sierra Forest Reserve, the Santa Barbara Forest Reserve, and the San Gabriel Timber Land Reserve, California, to the city of Los Angeles, California."

Under date of the 13th instant the Secretary to the President forwarded a communication, signed by the Director of the Geological Survey and the Forester, concerning an investigation of the question of water supply for the city of Los Angeles, and in said letter states that the President approves of the Department's proceeding in the disposition of pending applications along the lines suggested. Said communication recommends that immediate action be taken upon the application of the Mono Power Company and that the Secretary of the Interior should give his approval to the pending application by the company, if otherwise regular and proper, but that the company should be required to enter into a binding stipulation with the city that it will not claim or demand more than 160 second feet of water from and after the completion of what is known as the Long Valley Dam.

Proceeding as suggested, and finding that the application is regular and satisfactory, I accept and herewith return for filing, the copies of the articles of incorporation and due proofs of organization of said Mono Power Company, and have granted and noted upon the map of location permission for use of the public lands, as provided by the act of 1901, upon the condition that the company will not claim the right to have more than 160 second feet of water flow continuously past the Long Valley Dam when built in furtherance of the act of June 30, 1906, *supra.*

In this connection I invite your attention to the further recommendations made in said communication: first, that all pending applications for right of way against the granting of which the city of Los Angeles has protested, be taken up for disposal on July 1, next, or as soon thereafter as is convenient, and considered in the light of the plans of the city, as disclosed by any showing filed at that time; and second, "that action be taken, without regard to the protests of the city, upon any application for rights of way between the proposed Long Valley Reservoir site and the proposed intake from the Owens river for the city's conduit, the granting of which will not require the use, diversion, or impairment of a greater amount of water than that involved in the granting of the Mono Power Company's application." In the further disposition of applications for right of way involving the use of water in the territory indicated by the act of June 30, 1906, *supra*, you will be guided by the suggestions herein.

OKLAHOMA LANDS—PASTURE AND WOOD RESERVES—AWARDS TO SUCCESSFUL BIDDERS.

INSTRUCTIONS.

Awards made to successful bidders on Oklahoma pasture and wood reserve lands in accordance with the descriptions of the lands given in the bids will not be canceled and the deposits accompanying the bids returned, merely because the bids were made in ignorance of the true character of the lands or because of error in description the lands designated in the bids and awarded thereunder are not the lands intended to be purchased.

Secretary Garfield to the Commissioner of the General Land Office,
(F. L. C.) *March 16, 1907.* (C. J. G.)

The Department has received your office letter of February 20, 1907, transmitting a letter from Stubblefield & Whalin, attorneys at law, Lawton, Oklahoma, from which it appears that they have several clients who were successful bidders on Oklahoma Pasture and Wood Reserve lands, but who it is stated were, as the result of mistakes in description made by them or the persons preparing their bids, awarded lands they did not intend to purchase. It is repre-

sented by said attorneys that in many instances the lands are practically worthless and that the purchasers will forfeit the deposits made by them with their bids rather than make entry of said lands.

Your office states that many communications of like nature are being received from other sources, the purchasers asking that they be relieved from making entry of the lands awarded and the forfeiture of their deposits, because, as they say, being unable to visit and inspect the lands, they were erroneously induced by persons professing to know the character of said lands to make high bids on tracts that are worthless for farming purposes.

Your office requests consideration of the question as to whether the awards made to such persons as the foregoing may now be canceled and the deposits accompanying their bids returned to them, in view of the consequent hardships.

It is very clear, as stated by your office, that the government can not in any sense be held at fault in this matter. Prior to the sale of these lands very full and specific instructions were issued for the guidance of prospective purchasers, accompanied by a descriptive schedule of the lands to be sold, and there was also issued a pamphlet containing a general description of the character of said lands in each township. Even up to the time of actual award persons were allowed to withdraw their bids and deposits. It would seem that every reasonable opportunity was afforded bidders before final award to enable them to take the necessary precaution both in acquainting themselves with the character of the lands bid upon and in seeing that they properly described the lands they in fact intended to purchase.

Therefore it is not believed it would be advisable or justifiable to cancel the awards and return the deposits in cases where the awards were made on the descriptions of the lands given in the bids.

SCHOOL LAND—INDEMNITY SELECTION—CERTIFICATE OF NON-INCUMBRANCE.

STATE OF CALIFORNIA.

Compliance with the requirement of paragraph 2 of the instructions of February 21, 1901, and March 6, 1903, that with each list of indemnity selections the State shall furnish a certificate of the proper authorities that the base lands have not been sold, incumbered, or otherwise disposed of, will not be insisted upon, as to selections made prior to the promulgation of the instructions of February 21, 1901, where there is on file in the General Land Office a certificate of non-incumbrance covering the entire section in which a particular tract assigned as base is located provided reference be made by the State to the particular list, by State and register-and-receiver number, in connection with which the certificate of non-incumbrance was furnished, and a like reference to all pending lists to which said certificate is desired to be applied.

Secretary Garfield to the Commissioner of the General Land Office,
(F. L. C.) *March 18, 1907.* (F. W. C.)

The Department has considered the appeal by the State of California from your office decision of June 1, 1905, requiring of the State evidence of non-incumbrance of the base lands used in connection with twenty-five separate and described school land indemnity selections in such form that the same may be filed with each list of selections. This requirement is made in furtherance of paragraph 2 of instructions of February 21, 1901 (30 L. D., 491), and paragraph 2 of instructions of March 6, 1903 (32 L. D., 39), relating to the selection of indemnity school lands. By these regulations it was required that with each list "a certificate of the proper authorities that the base lands have not been sold, incumbered, or otherwise disposed of," shall be furnished.

In the appeal of the State it is urged that this requirement is unreasonably burdensome, but after full consideration of the matter in the case of *Ex parte* State of California (34 L. D., 245), this requirement was adhered to for the reason therein given.

The selections in question were made many years ago and it is claimed on the part of the State that as certificates of non-incumbrance are generally furnished for the entire section where part only is used as base for any particular selection, in many, if not most, instances the proof desired has heretofore been furnished; that examination of your records will disclose this fact; that such examination should be made and the certificates heretofore furnished applied to selections pending at the time said certificates were filed; and that the State to this extent should be relieved from the expense incident to furnishing new certificates; also, that where new certificates are necessary, one certificate covering base lands used for several selections should be accepted. It is admitted by the State that certificates of non-incumbrance are valueless where the selection is made subsequently to the filing of the certificate.

After full and careful consideration of the matter and for the purpose of disposing of those selections made prior to the promulgation of the instructions of February 21, 1901, the Department sees no objection to granting the State's request, provided reference be made to the particular list, by State and register-and-receiver number, in connection with which the certificate of non-incumbrance was furnished, and a like reference to all pending lists to which said certificate is desired to be applied. This will greatly relieve your office and grant substantially the State's request in the matters, so far as the selections were made prior to the promulgation of the instructions of February 21, 1901.

SWAMP LAND GRANT—ADJUSTMENT—FIELD NOTES OF SURVEY.

ANDERSON *v.* STATE OF MINNESOTA.

The rule laid down in the departmental decision of November 26, 1906, 35 L. D., 326, as supplemental to the rule in First Lester, 543, governing the adjustment of swamp land grants, has no application except in instances where the rule in First Lester is inapplicable, nor should it be applied to the disadvantage of persons who made settlement prior to the promulgation of said rule.

Secretary Garfield to the Commissioner of the General Land Office,
(F. L. C.) *March 18, 1907.* (F. W. C.)

The Department has considered the appeal by Ananias Anderson from your office decision of April 6, 1905, affirming the action of the local officers in rejecting his homestead application as to the NE. ¼ of SE. ¼ of Sec. 21, T. 62 N., R. 19 W., Fourth P. M., Duluth land district, Minnesota, for conflict with the claim of the State to said tract under the swamp land grant.

Anderson on October 18, 1904, forwarded to the local land office his homestead application for the entire SE. ¼ of said section 21, and in his homestead application accompanying the same alleged settlement upon the land in August, 1903, with continuous residence and cultivation from that date, and on November 3, 1904, he filed a formal contest against the swamp land claim of the State to the NE. ¼ of SE. ¼ of said section 21, which had been claimed by the State under its swamp land grant, alleging that the same was not swamp in character; that he had moved upon the land July 15, 1903, and had resided thereon ever since, having made improvements upon the land of the value of $600.

January 5, 1905, the register advised him that his application had been rejected as to said NE. ¼ of SE. ¼ of Sec. 21, under the authority of the instructions issued by your office dated April 4, 1903, re-affirmed in decision of December 10, 1904, and that unless he should elect "to take clear land, by payment of the fees and commissions on the NW. ¼ of SE. ¼ and S. ½ of SE. ¼, Sec. 21–62–19, amounting to $13.00, the same will be rejected without further notice to you."

In his appeal Anderson alleges that the field notes of the survey in returning the land as swamp were false and fraudulent; that the land is not of the character contemplated by the swamp land grant, and that it is high and dry, subject to homestead settlement.

Your office in its decision of April 6, 1905, held that the contest must be determined by the showing of the field notes and that as the field notes of survey showed that the greater part of the east line of said tract runs through swamp, under the rule laid down in First Lester, 543, and the later ruling of the Department, March

20, 1905 (33 L. D., 475), the tract in question must be adjudged as of the character of lands granted, and the rejection of Anderson's application as to the NE. ¼ of SE. ¼ was therefore affirmed.

Upon inquiry at your office it is learned that the survey of the township in question was not completed until September 25, 1903, and that the same was not approved until May 4, 1904. Under the decision of the Department in the case of Lampi *v.* State of Minnesota (35 L. D., 58), Anderson is clearly entitled to an opportunity to show the true character of the lands by evidence other than the field notes of survey. Both your office and the local officers therefore erred in denying him a hearing.

In this connection it is noted, although it is not clearly stated, that but for the ruling of March 20, 1905, referred to, this tract would not have been adjudged to be of the character of lands granted to the State; in other words, that under the rule laid down in First Lester, 543, this tract would not have passed to the State as swamp upon the field notes of survey. The matter of supplementing the rule announced in First Lester, where such rule was incapable of application, was fully considered in departmental decision of November 26, 1906 (35 L. D., 326), in the matter of the State's appeal from the rejection of its list of swamp land selections No. 148, and in the disposition of this matter it was said:

> While the Department is not disposed to modify the rule in 1 Lester, when capable of application, yet in view of the foregoing considerations, it is thought such rule should be supplemented, and it is directed, in instances where sketch maps have been returned, with surveys in the field, and the field-notes of survey show intersections of swamp and overflowed lands with *one* line of a section only, that these sketch maps be taken into consideration in determining the character of the portion of the section lying upon the surveyed line with reference to its swampy or non-swampy character, and in such instances, where the outline of the swamp or overflowed lands is shown by the diagram to extend from the section line fifteen chains or more within the section, the adjustment will be made upon the basis of the relative portions of the surveyed lines shown to be swamp or dry by the field-notes of survey. That is, if the diagram shows that the swamp or overflow thereby represented extends at any point fifteen chains or more across the section line, and within the section, the State will be entitled to such forty-acre subdivisions lying upon the section line as are shown by the field-notes of the major portion of said line to be of the character granted, but this rule shall have no application in the adjustment of a claim to the *interior* forty-acre subdivisions of a section.

I deem it but necessary in disposing of this case to say that it was not intended that this supplemental rule should have any application in the adjustment of the State's grant except in instances where the rule announced in 1 Lester was inapplicable; and, further, as it provided a new method whereby the State might be entitled to land which she could not take under the rule in 1 Lester it should not be

applied to the disadvantage of settlers upon the land prior to the promulgation of said rule.

The decision appealed from is hereby reversed and the record remanded with direction that a hearing be ordered on Anderson's affidavit attacking the State's claim under the swamp land grant, unless, upon further investigation, it be found that the State's claim can be denied without such hearing, upon a proper reading of the field notes.

NORTHERN PACIFIC LAND GRANT—CLASSIFICATION UNDER ACT OF FEBRUARY 26, 1895.

NORTHERN PACIFIC RAILWAY CO.

A description by the commissioners appointed under the act of February 26, 1895, in their report of lands examined and classified, as "all not patented of" a designated section, clearly and with certainty indicates the particular parts included; and such classification and report are therefore within the requirements of sections 3 and 5 of that act.

Secretary Garfield to the Commissioner of the General Land Office,
(F. L. C.) *March 19, 1907.* (J. T.)

In January, 1898, the commissioners appointed under the act of February 26, 1895 (28 Stat., 683), examined and classified as mineral "all not patented of" Sec. 27, T. 9 N., R. 2 W., in the Helena, Montana, land district, as shown by their report filed February 4, 1898.

In letter of August 5, 1898, to the local officers, your office called attention to the fact that the schedule attached thereto shows the tracts omitted from the list submitted to the Department for approval, and the reasons for their being omitted. This schedule recites that the classification of "all not patented" of this section 27 was "omitted for description." In that connection your office held:

> As to the tracts that were omitted for description and for conflict with mineral entries the U. S. mineral land commissioners will be required to submit a supplemental report describing the tracts remaining, after eliminating all patented and entered tracts from a particular section, by their proper legal subdivisions.

The supplemental report for January, 1898, which appears to have been filed September 3, 1898, shows the E. ½ of the NE. ¼, the S. ½ of the SE. ¼, the NE. ¼ of the SE. ¼, the S. ½ of the SW. ¼, and the W. ½ of the NW. ¼ of said section to be classified as mineral by the commissioners; and as so classified those portions were embraced in a supplemental list, approved by the Department April 5, 1899. The NE. ¼ of the SW. ¼ of this section was therefore also omitted from that supplemental list.

June 15, 1905, the Northern Pacific Railway Company, under the

act of July 2, 1864 (13 Stat., 365), and resolution approved May 31, 1870 (16 Stat., 378), offered, in duplicate, for filing in the Helena land office, Montana, its selection "List No. 299" (Place), describing one tract only, viz., the northeast quarter of the southwest quarter of section 27, T. 9 N., R. 2 W., M. P. M., which list was rejected by the local officers on the 17th of June, 1905, because, as stated, "the land applied for has been classified as mineral, and approved."

Your office decided on appeal, November 23, 1905, that this tract "was not embraced in supplemental classification and hence does not appear to have been classified;" that the company can not secure patent to lands not classified and can get patent only when the classification shows the lands to be non-mineral in character, and that the local officers' rejection of the list was proper, although the reason given therefor was erroneous; and their action was sustained.

January 25, 1906, the company appealed from that decision. The appeal erroneously describes the tract as in T. 9 N., R. 2 *E.*, and assigns error on the part of your office in holding that the mere fact that the land had not been classified constitutes a reason for denying the company the right to include the land in a list to be placed of record. Appellant contends that section 7 of the act of February 26, 1895, in providing that no patent or other evidence of title shall issue to the company for any land until the same shall have been classified, has reference only to the certification and patenting, and not to the orderly course of procedure in the preliminary filing of a list; that the list should be accepted and placed of record, leaving the determination of the rights of the company to such time as the land may be determined to be either mineral or non-mineral in character; that the prohibition of the statute is extended by your office decision beyond its true meaning, and that the company's list should be received, with the condition that no action shall be taken thereon until the land has either been classified, or section 7 of the act of February 26, 1895, has been repealed.

At once the question arises: Has the northeast quarter of the southwest quarter of this section 27 been classified as mineral by the commissioners, as provided by the act of February 26, 1895?

Section 3 of that act requires that the classification "shall be by each legal subdivision where the lands have been surveyed," and by section 5 the commissioners were required, on or before the fifth day of each month, to—

> file in the office of the register and receiver of the land office of the land district in which the land examined and classified is situated a full report, in duplicate, in such form as the Secretary of the Interior may prescribe, showing all lands examined by them during the preceding month, and specifying clearly, by legal subdivisions, where the land is surveyed, or otherwise by natural objects or permanent monuments to identify the same, the lands classified by them as mineral lands and those classified as non-mineral.

Under the provisions of the act of February 26, 1895, the company had ample opportunity to object to the commissioners' report filed February 4, 1898, classifying as mineral "all not patented of" this section 27. No protest against that classification appears to have been filed by the company. On the other hand, the only objection made by your office to that report appears to relate to the descriptive language used therein to indicate the parts of the section which the commissioners examined and classified. There can be no possible doubt or uncertainty as to the particular legal subdivisions which are included in the description "all not patented of" this section. All that part of the section which was patented at date of that report, and which is excluded from the classification, is shown by the records of your office, and the legal subdivisions remaining, which are included in that report and classification, are likewise shown by the records of your office. Under the rule *id certum est quod certum reddi potest*, the description employed ("all not patented of" section 27) is as certain as would be a description naming each of the smallest legal subdivisions classified in the section.

It appears that as late as January, 1898, it was the practice of those commissioners in their reports to describe the land classified by entire sections in many cases, or as "all not patented of" particular sections named, or in some like manner. In a list approved by the Department July 19, 1897, a great many tracts are classified which are described merely as "all that portion [of the section named] not covered by mineral entries and patents."

In the opinion of the Department the commissioners' report filed February 4, 1898, describing the classification as "all not patented of" said section 27, clearly and with certainty indicates the particular parts classified by them, and does, within the meaning and purpose of that act, constitute a mineral classification and report by them "specifying clearly, by legal subdivisions," the particular land classified in that section.

Section 1 of the act of February 26, 1895, directs the Secretary of the Interior "to reject, cancel and disallow any and all claims or filings heretofore made, or which may hereafter be made, by or on behalf of the said Northern Pacific Railroad Company on any lands . . . which upon examination shall be classified as provided in this act as mineral lands," and the Department, in the case of Northern Pacific Ry. Co. *v.* Frei *et al.* (34 L. D., 661), held that any lands classified "as mineral under this act are forever excluded from the operation of the Northern Pacific land grant" (p. 664). The list offered for filing by the railway company must, therefore, be rejected.

Your office will, from time to time and as speedily as practicable, in all cases in which such action may properly be taken, prepare and submit to the Department, for approval, correct lists including all

lands, surveyed or unsurveyed, actually classified by the commissioners under the act of February 26, 1895, the classification whereof has not heretofore received the approval of the Secretary of the Interior, not only those which in accordance with the views herein expressed are subject to such approval but all others to the approval of the classification whereof no bar exists, making for that purpose careful comparisons of the commissioners' reports with the tract books and other pertinent records of your office.

As thus modified, the decision of your office is affirmed.

DESERT LAND ENTRY—ASSIGNMENT—RIGHTS OF ASSIGNEE.

CAMPBELL *v.* GLOVER ET AL.

The right of a person claiming under an instrument of assignment of an unperfected desert land entry to recognition by the land department is dependent upon the filing in the local office of a certified copy of the instrument of assignment, together with an affidavit, executed by himself before the proper officer, showing his qualifications to take and complete the entry.

Secretary Garfield to the Commissioner of the General Land Office,
(F. L. C.) *March 20, 1907.* (E. P.)

July 19, 1904, Alpheus Glover made desert land entry of the S. ½ of the NW. ¼ of Sec. 2, and the S. ½ of the NE. ¼, the S. ½ of the NW. ¼ and the W. ½ of the SW. ¼ of Sec. 3 (containing 320 acres), T. 19 S., R. 26 E., Roswell land district, New Mexico, upon which he submitted first annual proof, showing an expenditure of the sum of three hundred and twenty dollars in the purchase of two hundred and fourteen feet of nine-inch well-casing, which had then been placed on the land.

By deed dated May 11, 1905, and acknowledged May 15, 1905, Glover assigned the entry to Dona S. Hersey, of Wichita, Kansas. The deed of assignment was recorded on or before June 23, 1905, in the office of the Recorder of Eddy County, New Mexico (said county being that in which the land is situate), and on August 18, 1905, notice of such assignment was filed in the local office.

September 8, 1905, Hersey submitted what is denominated "supplemental first yearly proof," showing an expenditure upon the land of the sum of three hundred and thirty-six dollars and eighty-five cents in the construction of three and three-fourths miles of four-wire fence.

In the meantime, however, to wit, on August 16, 1905, Alan F. Campbell filed in the local office an affidavit of contest against the entry of Glover, charging that the entryman—

has not expended upon said tract in the necessary irrigation, cultivation, reclamation and permanent improvements the sum of $1.00 per acre for the year beginning July 19, 1904, to July 19, 1905.

Notice issued on the day the affidavit was filed, citing the parties to appear before the local officers November 16, 1905, and submit testimony. No effort, so far as the record discloses, appears to have been made to serve this notice. October 3, 1905, Campbell filed in the local office an affidavit, executed by himself, alleging that "since filing his said contest said entry has been duly transferred from Alpheus Glover to Dona S. Hersey," and praying that "said Dona S. Hersey be made party to said contest case, as defendant-assignee, and notice issue to him as such."

New notice accordingly issued, October 3, 1905, naming Hersey as assignee, and the same was served personally upon Hersey at Wichita, Kansas, October 9, 1905.

At the hearing, had November 16, 1905, contestant's witnesses testified that they examined the land August 15, 1905, the day before the affidavit of contest was filed, and at that time there was nothing on the land except a number of lengths of well casing, which was lying on the ground. One of said witnesses testifies, however, that a week or two after this examination there was constructed on the land three or four miles of four-wire fence, the posts thereof being about two rods apart.

Contestee Hersey admitted at the hearing that at the date of the filing of the affidavit of contest the land was in the condition described by the contestant's witnesses, but testifies (and his testimony is corroborated by several of his witnesses) that between the first and the seventh of September, 1905, he caused to be erected on this land a quantity of fencing, at a total cost of between three hundred and fifty and three hundred and sixty dollars, and that this work had been completed nearly a month before he had any knowledge of the contest. He testifies further that he paid Glover, the entryman, two thousand two hundred dollars for the land, and also furnished the money (three hundred and twenty dollars) with which the well casing, which formed the basis for the first yearly proof submitted by Glover, was purchased.

On the facts disclosed at the hearing the local officers rendered dissenting opinions, the register deciding in favor of the contestant and the receiver in favor of the contestee.

Your office, by decision of May 5, 1905, after setting forth the facts in the case substantially as hereinbefore stated, held as follows:

> This contest was filed August 16, 1905, against Alpheus Glover. He was the only party against whom complaint was alleged, and he was not a party in interest. He had conveyed all his right, title and interest in the land to Dona A. Hersey and the deed had for some months prior to the filing of contest been placed on record in the county where the land is situated. The said contest was a nullity, no party in interest being charged with default.
>
> It does not appear that any notice of contest was issued and served upon Glover, and it cannot be said that a contest had been initiated until October 3,

1905, when the contestant asked that Hersey be made a party defendant, and notice was issued and hearing had.

It appears that at the time Hersey, the real party in interest, was brought into court, and before any notice was issued citing him to appear there, and before any default had been alleged against *him*, and before he had any actual notice of any proceeding against Glover, the former owner of the land embraced in the said entry, all laches, if any existed, had been cured by him. The decision of the register is affirmed, and the said contest is dismissed.

From this decision the contestant appeals.

The Department does not concur in the view expressed by your office, to the effect that, for the reasons stated, the contest proceeding initiated by Campbell was ineffective for any purpose prior to October 3, 1905, the date upon which the contestant sought to have Hersey made a party thereto. That view seems to be predicated upon the theory that prior to the filing of the affidavit of contest Hersey's right to entry had become complete. That theory, however, is clearly erroneous. The rights of a person claiming under an instrument of assignment of an unperfected desert land entry are dependent absolutely upon the assignee's filing in the local office a certified copy of the instrument of assignment, together with an affidavit, executed by himself before the proper officer, showing his qualifications to take and complete the entry. In the absence of such a showing no assignment of an unperfected desert land entry can be recognized by the land department (Arthur F. Hogsett, 29 L. D., 355; Anna I. Dool, 31 L. D., 184). No evidence of the assignment of the entry here in question had been filed in the local office by Hersey, the assignee, at the time the affidavit of contest was filed; hence the assignee had not at that time acquired any rights respecting the entry that were entitled to recognition by the land department. The entryman, therefore, in whose name the entry then stood upon the records of the local office, was the only person against whom a contest could be brought, and the only person who could, with propriety, be charged with any default respecting the entry. From this it follows that the contest initiated by Campbell was a valid proceeding against the entry from the time his affidavit was filed, and that the assignee acquired the entry subject to the contest.

Considering the case on its merits, the Department finds that at the time this contest was initiated no expenditure for permanent improvements upon the land had been made, but that before notice of the contest was served, the assignee, without any knowledge of the contest, had expended in permanent improvements upon the land an amount sufficient to meet the requirements of the law; and that, so far as anything to the contrary appears in the record, he has acted in good faith throughout his entire connection with the land.

The Department has repeatedly held that a contest against an entry must fail where the entryman, in good faith and without

knowledge of the contest, cures the default charged, prior to the service of notice upon him. The assignee of a desert land entryman, who for all purposes is the successor of the entryman, must be held to be entitled to the same rights and privileges with respect to the entry that the entryman himself might have been entitled to in the absence of an assignment. The facts in this case clearly warrant the application hereto of the rule above stated, and the contest will stand dismissed.

The judgment of your office, though for different reasons than those stated in the decision appealed from, is therefore hereby affirmed.

SOUTHERN UTE INDIAN RESERVATION—DESERT LANDS—SELECTION UNDER CAREY ACT.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 20, 1907.

The act of March 1, 1907 (Public—No. 161), entitled, "An act providing for the granting and patenting to the State of Colorado, desert lands formerly in the Southern Ute Indian Reservation in Colorado," extends the provisions of section 4 of the act of August 18, 1894 (28 Stat., 372, 422), and the acts amendatory thereof of June 11, 1896 (29 Stat., 413, 434), and March 3, 1901 (31 Stat., 1133, 1188), to the desert lands included within the limits of the Southern Ute Indian reservation, but not including any lands lying within any forest reservation, lands containing valuable improvements belonging to the United States, or which have been reserved for Indian schools or farm purposes, and provides for the payment of $1.25 per acre before patent issues therefor, leaving the State to comply with the provisions of said acts of August 18, 1894, and the acts amendatory thereof.

Applications for the segregation of such lands by the State should be prepared and filed in accordance with the regulations (circular of January 15, 1902, 31 L. D., 228), but in all forms, on the map, segregation list, contract and list for patent, reference to said act of March 1, 1907, must be made, and the words " or price " in the fifth line on the second page of the printed form of contract, should be eliminated before the contract is signed on behalf of the State.

The segregation lists and lists for patent should be numbered by the State in the regular order, but they should bear the words " Ute lands."

When a list for patent is received in this office it will be examined in the usual manner and the number of acres that will be included in

the patent will be determined. The State will then be called upon to pay the price fixed by the act of March 1, 1907, to the receiver of the proper local land office, who will issue a receipt in duplicate, beginning a new series of receipt numbers, designated as Ute series, one to be given to the State agent, and the other to be forwarded to this office as evidence of such payment, whereupon patent will issue to the State.

The money will be accounted for in the same manner as other moneys received from the disposal of the Southern Ute Indian reservation lands.

R. A. BALLINGER, *Commissioner.*

Approved:

J. R. GARFIELD, *Secretary.*

STATE OF LOUISIANA.

Motion for review of departmental decision of June 6, 1904, 33 L. D., 13, denied by Secretary Hitchcock, March 20, 1907.

EXTENSION OF TIME FOR MAKING FINAL PROOF IN CERTAIN DESERT-LAND ENTRIES IN WASHINGTON.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 25, 1907.

Register and Receiver,
North Yakima and Walla Walla, Washington.

GENTLEMEN: Your attention is directed to the act of March 1, 1907 (Public—No. 162), the text of which is as follows:

An act extending the time for making final proof in certain desert-land entries.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all desert-land entrymen, under the Benton Water Company's canal, in Benton County, State of Washington, who would be required under existing law to make final proof during the year 1907, are hereby given an additional year in which to make such final proof: *Provided,* That each entryman claiming the benefits of this act shall, within ninety days after its passage and approval, file in the local land office in the district in which the lands embraced in his entry are located, an affidavit describing his lands and stating that he expects to irrigate the same with water from the canal of said company.

Part of Benton County, State of Washington, appears to be in your district.

Make proper notation upon your records, and give the act as much publicity as possible, without expense to the government. After the

expiration of ninety days from date of approval of the act, you will proceed to serve notice upon each entryman affected by the provisions of the act who is in default as to making final proof within the statutory period and has not filed the affidavit required by the act, in the usual manner under circular of January 25, 1904, page 40, and at the expiration of the period allowed make report to this office.

Very respectfully,

R. A. BALLINGER, *Commissioner.*

Approved:

J. R. GARFIELD, *Secretary.*

EXTENSION OF TIME FOR MAKING SETTLEMENT, FINAL PROOF, AND PAYMENT ON CERTAIN LANDS IN LOS ANGELES LAND DISTRICT.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 25, 1907.

Register and Receiver, Los Angeles, California.

GENTLEMEN: Your attention is directed to the act approved March 1, 1907 (Public—No. 156), the text of which is as follows:

An act extending the time for making settlement, final proof, and payment on public lands in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the time for making final proof and payment for all lands located under the desert-land laws of the United States and for making settlement and final proof under the homestead laws of the United States, in township thirteen south, ranges twelve and thirteen east; sections six, seven, seventeen, eighteen, nineteen, twenty, twenty-nine, thirty, thirty-one, township thirteen south, range fourteen east; township fourteen south, ranges twelve and thirteen east; township fifteen south, range twelve east; sections five, six, and seven, township fifteen south, range thirteen east; township sixteen south, range twelve east; township seventeen south, ranges twelve and thirteen east; sections five, six, seven, eight, nine, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, and twenty-one of township seventeen south, range fourteen east, San Bernardino base and meridian, in the County of San Diego, California, settlement, proof and payment of which has not been made, be, and the same is hereby, extended for the period of two years from the time settlement, proof and payment would be required and become due under existing law.

Approved, March 1, 1907.

Make proper notation upon your records and give the act as much publicity as you can, but without expense to the government.

Very respectfully,

R. A. BALLINGER, *Commissioner.*

Approved:

J. R. GARFIELD, *Secretary.*

CEMETERIES—ENTRY BY RELIGIOUS, FRATERNAL, AND PRIVATE CORPORATIONS OR ASSOCIATIONS—ACT OF MARCH 1, 1907.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 26, 1907.

The act approved March 1, 1907 (Public—No. 155), provides:

That the Secretary of the Interior be, and he is hereby, authorized to sell and convey to any religious or fraternal association, or private corporation, empowered by the laws under which such corporation or association is organized or incorporated to hold real estate for cemetery purposes, not to exceed eighty acres of any unappropriated nonmineral public lands of the United States for cemetery purposes, upon the payment therefor by such corporation or association of the sum of not less than one dollar and twenty-five cents per acre: *Provided*, That title to any land disposed of under the provisions of this act shall revert to the United States, should the land or any part thereof be sold or cease to be used for the purpose herein provided.

1. The right of purchase, under said act, is limited to religious, fraternal, and private corporations or associations, empowered to hold real estate for cemetery purposes by the laws under which they are organized. Such corporation or association shall be allowed to make but one entry of not more than eighty acres of contiguous tracts by government subdivisions of nonmineral, unreserved, and unappropriated public land.

2. If the public surveys have not been extended over the land so sought to be entered, the corporation or association should first apply to the proper surveyor-general for a special survey of the exterior lines of the tract desired, describing the topographical character of the land and its area and geographical location as accurately as possible. Such tracts must be as nearly as practicable in a rectangular form, and after the survey and plat thereof has been made, approved by the surveyor-general, accepted by this office, and filed in the local office, application may then be made for the entry of the land under said act. The cost of such surveys will be paid out of the current appropriation for "surveying the public lands," and the deputies employed will report whether the land is mineral in character.

3. The proof must satisfactorily show:

First. The filing of a notice of intention to make proof, the issuance, in manner and form so far as possible as in other cases provided, of the publication notice, to be published and posted for the time in the manner provided by the act of March 3, 1879 (20 Stat., 472), and the regulations thereunder.

Second. The official character of the officer or officers applying on behalf of the association or corporation to make the entry, and his

or their express authority to do so conferred by action of the association.

Third. A copy of the record, certified by the officer having charge thereof, showing the due incorporation and organization and date thereof of the association or corporation and its location and address. The law under which it is organized and by which it derives its authority to hold real estate for cemetery purposes must also be cited.

Fourth. The testimony of the applicant and two published witnesses to the effect that the land applied for is nonmineral, vacant, and unappropriated public land, and showing to what extent, if any, the land has been used for cemetery purposes.

4. The land must be paid for at such price per acre as shall be determined by the Commissioner of the General Land Office, provided that in no case shall the price be less than $1.25 per acre.

5. Entries under this act will receive the current number of the cash series of entries, and cash certificate (Form No. 4–189) as herein modified must issue to the association or corporation in its corporate name, and the granting clause of the certificate should read as follows:

Now, therefore, be it known, that on presentation of this certificate to the Commissioner of the General Land Office, the said _____, of _____, shall be entitled to receive a patent, for the tract above described for cemetery purposes, subject to reversion "to the United States should the land or any part thereof be sold or cease to be used for the purpose" in said act provided.

R. A. BALLINGER, *Commissioner.*

Approved:

J. R. GARFIELD, *Secretary.*

CHIPPEWA INDIAN LANDS—DRAINAGE SURVEY—ACT OF MARCH 1, 1907.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 27, 1907.

Registers and Receivers,
Cass Lake, Crookston and Duluth, Minnesota.

GENTLEMEN: On November 10, 1906, the Secretary of the Interior withdrew from "sale, occupation, or any disposition whatever, all of the unsold lands known as the ceded Chippewa lands, pending the completion of the drainage survey" authorized by act of June 21, 1906 (34 Stat., 352), and by letter of November 15, 1906, you were

advised that said withdrawal extends to all undisposed of lands in the agricultural circulars of March 27, 1896, August 12, 1898, October 6, 1900, September 22, 1903, April 20, 1904, and June 23, 1905, and to the undisposed of Red Lake lands subject to disposal under the act of February 20, 1904 (33 Stat., 46), which lands are described in the schedule of May 18, 1904.

Your attention is now invited to the Indian appropriation act approved March 1, 1907 (Public—No. 154), which provides in part as follows:

> That the lands withdrawn by the Secretary of the Interior under the provisions of chapter thirty-five hundred and four, Fifty-ninth Congress, first session, approved June twenty-first, nineteen hundred and six, authorizing a drainage survey of the lands ceded by the Chippewa Indians, shall be subject to entry in the same manner as other lands so ceded, subject to the condition, however, that the entrymen shall be required in addition to the fees and charges now authorized by law, to pay a pro rata charge for the examination and investigation of the swampy and overflowed character of the land, and for the drainage and reclamation thereof.

The lands subject to homestead entry under said act are those which have been classified in accordance with the provisions of section 4 of the act of January 14, 1889 (25 Stat., 642), as amended by the act of June 27, 1902 (32 Stat., 400), and opened to homestead entry in accordance with the provisions of section 6 of said act of January 14, 1889, after due notice has been given.

The lands which have thus been opened are described in the circulars mentioned above.

Under said act of March 1, 1907, entrymen are required to pay, in addition to the fees and charges now authorized by law, a pro rata charge for the examination and investigation of the swampy and overflowed character of the land, and for the drainage and reclamation of said lands, to be hereafter assessed.

In allowing entries for the lands affected by the act, you will note on the tract books and on the receipts and applications as follows: Act of March 1, 1907—Public No. 154.

No cash or final certificates are to be issued on the entries allowed under said act until all the charges authorized by the act are fully paid.

You will observe the instructions given above, so far as applicable, in regard to applications to make townsite entries under the act of February 9, 1903 (32 Stat., 820). By said act Chapter 8, Title 32, of the Revised Statutes of the United States, entitled, "Reservation and sale of townsites on public lands," was extended to and declared to be applicable to ceded Indian lands within the State of Minnesota.

You will give as much publicity as practicable, through the local newspapers and otherwise, as a matter of news, as to the provisions

of said act, but you are not authorized to pay anything to secure such publication.

Very respectfully, R. A. BALLINGER,
Commissioner.

Approved:
J. R. GARFIELD, *Secretary.*

SURVEYOR-GENERAL'S SCRIP—LOCATION—EXCESS.

HARVEY SPAULDING AND SONS.

Location of a surveyor-general's certificate, upon lands of the class designated in the act of June 2, 1858, for a less area than called for, does not constitute a waiver of the excess.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *March 29, 1907.* (J. R. W.)

Harvey Spaulding and Sons appealed from your decision of October 1, 1906, refusing to return to them as only partially satisfied fifteen pieces of surveyor-general's scrip, each for eighty acres, located by Charles D. Gilmore on tracts of less area, at land offices in Wisconsin, at dates between May 1, 1872, and August 9, 1873, inclusive, the whole area called for being 1200 acres, the whole area located 1124.55 acres, and the deficiency in area 75.45 acres. Gilmore died after these locations, about December, 1884, in the District of Columbia, and the administrators of his estate, pursuant to an order of the probate court of the District, sold and assigned Gilmore's right to the claimants, as assets of his estate, for the consideration of $400 paid.

The act of June 2, 1858 (11 Stat., 294), provided for issue to a successful claimant to a confirmed grant of lands, in whole or in part unsatisfied—

> a certificate of location for a quantity of land equal to that so confirmed and unsatisfied; which certificate may be located upon any of the public lands of the United States subject to sale at private entry at a price not exceeding one dollar and twenty-five cents per acre: *Provided* such location shall conform to legal divisions and subdivisions.

The act of June 22, 1860 (12 Stat., 85, 87), was similar in terms, the particular words being that the party should be entitled to enter "a quantity of land equal in extent to that sold by the government." Certificates under these acts are for quantity that the government has received the full consideration for at a time prior to issue of the certificate.

Your office, because of the act of January 28, 1879 (20 Stat., 274),

held that location of these certificates was controlled by the same rules as military bounty land warrants. The act provided:

> That such scrip shall be received from actual settlers only in payment of pre-emption claims or commutation of homestead claims, in the same manner and to the same extent as is now authorized by law in case of military bounty land warrants.

The purpose of this section was clearly not to qualify or lessen the obligation of the government, but to make the certificates receivable as money or as land warrants in pre-emption purchases and commutation of homestead entries of public lands. Military bounty land warrants are not grants of right to quantity, but the act (Revised Statutes, section 2415) provides they may be located "according to the legal subdivisions of the public lands in one body," "but where such tract . . . . does not exceed the area specified in the warrant, it must be taken in full satisfaction thereof." The holder of a military bounty land warrant therefore takes it as issued, with these express conditions of the grant or bounty. The holder of a certificate of an unsatisfied grant, or in lieu of lands to which his right to legal title was perfect takes it as compensation for spoliation of his property by the government and with the express promise that he may enter "a quantity of land equal to that" of which he was unjustly deprived, "equal in extent."

It is true that he must take by entire government subdivisions, and can not divide a subdivision to obtain his quantity, but nothing in the acts requires him to waive deficiency of area in the tract located, nor do the acts require him to make his entire location in one body. This was recognized in the circular of October 8, 1874, under the act of June 22, 1860 (12 Stat., 85), as shown in Frederick W. McReynolds (31 L. D., 259, 260), quoting such circular. The same rule was afterward clearly recognized in the circular of September 15, 1875 (2 C. L. L., 1000). The circular of February 13, 1879, related to the use of such scrip in pre-emption purchases and commutation of homesteads under the act of January 28, 1879, *supra*, wherein a special privilege or use was extended to this scrip for which it was not before available. While restrictions were imposed as to such new availability or use, they do not apply to, or derogate from, the original grant of right.

The use made of the scrip in question appears not to have been in pre-emption purchases or commutation of homestead entries, as the locations occurred prior to the act of January 28, 1879, allowing that use of such scrip. The certificates were therefore not satisfied by the locations.

Your decision is therefore reversed.

MINING CLAIM—APPLICATION AND ENTRY—CORNERING LODE CLAIMS.

HIDDEN TREASURE CONSOLIDATED QUARTZ MINE.

An application for patent and an entry under the mining laws may embrace two or more lode claims held in common only where such claims are contiguous within the meaning of the public-land laws; and claims which merely corner on one another are not so contiguous.

Directions given that all pending entries for lode mining claims held in common and embraced in a single patent proceeding be sustained, and entry allowed in all cases where application for patent to such claims shall have been filed prior to September 1, 1907, if the law has in all essential respects been complied with and no question of common improvements is involved, and the only defect is that one or more of the claims merely corner on the other claims embraced in each application and entry.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *April 1, 1907.* (G. N. B.)

June 24, 1903, the Iron Mountain Investment Company made entry for what is called the Hidden Treasure Consolidated Quartz Mine, comprising the Wedge, Hidden Treasure, Great Eastern, Big Dipper, Last Link, and Keystone lode mining claims, survey No. 3,744, Redding, California, land district.

March 28, 1905, your office examined the record and found that the Big Dipper, Last Link, and Keystone claims are contiguous; that the Wedge, Hidden Treasure, and Great Eastern claims are also in themselves contiguous; and that the Big Dipper claim and the Wedge and Hidden Treasure claims have a common corner, which is the only contact between the two sections of the consolidated claim. It was held that the entry therefore embraces two distinct groups of three claims each, and that two such groups of mining claims can not properly be included in the same patent proceedings. The local officers were directed to notify the company that it would be allowed sixty days from notice within which to show cause why the entry should not be canceled as to one of the groups, or to elect as to which cancelation should be made; and it was stated that on failure to make such showing, or election, the entry would be canceled to the extent of the Big Dipper, Last Link and Keystone claims without further notice.

The company has appealed to the Department.

The finding and statement by your office of the material facts, above substantially set forth, as to the relative positions of the individual claims embraced in the entry, are confirmed by the record.

It is contended by the appellant company that there is no provision in the mining laws, or in the departmental regulations thereunder, which requires that lode mining claims, held in common and embraced in one application for patent, shall be contiguous, and it is ar-

gued that your office erred, therefore, in holding the entry for cancelation for the reasons and to the extent stated.

Whilst there is in the mining laws no express requirement that a number of lode mining claims sought to be embraced in a single application for patent and entry shall be contiguous, the provisions of the law respecting the proceedings to secure patent to such claims necessarily imply that the locations shall together comprise but one body of land.

Section 2325 of the Revised Statutes, amongst other things, provides that—

> 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 the 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. At the expiration of the sixty days of publication, the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication.

The mining claim for which patent may be obtained is spoken of as "a piece of land" and in the same connection as "the claim or claims in common." Provision is made for one survey and one plat of the claim or claims, for posting one notice on the land embraced in the plat, and for the publication of one notice in one newspaper. The notice of the application for patent and the plat of survey are required to be posted together "in a conspicuous place on the land embraced in the plat," and the notice is to be published in a newspaper published "nearest to such claim." From the language used the purpose and intent of Congress seems clear. The land to be

embraced in the plat of the survey, and for which "an application for a patent" may in accordance with the law be filed, may consist of a single mining location or many such locations held in common; and, whether the owner purchased adjoining locations and added them to his own, or made all the locations himself, all become his "claim." Smelting Co. *v.* Kemp (104 U. S., 636, 649). It is manifest that the statute does not contemplate that a number of mining locations, though held in common, if situate separate and apart from one another on the ground, may constitute the composite claim, or group, for which patent may be obtained in one proceeding. The provisions of the statute in that behalf are clearly inapplicable to detached locations, which can not in the nature of things form the piece or body of land to which the requisites to the obtaining of a patent are made to relate.

It is the location or consolidation of contiguous or adjoining claims, where more than one is involved, that is recognized in the statute as constituting the subject of a single patent proceeding.

This was plainly recognized in the case of Smelting Company *v.* Kemp (*supra*, p. 653), in which the trial court had taken the position that the owner of several mining locations who seeks patent therefor must present a separate application for each, and obtain a separate survey, and prove that upon each the required work has been performed. The Supreme Court declared this position to be untenable, and said:

> Requiring a separate application for each location, with a separate survey and notice, *where several adjoining each other are held by the same individual*, would confer no benefit beyond that accruing to the land-officers from an increase of their fees. The public would derive no advantage from it, and the owner would be subjected to onerous and often ruinous burdens. The services of an attorney are usually retained when a patent is sought, and the expenses attendant upon the proceeding are in many instances very great. To lessen these as much as possible the practice has been common for miners to *consolidate*, by conveyance to a single person or an association or company, *many contiguous claims into one*, for which only one application is made and of which only one survey is had. Long before patents were allowed—indeed, from the earliest period in which mining for gold and silver was pursued as a business—miners were in the habit of *consolidating adjoining claims*, whether they consisted of one or more original locations, into one, for convenience and economy in working them. It was, therefore, very natural, when patents were allowed, that the practice of presenting a single application with one survey of the *whole tract* should prevail. It was at the outset, and has ever since been, approved by the Department, and its propriety has never before been questioned. [Italics borrowed.]

No decision of the Department is cited, and none has been found, which recognizes the principle that non-contiguous mining claims may be embraced in a single application for patent. Counsel cite The Hidee Gold Mining Company (30 L. D., 420) and The Alice

Lode Mining Claim (*Id.*, 481), and contend that in each of those cases the Department sanctioned the patenting in one proceeding of non-contiguous tracts of land by authorizing the laying of the lines of junior locations over and upon prior patented ground. The case of Mary Darling Placer Claim (31 L. D., 64) is also cited, and it is argued therefrom that as a placer location, good when made, was afterwards intersected by patented lode claims, the principle now contended for was recognized and approved by the Department. It is sufficient to say in answer that the Department, in the cases cited, had under consideration single mining locations, and that there is no analogy between an application for patent to and an entry of a single mining claim under the circumstances there existing and an application for patent which embraces several claims held in common. In the cases cited the question was as to the integrity of the individual locations, and the question here is as to the right to embrace in one patent proceeding several mining claims held in common, some of them being non-contiguous. The cases cited are therefore not in point and do not control in principle.

The appellant company further contends, however, that mining claims which corner on each other are contiguous. This contention, as well, can not be sustained. The word "contiguous," as applied in the disposition of the public lands, has a long-established and well-understood meaning. Tracts of land which merely corner on each other in pre-emption and homestead claims have always been held to be non-contiguous. Hugh Miller (5 L. D., 683); Svang *v.* Tofley (6 L. D., 621); also see paragraph 25 of "General Rules Applicable to Different Classes of Entries" (pp. 73, 78, of the Circular from the General Land Office, approved January 25, 1904). In the land laws generally parts of the public domain are not held to be contiguous unless they lie alongside, in whole or in part, so that together they form one body of land. Contiguous means touching sides, adjoining, adjacent. Two tracts of land touching only at a point are not contiguous. Linn County Bank *v.* Hopkins (47 Kan., 580). Two tracts of land mutually touching only at a common corner—a mere point—can not according to any ordinary or authorized use of language be spoken of as constituting one body or tract of land. Kresin *v.* Mau (15 Minn., 116). These authorities are not, in the opinion of the Department, overborne by the cases of Holmes *v.* Carley (31 N. Y., 289) and Clements *v.* Crawford County Bank (64 Ark., 7), cited by counsel for appellant.

The Department is therefore of the opinion that the requirement that mining claims held in common, and sought to be embraced in a single application for patent and entry, shall be contiguous within the meaning of that word as understood and applied generally in the disposal of the public lands, is a proper one, and that it is in full

harmony with the purpose and intent of the mining laws respecting proceedings necessary to obtain patent.

It is asserted by the appellant company that heretofore your office has sustained entries and issued patents for lode mining claims held in common and embraced in a single application, wherein the claims touched one another only at a corner. The case of the Owl Consolidated Mine, entry No. 424, Redding, California, is cited, in which the appellant company received a patent, May 19, 1902, for three lode claims held in common and embraced in one application, where one of the claims touched the others by a corner only, as shown by the records of your office. Informal inquiry discloses that the practice with respect to allowing entry and issuing patents for lode claims held in common, and embraced in a single patent proceeding, where one or more of such claims touch others only at a corner, has not been uniform, but that patents have frequently issued in such cases.

Under these circumstances, therefore, and in recognition of the hardship which may by what is here held be imposed upon those who, upon faith of the contrary practice heretofore more or less generally observed, may have prosecuted, or prepared to prosecute, patent proceedings in cases like the present, direction is given that all pending entries for lode mining claims held in common and embraced in a single patent proceeding be sustained, and entry allowed in all cases where application for patent to such claims shall have been filed prior to September 1, 1907, if the law has in all essential respects been complied with and no question of common improvements is involved, and the only defect is that one or more of the claims merely corner on the other claims embraced in each application and entry. All other cases thus defective will be adjudicated according to the principles herein announced.

In this case, therefore, the decision appealed from is modified to allow adjudication in the manner indicated.

OFFICIAL RECORD—BASIS OF PATENT—MILITARY BOUNTY LAND WARRANT.

CROSSETT LUMBER CO. *v.* DAVIS.

The fact that the location of a military bounty land warrant, appearing from the records of the local office to have been regularly made and final certificate issued therefor, was never reported in any of the returns of warrant locations from the local office, and that neither the warrant nor any of the location papers are found in the files of the General Land Office, is not sufficient ground for refusing to recognize the validity of the location, where, owing to the civil war, the business of the local office was suspended and no returns made by the local officers covering the date the location was made.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *April 1, 1907.* (E. F. B.)

The Crossett Lumber Company, claiming under an assignment from Jonathon P. Davis to Eben M. Davis, has appealed from the decision of your office of November 24, 1906, holding that the entry made May 3, 1861, of the SW. ¼, Sec. 13, T. 19 S., R. 6 W., at the Champagnolle, Arkansas, local land office, by the location of military bounty land warrant, No. 94,230, can not be recognized by the land department, and directing the local officers at Camden, Arkansas, in which district the land is now situated, to notify any one claiming the land to show cause why the location should not be canceled on the records of your office.

The register of the local office at Camden, Arkansas, by letter of May 8, 1906, states that the records of that office show that the SW. ¼ of Sec. 13, T. 19 S., R. 6 W., was located by Jonathon P. Davis and Eben M. Davis *May 3, 1861*, with military bounty land warrant No. 94,230, issued in favor of Vincent Hernandez, and that register and receiver's final receipt No. 1171 was issued therefor.

It does not appear that there was any irregularity in the location of the warrant, or that the land was not subject to such location, or that the locators were not qualified to make entry; but your office refused to recognize the validity of the entry because it was not reported in any of the returns to your office from the local office that issued the final certificate, basing your ruling upon the decision of the Department in the case of John R. Maxwell (20 L. D., 330).

At the time of the location of this warrant, May 3, 1861, the register and receiver at the Champagnolle land district were the accredited officers of the United States, with full authority to allow location of land with military bounty land warrants and to issue their certificate that the warrant had been received and located in accordance with law and instructions. No further act is required on the part of the locators to entitle them to a patent for the land located. Such certificate was issued in this case upon the location and surrender of the warrant, which was the equivalent of payment, and the equitable title that thus passed from the United States vested in the locators, which could be conveyed as other private property.

The mere fact that such location is not reported in any of the returns of warrant locations from that office to your office, and that neither the warrant nor any of the location papers can be found in their proper place in the files of your office, is not of itself sufficient ground for refusing to recognize the validity of the location, as they may have been lost in transmission or may have been lost or destroyed in the local office.

The State of Arkansas passed its ordinance of secession May 6, 1861, three days after the entry of the land by the location of this warrant. From that time the *de facto* government established in that State did not recognize the jurisdiction and sovereignty of the United States until the termination of hostilities, thus rendering it impossible for the local land officers to communicate with the land department, and to render their returns. The business of the local land offices in that State was suspended by reason of such condition, until they were reopened by the proper authority.

The regularity of the proceedings at this office up to the time of the enforced suspension of business, is indicated by the fact that the register and receiver made their returns to your office for the month of April, 1861, and made of record all locations of land warrants up to and including May 3, 1861, as appears from the monthly abstract of locations with military bounty land warrants made at that office for the month ending May 31, 1861, which was certified and transmitted to your office May 20, 1903, by the local officers at Camden, Arkansas.

This abstract contains all locations made up to and including May 3, 1861, from No. 1165 (R. and R. receipt) to No. 1173, and includes (1171) the location of the SW. ¼, Sec. 13, T. 19 S., R. 6 W., by Jonathon P. and Eben M. Davis, with bounty land warrant No. 94,230.

In the case of John R. Maxwell, *supra*, cited by your office, there was no record whatever of the entry and for that reason the patent was refused. That is not this case. The record of the location of this land is complete in the local office upon the plats and on the tract books, as shown by the certified abstract of locations.

The power of supervision over the acts of registers and receivers to correct and annul entries of lands where the lands were not subject to entry or where the parties were not qualified to enter them, or where the entry was made upon false testimony or without authority of law, does not extend to land lawfully entered and paid for. Cornelius *v.* Kessel (128 U. S., 456, 461).

Your decision, so far as it holds that the validity of the entry can not be recognized because such entry was not returned by the local officers, is reversed, but it is not intended to deprive your office of jurisdiction to inquire into the validity of the entry upon other grounds before patenting. Upon the face of the record, there appears to be no reason why the entry should not be patented.

REPAYMENT—EXCESS—ACT OF MARCH 2, 1907.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 2, 1907.

Registers and Receivers, United States Land Offices.

GENTLEMEN: The act of March 2, 1907 (Public—No. 227), is as follows:

Be it enacted . . . . That in all cases in which homestead entrymen upon final proof or commutation shall have been required to pay more than the lawful purchase money for their lands, the Secretary of the Interior shall cause the excess to be repaid to the entryman or to his heirs or assigns.

As the act does not in specific terms declare an appropriation to be made, it was thought that its provisions might prove inoperative, and on March 14, 1907, the Secretary of the Interior was requested to ask the Comptroller of the Treasury to say whether or not repayments can be made under the act.

The Comptroller decided on March 22, 1907, that section 9 of the act of June 30, 1906 (34 Stat., 764), prohibits construing the act of March 2, 1907 (*supra*), to make an appropriation, and stated that he knew of no appropriation applicable to the object provided for therein, and that the repayment of the excess of purchase money referred to in said act is not authorized.

You will, therefore, furnish a copy of this circular in answer to any inquiries regarding the act in question, and will advise all parties who contemplate filing claims under the act that by so doing they will, for the present at least, incur a useless expense.

Very respectfully,

R. A. BALLINGER,
Commissioner.

Approved:
J. R. GARFIELD, *Secretary.*

PRACTICE—NOTICE OF DECISION BY REGISTERED MAIL—TIME FOR APPEAL.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 3, 1907.

Registers and Receivers, United States Land Offices.

SIRS: Your attention is called to the case of Schmiedt *v.* Enderson (35 L. D., 307), in which it was held that the time for appeal begins to run from the date when the notice of the decision sent by regis-

tered mail was actually received by the party to whom it was addressed, and not from the date of the mailing of such letter.

You are therefore directed to carefully note the date of the delivery of such notices as indicated by the registry return receipt signed by or for the party to whom the notice is addressed, and in computing the time for appeal you will govern your subsequent action in such cases by the date of such receipt.

You should in all cases carefully examine the registry return receipts which are signed by or for the person entitled to any notice sent by you by registered mail, as soon as they reach your office, and in all cases where they fail to show the date of delivery of such notice, you should at once return the registry receipts to the postoffices to which they were sent, and request the postmaster to enter thereon the actual date of the delivery of the letter and return the receipt to you.

It is expected that you will fully comply with this suggestion, as by doing so you will not only save this office and your office unnecessary correspondence, but will facilitate and hasten final disposition of the cases to which the notices relate.

Very respectfully,

R. A. BALLINGER,
Commissioner.

Approved:
JAMES RUDOLPH GARFIELD, *Secretary.*

MINING CLAIM—IMPROVEMENT—STAMP MILL.

MONSTER LODE MINING CLAIM.

A stamp mill, even though located upon and used exclusively in connection with the mining claim to which it is sought to accredit it toward meeting the statutory requirement of an expenditure in labor or improvements of the value of $500 as a condition to obtaining patent, can not be accepted as an improvement within the meaning and intent of the statute.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *April 9, 1907.* (G. N. B.)

December 27, 1905, the Eglanol Mining Company made entry for the Monster lode mining claim, survey No. 7,716, Helena, Montana, land district.

The improvements certified by the surveyor-general consist of two open cuts, valued at $25.00 each; a pit six by eight feet, ten feet deep, valued at $75.00; and a ten-stamp quartz mill, valued at $1,200.

May 22, 1906, your office, citing the case of Highland Marie and

Manilla Lode Mining Claims (31 L. D., 37), held that "the stamp mill can not be properly credited as an improvement upon or for the benefit of the claim," and found that the other certified improvements are not sufficient to satisfy the requirement of the statute. The local officers were directed to notify the claimant company that it would be allowed sixty days from notice within which to file a supplemental report by a mineral surveyor, certified by the surveyor-general, showing that an expenditure of $500 had been made upon or for the benefit of the claim, prior to the expiration of the period of publication of notice; and it was stated that on failure to make such showing and in the absence of appeal the entry would be canceled without further notice.

The claimant company has appealed to the Department.

It is well settled that labor and improvements to be credited in satisfaction of the statutory requirement must actually promote or directly tend to promote the extraction of mineral from the land or forward or facilitate the development of the claim as a mine or mining claim, or be necessary for its care or the protection of the mining works thereon, or pertaining thereto. (Smelting Co. *v.* Kemp, 104 U. S., 636, 655; Copper Glance Lode, 29 L. D., 542; Zephyr and Other Lode Mining Claims, 30 L. D., 510, 513; Highland Marie and Manilla Lode Mining Claims, 31 L. D., 37, 38.)

In the Highland Marie case, *supra*, the Department said:

> There is a sense, of course, in which the ownership of a mill in the vicinity of a mine, for crushing or reducing ores, by one who is also the owner of the mine, may promote the development of the mine, but so also doubtless, to some extent, might the development of the mine be hastened or promoted by the ownership or interest of such mine owner in a stock of mining implements or machinery kept in a general supply store in the neighborhood, or by his ownership of or interest in a tramway or railway built to bring in supplies and carry out mining products to and from the nearest mining camp. But in all these instances the connection between the ownership or interest in the thing mentioned and the development of the claim or the extraction of ore therefrom is too remote to justify holding such thing to be an improvement upon or for the benefit of the claim, or the crediting of the value of any part thereof toward the required expenditure.

It is contended by the appellant company, in effect, that the principle announced in the above case with respect to a stamp mill, the value of which was therein sought to be accredited in satisfaction of the statutory requirement as to improvements for the benefit of a number of claims, embraced in separate groups of claims, has no application to this case wherein the mill is situated upon the single claim involved, and was built for the benefit of that claim only.

This contention is not tenable. The Department is of opinion that the controlling objection made in the Highland Marie case is clearly applicable here.

A stamp mill erected upon a mining claim may be of benefit to the owner of the claim, but it in no way directly facilitates the extraction of mineral therefrom, or contributes to its development as a mine. Whilst it may be of advantage to have a stamp mill upon the claim and thus save a long haul of the ore extracted therefrom, yet such a mill is not an active agency in the actual development of the mine; and the relation in that respect is precisely the same whether the mill be situated upon the claim or at some distance therefrom. The only purpose which the mill can serve is in treating the mineral-bearing rock after it has been mined from the claim. A stamp mill has no connection with the operation of extracting mineral from the ground, but its function begins only when the process of mining has ceased.

The stamp mill here assigned and certified as an improvement upon the claim can not, therefore, be accepted as coming within the meaning and intent of the statute.

The decision of your office is affirmed.

B. B. WELDY.

Motion for review of departmental decision of February 1, 1907, 35 L. D., 405, denied by Secretary Garfield, April 9, 1907.

MINING CLAIM—ADVERSE PROCEEDING—SECTIONS 2325 AND 2326, R. S.

GRAND CANYON RAILWAY CO. *v.* CAMERON.

The provisions of sections 2325 and 2326 of the Revised Statutes contemplate, as the subject of judicial determination, the disputed possessory right to ground embraced in conflicts between different mining claims only.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *April 9, 1907.* (G. N. B.)

May 17, 1905, Ralph H. Cameron filed application for patent for the Golden Eagle and the Cape Horn lode mining claims, surveys numbers 2,022 and 2,023, respectively, Phoenix, Arizona, land district. The claims are situate in Sec. 23, T. 31 N., R. 2 E.

During the period of publication of notice of the application The Grand Canyon Railway Company filed what it called an "adverse claim and protest," and, it appears, suit was instituted thereon in the district court of the fourth judicial district of the Territory of Arizona, within thirty days from the date it was filed.

In the "adverse claim and protest," amongst other things, it is alleged, in substance, that The Grand Canyon Railway Company, as successor of the Santa Fe and Grand Canyon Railway Company, is the owner of the right of way from Williams, Arizona, through the Grand Canyon forest reserve to Bright Angel, Arizona, and of station grounds, granted by the act of May 18, 1898 (30 Stat., 418); that the protestant and its predecessor constructed a railroad upon such right of way; that the protestant operates such road, and in September, 1901, laid out and occupied station grounds, not exceeding twenty acres in extent, on the section in which the mining claims applied for are situate; that the mining claims conflict in part with the station grounds as laid out and occupied; that the lands covered by the mining claims contain no valuable deposits of mineral in rock in place or otherwise; that the claims are not located upon mineral land; that the applicant has not expended for labor and improvements upon or for the benefit of either of the claims the sum of $500 as required by the statute; and that the notice required by the statute was not posted on either of the claims: wherefore, it was prayed that all proceedings upon the application for patent might be stayed by the local officers until the rights of the parties to the lands in conflict could be determined in court.

August 19, 1905, the mineral applicant filed a motion to dismiss the "so-called adverse claim," on the ground that it presents no reason for a stay of proceedings upon the application, as it is not an "adverse claim" within the meaning of sections 2325 and 2326 of the Revised Statutes.

The local officers concurred in holding that the instrument so filed is not an adverse claim within the meaning of those sections, but disagreed as to their authority to dismiss it.

Upon appeal your office, by decision of May 5, 1906, approved the concurring conclusions below, and held the so-called adverse claim for dismissal.

The protestant has appealed to the Department.

It is well settled that the provisions of sections 2325 and 2326 of the Revised Statutes contemplate, as the subject of judicial determination, the disputed possessory right to ground embraced in conflicts between different mining claims only. Richmond Mining Company *v.* Rose (114 U. S., 576, 584); Iron Silver Mining Company *v.* Campbell (135 U. S., 286, 300); Creede and Cripple Creek Mining and Milling Company *v.* Uinta Tunnel Mining and Transportation Company (196 U. S., 337, 357); Wright *v.* Hartville (13 Wyo., 497; 81 Pac. Rep., 649); Powell *v.* Ferguson (23 L. D., 173); Snyder *v.* Waller (25 L. D., 7); North Star Lode (28 L. D., 41, 43); Ryan *v.* Granite Hill Mining and Development Company (29 L. D., 522).

The decisions to the other effect, in Bonner *v.* Meikle (82 Fed., 697)

and Young *v.* Goldsteen (97 Fed., 303), cited by the appellant, are not only not of binding authority here but are not persuasive, being wholly at variance with the views expressed in the cases next above cited and the manifest purpose of the statute.

The records of your office sustain the allegations of the protest as to the grant to the protestant, and compliance with its terms and the rules and regulations of the land department respecting grants to railroad companies of rights of way, etc. It is not denied by the mineral claimant that a railroad was built on the right of way; that depot grounds were established and surveyed on section 23; that the railroad is owned and operated by the protestant company; and by a blueprint tracing accompanying the record the Cape Horn location is shown to present a considerable conflict with the station grounds and the Golden Eagle location a small conflict with the railroad right of way outside those grounds. The claim of the appellant company to the lands involved rests wholly upon its grant, and it is not a rival claimant under the mining laws.

Whilst the record contains what purports to be a transcript of an oral opinion or decision by the judge of the aforesaid district court of the Territory, in favor of the railroad company, in an apparently concurrent action or suit between the same parties, but in which their positions as plaintiff and defendant were reversed, and involving one of the mining locations here in question, it does not appear that the suit commenced by the railroad company to support its so-called adverse claim has yet passed to judgment; but in any event the issues thus far disclosed are not such as could form the basis of a judgment which would be binding upon the land department or which it should accept in lieu of its own determination.

The mining location involved and upon which the applicant for patent relies, as indicated by the certificates thereof with the record, were made April 10, 1902 (amended February 23, 1904), and subsequent to the railroad company's establishment and occupation of the station grounds. The company's grant by the act of May 18, 1898, *supra*, is expressly "subject to the rules and restrictions and carrying all the rights and privileges of" the act of March 3, 1875 (18 Stat., 482). Thereunder the railroad company has acquired merely an easement, subject to which the desired mineral patent may issue in the absence of other objection (see case of John W. Wehn, 32 L. D., 33), but by virtue of which easement the company may rightfully resist the patent application upon any sufficient ground.

The instrument filed by the company may be treated as a protest, which raises a question of the character of the land, of the expendi-

tures in improvements on the claims, and of the sufficiency of the posted notice, all of which are committed to the land department alone to determine, and upon which the issue of mineral patent might be defeated. The appellant will therefore be afforded opportunity to apply for a hearing, in the usual manner, upon these questions.

The decision of your office is modified accordingly, and the papers are returned for such further proceedings as may appropriately be had in the premises.

COX *v.* WELLS.

Petition for re-review of departmental decision of February 7, 1906, 34 L. D., 435 (adhered to on motion for review, October 5, 1906, 35 L. D., 208), denied by Secretary Garfield, April 9, 1907.

TIMBER AND STONE ENTRY—CHARACTER OF LAND.

DUNCAN *v.* ARCHAMBAULT.

Where the character of land sought to be acquired under the timber and stone act is put in issue, entry under that act may be allowed only where it appears that the growth of timber thereon is so extensive and so dense as to render the tract as a whole, in its present state, substantially unfit for cultivation, and that the chief value hereof is for the timber thereon.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *April 11, 1907.* (E. O. P.)

John Archambault has appealed to the Department from your office decision of March 22, 1906, reversing the action of the local officers dismissing the protest of William A. Duncan against the allowance of timber and stone application filed by John Archambault for the NW ¼, Sec. 35, T. 164 N., R. 72 W., Devils Lake land district, North Dakota, and holding that the allegations contained in said protest were sustained by a preponderance of the evidence, thus in effect rejecting said application.

But one error is specified as ground for reversal, and this relates solely to the correctness of your finding that the land in question is not chiefly valuable for its timber and unfit for cultivation.

The material facts disclosed by the testimony are correctly set out in your said decision. It is contended by counsel for the timber and stone applicant that the conclusion reached can not be supported if the rule of classification laid down in the case of United States *v.* Budd (144 U. S., 154, 167) be observed. The correctness of this

rule has been confirmed in the more recent case of Thayer *v.* Spratt (189 U. S., 346, 350) and the Department is bound to recognize and apply it in all cases where the rights of claimants are dependent upon a determination of the relative value of the land because of the timber thereon as compared with its value for other purposes.

In the case of United States *v.* Budd, *supra*, it was held, without qualification, that:

> The *chief* value of the land must be its timber, and that timber must be so extensive and so dense as to render the tract *as a whole*, in its present state, substantially unfit for cultivation.

It is clear that the facts recited will not support the conclusion that the land in question is chiefly valuable for its timber or that it is "substantially unfit for cultivation." Only by the most narrow construction of the term "cultivation" could it be held that the land in its present state is substantially unfit therefor. The tract, taken as a whole, is not heavily timbered and it appears that much of it is susceptible of cultivation in its present state and that a reasonable man would be warranted in attempting to prepare the larger part of the land for agricultural purposes. Land of such character can not be presumed to be *chiefly* valuable for its timber nor unfit for cultivation. The Department, even under a strict application of the rule laid down in the Budd case (*supra*) is of opinion no other conclusion than that reached by your office could be supported upon the testimony offered touching the character of the tract in question. The decision appealed from is hereby affirmed.

William J. Hiskett.

Motion for review of departmental decision of December 4, 1906, 35 L. D., 345, denied by Secretary Garfield, April 11, 1907.

HOMESTEAD—SOLDIERS' DECLARATORY STATEMENT.

Dyar *v.* Jones et al.

The homestead right is not exhausted by the filing of a soldiers' declaratory statement which is subsequently abandoned because of a prior adverse settlement claim.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *April 11, 1907.* (J. R. W.)

Louis A. Dyar appealed from your decisions of May 17, 1905, and May 14, 1906, the first rejecting his application for homestead entry

for the SE. ¼, Sec. 11, T. 9 S., R. 9 W., W. M., Portland, Oregon, and the second refusing application to reopen the case because of Andrew Blom's intervening homestead entry of the tract.

Ira Jones, March 26, 1901, filed soldiers' homestead declaratory statement for the SW. ¼, Sec. 11, T. 4 N., R. 4 W., W. M., against which, March 29, 1901, one Bielstein filed a contest, asserting prior settlement, and June 10, 1903, the land was awarded to Bielstein. There appears to have been a hearing of this contest, but whether the land was awarded to Bielstein as the result of the hearing or for Jones's failure to pursue his declaratory statement and make an entry, is not shown by the record here. For the purposes of this decision, the latter is assumed to be the fact. Jones never obtained an entry of that tract.

July 30, 1904, he filed a soldiers' homestead declaratory statement for the land here involved, as an application for a second entry, alleging, in addition to the things necessary to a first entry, that the former one was filed in good faith, allowed of record, that he never lived on it, and that March 29, 1901—

> John Bielstein filed a contest against my said filing, alleging prior settlement, ... that a hearing was had and the testimony submitted on the part of contestant; pending controversy . . . . I was advised by register Moores it was not necessary to file and make homestead application, and pending the contest . . . . later on I found the advice of said register to be erroneous. The decision of the Commissioner of the General Land Office, June 10, 1903, will better explain the controversy, but suffice to say Bielstein made his homestead entry for the tract.

Pending Jones's application, August 5, 1904, Louis A. Dyar applied to enter the land, which the local office held pending action of your office upon Jones's application of July 30, *supra*. November 7, 1904, your office held Jones's showing sufficient to entitle him to a second entry under the act of April 28, 1904 (33 Stat., 527), and Jones made entry January 16, 1905. January 19, 1905, the local office rejected Dyar's application, and February 24, 1905, he appealed to your office. May 17, 1905, you dismissed the appeal for want of evidence of service on Jones and because Jones's entry was—

> duly made by authority of this office, and the said Dyar having alleged no prior rights thereto, the sufficiency of the showing of the said Jones to entitle him to make entry under the act of April 28, 1904, is one that rests entirely between the entryman and the government.

The record shows that Dyar's appeal from rejection of his homestead application was duly served by him on Jones by registered letter mail from Los Angeles, California, February 21, 1905, transmitted by the local office with the appeal, so that the dismissal of the appeal for a supposed default of service was erroneous.

June 6, 1905, Dyar transmitted to the local office an affidavit of the former register of the local office, to the effect that he gave Jones no such advice as was alleged in the application for a second declaratory filing, which the local office transmitted to your office June 15, 1905, and was treated as an application to reopen the case. May 14, 1905, you noted that your office records showed that Jones's entry was canceled on relinquishment, August 8, 1905, on which day Andrew Blom made homestead entry for the tract, which was intact, and held that Jones's entry was properly allowed; Dyar's application was properly rejected, and that, as Blom's entry was allowed when the land was vacant, Dyar's application to reopen the case was denied. He appealed to the Department.

There was no error in your decision. Dyar's application for entry, made while that of Jones was pending, gave him no right, as the land was then included in the application pending. Dyar alleged no settlement or interest in the land, and could acquire none by his application subject to Jones's prior one, until that should be rejected. It was allowed. His only remedy was to contest Jones's entry, if he deemed its allowance unwarranted, and thus make himself a party to the record. There was no ground for his appeal from rejection of his application by the local office, as your allowance of Jones's entry effectually disposed of the land and of all applications for its entry.

This disposes of the case, but it is necessary to note that both Jones and your office erred in regarding his declaratory statement for homestead entry of the land here involved as one to be allowed of grace of the land department, whereas it was one of right—his right never having been exhausted.

He had a right under the law and when he attempted to exercise it on the tract first selected, he was met by the assertion of an earlier one.

It was held in Keane *v.* Brygger (160 U. S. 276, 287) that:

> it would be a strange doctrine to announce that a party did not have the right to relinquish any right that he had to or in any property, and that it was the intention of the Government to compel its citizens to go to the expense and delay of a contest to extinguish an interest of another citizen who is willing to make a disclaimer of that interest.

This is recognized by the land department in repeated decisions. In a similar case to the present—Orlando Starkey (7 L. D., 385, 386)—the soldier's right was held not to be exhausted by the filing of a declaratory statement when that was met by assertion of a prior settlement right. It was held that—

> he was not bound under the law to incur the expense or await the delay of a contest, and if the filing was *prima facie* a valid one he would not be chargeable with laches for failing to contest.

See also James A. Forward (8 L. D., 528); Thurlow Weed (8 L. D., 100); Charles Wolters (8 L. D., 131); James M. Frost *et al.* (18 L. D., 145).

In Anna Lee (24 L. D., 531, 533) it was held that:

A homestead right is not exhausted by an entry which through no fault of the entryman can not be perfected; and this rule should, in my judgment, be held to embrace all cases in which the entryman in good faith believes, and has reasonable grounds to believe, that the entry can never ripen into a perfect title.

It was meritorious for Jones to proceed no further with his first declaratory statement than to the point where he became convinced of Bielstein's prior and better right. Enough appears in the record by Jones's affidavit, not controverted by Dyar, to show that there was a hearing, and that Bielstein was awarded the land. Dyar does not charge that Jones's action was collusive, or that the prior claim of Bielstein was not well founded or not asserted in good faith. Whether well founded or not, if made in good faith, Jones had right to yield to it without any hearing or controversy at all, or to pursue controversy to such point as satisfied him of futility or impolicy of further contention, and, if no entry had yet been made, all his original right remained, unexhausted and unimpaired by the futile attempt to exercise it by filing of his first declaratory statement. The filing upon the land here involved was his first exercise of the right upon land subject thereto, and that was his first right under the law, not a second by grace of the land department.

For these reasons your action rejecting Dyar's application for entry is affirmed.

HOMESTEAD SETTLERS ON RAILROAD LANDS IN THE STATE OF ALABAMA.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 11, 1907.

The act of March 4, 1907 (Public—No. 259), is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An act for the relief of certain homestead settlers in the State of Alabama," approved February twenty-fourth, nineteen hundred and five, be, and the same is hereby, amended so as to read as follows:

"That where any homestead entry heretofore allowed by the officers of the Land Department for lands within the limits of the grant made by act of Congress approved June third, eighteen hundred and fifty-six (Eleventh Statutes, page eighteen) to the State of Alabama in aid of the construction of the railroad known as the Mobile and Girard Railroad has been canceled because

of a superior claim to the land through purchase from the railroad company, which claim has been held to have been confirmed and a confirmatory patent issued for the land under the provisions of section four of the act of March third, eighteen hundred and eighty-seven (Twenty-fourth Statutes, page five hundred and fifty-six), or where any homestead entry has been 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 said lands lie opposite to and coterminous with those portions of either of said roads which were constructed prior to the passage of the forfeiture act of September twenty-ninth, eighteen hundred and ninety (Twenty-fifth (?) Statutes, page four hundred and ninety-six), the title to which is asserted and claimed by the vendee or successor in interest of either of said railroad companies, such homesteader is hereby accorded the privilege of transferring his claim thus initiated under the homestead laws to any other nonmineral unappropriated public land subject to homestead entry, with full credit for the period of residence and for the improvements made upon his said homestead entry prior to the order of its cancellation, or prior to the passage of this act: *Provided*, That he has not forfeited or voluntarily abandoned his homestead claim and that his application for transfer is presented within one year from the date of the passage of this act.

"Should such homesteader elect, however, to retain the tract embraced in his homestead entry heretofore canceled, or the tract so entered by him, the title to which may be claimed by the vendee or successor in interest of either of said railroad companies, the holder of the patented title through the railroad grant or of the title so claimed and asserted by any person, association, or corporation under either of said railroad grants as aforesaid shall thereupon be invited to relinquish or reconvey to the United States of America the land included in such homestead entry, and upon filing such relinquishment or reconveyance the party making such relinquishment or reconveyance shall be entitled to select and receive patent for an equal quantity of nontimbered, nonmineral, and unappropriated surveyed public lands subject to homestead entry within three years after the passage of this act, and upon the filing of such relinquishment or reconveyance all right, title, and interest under and through either of the said railroad grants or the confirmatory patent hereinbefore referred to shall revert to the United States, and the tract thus relinquished or reconveyed shall be treated and disposed of as other public lands of the United States: *Provided, however*, That such previous homesteader shall be reinstated in his rights and permitted to complete title to the land previously entered as though no cancellation of his homestead entry had been made or the title to the land had not been claimed and asserted adversely to him as aforesaid: *Provided*, That such homesteader or vendee or successor in interest of either of said railroad companies shall not be permitted to select more than one hundred and sixty acres of lands in one section nor more than three hundred and twenty acres of contiguous lands."

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

THE BENEFICIARIES UNDER THE ACT.

The act of March 4, 1907, clearly describes four classes of beneficiaries, as follows:

First. Those who had, prior to the passage of said act, been allowed by the officers of the Land Department to make homestead entry for

lands within the limits of the grant made by act of Congress approved June 3, 1856 (11 Stat., 17, 18), to the State of Alabama in aid of the construction of the railroad known as the Mobile and Girard railroad, whose entries have been canceled because of superior claims to the land through purchase from the railroad company and the land patented to such purchasers under the confirmatory provisions of section 4 of the act of March 3, 1887 (24 Stat., 556).

Second. Those who made homestead entry on lands granted by Congress to the State of Alabama to aid in the construction of the Mobile and Girard and Tennessee and Coosa railroads, which lands lie opposite to and coterminous with those portions of either of said roads constructed prior to the passage of the forfeiture act of September 29, 1890 (26 Stat., 496), the title to which is now asserted and claimed by either the vendees or successors in interest of either of said railroad companies having constructed said roads.

To such homesteaders the act accords the privilege of transferring the claim under the homestead law to any other nonmineral unappropriated public lands subject to homestead entry, with full credit for the period of residence and for the improvements made upon their respective homestead entries prior to the order of cancellation, or prior to the passage of the act, provided they have not forfeited or voluntarily abandoned their homestead claims and that the application for transfer is presented within one year after the passage of the said act.

Where any such homestead has passed to patent or to final entry and certificate, or to the submission of final proof entitling the claimant to final entry and certificate, and the homesteader has since died or sold or transferred and assigned his rights under such entry, the heirs of such deceased homesteader or his vendees, successors in interest, or assigns will be entitled to all the benefits of this act, the evident purpose thereof being to place the homesteader and those claiming under or through him in the same position as though his entry when originally made had been of public lands of the United States to which no adverse claim had been asserted under either of the railroad grants above mentioned.

Third. The third class of beneficiaries named in the act is "the holder of the patented title through the railroad grant," who, in the event that a homesteader of the first class elects to retain the tract formerly entered, is to be invited to relinquish or reconvey said tract to the United States, whereupon he is granted a right to select and receive patent for an equal quantity of nontimbered, nonmineral, unappropriated, surveyed public lands subject to homestead entry, provided such selection is made within *three* years after the passage of the act. The person thus designated is the lawful holder of the

patented title to the land at the time the relinquishment and reconveyance is requested and made.

Fourth. The fourth class of beneficiaries named in the act is described as the person, association, or corporation asserting and claiming a title to lands covered by the entries of homesteaders of the second class of beneficiaries above mentioned as the vendee and successor in interest of either the Mobile and Girard Railroad Company or of the Tennessee and Coosa Railroad Company. In the event that a homesteader of this class elects to retain the land covered by his entry, such person, association, or corporation is to be invited to relinquish his claim to such tract to the United States, whereupon such party will be entitled to select and receive patent for an equal quantity of nontimbered, nonmineral, unappropriated, surveyed public lands subject to homestead entry, provided such selection is made within *three* years after the passage of the act. The party thus designated is the person, association, or corporation asserting claim as aforesaid at the time such relinquishment is requested and made.

Selections under this act will not be permitted to exceed 160 acres of land in one section, nor more than 320 acres of contiguous lands.

PROCEDURE IN OBTAINING RELINQUISHMENTS.

Wherever, upon examination of the records, it appears that a homestead entry of either of said classes described comes within the provisions of this act, the Commissioner of the General Land Office will notify the homestead claimant of the option accorded him by law, either to transfer his claim to other lands or to retain the land described and request him to file a notice of his election at the earliest opportunity. If he elects to relinquish the land and take other lands in lieu thereof he must execute a proper relinquishment or reconveyance as hereinafter required, and transmit the same to the Commissioner of the General Land Office, together with his notice of election so to do. If he elects to retain the land entered as aforesaid, the notice of his election should be accompanied by proof that he has not forfeited or voluntarily abandoned his homestead claim.

Where any such homesteader had, prior to the passage of this act, made a homestead entry for other lands, he will, upon filing an election with the Commissioner of the General Land Office to transfer his claim to the lands covered by such second entry, be entitled to full credit for the period of residence and for the improvements made upon his former canceled homestead entry as though said second homestead entry had been made under the provisions of this act.

An individual may, without formal notice or request, make the required proof and file notice of his election with the Commissioner of the General Land Office.

Where the claimant under the homestead elects to retain the land entered and makes satisfactory proof in support of such election, the Commissioner of the General Land Office will thereupon notify the holder of the patented title, or the person, association, or corporation asserting title through the railroad grant, to the land entered, inviting such holder or claimant to relinquish or reconvey to the United States the land included in such homestead entry.

WHAT IS A PROPER RELINQUISHMENT?

The relinquishment or reconveyance must be an instrument in writing describing the land relinquished and making appropriate reference to the claim intended to be surrendered and in terms releasing, quitclaiming, and relinquishing or reconveying unto the United States of America all the right, title, interest, and claim of the homesteader or holder of the patented title or claimant through the railroad grant, as the case may be, to such lands, and when relinquishing or reconveying the patented title must be executed, witnessed, and acknowledged conformably to the laws respecting the conveyance of real property in the State of Alabama.

Relinquishments by those claiming under the homestead entry, where the same has passed to patent or to final entry and certificate or to the submission of final proof entitling the claimant to final entry and certificate, and also all relinquishments by the holder of the patented title through the railroad grant, or of claimants of the title asserted under either of said railroad grants, must be accompanied by proof satisfactorily showing whether the land relinquished has been sold, contracted to be sold, or encumbered, and that it is free from liability for taxes, pending suits, judgment liens, or other incumbrances.

EFFECT OF RELINQUISHMENT—WHEN RIGHT TO SELECT OTHER LAND IS COMPLETED.

Upon the filing with, and acceptance by, the Commissioner of the General Land Office of a relinquishment under the homestead claim, the claimant, upon receiving notice of the acceptance of his relinquishment, will be entitled, upon proper application, to select other lands according to the conditions and limitations of the act of March 4, 1907.

Upon filing with, and acceptance by, the Commissioner of the General Land Office of a relinquishment by the claimant under the railroad grant or the holder of the patented title through the railroad grant, all right, title, and interest under and through the railroad grant and the confirmatory patent shall revert to the United States, and the lands so relinquished will be treated and disposed of as other

public lands of the United States. The former homesteader, however, will be reinstated in his rights and permitted to complete title to the land previously entered as though no order for the cancellation of his homestead entry had been made. In the event that any such homestead is not thereafter perfected, any title to the lands embraced in such entry will not revert to the holder of the patented title through the railroad grant, but will be subject to disposal as other public lands.

The holder of the patented title or claimant under the railroad grant upon receiving notice of the acceptance of his relinquishment, will be entitled, upon proper application, to select other lands according to the limitations and conditions of said act of March 4, 1907.

PROCEDURE IN SELECTING LIEU LANDS AND PERFECTING TITLE THERETO.

Applications to select lieu lands hereunder, and to transfer the homestead claim, must be presented to the local land office in the district within which the lands selected or to which the transfer is made are situate. The application must particularly state the description and acreage of the lands relinquished, the acceptance by the Commissioner of the General Land Office of the relinquishment, and the description and acreage of the lands applied for, and since corresponding legal subdivisions generally approximate but do not always embrace the same area, the rule of approximation permitted in entries under the homestead and other public-land laws may be properly applied in selections and entries under this act.

The application must be supported by an affidavit made by the selector or some credible person in his behalf, to be filed with and made part of the selection, showing that the land selected is of the character subject to selection under said act and is unappropriated within the meaning thereof. The selector will then be required, within thirty days after filing his application, to begin publication at his own expense in a newspaper to be designated by the register as of general circulation published nearest to the land selected, of notice of his intention to submit, at the date fixed therein, before the register and receiver, affirmative proof that the land selected is of the character subject to selection under said act and requiring all persons to appear at that time and offer objections, if any they have, to the appropriation of the land under the provisions of the said act. Such publication must be continued for a period of not less than thirty days from the date of the first publication, during which period a similar notice of selection must be posted in the local land office and upon each and every *noncontinguous* tract included in the selection.

The notice should describe the land selected, give the date of

selection, state the purpose of the selector to offer affirmative proof of the character of the land described, and state that an opportunity will be offered to all persons to file objections to such selection with the local officers and to assert any adverse claim thereto which they may have.

Proof of publication shall consist of the affidavit of the publisher or of the foreman or other proper employee of the newspaper in which the notice was published, with copy of the published notice attached. Proof of posting upon the land and that such notice remained posted during the entire period as above required, shall be made by the selector or some credible person having knowledge of the fact. The register shall certify as to posting in his office. The first and last dates of such publication and posting shall in all cases be given.

At the date fixed in said notice, if no protest, objection, or contest has been filed against said selection, the local officers will receive affirmative proof as to the nonmineral, nontimbered, and unappropriated character of the land. The affirmative proof must consist of affidavit of the selector or of his agent, duly corroborated by not less than two credible and disinterested witnesses. If such proof is satisfactory to them, they will approve and accept the same, give the selection an appropriate number, make due notation thereof upon their records, and transmit the papers to the Commissioner of the General Land Office for his consideration.

In case any protests, objections, or contests are filed, the register and receiver will forward all papers to the Commissioner of the General Land Office, together with any information they may have received as to the character of the land, when appropriate action will be taken thereon.

Where the homestead claim sought to be transferred has not been carried to patent, or to final entry and certificate, or to the submission of final proof entitling the entryman to final entry and certificate, the claimant will be required to perfect his right to the land in the new entry by compliance with the homestead law and the submission of proof thereof in the usual way, but credit will be given for the period of residence and for the improvements made upon the former homestead entry as provided in said act of March 4, 1907, and for any payment of fees or purchase money upon the land relinquished, it being the purpose of the act to give the homestead claimants the same status with respect to the transferred lands which they occupy with respect to the lands relinquished.

TIME OF ISSUING PATENTS TO SELECTED LANDS.

Patents to lands taken under this act, either by those claiming under a former homestead entry or by the holders of the patented

title under the railroad grant, or by the person, association, or corporation claiming under either of the railroad grants above mentioned, will be issued after due examination and approval of the claims made hereunder, conformably to the general rules of practice governing like matters in the General Land Office.

R. A. BALLINGER,
Commissioner.

Approved:

JAMES RUDOLPH GARFIELD, *Secretary.*

OKLAHOMA LANDS—SELECTION—SECTION 12, ACT OF JUNE 16, 1906.

TERRITORY OF OKLAHOMA.

Non-saline affidavits are not required in connection with lists of selections under section 12 of the act of June 16, 1906.

The amount of fees collectible on account of selections made under said section shall be determined by dividing the total amount of lands embraced in a list by 160, and the fees computed at the rate of two dollars for each 160 acres selected and for any remaining fraction.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *April 12, 1907.* (F. W. C.)

By section 12 of the act of June 16, 1906 (34 Stat., 267, 274), in lieu of the grant of land for purposes of internal improvement, made to new States by the eighth section of the act of September 4, 1841 (5 Stat., 455), and also in lieu of any claim or demand of the new State of Oklahoma, under the act of September 28, 1850 (9 Stat., 519), and section 2479 of the Revised Statutes, making a grant of swamp and overflowed lands, which grant it was declared was not extended to the State of Oklahoma, there was granted to the future State—

from public lands of the United States within said State, for the purposes indicated, namely: For the benefit of the Oklahoma University, two hundred and fifty thousand acres; for the benefit of the University Preparatory School, one hundred and fifty thousand acres; for the benefit of the Agricultural and Mechanical College, two hundred and fifty thousand acres; for the benefit of the Colored Agricultural and Normal University, one hundred thousand acres; for the benefit of normal schools, now established or hereafter to be established, three hundred thousand acres. The lands granted by this section shall be selected by the board for leasing school lands of the Territory of Oklahoma immediately upon the approval of this act. Said selections as soon as made shall be certified to the Secretary of the Interior, and the lands so selected shall be thereupon withdrawn from homestead entry.

From the papers forwarded with your office letter of February 16, last, it appears that shortly after the passage of said act there were

filed in the local offices at Guthrie, Lawton and Woodward lists of selections under said section 12, without such means of identification as would enable the land department to determine on account of what particular grant each list was intended, and in the aggregate these lists exceed the total amount granted by said section. Further, due to their evident haste in preparation, they were so disfigured by elimination, upon inspection by the local officers and otherwise, of tracts improperly included, that when they reached your office they are said to have been practically illegible. Because of these facts and other matters relating to form, the lists in the Lawton and Woodward land districts were, with your office letters of November 9, 1906, returned that they might be completed and presented in proper shape. They are not now before the Department but it is assumed from statements made in connection with the appeal of the Territory relating to other matters to be hereinafter considered, that it is the intention to comply with the requirements of your office in the matter of the formal presentation of lists by amendment, so far as possible, so that no consideration is at this time given to any question affecting the formal presentation of lists of selections under said section, further than to say that each list presented must be on account of a specific grant; must contain a statement of the amount of previous selections on account of that grant, and, with those sought, must not exceed in the aggregate the total amount granted.

In disposing of these lists your office required that the amended lists be accompanied by proper affidavits showing that the lands selected contain no salt springs or deposits of salt in any form, sufficient to render them chiefly valuable therefor, and in the letter addressed to the register and receiver at Woodward, it was said, in referring to the question of the payment of fees on account of the selections made, that—

> such fees should be computed separately for each list and without regard to the selections contained in any other list. The amount of $2 should be paid for each selection of 160 acres or fraction thereof.

An appeal to this Department has been filed, particularly from the requirement that a non-saline affidavit must accompany each list of selections filed under this act, and a question is also raised as to the fees collectible on account of such selections.

With regard to the requirement of a non-saline affidavit it is the opinion of this Department that there is no reason therefor.

The grant made by the twelfth section to the future State of Oklahoma is "from public lands of the United States within said State," without a specific mineral exception.

By section 8 of the act specific provision is made governing the disposal of the lands granted by said act to the State of Oklahoma,

where the same are valuable for minerals, which term, it is provided, shall also include gas and oil. This would seem to remove any question of doubt as to whether the grants made by said act were intended to apply to mineral lands.

The act of January 31, 1901 (31 Stat., 745), extends the mining laws to saline lands by declaring the same subject to location and purchase under the provision of the law relating to placer mining claims. There would seem to be therefore no reason for making any special exception of saline lands. Your requirement in this particular is therefore overruled.

It is noticed that by section 36 of the act of June 16, 1906, it is provided:

> That all mineral lands shall be exempted from the grants made by this act; but if any portion thereof shall be found by the Department of the Interior to be mineral lands, said State, by the commission provided for in section thirty-five hereof, under the direction of the Secretary of the Interior, is hereby authorized and empowered to select, in legal subdivisions, an equal quantity of other unappropriated lands in said State in lieu thereof.

But a reading of this section shows that it had reference solely to the grants made to the future State of Arizona.

Referring to the question of fees collectible on account of selections made under said section 12, the appeal states:

> In the Woodward land district a large number of selections were made and certified which consists of lots and legal subdivisions, in many instances containing but 20 or 30 acres. By the Commissioner's ruling the State must pay for each of said selections the amount of $2.00.

From this it seems that the requirement on the part of your office in this particular has been misunderstood. It does not seem to have been the intention to charge for each item in a selection list but rather that the total amount covered by the list should be divided by 160, the unit prescribed in the act of July 1, 1864 (13 Stat., 385), and the fees computed at the rate of $2.00, one for each officer, for each 160 acres selected and for any fraction remaining over. This is the uniform plan adopted and followed since the passage of the act of 1864 in the computation of fees collectible on account of the final location or selection by States and corporations under grants from Congress for railroads and other purposes, and will be insisted upon in the matter of the selections filed by the Territory.

Other appeals of the Territory were forwarded with your letters of the 4th instant, from orders made requiring the furnishing of non-saline affidavits in connection with selections made of lands within the Guthrie land office under said section 12, which will not be insisted upon under the holding herein made.

HOMESTEAD—WIDOW—CULTIVATION.

THIES ET AL. *v.* HEIRS OF CALHOUN.

Upon the death of a homestead entryman who had up to that time complied with the law, his widow will not be required to cultivate the land where the period during which compliance with law is necessary has so nearly expired that no effective cultivation by planting and harvesting is possible within the time remaining.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *April 12, 1907.* (J. R. W.)

Henry O. Thies and his mortgagee, Robert B. Mathieson, appealed from your decision of December 4, 1905, canceling Thies's homestead entry final certificate for the NW. ¼, Sec. 8, T. 112 N., R. 78 W., Pierre, South Dakota.

The facts are extraordinary. April 27, 1883, Andrew Calhoun made homestead entry for the tract, and September 6, 1884, the local office accepted final proof submitted by Adam Lutz, administrator of Calhoun's estate, and issued final certificate. The final proof was very irregular, but, with the accompanying papers, showed, by the original discharge of Calhoun, that he was entitled to credit for military service of three years and ten months, so that residence and cultivation were required for but one year and two months. Before that lapse of time he died, the fact and date not being more definitely shown than that Adam M. Lutz was by the probate court of Hughes county, South Dakota, appointed, June 18, 1884, administrator of his estate. As this was prior to June 27, 1884, when his required period of residence would have expired, he must have died prior to completion of his residence.

The final proof by Lutz and two witnesses was to the effect that "*I*" [Lutz] established residence on the land April 27, 1883, built a framed house and a cellar, broke five acres, and the improvements were worth $60 to $75; that *Lutz's* family consisted of an invalid wife and four children, who were still residing in Illinois; that he resided on the land to the time of his death. This was doubtless intended to apply to the entryman Calhoun and not to the administrator, Lutz. May 11, 1885, your office rejected the final proof, and called attention to the rule of descent (1) to the widow and (2) to the heirs, and required final proof by the proper party.

The local office erroneously regarded and noted this as cancellation of Calhoun's entry, and March 21, 1892, nearly eight years later, allowed homestead entry of Oscar J. Clements for the same tract, and April 30, 1892, your office directed a report why this entry was allowed while that of Calhoun was still intact, and May 4, 1892, the local office reported such facts. June 21, 1892, you canceled Clements's

entry and directed correction of the local office record to show reinstatement of Calhoun's entry. As the record showed a widow and four children of Calhoun resident in Illinois, you directed inquiry as to their rights and advice to them. After correspondence, not here material, February 21, 1893, your office directed notice to Oscar and Leslie Calhoun, Courtland, Illinois, that if their mother, the widow, was insane, the final affidavit might be executed before an officer having a seal qualified to administer oaths, "by any person duly authorized to act for her during her disability." Nothing appears to have resulted, nor does the record here show that such notice was ever given.

February 15, 1902, the local office allowed Henry O. Thies to make homestead entry for the tract, and May 3, 1903, he made commutation final proof, paid $200, and received final cash certificate.

June 2, 1904, William Calhoun made before the register of the local office and filed his protest upon oath that he is son of the entryman, and that his father—

> the said Andrew Calhoun died March 8, 1884, and that at the time of his death he was living on said premises; that he left surviving him as his heirs-at-law, Rebecca Calhoun, widow; Oscar and Leslie Calhoun, sons; Ida Calhoun, a daughter, and William Calhoun, a son, the protestant. That at the time of his father's death protestant was about one year old, having attained his majority March 13, 1904.
>
> That the said Rebecca Calhoun, wife and widow of deceased, was, at date of death of Andrew Calhoun, a feeble-minded person and incompetent to transact business, being confined to an insane asylum a greater part of the time. That subsequent to his father's death protestant was placed in the care and control of A. H. Calhoun, who was guardian of protestant and the other children of the said Andrew Calhoun; that the said guardian embezzled and dissipated the property and estates of his wards and reduced them to penury and want. That protestant, owing to lack of funds, was unable to come to the land office at Pierre, S. D., to investigate said entry of his father prior to this time.
>
> Wherefore protestant protests against the issuance of any patent to Henry O. Theis by the United States, for the lands above described, and prays that the proof therefore be disallowed and that the entry as made by the said Henry O. Theis be canceled and protestant and other heirs of the said Andrew Calhoun, hereinbefore named, be permitted to succeed to all the rights of said Andrew Calhoun; protestant further prays that a day of hearing be set and due notice thereof be furnished the said heirs and Henry O. Theis, at which time protestant and the other heirs may prove the facts as alleged.

You held that Thies's entry was allowed while a prior entry of the tract existed, and required him within sixty days to show cause why it be not canceled. Thies appealed.

The final proof showed that the entryman complied with the law to his death, and that he left a widow who succeeded to his right under section 2291 of the Revised Statutes of the United States. She was at the time insane, though that fact did not appear by the final proof.

The entryman's time was so near expired that no effective cultivation by planting and harvesting of a crop was possible, and in view of the Department it is not within meaning or intent of the law that the widow or some one for her must plow and plant a crop that could not in the required period mature or be harvested. No object of the act could be attained thereby. The widow could not make the oath necessary to completion of evidence of her right, and her unfortunate condition rendered her free of laches in failure to do so. Any one qualified to act for her may yet make the proof under the act of June 8, 1880 (21 Stat., 166), providing for proof on behalf of insane persons.

Your decision is affirmed.

FEES OF SURVEYORS-GENERAL—CERTIFIED COPIES OF PLATS AND RECORDS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 15, 1907.

The UNITED STATES SURVEYOR-GENERAL.

SIR: Under the terms of office circular dated October 13, 1886 (5 L. D., 190), you were permitted to furnish certified copies of plats and records in your office and to receive a fee therefor under certain conditions.

As it is considered that the continuance of this practice is detrimental to the best interests of the public service, you are hereby advised that it must be discontinued by you on and after your receipt of this communication, which you will acknowledge at once.

Hereafter, when application is made for exemplified copies of plats or any other records in your office, you will first furnish the applicant a memorandum of the exact cost thereof at the rates established by law for registers and receivers for like services, and require him to deposit the amount in a designated United States Depository, to the credit of the Treasurer of the United States, and upon presenting to you the duplicate certificate you can then cause them to be prepared during office hours and furnish them to the applicant.

The duplicate certificates thus received you will forward to this office in the usual manner.

Very respectfully,

R. A. BALLINGER,
Commisisoner.

Approved:
J. R. GARFIELD, *Secretary.*

DESERT LAND ENTRY—ASSIGNMENT BY OPERATION OF LAW.

YOUNG *v.* TRUMBLE ET AL.

Prior to final proof and certificate, a desert land entryman has no such right in the land as may be assigned by operation of law without any voluntary act on his part.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *April 16, 1907.* (P. E. W.)

April 7, 1903, Thomas M. Chandler made desert land entry, No. 161, for the W. ½ SW. ¼, Sec. 36, and E. ½ SE. ¼, Sec. 35, T. 34 N., R. 12 W., Durango, Colorado.

July 18, 1903, he assigned the entry to his wife, Jennie Chandler, who, on January 12, 1904, assigned her interest therein to her father, Nelson Trumble.

April 8, 1904, John R. Young filed his affidavit of contest against said entry, alleging that no annual proof in support thereof had been filed within a year after its date. In transmitting the said affidavit the local officers reported that their records substantiated the same.

Subsequently, on April 19, 1904, Trumble filed such report, together with his own affidavit and a corroborating affidavit by his physician, that he had been prevented by illness from transacting this or any business between January 20 and April 19, 1904. The contestant challenged the truth of this excuse, and as ordered by your office letter of June 10, 1904, a hearing was had September 22, 1904, at which, in addition to the parties, O. A. Dalton appeared and submitted evidence in support of his petition to intervene, filed September 20, 1904, alleging his present legal ownership, gained before contest was initiated, of all the rights and improvements pertaining to said entry.

The claimant duly objected to any recognition or hearing of the intervener. Upon the hearing the local officers recommended the dismissal of the contest on the ground that the delay in the submission of annual proof involved no lack of proper diligence. As to the rights of the intervener they made no finding or recommendation.

Upon appeal by Young your office found that due diligence was exercised in the submission of the first annual proof and dismissed the contest, and further considered the case upon the petition and proof in intervention, adjudging Dalton to be the legal assignee of the entry and accepting his annual proof for the second year.

Trumble has appealed to the Department from all that portion of your said office decision which relates to the intervener. It is true that your said office letter of June 10, 1904, contemplated a hearing herein only upon the excuse offered for the delay in filing annual proof and Young's confutation thereof, but since Dalton's intervention is based on matters theretofore of record, and only a question of

law is presented, it will be considered in order to avoid circuity of action.

In the present case it appears from certified copies of the court records, that the intervener, on November 16, 1903, obtained judgment in the county court of La Plata County, Colorado, against said Thomas M. and Jennie Chandler for $520, and against said Thomas M. Chandler for $40, with costs and interest; that on January 26, 1904, he filed with the local officers a protest against the allowance of an assignment made by Jennie Chandler on January 12, 1904, by quit claim deed to her father, Nelson Trumble, on the ground that the intervener had a valid, subsisting judgment lien upon said entry and the interest therein of Thomas M. and Jennie Chandler, and that on January 25, 1904, upon examination of the judgment debtors the court held that the said assignment of the entry by Thomas M. to Jennie Chandler was without any consideration and for the purpose of defrauding his creditors; that prior to the assignment by Jennie Chandler to Nelson Trumble of this entry, the said judgments were liens of record against the interests of both judgment debtors; and that so far as they are affected, the said Trumble not then being before the court, the subsequent transfer of the entry by quitclaim deed from Jennie Chandler to Trumble was fraudulent and void. That on February 13, 1904, return of execution was made, stating that the deputy sheriff had levied upon all the right, title, equity and interest of the judgment debtors in and to the described lands "and all improvements, ditch and water rights thereon or thereunder appertaining;" that an "additional return" was made thereon March 12, 1904, stating that sale of the said property had been duly made to the intervener for $625; and that sheriff's deed therefor was made and delivered to him on October 5, 1904.

It further appears that Dalton made the second annual proof in support of said entry, alleging the expenditure during the second year of the entry of $171 towards the reclamation of the land, expended for clearing 65 acres thereof.

The question is whether a desert land entry prior to final proof and certificate may be assigned by operation of law without any voluntary act on the part of the claimant, the record in the trial court to be conclusive of such assignment and of the judgment creditor's succession to all the rights of the judgment debtor under the desert land entry.

The express statute under which the proceedings above stated were had, Section 2582 Mills Annotated Statutes of Colorado, provides that:

> Every interest in land, legal and equitable, shall be subject to levy and sale under execution, and the claim or possessory right of any defendant in execution, in or to any public lands may be levied upon and sold under execution in

the same manner as if the same were held by such defendant in fee simple: *Provided*, that nothing in this chapter contained shall be so construed as to give any plaintiff in execution the right to levy on any land filed on by any person in the land office of the Colorado land district and occupied as a homestead by the defendants in execution.

In the case of Thomas E. Jeremy (24 L. D., 418), on review (25 L. D., 375), Jeremy was holder of a mortgage covering the land embraced in the desert-land entry of one Dyer. Since the laws of the State (Utah) provide that a mortgage shall not be deemed a conveyance enabling the mortgagee to take possession of the property until foreclosure and sale are had, the Department said:

If he shall by the foreclosure of his mortgage under the laws of Utah, as suggested, place himself in a position to be recognized as the assignee of Dyer, I see no just reason why he may not be allowed to submit proof under the former's entry; and if so submitted, the same will be duly considered.

In this case, however, the entryman had voluntarily taken action which, coupled with further proper steps under the State law, was properly held to be a voluntary assignment of his entry. This is supported by the case of United States *v.* Commonwealth Title Insurance and Trust Company (193 U. S., 651), wherein the court held:

A mortgagee who has foreclosed the property mortgaged at the sheriff's sale under a decree of the court is an assignee of the owner of the land within section 2 of the act of June 16, 1880 (21 Stat., 287).

It had been urged in that case that the mortgagee was not an assignee of the entryman because under the laws of the State (Montana) a mortgage creates a lien only, but the court said:

It is a lien which may become the title. The decree of the court conveying the title is, of course, the act of the law, but it is the act of the law *consummating the act of the mortgagor*. And the sale and deed relate to the date of the mortgage, conveying the title, which was then possessed by the mortgagor. . . . We regard the word "assigns," as used in the statute, as one who derives from the original entryman by the *voluntary act* of the latter.

In the case now before the Department it is asked to extend the doctrine to include transfers which are purely by force and operation of law, not having their inception in the voluntary action of the entryman.

In the case of Hoffeld *v.* United States (186 U. S., 273) the question was likewise one of repayment, under said section 2, to parties claiming as assignees of the entryman for certain coal lands. The court said:

The only question for our consideration is, whether the purchaser of the original rights of an entryman at an execution sale against him or his grantee can be said to be an "*assign*" within the meaning of the act. . . . . A voluntary assignee is ordinarily invested with all the rights which his assignor possessed, with respect to the property; while the rights of an assignee by operation of law are such only as are necessarily incident to the complete possession and enjoy-

ment of the things assigned. A voluntary assignee takes the property with all the rights thereto possessed by his assignor, and if he has paid a valuable consideration may claim all rights of a *bona fide* purchaser with respect thereto. Upon the other hand, an assignee by operation of law, as, for instance, a purchaser at a judicial sale, takes only such title as the execution debtor possessed at the time of sale. The Monte Allegre, 9 Wheat., 616. The doctrine of *caveat emptor* applies in all its rigor, and the buyer cannot set up the rights of a *bona fide* purchaser, even against an unrecorded deed. . . . . The purchaser at an execution sale would only take the actual title of the owner to the land itself, unaccompanied by any collateral claims or rights incident to the acquisition of the land.

From this it is clear that, should any of the causes arise under said section 2 of the act of June 16, 1880, which would result in a cancellation of the entry in question herein, the intervener, as merely a purchaser at judicial sale, would not be entitled to the repayment provided to be made to the entryman or his heirs or assigns.

If not an assignee to that extent, how can he be held to be an assignee to the far greater extent of recognition by the government as entitled to make the further annual proofs and to receive patent for the land? The entryman alone possesses the right, until voluntarily relinquished, to meet the further requirements of the law incident to the entry. This personal right may not be taken from him. Nor if relinquished by him could his entry be given to another to complete. Any other person must initiate a right, must make new entry.

It is not necessary to discuss the scope or intent of the Colorado statute cited, since it can not be invoked to defeat the purpose of the desert-land act.

The Department fails to find authority for accepting the proof of annual expenditure by the intervener, or for holding him to be the legal assignee of the entry. Therefore your decision relative to him is hereby reversed; but in all other respects affirmed.

ISOLATED TRACT—SECTION 2455, R. S., AMENDED BY ACT JUNE 27, 1906.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 18, 1907.

Registers and Receivers, U. S. Land Offices.

SIRS: Hereafter the sale of isolated and disconnected tracts of public lands will not be ordered under the act of June 27, 1906 (34 Stat., 517), on application therefor, unless the applicant shall, in addition to the showing now required, swear that he desires to purchase the land described in his application for his own individual use and actual occupation and not for speculative purposes. All pending ap-

plications for such lands, under which sales have not been heretofore ordered, are hereby rejected, and you are directed to notify the applicant hereof, and hereafter you will not receive and forward any applications for such sales which are not supported by the oath herein required.

Very respectfully, R. A. BALLINGER,
Commissioner.

Approved:
JAMES RUDOLPH GARFIELD, *Secretary.*

HOMESTEAD—USE OF LAND FOR BUSINESS PURPOSES.

FRANCIS C. EATON.

The fact that a homestead entryman uses a portion of the land embraced in his entry in connection with the prosecution of his saw-milling business, in no wise affects the validity of his claim under the homestead law, if he in good faith complies with the terms thereof.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *April 23, 1907.* (G. C. R.)

This case involves lot 6, Sec. 1, and lot 1, Sec. 12, T. 1 S., R. 23 W., Gainesville, Florida, for which Francis C. Eaton made homestead entry, March 6, 1900.

After due publication the entryman submitted final proof, May 23, 1905. The register and receiver rejected the proof on their finding that the land had been entered and used as a site for a saw-mill and that the entry was primarily made for a business site and not as a homestead.

On appeal, your office, June 8, 1906, affirmed the action of the register and receiver, and claimant's further appeal brings the case here. It is shown that claimant has improvements on the land valued at from $2,000 to $3,000. He has besides his own residence five dwelling houses on the land, also a shop, a store or commissary building, a saw-mill and stalls. The extra dwelling houses are not essential to his use of the land for agricultural purposes, but are used by his employes in his timber and saw-mill business. The testimony shows that he has about fifteen acres of the land fenced and that he has cultivated ten acres thereof every year since he made entry.

It is shown that claimant's wife has lived most of the time away from the land. On this point he stated under oath, at the request of the register and receiver, the following:

In explanation of the fact that my wife and daughter has not resided on the land continuously with me on my homestead at Boggy, will say that the homestead is 25 miles back from the railroad, no church or school privileges and not very healthful. My wife owns a dwelling house in De Funiak Springs and

my daughter is a pupil in the high school, the term of which is 8 months in the year. Like many others, I am obliged to do business in places that are not desirable for residence. I have my own residence on the homestead, as I do business there, and own no other dwelling house except this one on the homestead, but I cannot oblige my family to spend all their time in such an undesirable location. I am obliged to live there as that is where I make my living. Have no other business elsewhere.

It is clearly shown that claimant lived continuously on the land, with only such short absences therefrom as the exigencies of his business demanded. His wife's living a part of the time elsewhere for the reasons frankly given by him did not affect his own status as a legal resident of the land. (Jane Mann, 18 L. D., 116.)

The basis of your adverse holding is that claimant's entry was not made for a home and for agricultural purposes, but was made "to secure a suitable mill site," and you apparently arrived at this conclusion because "most of the improvements" are used in connection with his saw-mill business and because his wife and daughter did not reside with him all the time.

But your office also found that:

> The improvements made appear to be entirely owned by the entryman and he appears to have literally complied with the requirements of the homestead law as to residence and cultivation.

The land involved herein was properly subject to homestead entry, and the fact that the entryman has for the most part used the land in connection with the prosecution of his milling business can in no way affect the validity of his claim under the homestead law if he has in good faith complied with the terms thereof.

This it appears he has done, both in the matter of residence and cultivation, and it is not believed that the integrity of his entry should now be questioned on the existing record.

The action appealed from is vacated, and the papers in the case are herewith returned with directions to re-adjudicate the claim in harmony with the views herein expressed.

HOMESTEAD ENTRY—MINOR CHILDREN—SECTION 2307, R. S.

LOUISE C. MORAN.

Where the minor child of a soldier makes homestead entry under section 2307 of the Revised Statutes, in his own name, by a duly appointed guardian, and perfects title thereto, he thereby exhausts his right under the homestead law.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *April 23, 1907.* (E. P.)

Louise C. Moran appeals from your office decision of September 22, 1905, holding for cancellation her homestead entry, made August

15, 1904, for the SW. ¼ of Sec. 11, T. 97 N., R. 72 W., 5th P. M., Chamberlain land district, South Dakota.

It appears that Miss Moran, on October 25, 1897, by guardian (she being then the minor child of a deceased soldier who had rendered the requisite military service and had never exercised his homestead right), made homestead entry, under the provisions of section 2307 of the Revised Statutes, of lot 8 of Sec. 7, lot 4 of Sec. 8, and the W. ½ of the NW. ¼ and the NW. ¼ of the SW. ¼ of Sec. 17 (containing 167.55 acres), T. 95 N., R. 65 W., 5th P. M., Chamberlain land district, South Dakota.

Commutation proof was submitted by Miss Moran upon this entry July 11, 1902, and final certificate issued thereon July 17, 1902. The land covered by the entry was patented to her November 3, 1905.

Your office held the entry of 1904 for cancellation on the ground that the entry-woman, having acquired title (by the entry of 1897) to 160 acres under the homestead law, was prohibited by the express terms of section 2298 of the Revised Statutes from acquiring title to any more land under the homestead law.

It is contended, in effect, by the appellant that she was entitled to make two homestead entries of 160 acres each—one under section 2307 as the minor child of a deceased soldier, and one, after reaching her majority, as an adult citizen of the United States; and hence that section 2298 does not apply to the entry in question.

Substantially the same contention was advanced by the widow of a deceased soldier in the case of Adelia S. Royal (15 L. D., 408). In passing thereon Mr. Secretary Noble said:

> It seems to me that section 2298 of the Revised Statutes, already quoted, answers this question. Because two persons are each qualified to make homestead entry for one hundred and sixty acres of land, and one of them dies before exercising that right, that fact does not authorize the survivor to make two entries, although he is the sole heir of the deceased. The right to make homestead entry for land is a personal right. If a person possessing the right dies without exercising it, the right ends. If such person is a soldier, the law gives to his widow, or orphan children, the benefit of his military services upon any homestead entry made by her or them. I am not aware, however, of any provisions of law which authorize the widow to make two entries because her husband neglected to make one.

That was a case wherein the widow who had, under the provisions of section 2307, made homestead entry of, and acquired title to, 160 acres of land, applied to make another homestead entry for 160 acres. Her application was, however, for the reasons stated, rejected.

The rule announced in that case applies with equal force to a case where the child of a deceased soldier, who, as a minor, having made homestead entry of 160 acres under the provisions of section 2307, and acquired title to the land, seeks to make another homestead entry. Miss Moran comes clearly within this rule. The decision appealed from is therefore affirmed.

FINAL PROOF—RESIDENCE—COMPLIANCE WITH LAW BY HEIRS OF ENTRYMAN.

JOHNSON *v.* HEIRS OF MALONE.

There can be no constructive residence where actual *bona fide* residence has never been established.

While the heirs of a deceased homesteader take the entry free from any default on the part of the entryman, it is incumbent upon them, in submitting proof, to show that the requiremets of the statute have been fully met, either by the entryman or by them, or in part by the entryman and in part by them.

Secretary Hitchcock to the Commissioner of the General Land Office,
(G. W. W.) *April 25, 1907.* (E. O. P.)

Christian U. Johnson has appealed to the Department from your office decision of June 15, 1906, dismissing his contest against the homestead entry of Mary A. Malone, made January 12, 1898, for the N. ½ SW. ¼, lots 3 and 4, Sec. 30, T. 34 N., R. 10 W., O'Neill land district, Nebraska.

James Malone, as the heir of Mary A. Malone, submitted final proof on said entry February 18, 1905. Claimant died December 29, 1904.

Johnson combined with his contest a protest against the acceptance of the proof offered. Several grounds are set up as basis for the protest and contest, only one of which is material, viz., the allegation that claimant never established a *bona fide* residence on the land. Your office, in affirming the decision of the local officers, erred in holding that as claimant was "taken sick in March, 1898, within six months after entry, and that her illness continued to the time of her death, this contention is not a material one."

It is only upon proof of the establishment of residence on the land that the excuse offered for her subsequent absences therefrom can be accepted. There can be no *constructive residence* where actual *bona fide* residence has not been established. The rule is clearly stated in departmental decision rendered in the case of Grindberg *v.* Campion (33 L. D., 248, 250), in the following terms:

> Absence caused by sickness may be excused where residence has been established on the land, but before such excuse can be accepted, residence must be established.

It follows, therefore, that unless claimant established residence on the land there was no compliance with law during her lifetime, as cultivation and improvement, without residence, is insufficient. The preponderance of the evidence sustains the contention of contestant respecting the failure of Mary A. Malone to establish a *bona fide* residence on the land during her lifetime. Proof was offered less than two months after her decease and it is impossible that sufficient compliance with the law could have been made by or on behalf

of the heirs. The fact that the heirs took the entry free from any default on the part of the claimant does not entitle them to submit proof until the requirements of the statute have been fully met, either by the claimant or by them, or in part by the claimant and in part by them. (Meeboer *v.* Heirs of Schut, 35 L. D., 335.) Measured by this standard, the proof offered must be rejected, and the statutory life of the entry having expired, the same will be canceled.

The decision appealed from is hereby reversed.

SOLDIERS' HOMESTEAD—CONSTRUCTIVE RESIDENCE.

EDWIN G. STEELE.

In the commutation of a soldiers' homestead entry credit for constructive residence between the date of the filing of the declaratory statement and the date of the entry based thereon can not be allowed.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *April 25, 1907.* (A. W. P.)

February 7, 1905, Edwin G. Steele made homestead entry No. 1593 for the SE. ¼, Sec. 27, T. 99 N., R. 73 W., Mitchell, South Dakota, land district, following his soldiers' declaratory statement No. 324, filed August 17, 1904.

October 18, 1905, claimant submitted commutation proof in support of his entry, wherein it was shown that he established residence upon the land January 1, 1905; and that he resided there continuously until date of proof. The local officers accepted said commutation proof, and issued cash certificate No. 50 thereon, October 26, 1905.

Upon examination of this proof your office, by decision of May 24, 1906, found that the period of residence shown was only nine months and seventeen days; and that as the claimant was not entitled to constructive residence for the period between the date of filing his declaratory statement and the date of establishment of his actual residence, the proof was prematurely submitted by four months and thirteen days. By decision of July 30, 1906, you also denied motion for review of said decision. Claimant has now appealed from the judgment of your office to the Department.

Section 2301 of the Revised Statutes, under which this proof was submitted, as amended by the act of March 3, 1891, required a showing of fourteen months' residence from date of entry. The provisions of this section, however, were modified by section 2 of the act of June 3, 1896 (29 Stat., 197), so as to permit the commutation of homestead entries upon a showing of fourteen months' compliance with the homestead law after the date of *settlement*, instead of after date of *entry*, as formerly required.

The effect of this modification was to give one claiming settlement prior to entry the benefit of such settlement on offering commutation proof. Where no such prior settlement was claimed, however, fourteen months' residence from date of *entry* was required in order to commute. The Department in construing this act in the circular of July 9, 1896 (26 L. D., 544), said that:

> Constructive residence from the date of the *entry* will be recognized where settlement is made and residence established within six months thereafter.

The effect of this was to allow a commuting entryman, as in the case of one submitting ordinary final proof, credit for constructive residence during the first six months of his entry, where actual residence was established within that period. Fry *v.* Kuper (31 L. D., 159). But if a *bona fide* residence be not established within that time, credit for constructive residence can not be allowed to such an entryman. James A. Hagerty (35 L. D., 252).

It will thus be observed that while the act of June 3, 1896, *supra*, allows credit for compliance with the homestead law before entry, where such entry is based on prior settlement, yet neither the act nor the circular based thereon authorizes the allowance of credit for a period of constructive residence prior to entry. It must therefore be said that there is no law or departmental decision warranting the acceptance of the commutation proof herein, based on claim of constructive residence between date of filing soldiers' declaratory statement and date of subsequent entry based thereon. Such proof being premature must be rejected and the cash certificate canceled.

The judgment of your office is proper, and is accordingly hereby affirmed.

PUBLIC LAND—LIMITATION OF ACREAGE—APPLICATION—DISQUALIFICATION.

ELFERS *v.* KNAUFF.

One asserting claim by virtue of an entry or entries under the public land laws to 320 acres of agricultural land, is disqualified to enter, or make or maintain a valid settlement upon, other agricultural public land; and no such rights are acquired by the filing of an application to make homestead entry, by one so disqualified, as will, upon his subsequently becoming qualified, affect the rights of an intervening qualified applicant.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *April 30, 1907.* (E. P.)

This case comes before the Department on the appeal of Henry A. Knauff from your office decision of May 26, 1906, rejecting his application to make homestead entry of the W. ½ of the NE. ¼ and the NE. ¼ of NW. ¼ of Sec. 4, T. 25 N., R. 1 E., Lewiston land district, Idaho.

It appears from the record that Henry J. Elfers, who had made desert land entry August 11, 1903, for a tract containing 323.40 acres, applied April 13, 1904, to make homestead entry of the land here in question, together with an adjoining 40-acre tract. His application was rejected by the local officers because the tract applied for, together with the land covered by the applicant's desert land entry, would exceed in quantity 320 acres. On appeal by Elfers, your office, by decision of September 16, 1905, affirmed the action of the local officers, but directed them to advise Elfers that in the event he relinquished a sufficient quantity of the land covered by his desert land entry he would be allowed, in the absence of other objection, to enter so much unappropriated land as would not, together with the quantity then otherwise claimed by him, exceed in quantity 320 acres.

Notice of this decision was given Elfers, by registered letter, September 21, 1905, but no appeal was taken therefrom. On September 26, 1905, however, as shown by the affidavits of Elfers on file with the record, he went before a United States Commissioner at Grangerville, Idaho, and executed a new homestead application for the land previously applied for, and on November 5, 1905, went before United States Commissioner F. Z. Taylor, at White Bird, Idaho, and there executed a relinquishment of all but 160 acres of the land embraced in his desert land entry. This relinquishment, together with his previously-executed homestead application, he left with Commissioner Taylor to be forwarded by him to the local office, but owing to erroneous advice given him by Taylor, the homestead application was not presented at the local office until January 12, 1906. The relinquishment was not filed until December 9, 1905.

In the meantime, to wit, on December 6, 1905, Knauff presented at the local office his application to make homestead entry of the land here in question. This application was rejected by the local officers on the day of its presentation, " because of conflict with prior appl. H E of Henry J. Elfers " (the application of Elfers referred to being the one filed by him April 13, 1904).

Upon the presentation, on January 12, 1906, of Elfers's second application, it was rejected by the local officers because of conflict with the prior application of Knauff.

From the action of the local officers in rejecting their respective applications Knauff and Elfers each appealed, and on their appeals the decision of your office now under consideration was rendered.

Your office held in that decision that, notwithstanding Elfers's failure to appeal from its decision of September 16, 1905, or to take the action therein suggested within the time allowed, the land was not, at the date of the filing of Knauff's application, subject to entry, for the reason that it had not been determined by your office that

proper notice had been given Elfers or that he had failed to respond thereto within the prescribed time, and hence that Knauff's application could not have been properly allowed; that Elfers had settled upon the land in March, 1902, and has lived thereon and improved the same for more than four years; that he applied at the proper time to make homestead entry thereof but was unsuccessful in securing the allowance of his application prior to the filing of Knauff's, partly because of his ignorance of the requirements of the homestead law and partly because of the error of United States Commissioner Taylor; that Knauff does not allege that he has settled upon the land, but bases his claim thereto solely upon his application filed at a time when the land could not have been entered; and that, in view of these circumstances, Elfers's right to enter the land is superior to that of Knauff. The action of the local officers in rejecting Knauff's application was therefore affirmed.

The act of August 30, 1890 (26 Stat., 391), provides 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 public land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws.

And in section 17 of the act of March 3, 1891 (26 Stat., 1095), it is declared that the provisions above set forth—

> shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands and not to include lands entered or sought to be entered under the mineral land laws.

The effect of these provisions is to disqualify a person, while asserting claim under one or more entries to 320 acres of agricultural land, from entering, or making or maintaining settlement upon, other agricultural land (Instructions, 33 L. D., 539). Elfers had made a desert land entry August 11, 1903, for 323.40 acres of land, and the same remained of record as originally made until December 9, 1905, when his relinquishment of a portion thereof was filed. He was therefore, during the period beginning and ending with the two dates last above named, disqualified from asserting any claim, howsoever sought to be initiated or maintained, to the land here in question. Hence his rights in the premises must be determined without reference to his first application or to anything that he may have done upon the land prior to the time his disqualification as a homestead entryman or settler was removed.

This brings the Department to the consideration of the application of Knauff, filed December 6, 1905, three days prior to the time that Elfers became again qualified to initiate or maintain a homestead claim. At the time Knauff's application was presented the land was vacant, unappropriated public land, and subject to entry by the first

qualified applicant. The only prior claimant thereto was Elfers, and he was disqualified. Whether the condition of the record with respect to Elfers's first application did or did not warrant the allowance of Knauff's application upon the date of its presentation is immaterial, for Elfers's application, even though final action may not have been taken thereon, did not constitute a bar to the filing of another application for the same land, which would take effect as of the date of its presentation whenever the rejection of Elfers's first application should become final (Jerry Watkins, 17 L. D., 148). There can be no question that the rejection of Elfers's first application has long since become final. Therefore, whatever the date may have been upon which said application ceased to be an impediment to the allowance of an entry for the tract, Knauff's rights attached as of the date his application was presented. This, as before stated, was three days before Elfers's disqualification was removed. Hence, it must be held that Knauff's right to enter the land is superior to that of Elfers, whose claim to the land can be properly based only on something he has done since Knauff's claim attached.

The Department is unable to discover anything in the record before it that warrants the finding of your office that Elfers has resided on the land for more than four years, or, in fact, anything tending to show that he has ever established a residence thereon. However, in the view the Department takes of the case, it is immaterial whether Elfers has resided on the land or not. Neither is the fact that Knauff may not have settled on the land a matter that can be taken into consideration in determining this case, for he bases his rights, as he is clearly entitled to do, solely upon his application, which was presented at a time when Elfers could assert no valid claim to the land.

For the reasons stated the decision of your office is reversed, and Knauff's application, in the absence of other objection, will be allowed.

CONTEST—RELINQUISHMENT—SECOND CONTESTANT—PREFERENCE RIGHT.

LA BAU *v.* CARROLL.

Where a contested entry is relinquished after the contest has been dismissed for want of prosecution, and while a second contest is pending, the second contestant is entitled to a preference right of entry.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *April 30, 1907.* (E. F. B.)

Lawrence Carroll has appealed from the decision of your office of July 20, 1906, holding for cancellation his entry of the SE. ¼ of Sec. 25, T. 110 N., R. 74 W., Pierre, South Dakota, for conflict with the

prior application of James G. La Bau. It involves the question as to whether a second contestant is entitled to a preference right of entry where the contested entry was relinquished after the first contest had been dismissed for want of prosecution and while the second contest was pending. The material facts are as follows:

August 19, 1905, Roy Weightman filed an affidavit of contest against the entry of James T. Ray for the tract in question, charging abandonment, upon which no hearing was ordered until January 15, 1906. Weightman failed to appear at the time and place fixed for the hearing, and the contest was dismissed. On January 17, his counsel was notified of the dismissal of the contest for want of prosecution, and of his right to apply for reinstatement within thirty days.

January 29, 1906, Lawrence Carroll filed a contest affidavit, charging abandonment, which was accepted and held to await the disposition of the prior contest of Weightman.

February 13, 1906, James G. La Bau filed in the local office a relinquishment of the entry executed by Ray December 9, 1905, and at the same time tendered an application to make entry of the land. The local officers entered of record the cancellation of Ray's entry by relinquishment of that date, suspended the application of La Bau to make entry, and notified Carroll of his preference right, which he exercised February 27, 1906, by making homestead entry of the tract.

Upon the appeal of La Bau you reversed their decision and held Carroll's entry for cancellation, for the reason that, as Weightman failed to apply for a reinstatement of his contest and Ray's entry having been cancelled during the time allowed Weightman to apply for reinstatement, Carroll acquired no right by his application to contest and was therefore not entitled to a preference right of entry. You based your decision upon the decision of the Department of May 24, 1905, in the case of Dugan *v.* Meyer and O'Connell (not reported).

The facts in that case are in all material respects similar to the facts in the case at bar, except that in the case cited the tender of the relinquishment with the application to make entry by O'Connell and the application of Dugan to file a second contest were on the same day. It was held that the filing of the relinquishment could not have been induced by the second contest, and it was upon that ground that the decision was based, and the entry of O'Connell was sustained.

In this case the second contest was filed after the first contest (Weightman's) had been dismissed for want of prosecution, and fifteen days before the filing of Ray's relinquishment. The dismissal of Weightman's contest was not a nisi proceeding but was absolute. It left the entry intact, with no contest pending against it.

The notice given to Weightman under Rule 43, that he would be

allowed thirty days within which to file an application for *reinstatement* of his contest, did not have the effect of its own force to revive and continue the pendency of his contest, but merely to suspend action upon any claim or right that might intervene until the contestant had been afforded an opportunity to revive his contest by showing that it had been improvidently dismissed because of his failure to receive notice of the hearing, or that his failure to attend and prosecute his contest was from unavoidable cause.

At the time of the filing of Carroll's contest, Ray's entry was intact upon the records, with no other contest pending against it. It was relinquished in the face of that contest and Carroll was therefore entitled to every right that a successful contestant may secure by reason of the relinquishment of the entry. His right was subject only to the right of Weightman to show, within the time allowed, that his contest had been improperly dismissed. As no such showing was made, Carroll's right was not affected by the application of La Bau made simultaneous with the filing of Ray's relinquishment.

It is a well-established rule that where a contest is dismissed for want of prosecution, leaving a second contest pending, or where a second contest is filed after the dismissal of the first upon the same charge, a relinquishment of the entry filed thereafter will inure to the benefit of the second contestant. Huffman *v.* Milburn (22 L. D., 346); Heinrichs *v.* Bakkene (23 L. D., 234).

The rule that a second contest abates upon the relinquishment of an entry pending a prior contest, leaving the land open to entry by the first legal applicant, subject only to the preferred right of the successful contestant, is not applicable in this case, for the reason that the dismissal of Weightman's contest left the entry intact, which was afterward relinquished while Carroll's contest was pending. The cancellation of the entry upon the filing of Ray's relinquishment may be presumed to have been the result of Carroll's contest. Hemsworth *v.* Holland (8 L. D., 400, 403). It is not the date of the execution but the date of the filing that fixes the date of the relinquishment. Huffman *v.* Milburn (*supra*, p. 348).

Your decision is reversed, and the entry of Carroll will remain intact.

PRACTICE—TRANSFEREE—NOTICE—RULE 8½.

CHARLES H. BABBITT.

A purchaser from the State of lands selected by it as school-land indemnity, who fully discloses his interest, is entitled, under rule 8½ of practice, to notice of proceedings in the land department affecting such land; and it is not necessary that counsel authorized to represent the purchaser shall also show authority to represent the State.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *April 30, 1907.* (F. W. C.)

The Department has considered the appeal from your office decision of March 15, 1907, adhered to April 3, 1907, refusing to recognize the appearance of Mr. Charles H. Babbitt, as attorney for N. Haskell Withee, transferee of the State of Oregon, in the matter of a certain list of indemnity school land selections, until he shall furnish evidence that he is authorized to represent the State of Oregon.

March 5, 1907, a notice of assignment was filed in the local land office at Roseburg, Oregon, consisting of an affidavit by N. Haskell Withee, to the effect that he claimed an interest in certain described lands acquired by purchase from the State of Oregon, said lands having been selected by the State as school land indemnity; that the affidavit was filed for the purpose of giving notice of his claim to the land department, in compliance with the provisions of rule of practice 8½, and he asked that notice of any action taken or requirement made with respect to said selection, in whole or in part, might be given to him or to his authorized attorney, Charles H. Babbitt, Washington, D. C.

The register at Roseburg forwarded said notice with his letter of March 5, 1907, in which he stated that notations had been made upon the records of his office. Prior to the filing of said notice Mr. Babbitt had filed in your office a formal appearance in behalf of Withee as transferee of the State, in which he stated that an affidavit disclosing interest will be forwarded to the Roseburg land office as provided by rule 8½ of practice. March 15, 1907, your office advised Mr. Babbitt, after referring to the case of the State of Oregon (18 L. D., 245), wherein it was held (syllabus):

> A purchaser of the State's interest in school indemnity lands prior to the approval and certification of such lands acquires no rights thereby; and if the State, in such case, waive its right to claim under its selection the purchaser has no standing to be heard before the Department—

that—

> This office must decline to recognize your appearance until you furnish evidence that you are authorized to represent the State of Oregon.

March 16, 1907, Mr. Babbitt advised your office that he did not desire to represent the State of Oregon further than might be necessary to present the interest of his client as transferee of the State; that he had been informed that one Charles H. Oliver had contested the claim of the State under its selection in question; that hearing and decision had been rendered by the district land officers, the case being styled, "Charles H. Oliver *v.* the State of Oregon and N. Haskell Withee, transferee," the State and the transferee cooperating in the defense of the selection; and in view of all the circumstances he

requested the recall of your letter of the 15th of March, that his appearance in behalf of Withee be accepted, and that he be notified of any action taken with respect to the land involved. Thereupon further consideration was given to the matter in your letter of April 3, 1907, addressed to Mr. Babbitt, in which your office adhered to the position taken in the letter of March 15, 1907; whereupon Mr. Babbitt appealed to this Department.

This Department has uniformly held that the purchaser under an unapproved selection is in no better position than the State making the selection and that in the matter of the selection the United States deals only with the State. Nevertheless, the equity of a *bona fide* purchaser through the State has been repeatedly recognized by this Department, both with respect to permitting supplemental action looking to the protection of the interest of the purchaser through further selection by the State (California and Oregon Land Company *et al.*, 33, L. D., 595), as well as permitting completion of title in the purchaser under other laws where the claim of the State under which the purchase was made fails. (Jones *v.* Arthur, 28 L. D., 235; Butler *v.* State of California, 29 L. D., 610.)

Rule 8½ of practice, above referred to, provides:

> Transferees and encumbrancers of land, the title to which is claimed or is in process of acquisition under any public land law, shall, upon filing notice of the transfer or encumbrance in the district land office, become entitled to receive and be given the same notice of any contest or other proceeding thereafter had affecting such land which is required to be given the original claimant. Every such notice of a transfer or encumbrance must be forthwith noted upon the records of the district land office and be promptly reported to the General Land Office, where like notation thereof will be made.

Claimant seems to be clearly within this rule.

While it is perhaps wise to refuse to recognize an appearance in a matter involving an indemnity school land or other selection which fails to disclose the interest sought to be protected with proper showing of authority from the party interested, yet no good reason appears for refusing recognition in a case like that made by the record now before this Department, nor does it seem necessary that the party show authority from the State. In the absence of such authority, it may be that he can not waive the claim of the State, but he seems to be entitled at least to the right of presenting in the interest of the transferee from the State any showing desired in the furtherance and for the protection of that interest.

The demand made in your office letter of March 15, last, that authority to represent the State of Oregon be first filed before recognition will be given to the appearance of Mr. Babbitt, in the interest of the transferee of the State, will no longer be insisted upon and you will so advise him.

INDIAN LANDS—CHIPPEWA AGRICULTURAL LANDS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 20, 1907.

Registers and Receivers,
Cass Lake, Crookston, and Duluth, Minnesota.

GENTLEMEN: I inclose herewith a schedule containing 229,297.41 acres of lands in the former Chippewa of the Mississippi, Red Lake, White Earth and Fond du Lac Indian reservations, being Chippewa lands ceded under the act of January 14, 1889 (25 Stat., 642), and classified as "agricultural" in accordance with said act, as amended by the act of June 27, 1902 (32 Stat., 400). The lands are to be disposed of to actual settlers only, under the provisions of the homestead law, as provided in section 6 of said act of January 14, 1889, and under the laws applicable to town sites, as provided by act of February 9, 1903 (32 Stat., 820).

The hour of 9 a. m., July 1, 1907, has been fixed upon as the time on and after which these lands will be opened to settlement and entry, and notices for publication, as required by statute, have been forwarded to the newspapers in which they are to be published.

Applicants for these lands must possess the necessary qualifications required in the case of ordinary homestead entries.

Each settler is required, by the act of January 14, 1889, to pay for the lands settled upon the sum of $1.25 for each acre, such payment to be made in five equal annual installments. The five annual payments must be paid at the end of the first, second, third, fourth, and fifth years, respectively, from the date of the homestead entry.

The usual fee and commissions must be paid at the time of original entry and when the commutation or final payment and proof are made, but you will not collect any payment for lands in excess of 160 acres embraced in one entry when the original entry is allowed, as the payment for such excess area will be included in the whole amount required to be paid in installments. See instructions of August 17, 1901 (31 L. D., 72), and September 6, 1901 (31 L. D., 106).

Under the act of March 1, 1907 (Public, No. 154), entrymen are also required to pay, in addition to the fees and charges above mentioned, a pro rata charge for the examination and investigation of the swampy and overflowed character of the land, as provided in the act of June 21, 1906 (34 Stat., 352), and for the drainage and reclamation of said lands. The amount of these charges can not now be determined. As soon as the charges are fixed, you will be fully advised in regard thereto, and also instructed in regard to the issuance of receipts upon payment thereof.

In allowing entries for said lands, you will note on the tract books and on the receipts and applications, as follows: "Act of March 1, 1907—Public, No. 154."

No cash or final certificates are to be issued on the entries allowed under said act until all the charges authorized by said act are fully paid.

Entries for said lands are to be given the current numbers, Chippewa agricultural series, and reported on separate abstracts.

Under the third proviso to said section 6, any person who has not heretofore had the benefit of the homestead or preemption law, and who has failed, from any cause, to perfect the title to a tract of land heretofore entered under either of said laws, is entitled to make a second homestead entry of these lands. An applicant for such right must describe his former entry.

The agricultural lands now to be opened are not affected by the provisions of the act of May 17, 1900 (31 Stat., 179), known as the free homestead act, for the reason that they were not "opened to settlement" prior to the passage of said act.

By act of February 9, 1903 (32 Stat., 820), chapter 8, Title 32, of the Revised Statutes of the United States, entitled "Reservation and sale of town sites on public lands," was extended to and declared to be applicable to ceded Indian lands within the State of Minnesota. The general town-site circular of June 12, 1903, will apply to applications made under said act, subject, however, to the further provisions of the act of March 1, 1907 (Public, No. 154).

All persons who go upon any of the lands from which the timber has been cut and removed under said act of June 27, 1902, some of which are described in the schedule herewith, or upon any of the other ceded Chippewa lands described in the schedule, with a view to settlement thereon, prior to the hour the lands are formally opened to settlement and entry, as above set out, will be considered and dealt with as trespassers, and preference will be given the prior legal applicant, notwithstanding such unlawful settlement.

The disposal of lot 3, SE. ¼ SW. ¼ sec. 30; lot 3, E. ½ NE. ¼ NW. ¼ sec. 31, T. 145 N., R. 25 W.; SW. ¼ NE. ¼, NW. ¼ NW. ¼, NE. ¼ SE. ¼ sec. 10; NW. ¼ NW. ¼, SW. ¼ SW. ¼ sec. 11; SW. ¼ NE. ¼ sec. 25, T. 145 N., R. 26 W.; NE. ¼ SE. ¼, SE. ¼ NE. ¼, sec. 8, lots 1, 2, SW. ¼ NE. ¼ sec. 18, lots 4 and 5, sec. 32, T. 143 N., R. 31 W.; NE. ¼ SW. ¼, NW. ¼ SE. ¼ sec. 1; NE. ¼ NE. ¼ sec. 12, T. 143 N., R. 32 W., lots 2, 3, 4, 5, 6, and 11, sec. 1, T. 145 N., R. 32 W., is subject to the right of the United States to construct and maintain dams for the purpose of creating reservoirs in aid of navigation, as provided in the act of June 7, 1897 (30 Stat., 67).

The right of way of the Northern Pacific Railway Company extends across the Fond du Lac Reservation in T. 48 N., Rs. 17, 18,

and 19 W., and the disposal of the following tracts is subject to said right of way, viz, NW. ¼ SW. ¼ sec. 5; NE. ¼ SE. ¼, NE. ¼ SW. ¼ sec. 6, T. 48 N., R. 18 W.; NE. ¼ SE. ¼, SW. ¼ SE. ¼ sec. 1, T. 48 N., R. 19 W. Therefore, in allowing entries for any of said tracts you will note on the original entry papers that it is subject to the right of way of the Northern Pacific Railway Company, and you will also make a similar note on the final entry papers when the same are issued.

You will at once make requisition for such blank forms as you will need in connection with the entry of these lands. Printed copies of these instructions for distribution will be forwarded to you as soon as practicable.

You are particularly enjoined to exercise proper diligence in order that no entries may be allowed for any lands in said reservations except the tracts described in this schedule and such other tracts as have been previously opened by proper authority.

Very respectfully,

R. A. BALLINGER,
Commissioner.

Approved:
JAMES RUDOLPH GARFIELD,
Secretary.

[Schedule omitted.]

RECOGNITION OF AGENTS AND ATTORNEYS BEFORE DISTRICT LAND OFFICES.

REGULATIONS.

1. An attorney at law who desires to represent claimants or contestants before a district land office must file a certificate, under the seal of a United States, State, or Territorial court for the judicial district in which he resides or the local land office is situated, that he is an attorney in good standing.

2. Any person (not an attorney at law) who desires to appear as an agent for claimants or contestants before a district land office must file a certificate from a judge of a United States court, or of a State or Territorial court having common law jurisdiction, except probate courts, in the county wherein he resides or the local office is situated, duly authenticated under the seal of the court, that such person is of good moral character and in good repute, possessed of the necessary qualifications to enable him to render clients valuable service, and otherwise competent to advise and assist them in the presentation of their claims or contests.

3. The oath of allegiance required by section 3478 of the United

States Revised Statutes must also be filed by applicants. In case of a firm, the names of the individuals composing the firm must be given, and a certificate and oath as to each member of the firm will be required.

4. An applicant to practice under the above regulations must address a letter to the register and receiver, inclosing the certificate and oath above required, in which letter his full name and post-office address must be given. He must state whether or not he has ever been recognized as an attorney or agent before this Department or any bureau thereof, or any of the local land offices, and, if so, whether he has ever been suspended or disbarred from practice. He must also state whether he holds any office under the Government of the United States.

5. After an application to practice has been filed in due form, the register and receiver will enroll the name and post-office address of the applicant upon a record kept by them for that purpose, and sign and deliver to him a certificate of such enrollment, and thereafter recognize the applicant as an attorney or agent, as the case may be, unless they have good reason to believe that the person making the application is unfit to practice before their offices, in which case they will at once forward the application to the Commissioner of the General Land Office, with a report giving full specification of their reasons for so doing, and furnish a copy of such report to the applicant, and notify him that he will be allowed to file a reply thereto with said Commissioner within thirty days from such notice.

6. When you have recognized and enrolled the name of any person as an attorney or agent, you will at once advise the Commissioner of the General Land Office of that fact, and give the name and post-office address of such person.

7. An attorney or agent who has been admitted to practice in any particular land district, or in the Department of the Interior, may be enrolled and authorized to practice in any other district upon filing with the register and receiver of such district a certificate of the register and receiver before whom he was admitted to practice, or a certificate of the Commissioner of the General Land Office, that he is an attorney or agent in good standing.

8. Every attorney must, either at the time of entering his appearance for a claimant or contestant, or within thirty days thereafter, file written authority for such appearance, signed by said claimant or contestant, and setting forth his or her present residence, occupation, and post-office address. Upon a failure to file such written authority within the time limited, it is the duty of the register and receiver to no longer recognize him as attorney in the case.

9. When the appearance is for a person other than a claimant or contestant of record, the attorney or agent will be required to state

the name of the person for whom he appears, his post-office address, the character and extent of his interest in the matter involved, and when and from what source it was acquired. Authorizations and powers signed or executed in blank will not be recognized.

10. If any attorney or agent shall knowingly commit any of the following acts, viz: Represent fictitious or fraudulent entrymen; prosecute collusive contests; speculate in relinquishments of entries; assist in procuring illegal or fraudulent entries or filings; represent himself as the agent or attorney of entrymen when he is only an attorney or agent for a transferee or mortgagee; conceal the name or interest of his client; give pernicious advice to parties seeking to obtain title to public land; attempt to prevent a qualified person from settling upon, entering, or filing for a tract of public land properly subject to such entry or filing, or be otherwise guilty of dishonest or unprofessional conduct, or who, in connection with business pending in local land offices or in this Department, shall knowingly employ as subagent, clerk, or correspondent a person who has been guilty of any one of these acts, or who has been prohibited from practicing before the register and receiver or this Department, it will be sufficient reason for his disbarment from practice.

11. When any register and receiver shall, either through their own personal knowledge or through any charge sworn to by some other person, have information that an attorney or agent admitted to practice before their office has been guilty of any act or misconduct which would warrant his disbarment, such register and receiver shall at once make investigation, and if they have or find reasonable grounds for believing the attorney or agent guilty of such acts of misconduct, they will at once formulate specific charges against him and forward the same to the Commissioner of the General Land Office for his consideration and such action thereunder as he may direct.

12. If the Commissioner of the General Land Office finds that any charges preferred by any register and receiver are sufficient to support a disbarment proceeding, he will at once forward the charges submitted to him to the register and receiver with his approvel and such directions as he may deem necessary, and thereafter the register and receiver will at once furnish a copy of the charges to the accused attorney or agent, and notify him that unless he, within thirty days from such notice, files in their office a denial of such charges under oath, the charges will be taken as confessed and forwarded with the register's and receiver's report thereon to the Commissioner of the General Land Office for further appropriate action.

13. In all cases where denials are filed as required by Rule 12 hereof, the register and receiver will at once fix a day for a hearing under such charges and thereafter proceed in the manner prescribed by the Rules of Practice regulating other hearings before their office.

14. In all cases where an accused attorney or agent fails to file a denial as required by Rule 12 hereof, and in all cases where the register and receiver have rendered a decision, either favorable or unfavorable to the accused attorney or agent, after a hearing, they will at once make report and recommendation thereon to the Commissioner of the General Land Office, and furnish the accused attorney or agent with a copy of such report and decision, and notify him that he will be allowed thirty days from date of such notice within which to file his objections thereto with the Commissioner.

15. After the expiration of the thirty days mentioned in Rule 14, or sooner if the accused attorney or agent so request it, the Commissioner of the General Land Office will consider the record and recommendations forwarded by the register and receiver, and if in his judgment disbarment is not warranted, he will dismiss the charges and notify the register and receiver and the accused attorney or agent thereof; but if he finds that disbarment is warranted, he will render his decision so holding and notify the accused attorney or agent thereof and of his right of appeal therefrom within the time and in the manner prescribed by the Rules of Practice for other appeals to the Secretary of the Interior.

16. If any accused attorney or agent shall fail to appeal from the decision of the Commissioner of the General Land Office as prescribed in Rule 15, or if the decision of the Commissioner is affirmed on such appeal, such attorney or agent will thereafter stand disbarred and be precluded from representing claimants or contestants before the local land offices, and the accused attorney or agent and the register and receiver will be so notified.

17. Prior to their actual disbarment attorneys and agents will be recognized as such, unless for special reasons the Secretary of the Interior shall order their suspension from practice during the pendency of the proceedings against them, but registers and receivers will in no case attempt to suspend them.

R. A. BALLINGER,
Commissioner.

Approved, April 20, 1907.
JAMES RUDOLPH GARFIELD,
Secretary.

STATE SELECTIONS UNDER GRANTS FOR EDUCATIONAL AND OTHER PURPOSES.

REGULATIONS.

1. All lands selected must be from the unappropriated nonmineral, surveyed public land, within the State or Territory making the selec-

tion, and their nonmineral character must be shown by the affidavit of some responsible party, having and testifying to a personal knowledge of the land, and shall apply to each smallest legal subdivision of land selected.

2. The selections in any one list under special grants or grants in quantity, should not exceed 6,400 acres, and the selections in any one list of indemnity school lands must not in the aggregate exceed 640 acres.

3. All lists of indemnity school lands must be prepared so that each selected tract will correspond in area with the base tract, and separate base or bases must be assigned to each smallest legal subdivision of land selected.

4. The assignment of a portion of the smallest legal subdivision of a school section as the basis, in whole or in part, for indemnity selections, is permitted; but such assignment is an election by the State or Territory to take indemnity for the entire subdivision, and is a waiver of its right to such subdivision, and any remaining balance must be used for future selections.

5. The cause of the loss for which indemnity is selected must be specifically stated, whether by entry, reservation, the mineral character of the land, or the fractional condition of the township.

6. The selecting agent must file with each list of selections of indemnity school lands a certificate showing that indemnity has not previously been granted for the assigned base lands, and that no previous selection is pending for such assigned base; and with each list of selections of lands under quantity or special grants, a certificate that the selections and those pending, together with those approved, do not exceed the total amount granted for the purpose stated.

7. Where indemnity is sought for school lands in place, because of their inclusion within any Indian, military, or other reservation, the list of selections must in every case be accompanied by a certificate of the officer or officers charged with the care and disposal of school lands, that the State has not previously sold or disposed of, or contracted to sell or dispose of, any of said lands used as bases, or any part thereof; that the said lands are not in the possession of, or subject to the claim of any third party under any law or permission of the State or Territory; and within three months after the filing of any such list of selections, the State or Territory must in addition 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 instrument purporting to convey or in any way encumber the title to any of said lands used as bases, is of record, or on file in his office, and upon the report of the local officers of the failure of

the State to file such certificate within the required time, any selection upon such base lands may be canceled without previous notice.

8. The legal fees required by law must accompany all lists of selections.

No more than one number must be given to any list of selections, notwithstanding it may contain more than one selection.

9. Notice of selection of *all lands* must be given by publication once a week for five successive weeks in a newspaper of general circulation in the county where the lands are located, the paper to be designated by the register.

10. Notices for publication will be prepared by the register at the time of the acceptance of the selections, and will be transmitted by registered mail to the proper State or Territorial official for publication in the paper or papers designated, and a copy of such notice shall also be posted by the register in a conspicuous place in his office, and remain so posted until the expiration of time allowed for the submission of proof of publication.

To save expense, the register may embrace two or more lists in one publication, when it can be done consistently with the requirement of publication in a newspaper of general circulation in the county where the land is situated.

The published notice will embrace only the selected lands described by the largest legal subdivisions embraced in the separate lists, care being taken to avoid repetition of numbers of sections, townships, and ranges.

11. Proof of publication will be the affidavit of the publisher or foreman of the newspaper employed, that the notice (a copy of which must be annexed to the affidavit) was published in said newspaper once a week for five successive weeks. Such affidavit must show that the notice was published in the regular and entire issue of the paper, and was published in the newspaper proper and not in a supplement.

The proof of publication of notice must be filed with the register within ninety days after receipt of notice for publication, and will be forwarded by the register to the General Land Office with a report as to whether protest or contest has been filed against any selection, and if protest or contest is filed, the same shall accompany the report. Failure by the State or Territory to furnish proof of publication within the time limited will be cause for the rejection of the selection, upon report of such failure by the register, accompanied with evidence of service of notice prescribed in rule 10.

During the period of publication, or any time thereafter, and before final approval and certification, the local officers may receive protest

or contest as to any of the tracts applied for, and transmit the same to the General Land Office.

Where lands sought to be selected are alleged by way of protest to be mineral, or where applications for patent therefor are presented under the mining laws, or are otherwise adversely claimed, 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.

12. When a list of selections is received by mail on the morning that the selected lands are opened to settlement, entry, or selection, it will be considered as proffered after the claims of all persons present at the time of the opening of the office have been received, but a list received by mail prior to the day of opening will be rejected as prematurely filed.

13. No application will be allowed for lands covered by an existing selection or entry, nor will any right be recognized as initiated by the tender of any such application.

No amendment will be allowed of any indemnity school land selection by the substitution of new base, in whole or in part, in place of that originally tendered, defective from any cause.

14. The local officers will not enter on their records the relinquishment of any State selection, until directed to do so by the General Land Office. All relinquishments of State selections will be forwarded to the General Land Office, through the local office, and if accepted, the local officers will be directed to cancel the selections on their records. The cancellation will become effective as of the date of receipt of order of cancellation by the local office, after which, and not before, the land if not reserved will be subject to disposition under the general land laws.

15. When a school section has been identified by survey, and no claim is asserted thereto under the mining or other public land laws, the presumption is that title to the land has passed to the State, but such presumption may be overcome by the submission of satisfactory proof to the contrary.

16. The States will not be permitted to make selections in lieu of lands within a school section alleged to be mineral, in the absence of proof that such lands are known to be chiefly valuable for mineral. Such preliminary proof must show the kind of mineral discovered and the extent thereof.

17. Upon the submission by the State of an ex parte showing, consisting of corroborated affidavits alleging that the land is chiefly valuable for mineral, accompanied with an application for indemnity in lieu of such lands, and certificates of the proper State authorities showing that said lands have not been sold, encumbered, or otherwise disposed of, as required by rule 7, the register will certify as

to the date of the filing of said list, the status of the land selected, as shown by the record, and forward the list to the General Land Office by special letter, without further action.

The legal fees payable upon such selection must be tendered with the application to select, and will be received and held as unearned fees and unofficial moneys until the selection has been allowed or finally rejected, and in the meantime no action will be taken looking to the disposal of the selected land.

If the showing is deemed sufficient, a hearing will be ordered by this Office to determine the character of the land, evidence to be submitted in support of the allegation contained in the preliminary showing. Notice of such hearing must be given by the State, by publication once a week for five successive weeks, in a newspaper designated by the register of the land office of the district in which the lands are situated, as published nearest to the location of such base lands, and proof that the notice was published must be filed in the local land office on or before the day of hearing.

All proof filed and testimony taken at such hearing will be forwarded to the General Land Office.

Should the proof be found sufficient, the list will be returned for allowance, when notice of selection will be published, as required by rule 9 hereof, and the State will be further required to furnish the certificate of the officer in charge of the record in the county where the lands are situated, showing that said lands have not been sold, encumbered, or otherwise disposed of, as required by rule 7.

18. A determination by the General Land Office or the 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 selection, and where mineral entry was made of any portion of the smallest legal subdivision of a school section, that fact will be taken as determining the right of the State to indemnity for the entire legal subdivision, upon proper showing that the State has not made any disposition of the land not embraced in such mineral entry.

19. Indemnity school land selections by the Territory of New Mexico, under act of June 21, 1898 (30 Stats., 484), must be made of lands as contiguous as may be to the base lands.

20. All previous rulings and instructions not in harmony herewith are hereby vacated.

R. A. BALLINGER,
Commissioner.

Approved, April 25, 1907.
JAMES RUDOLPH GARFIELD,
Secretary.

HOMESTEAD ENTRY—NEBRASKA LANDS—KINKAID ACT—ACT MARCH 2, 1907.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 27, 1907.

Registers and Receivers,
United States Land Offices in Nebraska.

SIRS: Your attention is invited to the provisions of the act of Congress of March 2, 1907 (Public—No. 186), a copy of which is appended hereto, entitled "An act relating to the entry and disposition of certain lands in the State of Nebraska."

RIGHTS OF PERSONS WHO MADE HOMESTEAD ENTRY BETWEEN APRIL 28, 1904, AND JUNE 28, 1904.

1. Section 1 of the act grants to qualified entrymen who within the area described in the act of April 28, 1904 (33 Stat., 547), made homestead entries during the period between April 28 and June 28, 1904, inclusive, the same rights and benefits as were given to persons who made homestead entries prior to April 28, 1904, or subsequent to June 28, 1904, but makes the exercise of such rights or privileges subject to all existing rights.

CREDIT FOR MILITARY SERVICE.

1. Section 2 of the act extends the privileges accorded by the general homestead law to all homestead entries made under the provisions of the act of April 28, 1904 (33 Stat., 547), by persons who served in the Army, Navy, or Marine Corps of the United States during the civil and Spanish wars or the Philippine insurrection.

ISOLATED OR DISCONNECTED TRACTS.

The sale of isolated tracts within the area affected by the terms of this act is to be governed by the provisions of the act of June 27, 1906 (34 Stat., 517), as amended by section 3 of said act of March 2, 1907, and all sales shall be made in the manner and form hereinafter provided.

1. Applications to have isolated tracts ordered into the market shall be filed with the register and receiver of the local land office in the district wherein the lands are situate.

2. Applicants must show by affidavits corroborated by two witnesses the character of the land; that it contains no salines, stone, or other minerals; the amount, kind, and value of the timber, if any, thereon; whether the land is occupied, and if so, the nature of the occupancy; for what purposes the land is chiefly valuable, and why

it is desired that same be sold. Applications must be in accordance with Form 4–008 B, modified, appended hereto.

3. The local officers will, upon receipt of applications, enter them in pencil upon the tract books and immediately thereafter forward same to the General Land Office.

4. Registers and receivers must carefully examine their plats and records, and in transmitting applications report the status thereof and the existence of any objections to the offering of the lands for sale.

5. The filing of the application does not affect the status of the land nor segregate same prior to the approval thereof by the General Land Office; nor does it give the applicant any preference right over others who may desire to purchase the land at any sale that may be had thereunder, as the land must be disposed of to the highest bidder.

6. If the land is ordered into market, the local land officers will be so advised and directed to give applicant notice thereof and allow him thirty days within which to deposit with the receiver sufficient money to cover the expense of such sale, including cost of publication of notice.

7. Thereafter the register and receiver will cause a notice to be published once a week for five consecutive weeks (or thirty consecutive days if in a daily paper) immediately preceding date of sale, in a newspaper to be designated by the register as published nearest the land described in the application, using the form hereinafter given. The register will also cause a similar notice to be posted in the local land office, such notice to remain so posted during the entire period of publication. The applicant must furnish proof that the publication was duly made.

8. At the time and place fixed for the sale, the register and receiver will read the notice of sale and afford all qualified persons present an opportunity to bid. After all bids have been offered the local officers will declare the sale closed and announce the name of the highest bidder, who, upon payment for the land, will be declared the purchaser, and such bidder must within ten days from such notice furnish evidence of his citizenship, nonmineral and nonsaline affidavit, Form 4–062, and affidavit that he has made the purchase for his own use and benefit, and that he has not theretofore purchased under said act such quantity of land as with the amount included in the sale in question will exceed the aggregate area permitted by the act to be sold to any one person. This affidavit must be made in accordance with the form appended hereto. Upon receipt of proper proof and payment for the land, the local officers will issue final papers.

9. No tract of land exceeding three-quarters of a section may be

disposed of as isolated or disconnected tract under the provisions of this act, and not more than three quarter sections can be sold to any one person.

10. No lands shall be sold at less than the fixed price nor less than $1.25 per acre. Should any of the lands so offered be not sold, the same may again be offered for sale in the manner herein provided.

11. Promptly after each sale the local officers will forward to the General Land Office a report showing the lands offered, indicating the sales, date thereof, number of certificates and names of the purchasers. Cash papers will be issued as in ordinary cash entries, indorsed "Public Sale," and reported in your current monthly returns. With the papers must be forwarded the affidavit of the publishers showing due publication, the register's certificate of posting, and the evidence required by paragraph 8 herein.

Very respectfully,

R. A. BALLINGER,
Commissioner.

Approved:
THOS. RYAN,
Acting Secretary.

(PUBLIC—No. 186.)

AN ACT Relating to the entry and disposition of certain lands in the State of Nebraska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all qualified entrymen who, during the period beginning on the twenty-eighth day of April, nineteen hundred and four, and ending on the twenty-eighth day of June, nineteen hundred and four, made homestead entry in the State of Nebraska within the area affected by an act entitled "An act to amend the homestead laws as to certain unappropriated and unreserved public lands in Nebraska," approved April twenty-eighth, nineteen hundred and four, shall be entitled to all the benefits of said act as if their entries had been made prior or subsequent to the above-mentioned dates, subject to all existing rights.

SEC. 2. That the benefits of military service in the Army or Navy of the United States granted under the homestead laws shall apply to entries made under the aforesaid act approved April twenty-eighth, nineteen hundred and four, and all homestead entries hereafter made within the territory described in the aforesaid act shall be subject to all the provisions hereof.

SEC. 3. That within the territory described in said act approved April twenty-eighth, nineteen hundred and four, it shall be lawful for the Secretary of the Interior to order into market and sell under the provisions of the laws providing for the sale of isolated or disconnected tracts or parcels of land any isolated or disconnected tract not exceeding three quarter sections in area: *Provided,* That not more than three quarter sections shall be sold to any one person.

Approved, March 2, 1907.

(Form 4–008 C.)

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
———, —, ——— —, 19—.

Application for the sale of isolated or disconnected tract.

To the COMMISSIONER OF THE GENERAL LAND OFFICE:

The undersigned, whose post-office address is ———, ———, respectfully requests that ———, section ——, township ——, range ——, be ordered into market and sold under the act of June 27, 1906 (34 Stats., 517), and March 2, 1907 (34 Stats., 1224), at public auction, all of the surrounding lands having been entered or otherwise disposed of. Applicant states that this land contains no coal, salines, or other minerals and no stone, except ——— ——— (character and amount); that there is no timber thereon, except —— trees of ——— species, ranging from —— inches to —— feet in diameter and aggregating about ——— feet of stumpage measure, of the estimated value of $———; that the land is unoccupied, except by ——— ———, of ——— post-office, who occupies and uses it for the purpose of ———, but does not claim the right of occupancy under any of the public-land laws; that the land is chiefly valuable for ———, and that applicant desires to purchase same for his own individual use and actual occupation for the purpose of ———, and not for speculative purposes. Affiant further states that he has not heretofore purchased under the provisions of this act an amount of land which, together with that for which application for sale is made, will exceed in the aggregate 480 acres, and that this application is not made at the instance of or directly or indirectly for the benefit of any other person.

If this request is complied with, applicant agrees to deposit in advance a sum sufficient to defray all expenses of the sale, including the cost of publication of notice.

——— ———,
Applicant.

The facts stated in the foregoing application are true to our own personal knowledge.

——— ———,
——— ———,
Corroborating witnesses.

The above applicant and corroborating witnesses, to me personally known (or satisfactorily identified by ——— ———), being first duly sworn, say that the facts stated in said application are true.

——— ———,
——— ———.

Notice of publication (isolated tract).

PUBLIC SALE.

——— LAND OFFICE, ——— —, 19—.

Notice is hereby given that, as directed by the Commissioner of the General Land Office under provisions of the act of March 2, 1907 (34 Stats., 1224), we

will offer at public sale to the highest bidder, at —— o'clock —. m. on the —— day of ——— next, at this office, the following tracts of land, to wit: ————.

Any persons claiming adversely the above-described lands are advised to file their claims or objections on or before the time above designated for sale.

———— ————,
Register.

———— ————,
Receiver.

Affidavit for purchaser under section 3, act of March 2, 1907.

I, ——— ———, being first duly sworn and upon oath, state that I am the purchaser of ———, section ——, township ——, range ——, in Nebraska, under the act of June 27, 1906 (34 Stats., 517), as amended by section 3 of the act of March 2, 1907 (34 Stats., 1224); that I am a ——— (state whether naturalized or native born)[a] citizen of the United States; that said purchase is made for my own use and benefit, and not, directly or indirectly, for the use and benefit of any other person; that I have not heretofore purchased under the provisions of said act, either direct or indirectly, any lands, except ———— (here give description of lands heretofore purchased under this act, if any).

———— ————.

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified by ——— ———), and that this affidavit was subscribed and sworn to before me at my office in ——— on the —— day of ———, 19—.

———— ————,

———— ————.

NOTARIES PUBLIC ACTING AS ATTORNEYS OR AGENTS—ACT OF JUNE 29, 1906.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 29, 1907.

Registers and Receivers,
United States Land Offices.

SIRS: Your attention is called to that part of the act of June 29, 1906 (34 Stat., 622), which reads as follows:

That no notary public shall be authorized to take acknowledgments, administer oaths, certify papers or perform any official acts in connection with matters in which he is counsel, attorney or agent, or in which he may be in any way interested before any of the departments aforesaid.

Although this statute forms a part of the act of Congress amending section 558 of the Code of Law for the District of Columbia, it

[a] If naturalized, record evidence thereof must be furnished.

has recently been construed by the Attorney-General to apply to notaries outside of that District; and you are therefore directed to scrutinize all affidavits and papers filed in your office for the purpose of seeing that they are not executed in conflict with this statute.

Very respectfully,

R. A. BALLINGER,
Commissioner.

Approved:
THOS. RYAN,
Acting Secretary.

FOREST RESERVES—PRACTICE—HEARINGS ON CHARGES FILED BY FOREST OFFICERS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
May 3, 1907.

1. A Government officer in charge of any national forest may, on behalf of the United States and in its name, initiate and prosecute a contest against a party to an entry, filing, or other claim under the public land laws for lands within said national forest for any sufficient cause affecting the legality or validity of the claim.

2. As a basis for such proceeding such officer shall file in the local land office for the district in which the lands involved are located a complaint signed by him in his official capacity, but not under oath or corroborated, setting forth facts which if true will warrant the cancellation of such entry or filing or defeat the claimant's right to the land.

3. Upon the filing of a sufficient complaint of the character indicated in rule 2 in any case in which final certificate has not issued, the register and receiver will issue a notice with a copy of such complaint attached thereto to the defendant, notifying him that unless he within twenty days from the receipt of such notice files in their office a denial or answer to such charges in writing and under oath, the truth of such charges will be taken as confessed by him and his entry, filing, or claim will be canceled without further notice to him.

4. When a complaint has been filed in any case where final certificate has issued, the register and receiver will at once suspend all further action and forward the complaint to the Commissioner of the General Land Office for his consideration and appropriate action, and when said Commissioner has ordered a hearing on any complaint so forwarded, the register and receiver will at once proceed to give notice and take action applicable under these regulations to cases where final certificate has not been issued.

5. The notices required by rules 3 and 4 will be delivered by the register and receiver to the forest officer, who will secure service thereof as provided in the Rules of Practice, and at once forward proof of such service to the register and receiver; but where any affidavit is required under the rules in relation to such notice, the official signature of the officer of the Forest Service, or of any special agent of the General Land Office who serves the notice shall be sufficient without an oath.

6. Where answer or denial under oath is filed with the register and receiver, as required by rules 3 and 4, the register and receiver will at once order a hearing thereon and give all parties not less than twenty days' notice thereof, either personal or by registered mail; and they will issue such subpoenas as the forest officer or a special agent in charge of such case may require and deliver the same to him for service.

7. In all cases where depositions are taken on the application of any officer of the Government it will not be necessary for such officer to either specify the names of all witnesses whose depositions are to be taken, or to file written interrogatories.

8. The officer of the Forest Service shall pay all per diem and mileage charges of witnesses subpoenaed on behalf of the Government, and shall pay for reducing to writing all testimony of witnesses called on behalf of the Government; but if the testimony of witnesses called on behalf of the Government can be taken by a salaried clerk in the local land office where the case is on trial, no testimony fee will be charged; and if taken by a contest clerk of such office, the forest officer will be required to pay that part of the rate fixed by law usually paid to contest clerks of that local land office.

9. In all cases where hearings have been held, the registers and receivers will render their decisions and duly notify the forest officer and the defendants thereof and all defendants of their right of appeal from any final decision adverse to them; and in all cases where the defendants fail to answer or deny the charges as required in rules 3 and 4, or fail to appeal from the final decision adverse to them, and in all cases where the final decisions are favorable to defendants, the register and receiver will at once forward the records of the cases to the Commissioner of the General Land Office for his consideration and appropriate action, and the forest officers shall not be required to appeal.

10. Except as herein provided, the Rules of Practice shall prevail in and govern all proceedings in cases arising under these regulations, but nothing herein shall affect the right of the Department of the Interior to conduct any investigation or proceeding with reference to the survey, prospecting, locating, appropriating, entering, relinquishing, conveying, certifying, or patenting any lands within

a national forest, and the Commissioner of the General Land Office may at any time direct a special agent or other officer or employee of his Bureau to attend any hearing and conduct the same, or take any other action therein which may seem to him to be necessary.

11. Cases now in the hands of special agents based on reports of forest officers adverse to any entry, filing, or other claim, will be by such special agent delivered to the forest officer and triplicate receipts taken therefor, one of which the agent will forward to this office, one to the proper register and receiver, and one to be retained in his files. He will also notify the register and receiver to substitute the name of such officer of the Forest Service upon the record as the proper officer to be thereafter recognized in any such case pending before them.

12. National forest officers may at the time of any final proof also appear and protest against the acceptance of such proof, but they will be required to pay the cost of taking testimony introduced by them in support of such protest.

R. A. BALLINGER,
Commissioner.

Approved:
JAMES RUDOLPH GARFIELD,
Secretary.

ALLOTMENT—MEMBERSHIP IN INDIAN TRIBE.

INSTRUCTIONS.

One who is recognized by the laws and usages of an Indian tribe as a member thereof, or who is entitled to be so recognized, is qualified to take an allotment out of the public lands under the fourth section of the act of February 8, 1887, as amended by the act of February 28, 1891.

Ulin *v.* Colby, 24 L. D., 311, overruled.

Secretary Garfield to the Commissioner of Indian Affairs, May 3, 1907.
(G. W. W.) (W. C. P.)

By letter of April 25, 1907, you suggest that a rule be laid down for the guidance of your office for disposal of Indian allotment applications under the fourth section of the act approved February 8, 1887 (24 Stat., 388), as amended by the act of February 28, 1891 (26 Stat., 794).

It is inferred from the wording of your letter that since the decision in Ulin *v.* Colby (24 L. D., 311), the rule has been to refuse others than full-blood Indians allotments under the fourth section of the act of 1887.

The decision in Ulin *v.* Colby was based on the two decisions in Black Tomahawk *v.* Waldron (13 L. D., 683; 19 L. D., 311), but

there is such a discrepancy between the syllabus of Ulin *v.* Colby, quoted in your letter, and the principle clearly expressed in Black Tomahawk *v.* Waldron (19 L. D., 311) that Ulin *v.* Colby will be disregarded hereafter in deciding questions of allotment.

If the practice has been to refuse allotment to those having white blood, it was a mistake. The quantum of Indian blood or of white blood possessed by the applicant does not control and should not, of itself, influence the decision as to his right to an allotment. One who is recognized by the laws and usages of an Indian tribe as a member thereof, or who is entitled to be so recognized, must be held qualified to take an allotment out of the public lands under the fourth section of the act of February 8, 1887, as amended by the act of February 28, 1891.

RIGHT OF WAY—INDIAN RESERVATION—ALLOTTED LANDS.

FRESNOL WATER-RIGHT CANAL.

Section 18 of the act of March 3, 1891, provides for the granting of rights of way over the public lands and reservations of the United States; and where the lands sought are within an Indian reservation they are within the scope of the act, notwithstanding they may have been allotted to individual Indians.

Secretary Garfield to the Commissioner of Indian Affairs, May 3, 1907.
(G. W. W.) (F. W. C.)

With letter of February 28, 1907, Charles Blenman, of Tucson, Arizona, submitted for departmental approval, on behalf of Frank and Warren Allison, an application under the act of March 3, 1891 (26 Stat., 1095), the right of way on account of the Fresnol Water-right Canal through the Papago Indian reservation, accompanying the same by a certified check on the Consolidated National Bank at Tucson, for the sum of $700.00, tendered as compensation for damages to certain Indian allottees across whose land the proposed canal or ditch extends.

Reporting upon said application, under date of April 10, last, the Acting Commissioner expresses the opinion that there is no existing law authorizing the granting of rights of way of this character because the land traversed has been allotted in severalty.

This matter seems also to have been reported upon, under reference from your office, by the farmer in charge of the Papago Indians, particularly as to the advisability of permitting the construction of the canal or ditch and as to the sufficiency of the compensation tendered. He recommends the approval of the necessary right of way under the terms offered, except that the compensation to one of the Indian

allottees should be increased $50.00, making the total sum $750.00, instead of $700.00, as tendered.

In returning the papers it is deemed but necessary to invite your attention to the fact that section 18 of the act of 1891, under which the right is sought, provides for the granting of a right of way for purposes similar to that desired by applicant, over the public lands and the reservations of the United States. The land affected by the present application is within a technical reservation of the United States and the fact that the lands sought to be traversed have been actually allotted does not, in my opinion, take them out of the scope of the act.

The papers comprising the application are herewith inclosed, and you are directed to return them with the advice that they be filed in the district land office in triplicate, and otherwise comply with the requirements issued under the act of 1891, calling attention particularly to the requirement of an additional $50.00 in settlement of the damages occasioned by the construction of the proposed ditch or canal.

MINING CLAIM—ADVERSE—FAILURE TO COMMENCE PROCEEDINGS WITHIN STATUTORY PERIOD.

MADISON PLACER CLAIM.

Failure to commence proceedings upon an adverse claim in a court of competent jurisdiction within the period prescribed by section 2326 of the Revised Statutes constitutes a waiver of the adverse claim; and such proceedings thereafter begun and prosecuted can not affect the rights of the applicant for patent.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *May 2, 1907.* (G. J. H.)

April 5, 1905, Harry L. Miller filed application for patent for the Madison placer mining claim, embracing the NE. ¼ NW. ¼ and NW. ¼ NE. ¼, Sec. 10, T. 34 N., R. 9 W., M. D. M., Redding, California, land district, against which, on June 5, 1905, within the period of publication of notice, the Humboldt Placer Mining Company filed its adverse claim, upon which suit in a court of competent jurisdiction was instituted July 6, 1905, and prosecuted to final judgment (filed in the office of the clerk of the court February 15, 1906), awarding the right of possession of the tract in controversy to the adverse claimant.

April 12, 1906, the applicant for patent filed in the local office his petition praying that the adverse claim be rejected, on the ground that suit thereon was not commenced within the time allowed by law. On the same day the local officers denied the petition; from which action the applicant appealed to your office, which by decision of August 2,

1906, reversed the action of the local officers and rejected the adverse claim, on the ground that suit was not timely instituted thereon, and also rejected the application for patent, on the ground that the showing as to improvements was insufficient.

Both parties have appealed to the Department.

It is clearly established by the record that suit was not commenced upon the adverse claim until the thirty-first day after the filing thereof in the local office. Section 2326 of the Revised Statutes provides, among other things, that—

> Where an adverse claim is filed during the period of publication it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim.

The statute specifically provides that a failure to commence proceedings in a court of competent jurisdiction within thirty days after the filing of the adverse claim shall be a waiver of said claim; and by virtue of its provisions the stay of proceedings upon the application for patent, effected by the filing of the adverse claim within the period of publication, continues only until the controversy shall have been settled or decided by a court of competent jurisdiction, *or the adverse claim waived*. The statute is mandatory; and where suit is not instituted within the prescribed time, the adverse claim is by force of the statute waived, and is no longer effective to stay the patent proceedings. In such case, the waiver declared by the statute becomes effective immediately upon the expiration of the thirtieth day, and any further proceedings upon the adverse claim are without authority of law and can in no wise affect the rights of the applicant for patent. (See Richmond Mining Co. *v.* Rose, 114 U. S., 576, 585; Steves *et al. v.* Carson *et al.*, 42 Fed. Rep., 821; Downey *v.* Rogers, 2 L. D., 707; Nettie Lode *v.* Texas Lode, 14 L. D., 180; Scott *v.* Maloney, 22 L. D., 274; Catron *et al. v.* Lewishon, 23 L. D., 20.)

The improvement which it was originally sought to accredit to this claim in satisfaction of the statutory requirement is the "eleventh mile" of a ditch, the nearest point of which is three-quarters of a mile from the claim, which ditch is alleged to have been constructed for the common benefit of this and other claims owned by applicant. The showing before your office at the time the decision appealed from was rendered clearly fails to establish the availability

of the improvement mentioned, and your action holding the same insufficient was correct.

With his appeal the applicant for patent files a supplemental showing relative to improvements, in which the ditch mentioned in the showing heretofore made and by your office held insufficient, as above set forth, is described in detail and the applicability thereof to meet the requirements of the statute attempted to be shown.

The adverse claimant files with his appeal a protest, charging, in substance and effect, that five hundred dollars in labor or improvements have never been expended upon or for the benefit of the claim in question.

Neither the additional showing on behalf of the applicant, nor the protest of the adverse claimant, has been considered by the local officers or your office.

Without in any wise passing upon the supplemental showing, or upon the protest, the case is remanded for such further action, in view thereof, as may be proper.

As thus modified, your office decision is affirmed.

RESIDENCE—MILITARY SERVICE—COMMUTATION—ACT OF JUNE 16, 1898.

JAMES B. WEAVER.

The act of June 16, 1898, specifically provides that "no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements," and credit for military service, as provided for by said act, can not be allowed as a substitute for such period of residence.

Directions given for the protection of rights under commuted homestead entries in which credit may have been allowed for military service in lieu of the one-year period of residence required by the act of June 16, 1898, under the then-existing practice of the General Land Office.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *May 6, 1907.* (A. W. P.)

On April 1, 1901, James B. Weaver made homestead entry No. 23933, for the SE. ¼, Sec. 11, T. 157 N., R. 80 W., Devils Lake, North Dakota, land district, and submitted commutation proof in support thereof, November 1, 1904, on which cash certificate No. 14882 issued December 5, 1904.

An examination of said proof discloses, according to the testimony of claimant, that he established residence on the land April 1, 1901, and that he was absent from April 4, 1901, to August, 1904, on account of service in the United States army, thereafter residing on the land until date of submitting proof.

Upon consideration thereof, your office, by decision of August 12, 1905, rejected said proof and held the cash certificate for cancelation because of insufficient residence, "no credit for military service in commutation proof being allowable," and directed the local officers to notify the claimant that he would be allowed to offer new commutation proof at any time during the lifetime of the entry when he could show fourteen months' continuous residence on the land. Notice of this decision was given by registered letter of August 18, 1905, receipt of which was acknowledged by the entryman.

By letter of November 18, 1905, the local officers reported that on November 9, 1905, Will W. Huston presented the relinquishment of the entryman, executed November 8, 1905, together with his own application to make homestead entry for the land; that said application was, on November 16, 1905, suspended, and applicant allowed thirty days within which to file evidence that the cash certificate issued to Weaver "had not become a matter of record, or an abstract of title showing title fully restored to the United States." With said letter they also transmitted Walter L. Smith's duly corroborated contest affidavit against said entry, filed November 14, 1905, charging, in substance, abandonment and failure of claimant to reside upon the land during the six months last past.

By letter of December 5, 1905, the local officers transmitted a motion for review of your office decision of August 12, 1905, filed with them on the preceding day by Harmon K. Smith, as transferee of the entryman. In support thereof he alleged substantially that on January 3, 1905, the land was transferred to him by warranty deed for the consideration of $1,600, and that on the following day said deed had been recorded in the office of the register of deeds of the county wherein the land is situate; that at the time he purchased said land he believed, and still believes, Weaver had complied with the requirements of the homestead laws as interpreted; that since coming into possession of the land he had cultivated all the land that said Weaver had broken, and broke one hundred acres more, so that at that time affiant had one hundred and fifty acres of said land broken and under cultivation; that he has built another building on the land, and has made over $500 worth of improvements; that upon receipt of your office decision said Weaver gave affiant to understand that he would comply with the requirements thereof, and therefore affiant took no further action, but as soon as he learned of said Weaver's attempted relinquishment he secured the services of an attorney and filed the motion for review. This affidavit is corroborated by four persons, who state under oath that they read the same and are familiar with its contents, and know of their own knowledge that the facts and circumstances therein stated are true.

By letter of January 19, 1906, the local officers also transmitted

an appeal filed December 23, 1905, on behalf of Will W. Huston, from their action in refusing to accept the relinquishment and homestead application tendered by him on November 9, 1905.

Counsel for the transferee urged in support of the motion for review that the commutation proof should be approved, by giving the entryman credit for his military service, in accordance with the provisions of the act of June 16, 1898 (30 Stat., 473), that such service should be construed to be equivalent to all intents and purposes to residence and cultivation for the same length of time; and that such construction has been given to said act in the consideration and acceptance of a number of other commutation proofs by your office.

By decision of February 7, 1906, however, your office held that neither the section of the Revised Statutes (2301) under which the commutation proof was made, nor said act of June 16, 1898, admits of such construction, and accordingly you denied the motion for review, and held that in the event said decision became final the cash certificate would be canceled, the relinquishment presented by Huston accepted, and Weaver's homestead entry canceled. But concluded as follows:

> However, in view of the fact that entryman's transferee has expended a large sum of money in improving and cultivating the land, besides the $1600 paid in reliance upon what he deemed the good title of the entryman, the application of said Huston, made with a knowledge of the improvements made by said transferee, is held subject to the right of said transferee to apply to enter the land within ninety days from notice of the cancellation of the entry. Should said Harmon K. Smith fail to avail himself of this privilege within the time named, you will allow said Huston to perfect his application.
>
> The contest affidavit of Walter L. Smith was filed subsequent to the presentation of the relinquishment of entryman, and no rights were acquired thereby.

The case is now before the Department upon separate appeals from your said office decision filed in behalf of Will W. Huston and Harmon K. Smith, assignee of James B. Weaver. Walter L. Smith did not appeal, so your decision became final as to him. The matters urged in support of each appeal are in all material respects the same as the contentions made on appeal to your office.

Considering the question presented by Huston's appeal, it will be observed that the relinquishment filed by him was executed by the entryman almost a year after the date of issuance of the cash certificate by the local officers upon the commutation proof offered by him, and, as it subsequently developed, long after he had transferred all his right, title, and interest in and to the land to Smith. Having thus parted with his interest in the land, Weaver had nothing to relinquish, and such instrument is therefore null and void. Falconer *v.* Hunt *et al.* (6 L. D., 512), Addison W. Hastie (8 L. D., 618),

Daniel R. McIntosh (8 L. D., 641), and Patrick H. McDonald (13 L. D., 37). It is evident from the statement contained in Huston's brief on appeal to your office that he was aware of the transfer of the land by Weaver at the time he appeared at the local office with a paper purporting to relinquish the former's interest therein. But whether he was or not, he was not deprived of any right by the action of the local officers, for, as stated, the entryman at that time had no interest in the land to relinquish.

Relative to the matters presented by Smith, as transferee of the entryman, on appeal, it will be first observed that the act of June 16, 1898, *supra*, provided:

> That in every case in which a settler on the public land of the United States under the homestead laws enlists or is actually engaged in the Army, Navy, or Marine Corps of the United States as private soldier, officer, seaman, or marine, during the existing war with Spain, or during any other war in which the United States may be engaged, his services therein shall, in the administration of the homestead laws, be construed to be equivalent to all intents and purposes to residence and cultivation for the same length of time upon the tract entered or settled upon; and thereafter no contest shall be initiated on the ground of abandonment, nor allegation of abandonment sustained against any such settler, unless it shall be alleged in the preliminary affidavit or affidavits of contest, and proved at the hearing in cases hereafter initiated, that the settler's alleged absence from the land was not due to his employment in such service: *Provided*, That if such settler shall be discharged on account of wounds received or disability incurred in the line of duty, then the term of his enlistment shall be deducted from the required length of residence without reference to the time of actual service: *Provided further*, That no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements.

Construing this act, your office, October 11, 1900, in the case of Phil H. Shortt, arising in this same land district, reversed the action of the local officers in rejecting his commutation proof, and held, as to the act of June 16, 1898, *supra*, as follows:

> This statute, it will be observed, allows homesteaders who enlist and serve in the Army, Navy, or Marine Corps of the United States, credit for such service as constructive residence and cultivation of the land, therefore, from the date of Shortt's enlistment, which occurred about the time of making his entry, until he returned to the United States and was discharged from the service of the U. S., a period of over 15 months, he was to all intents and purposes, under said statute, a resident of his homestead entry, and, therefore, entitled to take advantage of any of the benefits of the homestead law for which he is duly qualified.
>
> With this view of the case I am of the opinion that the settlement made by Shortt is sufficient, taken in connection with his constructive residence on the land, to entitle him to the right of commutation of his entry.

This holding was again announced by your office decision of March 6, 1901, in the similar case of Nels H. Peterson on appeal from the

action of the local officers of the Grand Forks, North Dakota, land office, in rejecting his commutation proof. In conformity therewith, the local officers thereafter accepted such showing on commutation proof; hence the allowance of Weaver's proof.

Relative to the said act of June 16, 1898, it will be observed that it is modeled in large part upon sections 2305 and 2308 of the Revised Statutes, the main body of the act, with slight verbal changes, being taken from section 2308, and the provisos from section 2305.

The Department, taking into consideration the said act, as well as the statutes upon which it was apparently formulated, and the evident purpose of such legislation, is of the opinion that your later construction of the act, so far as holding that military service could not be employed as a substitute for at least the one year's residence required in said act, is correct. It will therefore be seen from what has heretofore been stated that from the date of the Shortt decision down to the time when you rendered decision herein the rule had been as announced in the former case. Commutation entries thus made were allowed under authority of the land department, and rights arising thereunder should not be disturbed by reason of a later construction of the law. Especially is this true where it appears that, relying upon the former construction, and an entry allowed thereunder, rights of third parties have intervened that can not be protected if action taken under the former construction is to be ignored.

The entry of Weaver should be passed to patent, if the final proof is otherwise unobjectionable.

Your office should take steps at once to properly advise the different local offices of the rule announced herein, and that the doctrine in the Shortt case will no longer prevail. If, however, final proof has been submitted and certificate issued in accordance with the rule announced in that case, such entries may be considered in accordance with the ruling herein.

The decision of your office is accordingly modified.

MINING CLAIM—PLACER LOCATION—UNSURVEYED LAND.

GOLDEN CHIEF "A" PLACER CLAIM.

The provision of the statute requiring placer claims upon surveyed lands to conform in their exterior limits to the legal subdivisions of the public lands furnishes no authority, in the location of placer claims upon unsurveyed lands, for placing the lines of such locations upon previously patented or entered lands.

The case of Rialto No. 2 Placer Mining Claim, 34 L. D., 44, cited and distinguished.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *May 9, 1907.* (G. J. H.)

July 12, 1905, Carl Bergstrand *et al.* made mineral entry No. 4578 (survey No. 5281), for the Golden Chief "A" placer mining claim, in the unsurveyed portion of T. 9 N., R. 11 W., M. M., Helena, Montana, land district.

By decision of June 15, 1906, your office held the entry for cancellation on the ground that it did not conform to the system of public-land surveys.

Claimants have appealed to the Department.

The claim in question is about 8,300 feet in length and averages about 600 feet in width. It lies longitudinally in a northeasterly and southwesterly direction. Gold creek enters the claim at its southerly end, and, except for a bend therein, where for a short distance it flows outside the southeasterly side line, the creek flows substantially through the center of the claim, and passes out at the northerly end. It is evident that the claim was located so as to follow the course of the creek, and that no attempt was made to conform the location to the system of public-land surveys.

The claim is bounded on all sides by other placer claims. The Catch All, which adjoins it on the north, has been patented. All the other adjoining claims were entered by Bergstrand, one of the applicants here, subsequently to the date of the entry in question, and it appears from informal inquiry at your office that, for some alleged or supposed irregularity, those entries are now under investigation. If, as a result of the investigation, the entries should be sustained as valid, there would be no possibility of reforming the lines of the claim here in question to conform to the United States system of public-land surveys (Sec. 2331, R. S.), and in that view the entry might be sustained as it stands. The case of Rialto No. 2 Placer Mining Claim (34 L. D., 44), cited by your office, deals with placer claims on surveyed lands, which the statute contemplates shall be described by legal subdivisions (Sec. 2329, R. S.), and furnishes no authority, in the location of placer claims upon unsurveyed lands, for placing the lines of such locations upon previously patented or entered lands. If, on the other hand, the investigation of the surrounding entries should result in their cancellation, and the claim here in question should prove to be in other respects regular and valid, the obstacles which now prevent its conformity to the United States system of public-land surveys would be removed, and in that event the case should be readjudicated under the principles which would then govern.

The record is remanded to await the outcome of the ivestigation instituted by your office, when the matter will be again considered

in the light of the facts thereby disclosed and the views herein expressed.

Your office decision is modified accordingly.

TOWNSITE—LEGAL SUBDIVISIONS—SECTION 2389, REVISED STATUTES.

HARRISON GULCH TOWNSITE.

The provision of section 2389 of the Revised Statutes that a townsite entry "shall in its exterior limits be made in conformity to the legal subdivisions of the public lands authorized by law," is mandatory, and an entry which does not so conform can not be allowed.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *May 9, 1907.* (G. C. R.)

October 10, 1904, Charles M. Head, Judge of the Superior Court in and for Shasta County, California, applied to enter, under the townsite laws, a tract of land described by metes and bounds, containing 27.218 acres, and embracing portions of the SW. ¼ SW. ¼, Sec. 3, SE. ¼ SE. ¼, Sec. 4, NE. ¼ NE. ¼, Sec. 9, and NW. ¼ NW. ¼, Sec. 10, T. 29 N., R. 10 W., M. D. M., Redding, California. Cash certificate 4777 was issued the same day.

It appears that Edward Sweeny, predecessor to Judge Head, filed a townsite declaratory statement for said lands November 13, 1902.

December 7, 1906, your office rejected the final proof and held for cancellation the cash entry, without prejudice, however, to the right of the townsite applicant to begin new proceedings in conformity with law. Your office rejected the final proof on the ground that the lands were described by metes and bounds, admitting, at the same time, that your office erred in not noting that fact when the application was before your office.

The attorney for the townsite applicant has appealed to this Department, contending that it was error not to have allowed the application and entry for the townsite described, as it was, by metes and bounds. An argument has been filed in connection with the appeal.

Section 2389 of the Revised Statutes provides that a townsite entry "shall in its exterior limit be made in conformity to the legal subdivisions of the public lands authorized by law." You properly held that this statute is mandatory and that townsite entries must, in their exterior limits, be made in conformity to the legal subdivisions of the lands authorized by law.

In the appeal it is stated:

We respectfully submit that we know of no statute or rule of practice or procedure that would prevent the Commissioner making an order that an amended survey be made so as to segregate and designate by appropriate lot numbers.

Your office in the decision appealed from states:

> It appears there are some patented mining claims in the above legal subdivisions. The office will have a diagram prepared of such subdivisions so as to eliminate therefrom such claims, and others, if any, that must under the law and regulations be segregated, and will designate the remaining area by appropriate lot numbers. This will permit new application for the townsite should it be offered.

Appellants complain that they will have to suffer considerable delay, and that they will be subjected to some expense in making new publication, etc. This the Department cannot help. The law is clear as above quoted.

The action appealed from is affirmed.

ADDITIONAL HOMESTEAD—SECTION 2, ACT OF APRIL 28, 1904.

ABOLD *v.* MEER.

The right of entry granted by section 2 of the act of April 28, 1904, can only be exercised by those persons who, at the date of making entry thereunder, "own and occupy the land heretofore entered by them," and the occupancy of the land "heretofore entered" must be such as will defeat a contest based upon the charge of abandonment.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *May 9, 1907.* (E. O. P.)

Appeals have been taken on behalf of Henrietta Abold, contestant, and Mary E. Meer, claimant, from your office decision of July 21, 1906, holding intact her entry made September 22, 1902, and holding for cancellation her entry made July 21, 1904, upon contest initiated by said Abold. The original entry of Meer embraced the SW. ¼ SE. ¼, Sec. 27, NW. ¼ NE. ¼, S. ½ NE. ¼, Sec. 34, T. 34 N., R. 45 W., and the additional entry allowed under the provisions of section 2 of the act of April 28, 1904, (33 Stat., 547), covered the E. ½ SW. ¼, Sec. 27, E. ½ NW. ¼, SE. ¼, Sec. 34, same township and range, Alliance land district, Nebraska.

The charges upon which contest is based are failure to establish and maintain residence on any of the land entered and that the said entries were fraudulently made for the benefit of another or others. The first of said charges is fully sustained by the testimony offered, though the second charge fails.

It appears, however, that Meer belongs to that class of homestead claimants whose rights were involved in departmental decision rendered in the case of Anna Bowes (32 L. D., 331). Notice, in accordance with departmental circular of July 7, 1904 (33 L. D., 84), was sent to her by the local officers December 6, 1904. She had, therefore,

until June 7, 1905, within which to cure her then-existing default as to her *original* entry or to relinquish the same without prejudice to the future exercise of her homestead right. Contest was initiated February 17, 1905. It is at once apparent that the contest, in so far as it relates to the original entry of Meer, is premature and must be dismissed.

Counsel for Meer contends that the exemption of the original entry from contest extends to the additional entry also. Your office denied this contention.

The right of additional entry granted by section 2 of the act of April 28, 1904, *supra*, can only be exercised by those persons who, at the date of making entry thereunder, "own and occupy the land heretofore entered by them." The occupancy of the land "heretofore entered" must be such as will defeat a contest based upon the charge of abandonment. (Libolt *v.* Snider, 35 L. D., 430.) While the charge of abandonment of the original entry could not be maintained in the present contest, it is not because of failure of proof thereof, but because of the refusal of the land department to entertain contest based thereon pending the time allowed within which claimant might comply with the directions contained in notice issued under said departmental circular of July 7, 1904, *supra*. But this exemption did not extend beyond the original homestead entry. As to the additional entry, the specific terms imposed by the statute under which it is made must be fully met.

It is asserted that claimant had cured her default prior to notice of contest. The burden of establishing this defense is upon the claimant, where such default is shown to have existed at the date of filing of contest affidavit. Meer did not take the stand in her own behalf and the testimony offered tending to show absence of knowledge by her of the pending contest is insufficient.

For the reasons herein stated her original entry will be allowed to stand and the contest of Abold against the same dismissed. Her additional entry will be canceled. The decision of your office is hereby affirmed.

HOMESTEAD ENTRY—TIMBER LAND—COMMUTATION PROOF.

PATTON *v.* QUACKENBUSH.

The fact that lands may be chiefly valuable for the timber thereon does not exclude them from settlement and entry under the homestead law, but it must clearly appear that the settlement or entry upon such lands was made in good faith, for the purpose of making the tract a home; and where the entryman in such case submits commutation proof and pays a price to cut short the period of residence required by the homestead law, he invites scrutiny and challenges judgment as to the good faith of his entry.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *May 9, 1907.* (P. E. W.)

The Department has before it the appeal of William E. Quackenbush from your office decision of June 2, 1906, affirming that of the local officers and holding for cancelation his homestead entry, No. 18130, for the SE. ¼ SE. ¼, Sec. 23, SW. ¼ SW. ¼, Sec. 24, NW. ¼ NW. ¼, Sec. 25, and NE. ¼ NE. ¼, Sec. 26, T. 26 N., R. 13 W., Seattle, Washington.

Said entry was made November 15, 1901, and commutation proof was submitted January 14, 1905, upon which cash certificate No. 20501 was issued.

Cancelation was upon the ground that the entry was not made in good faith for the purpose of securing a home but to dispose of the timber on the land, of which, it appears, there are about eleven million feet.

It is contended in the appeal that your office action is virtually a holding that land chiefly valuable for its timber or stone may not be taken as a homestead.

The act of June 3, 1878 (20 Stat., 89), governing the sale of timber land, provides that nothing therein contained shall defeat or impair "any *bona fide* claim under any law of the United States, or authorize the sale of . . . the improvements of any *bona fide* settler," etc., and in the case of Rowley *v.* Hayes (29 L. D., 606) the Department held that the fact that land is more valuable for its timber than for agricultural purposes does not in itself require the cancellation of an entry.

The same was held, in effect, in the cases of Porter *v.* Throop (6 L. D., 691), Wright *v.* Larson (7 L. D., 555), John A. McKay (8 L. D., 526), and Harper *v.* Eiene (26 L. D., 151).

Thus there is abundant express recognition of the right to take, under the homestead laws, lands which are valuable chiefly for timber, and of the fact that there may be a *bona fide* settlement on lands of the character of that here in question.

But it was further expressly held in all of said cases that to be *bona fide* the settlement must be made with the purpose of making the tract a home. And where the development of a tract of land as a permanent abode is claimed to be the chief aim and consideration, the entryman, by submitting commutation proof and paying a price to cut short the period of residence required by the homestead laws, invites scrutiny and challenges judgment as to the good faith of his entry.

In the present case the claimant stated in his commutation proof that he was absent from the land about four months each year, and

at the hearing he testified that he established actual residence thereon about six weeks after making his entry on November 15, 1901, and thereafter spent two-thirds of his time on the land. Thus it is evident that his residence on the land was not substantially continuous for a period of fourteen months prior to submitting commutation proof on January 14, 1905. Said proof must therefore be rejected and the cash certificate canceled.

It remains to consider whether the facts in the case warrant the conclusion that the entry was made in good faith and justify the Department in holding the entry intact as one made with the intention of developing the land for a permanent home.

It appears that for some years prior to making this entry the claimant owned a house and followed his occupation as carpenter in the town of Arlington, Snohomish County, Washington, more than two hundred miles distant, by the usual routes of travel, from the land in question. Whenever he left the land he returned to Arlington, and between the dates of his entry and proof he bought and sold, for money and by way of speculation, a number of town lots in that place, describing himself in the various deeds as " of Snohomish county, Washington." This during the period when he claims to have been without means of subsistence other than his daily labor and therefore compelled to be absent from the land four months out of each year. As soon as he had made final proof at Seattle he gave Froom, one of his witnesses, permission to remove the stove from the house on this land, while he himself went directly to Arlington, and at date of the hearing, nine months later, he had not again seen the land.

In his statement that he spent two-thirds of his time on this land from date of entry until final proof the claimant is corroborated by witnesses, whose entries for lands in the same vicinity are under similar contest charges and for whom he in turn is witness, and the contestant furnished no testimony directly contradictory thereof. It was not until June 1, 1905, nearly five months after the entryman submitted final proof, that the contestant and his witnesses first visited the land. At that time, as shown by the evidence, the permanent improvements were as follows:

From about one-fourth of an acre, on which the cabin and shed stood, the trees had been felled and the logs and underbrush removed, but twenty-one stumps remained standing. This one-fourth acre was inclosed by a rail fence, outside of which on about one and one-half acres the trees had been felled and the brush partly burned but the logs and stumps all remained. Outside of said enclosure no breaking of the soil had been attempted; within it there had been some stirring done in spots but it had never been plowed or

harrowed. There was a habitable cabin, and also a shed built of round poles in which the entryman claims to have lived from September, 1901, until late in the fall of 1902, when the cabin was completed, though he had no stove. Some work had been done on the "trail" by which access was had to the land. For water supply a hole had been dug about five feet deep, and partly curbed to hold surface water.

As to the soil on this tract and its value for farming purposes, if cleared of the timber and brush, the testimony of the witnesses for contestant and claimant is irreconcilable. The former, experienced timber cruisers, state that there are eleven million feet of timber worth at least one dollar per thousand feet; that the soil is clay and gravel, with a covering of decomposed vegetation or peat, peculiar to cedar swamps, which will burn when drained of water, and which is practically worthless for farming. The latter state that the soil is a fertile loam and that the land when cleared will in its raw state be worth twenty dollars per acre, and one of them estimates the timber at five million feet, but admits that he had not "cruised" this tract.

But all the witnesses, including the claimant, agree that it will cost two hundred dollars per acre to fell the trees and remove the logs and brush from the land, allowing the stumps to remain. And while, under the law cited, land "unfit for cultivation," and lands, the cost of reducing which to cultivation is practically prohibitive, may be taken under the homestead law, these questions have a decided bearing upon the probable good faith of the entry. It is also true that the homestead law does not require residence after final proof, yet where it is claimed that such land is claimed as and for a home the fact that the claimant does not return to it after final proof has a bearing on the good faith of such claim and entry.

Taking into consideration the value of the timber and quality of the soil as shown by preponderant competent testimony, the meagre residence and improvements, in view of his financial ability, the early final proof and termination of such residence, and the fact that claimant never had a domestic animal or fowl on this land or otherwise indicated an intention of permanently residing thereon, the Department is unable to find in the record any facts on which to base a holding that the entry was made in good faith, for a home, and not for speculative purposes, to dispose of the timber on the land.

Your said decision is accordingly hereby affirmed.

JURISDICTION—LAND DEPARTMENT—PUBLIC LAND—HEARINGS.

INSTRUCTIONS.

By virtue of its jurisdiction over the public lands, involving their care as well as their disposition, the land department may at any time, of its own motion or at the instance of others, wherever it appears or is charged that claims asserted under any of the public-land laws are merely colorable and are used to cloak unlawful timber cutting, illegal fencing, the wrongful exclusion of *bona fide* settlers or claimants, or otherwise to the subversion of those laws, inquire into and determine those questions and thereupon take such further action as may be appropriate and necessary to enforce its jurisdiction and preserve the rights and interests of the public.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *May 15, 1907.* (F. H. B.)

The Department has considered those portions of your communication of February 27, last (not covered by the ensuing instructions of March 27, with respect to certain alleged illegal mining locations in the Plumas and other National forests), in which your office refers to certain mining locations on lands in the occupancy of the California Indians and the action of the Department, at the instance of the Commissioner of Indian Affairs, with respect thereto, and again cites the case of certain placer mining locations upon lands formerly embraced in the Walker River Indian Reservation, reported by an inspector of special agents of your office to have been fraudulently made, upon lands on which there are no indications of mineral, and as having been platted and sold by the locators as townsite lots, in turn reported to the Department, and also cites and quotes a portion of departmental instructions of February 6, last, to your office in that case. Further advice is asked, in view of what was said by the Department in those instructions.

In so far as the reported mining locations on lands in the occupancy of the California Indians are concerned it is sufficient for present purposes, in answer to your inquiry in that matter, to say, that any proceeding which may be initiated before the local land office of that district looking to a determination of the character, and any question of Indian occupancy, of the lands involved, will be entertained for that purpose.

In the case of the placer mining locations in the region of the former Walker River Indian Reservation, reported to the Department January 31, last, your office, submitting the report of the inspector and accompanying data, recommended the institution of criminal proceedings, through the Department of Justice, against those engaged in the reported fraudulent practices, and advised the Depart-

ment that with reference to certain of the reported cases the local land officers of the district had been directed to proceed in accordance with the circular of February 14, 1906 (34 L. D., 439), and that the inspector had been instructed to investigate the remaining cases, evidently as preliminary to a like course. The lands there involved were not then embraced in a forest or other reservation, or devoted or sought to be devoted to any public use, but were in the broadest sense public lands subject to entry and disposal, of which no attempt to purchase and enter, either based upon or in hostility to the mining locations, had yet been made. Under the apparent circumstances of the case the purpose of your office in ordering hearings pursuant to the circular, *supra*, was not clear; and upon informal inquiry the Department was informed that that purpose was to determine the legality or illegality of the mining locations, and, if their illegality should be established, to *cancel* them. Upon that point, alone, the Department said:

> The land department has no power to *cancel* a mining *location*, having in such case nothing before it or within its reach upon which to act, except where it may be able . . . to effect its defeat by the issuance of patent to another than the mining claimant; and no direct effort to *cancel* any such location, or merely to declare it invalid, can accomplish any practical result. If a practice along these lines has been followed by your office it should be discontinued.

In that connection, whilst expressing the opinion that the reports of the inspector appeared to justify a further and full investigation and that criminal prosecutions should be undertaken if sufficient evidence were obtained, the Department deemed the hearings ordered by your office to be inappropriate to that end, and vacated the orders therefor.

Your recent communication having led to further informal inquiry at your office, the Department has now through that source been advised that the orders for hearings, touching the mining locations in that region, had their origin in the fact that many of those who have settled upon the lands involved are purchasers of lots from the locators of the supposed mining claims, and that those settlers, it would appear, partly out of regard for what they believe to be the rights of those locators and partly because they in many instances claim title under them, decline or are reluctant to make, or to attempt to make, townsite entry. The hearings, therefore, it is now explained, were ordered with the view to the correction of the existing conditions.

As a general rule hearings to determine the character of public lands are ordered and had only when *ex parte* claims, or opposing claims which hinge upon that question, are in that regard brought to

the attention of the land department, by protest or otherwise, upon application to secure the legal title, or in analogous cases, as when private claims are inconsistent with some public use or purpose to which the land thereby covered may be devoted, pursuant to law, by or subject to the jurisdiction of any Department of the Government, where the character of the land is a determinative element.

It does not follow, however, that the right to order hearings or enter upon investigations for that or any other essential purpose is confined to such cases. By virtue of its jurisdiction over the public lands, involving their care as well as their disposition, the land department may at any time, of its own motion or at the instance of others, wherever it appears or is charged that claims asserted under any of the public-land laws are merely colorable and are used to cloak unlawful timber cutting, illegal fencing, the wrongful exclusion of *bona fide* settlers or claimants, or otherwise to the subversion of those laws, inquire into and determine those questions and thereupon take such further action as may be appropriate and necessary to enforce its jurisdiction and preserve the rights and interests of the public.

In view of what has thus been brought to the attention of the Department it would appear that the proposed hearings would be justified as the bases, in the event of appropriate results, for further and dispositive action pursuant to the provisions of section 2384, Revised Statutes, as follows:

> If within twelve months from the establishment of a city or town on the public domain, the parties interested refuse or fail to file in the General Land Office a transcript map, with the statement and testimony called for by the provisions of section twenty-three hundred and eighty-two, it may be lawful for the Secretary of the Interior to cause a survey and plat to be made of such city or town, and thereafter the lots in the same shall be disposed of as required by such provisions, with this exception, that they shall each be at an increase of fifty per centum on the minimum of ten dollars per lot.

If, therefore, the cases reported to your office by the inspector, and in turn by your office to the Department, appear to be within the purview of the foregoing section of the statutes, the proposed hearings may be ordered and had in the appropriate manner; and, should any such hearing result in a determination that the land involved is non-mineral in character, and it is definitely ascertained that the cases are within the contemplation of the above-quoted section, your office will thereupon submit its full report and recommendation in the premises, for further action and direction by the Department.

UNEARNED FEES AND UNOFFICIAL MONEYS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 16, 1907.

Registers and Receivers at United States District Land Offices.

GENTLEMEN: Your attention is invited to the following act of Congress approved March 2, 1907:

[PUBLIC—No. 221.]

AN ACT To authorize the receivers of public moneys for land districts to deposit with the Treasurer of the United States certain sums embraced in their accounts of unearned fees and unofficial moneys.

Be it enacted by the Senate and House of Representatives of the United State of America in Congress assembled, That the receivers of public moneys for land districts are hereby authorized, under the direction of the Commissioner of the General Land Office, to deposit to the credit of the Treasurer of the United States all unearned fees and unofficial moneys that have been carried upon the books of their respective offices for a period of five years or more, which sums shall be covered into the Treasury by warrant and carried to the credit of the parties from whom such fees or moneys were received, and into an appropriation account to be denominated "Outstanding liabilities."

SEC. 2. That at the time of making such deposit the receiver shall furnish a list showing the date when the money was paid to him or to his predecessor; the names and residences of the parties; the purposes of the payments and the amounts thereof, which list shall bear the certificate of the register and receiver that the same is correct; that the amounts are due and payable; that diligence has been exercised to return the same, and that the sums specified have remained unclaimed for a period of five years or more.

SEC. 3. That amounts that appear in a receiver's accounts as "Moneys deposited by unknown parties" shall also be deposited to the credit of the Treasurer of the United States, accompanied by a list showing the amount and, if possible, the date of the receipt of each item; which list shall bear the certificate of the register and receiver that, after careful investigation, the ownership of said moneys could not be determined, and that they have been reported in the unearned fees and unofficial moneys accounts for five years or more.

SEC. 4. That any person or persons who shall have made payment to a receiver, or to his predecessor, and the money shall have been covered into the Treasury pursuant to section one or section three thereof, shall, on presenting satisfactory evidence of such payment to the proper officer of the Treasury Department, be entitled to have the same returned by the settlement of an account and the issuing of a warrant in his favor according to the practice in other cases of authorized and liquidated claims against the United States: *Provided,* That when such moneys shall remain unclaimed in the Treasury for more than five years the right to recover the same shall be barred: *Provided,* That no homestead entryman shall be required to make payment of the purchase money on any application to make a cash entry until the same shall have been approved by the register and receiver, but such payment shall be made within ten days after notice of such approval.

Approved, March 2, 1907.

To carry into effect the provisions and intent of the foregoing act, it is hereby ordered that:

1. On the 29th day of June, 1907, the receiver at each district land office shall deposit to the credit of the Treasurer of the United States on account of the appropriation denominated "Outstanding liabilities" all moneys then carried in the receiver's account of unearned fees and unofficial moneys that were paid in or deposited on or before June 29, 1902.

2. The receiver shall prepare in triplicate, on Form No. 4–541a, a list, typewritten if practicable, of unearned fees and unofficial moneys transferred to the Treasury, setting forth accurately the details specified in section 2 of the act, and bearing the certificate of the register and receiver as prescribed in said section. Inasmuch as Form No. 4–541a has no heading for "Residence," the depositor's postal address will be inserted on the line next under that on which his name appears. Receivers will make requisition for a supply of Form 4–541a, if necessary, stating the number of blanks required.

3. The receiver shall likewise prepare in triplicate, on Form 4–541a, a separate list of "Moneys deposited by unknown parties" and transferred to the Treasury as above. This list must set forth, with such particularity as may be possible, information as to the date and character of the items, and must bear the certificate of the register and receiver as prescribed in section 3 of the act.

4. In the accounts of unearned fees and unofficial moneys for the month and quarter ending June 30, 1907, the receiver shall take credit for the amount transferred to the Treasurer of the United States, specifying therein the date and number of the certificate of deposit on account of "Outstanding liabilities." The original and duplicate lists shall be transmitted with the regular quarterly accounts to the Commissioner of the General Land Office, who will examine the same, retain the duplicate, and transmit the original to the Treasury. The triplicate list will be retained by the receiver. At the close of each succeeding quarter, the receiver will similarly transfer to the Treasury unearned fees and unofficial moneys then on hand for five years or more, and transmit similar lists of moneys so transferred.

5. Applications for the return of unearned fees or unofficial moneys that have been transferred to the Treasury under said act of March 2, 1907, should be stated by the applicant in the form of a claim or account, showing the date, purpose and amount of his deposit or balance, and his present post-office address. The register and receiver will certify to the correctness of the account as shown by their records, and forward the same to the Commissioner of the General Land Office for administrative examination and transmittal to the

Treasury Department, which will make settlement with the applicant direct, if his claim is approved.

6. Under the second proviso in section 4 of said act, a homestead entryman who offers commutation proof under section 2301, Revised Statutes, is allowed ten days after receiving notice that his proof has been accepted, within which to pay the commutation price. This privilege is not extended to an entryman who offers final homestead proof on Indian lands or other lands subject to entry under the homestead laws at a price fixed by special law and payable in whole or in part at the time of submitting such proof. If a homestead entryman after being notified of the approval of his commutation proof fails to make payment within ten days, his application will be rejected and the register will notify him thereof. Moneys already paid on commutation proofs that are now suspended, reported in the account of unearned fees and unofficial moneys, may be retained in said account until the suspended proofs are finally accepted or rejected; or, pending final action on such proofs, the purchase money shall, upon application, be returned to the depositor, without prejudice to his homestead rights, and the receiver shall, as soon as practicable, advise all such homesteaders of their right to have their money returned.

7. In all applications to enter or to offer proof, *except under the homestead laws*, purchase money already collected and now reported in the account of unearned fees and unofficial moneys shall be treated as official moneys and be deposited *before June 10, 1907*, to the credit of the Treasurer of the United States (sec. 3617, R. S.). Receivers are urged to make such deposits at once, if practicable, and not to delay the matter until June 10. As soon as deposit is made, receivers shall transmit the duplicate certificate of deposit to this Office, noting thereon the amount transferred under these instructions. These moneys are to be accounted for in the same manner as regular cash receipts, without regard to the final action on suspended proofs. As there is no provision for the repayment of such moneys from the Treasury, the Congress of the United States will be asked at its next session to provide relief in cases where the purchase money has been paid and the application rejected without taint of fraud. Hereafter where payment is made upon submission of proof the money collected shall not be entered in the account of unearned fees and unofficial moneys, pending investigation, but shall be credited directly to the United States according to the purpose of payment, and receiver's receipt (4–131) shall then issue. Said receipt shall likewise be issued when purchase money now reported in the account of unearned and unofficial moneys is credited to the United States as hereinbefore in this paragraph directed, the receipt bearing the current date and having also noted thereon the date when the money was originally de-

posited in the account of unearned fees and unofficial moneys. The receiver shall write in red ink across the face of every such receipt, "Register's certificate not yet issued." In all such cases the register's certificate, subsequently issued if the entry is allowed, shall bear current number and date at the time said certificate issues, and shall refer by number and date to the receiver's receipt previously issued. Said statement in red ink and said reference to receiver's receipt shall likewise be noted in the monthly abstract opposite the appropriate entry therein.

8. The register's and receiver's fees for filing and acting on applications to purchase timber or stone lands shall be paid when the proofs are submitted, and shall then be reported as earned whether the applications are eventually allowed or not. Such fees heretofore received and now carried in the account of unearned fees and unofficial moneys, shall be accounted for as earned at the time when the purchase money is covered into the Treasury.

9. Hereafter the estimated cost of reducing to writing testimony taken before the register and receiver shall be collected from the contesting parties from day to day in advance, and at the close of each day any unearned balance shall be returned, or if additional payment is necessary, it shall then be collected.

10. Applicants shall hereafter be required to make their own contracts for publishing notice of intention to make proof, and they shall make payment therefor directly to the publishers, the newspaper being designated and the notice prepared by the register.

11. The register's fee for notice of the cancellation of an entry, provided by the act of May 14, 1880 (21 Stat., 140), amended by the act of July 26, 1892 (27 Stat., 270), shall not be demanded at the time a contest is initiated, nor until the entry is canceled and notice thereof given to the successful contestant. The *register* will collect this fee at the proper time, and retain the same as personal. Deposits on account of register's fee for notice of cancellation, now reported in the account of unearned fees and unofficial moneys, shall, if possible, be returned to the parties who deposited the same, the receiver securing proper voucher therefor.

12. Departmental regulations and office instructions heretofore issued, in so far as they are in conflict with the regulations herein, are hereby superseded.

Very respectfully,

R. A. BALLINGER,
Commissioner.

Approved, May 16, 1907.

JAMES RUDOLPH GARFIELD,
Secretary.

COAL LANDS IN ALASKA.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 16, 1907.

Register and Receiver, Juneau, Alaska.

GENTLEMEN: The following instructions are issued for your guidance:

1. Under the order of November 12, 1906, withdrawing lands in Alaska from entry, location, or filing under the coal-land laws, and subsequent modifications of said order, no lands in Alaska known to contain workable deposits of coal can be entered, located, or filed upon while such orders remain in force, except as hereinafter provided.

2. All qualified persons or associations of qualified persons who had within one year prior to November 12, 1906, in good faith made legal and valid locations under the act of April 28, 1904, may file notices of such locations in the manner and within the time prescribed by said act, if such notices have not already been filed and such locations have not been abandoned or forfeited; and they or any other person or persons to whom they may lawfully assign their rights after such notices have been filed may thereafter proceed to make entry and obtain patent within the time and in the manner prescribed by law.

3. In computing the time within which notices of location may be filed under the preceding paragraph, the time intervening between November 12, 1906, and August 1, 1907, will not be taken into consideration or counted, but such notices may be filed within one year from the date of location exclusive of such time.

4. All qualified persons or associations of qualified persons who may have in good faith legally filed valid notices of location under the act of April 28, 1904, prior to November 12, 1906, and the bona fide qualified assignees of such persons, may make entry and obtain patent under such notices within the time and in the manner prescribed by statute if they have not abandoned their right to do so.

5. In computing the time within which persons or associations of persons mentioned in the preceding paragraph may apply for patent, the time intervening between November 12, 1906, and the day on which they receive the written notices given by you as hereinafter required will not be considered or counted, and such applications may be made at any time within three years from the date on which such notices of location were filed exclusive of such time.

6. You are directed to at once notify all persons or associations of persons who have filed notices of location in your office, including those who have pending applications for patent, and all per-

sons or associations of persons holding as assignees under such locations who have notified you of such assignments, of their right to proceed in the manner herein prescribed and authorized, and to furnish them with a copy of these instructions. These notices must be served either personally or by registered mail, and you should carefully preserve with the record in each case the registry return receipt or other evidence of such notice.

7. In all cases where you publish notice of applications for entry or patent under the coal-land laws, or under any other law, you will at once mail a copy of said notice to a special agent assigned to duty in Alaska. Should said agent thereafter file in your office a protest against the validity of the location or claim embraced in any such application you will defer action upon such application until said protest is withdrawn or appropriate action is taken thereon.

Very respectfully,

R. A. BALLINGER,
Commissioner.

Approved:
JAMES RUDOLPH GARFIELD,
Secretary.

OKLAHOMA PASTURE LANDS—DECEASED APPLICANT—RIGHTS OF WIDOW.

INSTRUCTIONS.

Upon the death of a person who applied for and was awarded Oklahoma pasture lands prior to making entry thereof, the right to enter is cast by law upon his widow, who is required to either cultivate or reside upon the land for the requisite period, but need not do both.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *May 17, 1907.* (C. J. G.)

May 9, 1907, your office submitted the question—

Whether in cases where entries are made by widows of persons to whom Oklahoma Pasture lands were awarded the widows will be excused from maintaining residence under the homestead laws?

In the case with respect to which the question is submitted the lands were awarded and set apart to the husband prior to his death, the deposit covering his first payment therefor was in the hands of the receiver, and all that remained to be done by him was to make homestead entry based on such award. Under the regulations of October 19, 1906 (35 L. D., 239), prescribing the method of sale of these pasture lands under the act of June 5, 1906 (34 Stat., 213),

after the awards had been made the successful bidders were to be notified by the local officers of a date on which they would be required to appear and make entry. These regulations further provided:

> The widows and heirs of persons who make entry under this act will not be required to maintain both residence and cultivation upon the lands covered by the entry of a deceased entryman, but patent will issue to them upon a sufficient showing of either residence or cultivation and the payment of the unpaid purchase money.

The foregoing is based upon a long line of decisions construing section 2291 of the Revised Statutes, which provides for a certificate of entry and patent "to the person making such entry; or if he be dead, his widow," etc. If an entry had actually been made in this case by the husband prior to his death, there is no question the widow could comply with law by either residing upon or cultivating the land, but she would not be required to do both. Stewart *v.* Jacobs (1 L. D., 636); Swanson *v.* Wisely's Heir (9 L. D., 31); Agnew *v.* Morton (13 L. D., 228); Brown *v.* Naylor (14 L. D., 141); Ware *v.* Wright (22 L. D., 181); Heirs of Stevenson *v.* Cunningham (32 L. D., 650); and Circular of August 4, 1906 (35 L. D., 187, 196). Nor is there any question, the husband having by his application initiated a right to make entry which was also confirmed by the award made to him, the widow may make entry for the land. Townsend's Heirs *v.* Spellman (2 L. D., 77); Tobias Beckner (6 L. D., 134); Prestina B. Howard (8 L. D., 286); Bellamy *v.* Cox (24 L. D., 181); and Northern Pacific R. R. Co. *v.* Coffman *et al.* (24 L. D., 280). In the Beckner case it was said:

> The broad underlying principle that controls the question is—that when a person initiates any right in compliance with, and by authority of the public land laws, and dies before completing or perfecting that right, it will not escheat and revert to the government, but inure to those on whom the law and natural justice cast a man's property, and the fruits of his labor after his death.

In the case of McPeek *v.* Sullivan *et al.* (25 L. D., 281) it was held that under a homestead entry made by the heirs of a successful contestant in accordance with the act of July 26, 1892, actual residence on the land is not required, if cultivation thereof is shown for the requisite period, it being said:

> The act of 1892 (*supra*), casts upon the heirs of a deceased contestant (if citizens, &c.,) the same right to enter the land upon the cancellation of the former entry as a result of a contest commenced by the deceased. Thereafter, the obligations imposed upon such heirs are no greater than those which are cast upon the heirs of a deceased homesteader; and in the latter case cultivation of the land for the required period, without actual residence thereon, is held to be sufficient.

In the case of Bellamy *v.* Cox, *supra*, it was said:

> Mrs. Crawford, having thus succeeded to the rights of her deceased husband, immediately took steps to protect those rights. She filed her formal applica-

tion to enter and continued the cultivation and improvement of the tract. It was not necessary for her to reside on the land.

Applying the foregoing principles of construction here, the widow of a person who applied for and was awarded Oklahoma Pasture lands, in making entry will but consummate a right initiated by her husband. His right to enter is cast by law upon her, and in thus succeeding to such right certain requirements devolve upon her under the homestead law, namely, either to reside upon or cultivate the land, but she need not do both. If therefore she cultivates the land for the requisite period, her husband prior to his death having done all that was required of him, she will be doing all that the law imposes upon her.

FINAL PROOF—DESERT LAND ENTRY—WATER RIGHT—EVIDENCE.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 18, 1907.

Registers and Receivers, United States Land Offices, Wyoming and Idaho.

SIRS: May 10, 1907, the Secretary of the Interior approved the recommendation of this office, which makes applicable to the States of Wyoming and Idaho the general recommendation of this office of October 25, 1906, contained in circular "G" of December 17, 1906 [35 L. D., 352], respecting the character of evidence required of desert land claimants to establish their rights to sufficient water to properly irrigate the lands entered by them, to wit,

> That the regulations governing final proofs in desert land entries be modified to require the entryman to show in making final proof that he has a right to the use of sufficient water to properly irrigate the irrigable land in his entry; that he has done all that the laws of the State or Territory require him to do for the maintenance of that right, and that he has actually used the water for the irrigation of the land embraced in his entry.

Under these instructions entrymen in the States of Wyoming and Idaho are not required to furnish the certificate of the State engineer mentioned in said circular of December 17, 1906, and the local officers in said states will be governed accordingly in all cases where, through no fault of the claimant, an absolute right to the use of water for irrigation can not be shown.

Very respectfully,

R. A. BALLINGER,
Commissioner.

PRACTICE—WITHDRAWAL OF APPLICATION TO AMEND OR MAKE SECOND ENTRY.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 18, 1907.

Registers and Receivers,
United States Land Offices.

GENTLEMEN: Where an application for second entry or amendment of an entry has been transmitted by you for the consideration of this office, and subsequently the applicant files in your office a withdrawal of his application, you will, unless the matter be involved in controversy, consider said withdrawal as a dismissal of the application and note such application withdrawn and the case closed upon your records, and transmit each withdrawal by a letter to this office, reporting your action thereon.

In cases where such application is involved in a contest or controversy pending before this office or the Department, you will promptly transmit the withdrawal for action in connection with the record.

Very respectfully,

R. A. BALLINGER, *Commissioner.*

Approved:
JAMES RUDOLPH GARFIELD,
Secretary.

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

MONTANA IMPLEMENT COMPANY.

After the lapse of more than two years from the issuance of final certificate for a desert land entry upon proof made in full compliance with regulations then in force, the confirmation extended by the proviso to section 7 of the act of March 3, 1891, becomes effective, in the absence of a pending adverse proceeding, and the land department is thereafter without jurisdiction to initiate any proceeding against said entry, by calling for additional proof or otherwise, except for causes which would prevent confirmation irrespective of the lapse of time from the date of the entry.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *May 27, 1907.* (F. W. C.)

April 25, 1907, the Department granted a petition filed by the Montana Implement Company, claimant through assignment of desert land entry made by John Le Roy, October 1, 1901, for the W. ½ of NE. ¼, the SE. ¼ of NW. ¼ and NW. ¼ of SW. ¼, Sec. 32, T. 25 N., R. 3 W., Great Falls land district, Montana, complaining of the refusal of your office to transmit its appeal from your decision of November 14, 1906, requiring additional proof showing that

the individual members of said company have not received by assignment or otherwise, under the desert land laws, title to a quantity of land which in the aggregate, with the land applied for, will exceed 320 acres, and in accordance therewith the record upon said appeal is now before the Department, having been transmitted with your office letter of the 7th instant.

It is disclosed by said record that said company submitted final proof upon said entry and received final certificate August 14, 1903. At the time of making said proof the company presented the following affidavit:

> That since August 30, 1890, it [The Montana Implement Company] had not entered under the laws of the United States, or filed upon, nor has there been assigned to it, a quantity of land agricultural in character, and not mineral, which with the tract now assigned would make more than three hundred and twenty acres.

This form of proof seems to have been considered sufficient by your office at the time it was made, in evidence of which is a copy of a decision by your office addressed to the register and receiver at Great Falls, Montana, dated January 2, 1904, in which the action of the local officers in requiring specific proof of the qualifications of the persons comprising the J. H. McKnight Company, claimant through assignment of desert land entry No. 6277, Helena series, was reversed and wherein it was held that:

> The J. H. McKnight Company is a person in contemplation of law, and has shown its qualifications as an assignee. Therefore the yearly proof is accepted and the assignment recognized.

Under departmental order of July 15, 1903, directing that until further orders no desert land entries for lands in the Great Falls land district be passed to patent, no action appears to have been taken by your office upon this entry until on July 20, 1905, a special agent was directed to ascertain whether the law had been complied with in the matter of improvement, annual expenditure and reclamation of the land. September 25, 1906, the special agent reported favorably upon the entry as to reclamation, water supply, dam and ditches, and that the sum of three dollars per acre had been expended in the reclamation of the land.

Although more than three years had expired from the date of the issue of final certificate upon this entry at the time of the receipt of the favorable report thereon by the special agent, your office on November 14, 1906, required the additional showing hereinbefore referred to, presumably in view of the holding of this Department in the case of Jacob Switzer Company (33 L. D., 383), wherein it was held that (syllabus):

> A corporation seeking to hold lands under the assignment of a desert land entry, must show that the members composing the corporation do not hold, in

the aggregate, by assignment or otherwise, more than three hundred and twenty acres of land under the desert land law.

Instead of complying with the call for additional proof the company attempted to appeal and in its appeal urges that there was error in making the call for the reasons: first, that at the time of the submission of final proof the showing made was in full compliance with the requirements of your office governing this class of cases; and second, that because of the lapse of more than two years from the issue of the final certificate your office is without jurisdiction to make further requirement in the matter of proof because of the confirmation extended by the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095), and that nothing remains to be done on the part of your office with respect to this entry except the ministerial duty of issuing patent thereon as required by said proviso.

After a most careful consideration of the matter, in the opinion of this Department the appeal is well taken.

The proviso in question reads as follows:

> That after the lapse of two years from the date of the issuance of the receiver's receipt upon final entry of any tract of land under the homestead, timber culture, desert land or preemption laws, or under this act, and where 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.

The land in question appears to have been subject to the entry and upon the face of the record it can not be held that the entry is void. Any proceeding by the government to determine the validity of the entry commenced within two years after the date of the issuance of final receipt would undoubtedly suspend the running of the statute and authorize further investigation as to the validity of such entry. John N. Dickerson (33 L. D., 498). The order of July 20, 1905, directing investigation for the purpose of ascertaining whether the law had been complied with was a proceeding of that character, but when no adverse action was taken by your office upon the report of the special agent which, as before stated, was favorable to the entry in the matters investigated and reported upon, there was no adverse proceeding pending against the entry at the date of your decision of November 14, 1906, and your office was precluded from taking any further action against such entry except for causes which would prevent confirmation irrespective of the lapse of time from the date of entry.

In applying the confirmatory provisions of the proviso of section 7 of the act of March 3, 1891, *supra*, it has been held by this Department that preemption entries although made in violation of section 2260 of the Revised Statutes, were nevertheless confirmed after the lapse of two years from the date of the final entry. See case of Patrick Tracey (13 L. D., 392); Joseph X. Yocum (16 L. D., 467),

and Sexon *v.* Jones *et al.* (18 L. D., 164). It has also been held that a preemption entry made by one who had previously filed a declaratory statement and was therefore disqualified from making the entry, was nevertheless confirmed (see case of Jairus Lincoln, 16 L. D., 465); and that an additional homestead entry allowed on a certificate of right issued on account of service in the Missouri Home Guards, notwithstanding such service would not support the entry, was nevertheless confirmed. (Carroll Salsberry, 17 L. D., 170.)

From the above it seems that unless exception is taken to the sufficiency of the proof in any particular within two years succeeding the issuance of the final certificate based thereon, no further investigation can be made thereof and that the entry is confirmed by the statute. As before stated, this land was subject to desert land entry, and upon the face of the entry it can not be held to be void. It follows as a consequence that in accordance with the terms of confirmation patent must issue thereon. The order of your office requiring further showing as to the qualifications of the individual members of the company with respect to the provisions of the desert land law, is hereby set aside.

SECOND HOMESTEAD ENTRY—"UNAVOIDABLE COMPLICATION"—ACT OF APRIL 28, 1904.

JOHN C. HEISLER.

The provision of the act of April 28, 1904, authorizing second homestead entry in cases where the entryman was unable to perfect his original entry "on account of some unavoidable complication of his personal or business affairs," and "did not relinquish his entry or abandon his claim for a consideration," contemplates that the "unavoidable complication" shall be one arising subsequent to the making of the entry, and which prevented the completion thereof, and not one existing at the time the entry was made.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *May 27, 1907.* (E. F. B.)

John C. Heisler has appealed from the decision of your office of October 27, 1906, rejecting his application to make a second homestead entry under authority of the provisions of the act of April 28, 1904 (33 Stat., 527), of the NW. ¼, Sec. 23, T. 159 N., R. 101 W., Williston, North Dakota, having made a former homestead entry which he alleges was relinquished because he was unable to perfect the same on account of unavoidable complication of his personal affairs.

He states that when he made his entry he was a poor boy, 21 or 22 years of age, dependent upon his own labor for support, that he was a wood-chopper and very poor, and therefore unable to continue a residence on his homestead by reason of the fact that he had no

money to improve the claim and no one to help him. You held that the applicant was financially unable to perfect his entry when he made it, and that the unavoidable complication of personal or business affairs contemplated by the act must be one arising subsequent to the making of the entry, which prevented the completion of the entry.

There is no error in interpretation of the statute and your decision is affirmed.

REPAYMENT—EXCESS—ACT OF JUNE 16, 1880.

EUGENE DESPIN.

The act of June 16, 1880, does not authorize repayment of an excess or overcharge, due to miscalculation, after the money has been covered into the treasury.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *May 28, 1907.* (C. J. G.)

An appeal has been filed by Eugene Despin from the decision of your office of April 29, 1907, denying his application for repayment of an excess or overcharge, due to miscalculation, paid by him on timber and stone entry for lots 1, 2 and 3, Sec. 4, T. 26 N., R. 24 W., Kalispell, Montana.

Repayment can only be made upon specific statutory authority. As early as 4 Op., 227, 229, the Attorney-General held, the repayment act of January 12, 1825 (4 Stat., 80), being under consideration:

> In reference to cases of error arising out of miscalculation of the amounts to be paid, I have had more difficulty. Money thus paid is never properly in the Treasury of the United States. It is paid and received by mutual mistake; and as long as it remains in the hands of the receiving officer, I can perceive no good reason why, upon discovery of the error, he should not be authorized to correct it. After it has found its way into the Treasury, however, like all other money, it should be withdrawn in strict fulfilment of the requirements of the law, which the administrative power of the executive department of the government can not control.

And in the same volume, pages 253, 255, it was stated:

> It will not do to say that the Department may refund simply because it is just that the money should be repaid, or that it is in the hands of the government by mistake, or without consideration.

The same principles are equally applicable to the repayment act of June 16, 1880 (21 Stat., 287), and as said act fails to provide for repayment in a case such as is here presented, Despin's application must be and hereby is denied, the decision of your office being affirmed accordingly.

SCHOOL LAND—SETTLEMENT PRIOR TO SURVEY—NOTICE OF ENTRY.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 30, 1907.

Registers and Receivers, United States Land Offices.

SIRS: The circular of instructions of June 21, 1905 (33 L. D., 638), is hereby amended to read as follows:

In any case where, upon an ex parte showing of settlement prior to survey of the lands in the field, an entry is allowed under section 2275, United States Revised Statutes, as amended by act of February 28, 1891 (26 Stat., 796), of lands within a section that has been granted, reserved, or pledged for the use of schools or colleges, it will be the duty of the register to at once advise the proper State or Territorial authorities thereof by registered mail. Such notice will give the description of the land, the date of survey, the date and number of entry, the name and post-office address of the entryman, and the date of alleged settlement. A copy of the notice, together with the postmaster's receipt for the letter containing same, will be filed with the entry papers, and forwarded therewith to the General Land Office.

A State or Territory protesting against the allowance of an entry will be required to attack same by affidavit of its authorized agent, duly corroborated, as prescribed in Rules 2 and 3 of Practice, when it will become your duty to order a hearing to determine the respective rights of the parties (Baxter *v.* Crilly, 12 L. D., 684).

These instructions are not intended to supersede or modify, in any particular, instructions of May 15, 1901 (30 L. D., 607), requiring the citation of the State or Territory in the published notice and evidence of service at time of final proof.

Very respectfully,

R. A. BALLINGER,
Commissioner.

Approved, April 30, 1907:

JAMES RUDOLPH GARFIELD,
Secretary.

ISOLATED TRACTS—SEC. 2455, R. S., AS AMENDED BY ACT OF JUNE 27, 1906.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 16, 1907.

Registers and Receivers, United States Land Offices.

SIRS: The sale of isolated tracts of public lands (outside of the area in the State of Nebraska described in the act of March 2, 1907,

34 Stat., 1224), is covered by the provisions of the act of June 27, 1906 (34 Stat., 517), amending section 2455 of the Revised Statutes.

1. Applications to have isolated tracts ordered into market must be filed with the register and receiver of the local land office in the district wherein the lands are situate.

2. Applicants must show by their affidavits, corroborated by at least two witnesses, that the land contains no salines, coal or other minerals; the amount, kind, and value of timber or stone thereon, if any; whether the land is occupied, and if so the nature of the occupancy; for what purpose the land is chiefly valuable; why it is desired that same be sold; that applicant desires to purchase the land for his own individual use and actual occupation and not for speculative purposes, and that he has not already purchased any public land sold as an isolated tract under an application for such sale presented by him.

Applicant must also state whether he has heretofore purchased lands under the provisions of this act, and if so give description of the same by section, township, and range.

3. The local officers will upon receipt of applications note same in pencil upon the tract books of their office, and immediately thereafter forward the same to the General Land Office, reporting the status of the land as shown by their records, and the existence of any objection to the offering of the lands for sale.

4. The filing of application does not affect the status of the land nor segregate it prior to the approval of the application by the General Land Office, nor does it give applicant any preference right over others who may desire to purchase the land at any sale that may be had thereunder, as same must be disposed of to the highest bidder.

5. If the land is ordered into market the local officers will be so advised and directed to give applicant notice thereof, allowing him thirty days within which to deposit with the receiver an amount to cover the expense of sale, including the cost of publication of notice.

6. When lands are ordered to be offered at public sale the register and receiver will cause a notice to be published once a week for five consecutive weeks (or thirty consecutive days if a daily paper) immediately preceding day of sale, in a newspaper to be designated by the register as published nearest to the land described in the application, using the form hereinafter given. The register and receiver will cause a similar notice to be posted in the local land office, such notice to remain posted during the entire period of publication. The register will require the publisher of the newspaper to file in the local office prior to the date fixed for sale evidence that publication has been had for the required period,

which evidence may consist of the affidavit of the publisher accompanied by a copy of the notice published.

7. At the time and place fixed for sale the register or receiver will read the notice of sale and allow all qualified persons present an opportunity to bid. After all bids have been offered the local officers will declare the sale closed and announce the name of the highest bidder, who will be declared the purchaser, and who must immediately deposit the amount bid by him with the receiver and within ten days thereafter furnish evidence of his citizenship, nonmineral and nonsaline affidavit (Form 4–062) or nonsaline affidavit (Form 4–062A), as the case may require. Upon receipt of the proof, payment having been made for the land, the local officers will issue the proper final papers.

8. No lands will be sold at less than the price fixed by law, nor at less than $1.25 per acre. Should any of the lands offered be not sold, the same will not be regarded as subject to private entry unless located in the State of Missouri (act of March 2, 1889, 25 Stat., 854), but may again be offered for sale in the manner herein provided.

9. After each offering where the lands offered are *not* sold, the local officers will report by letter to the General Land Office. No report by letter will be made when the offering results in a sale, but the local officers will issue cash papers as in ordinary cash entries, noting thereon the date of the letter authorizing the offering, and report same in their current monthly returns. With the papers must also be forwarded the affidavit of publisher showing due publication, and the register's certificate of posting.

Very respectfully,

R. A. BALLINGER,
Commissioner.

Approved, May 16, 1907:
JAMES RUDOLPH GARFIELD,
Secretary.

(Form 4–008B.)

APPLICATION FOR SALE OF ISOLATED OR DISCONNECTED TRACTS.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,

———— ————,
———— ——, *19—*.

To the Commissioner of the General Land Office:

The undersigned, whose post-office address is ————, respectfully requests that the ———— of Section ——, Township ——, Range ——, be ordered into market and sold under the act of June 27, 1906 (34 Stats., 517), at public

auction, all the surrounding lands having been entered or otherwise disposed of. Applicant states that this land contains no salines, coal or other minerals, and no stone except (state amount and character); that there is no timber thereon except —— trees of the ——— species, ranging from —— inches to —— feet in diameter, and aggregating about —— feet stumpage measure, of the estimated value of $———; that the land is not occupied except by ——— of ——— post office, who occupies and uses it for the purpose of ———, but does not claim the right of occupancy under any of the public land laws; that the land is chiefly valuable for ———, and that applicant desires to purchase same for his own individual use and actual occupation for the purpose of ———, and not for speculative purposes. That he has not heretofore purchased any public land sold as an isolated tract under an application for such sale presented by him, and has purchased, directly or indirectly, no lands under the provisions of the above act, except ———.

If this request is granted, applicant agrees to deposit in advance a sum sufficient to defray all expenses of the sale, including the cost of publication of notice.

———— ————,
Applicant.

The facts stated in the foregoing application as to character and condition of the land are true to our own personal knowledge.

———— ————,
———— ————,
Corroborating witnesses.

The above applicant and corroborating witnesses, to me personally known (or satisfactorily identified by ———), being first sworn by me, say that the facts stated in said application are true.

———— ————,
———— ————.

(Form 4–283A.)

NOTICE FOR PUBLICATION—ISOLATED TRACT.

PUBLIC LAND SALE.

DEPARTMENT OF THE INTERIOR,
——— LAND OFFICE,
——— ——, *19—*.

Notice is hereby given that, as directed by the Commissioner of the General Land Office, under the provisions of the act of Congress approved June 27, 1906 (34 Stats., 517), we will offer at public sale to the highest bidder, at —— o'clock, —— M., on the —— day of ———, next, at this office, the following tract of land: ———.

Any persons claiming adversely the above-described lands are advised to file their claims or objections on or before the time designated for sale.

———— ————,
Register.

———— ————,
Receiver.

ADDITIONAL HOMESTEAD ENTRY—COMPACTNESS—SECTION 2, KINKAID ACT.

RALPH E. WERTZ ET AL.

The provision of the act of April 28, 1904, that the land entered thereunder "shall be as nearly compact in form as possible, and in no event over two miles in extreme length," contemplates that the original entry shall be taken into account, in cases of additional entry under section 2 of said act, and that the original and additional entries taken together shall conform to this requirement.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *June 10, 1907.* (E. O. P.)

Nora B. Nolan, formerly Bourret, has appealed to the Department from your office decision of September 19, 1906, rejecting in part her application to make homestead entry under the provisions of section 2 of the act of April 28, 1904 (33 Stat., 547). Said application covered the SE.¼ NE.¼, NE.¼ SE.¼, Sec. 29, S.½ NW.¼, N.½ SW.¼, S.½ NE.¼, N.½ SE.¼, Sec. 28, SW.¼ NW. ¼, NW.¼ SW.¼, Sec. 27, T. 30 N., R. 56 W., Alliance land district, Nebraska. Nolan's application was presented June 29, 1904, and under it she sought to exercise the preference right of entry granted by the second proviso of section 3 of said act to those qualified to make entry under the provisions of section 2 thereof.

The same day declaratory statements were filed by agents of Charlotte Cox and William C. Wertz for all of sections 28 and 27, respectively. A conflict thus arose as between Nolan, Cox and William C. Wertz.

Applications were also presented by Peter Bourret and Ralph E. Wertz, and the rights of said parties were also before your office for consideration, but the questions there presented are now eliminated by the failure of the heirs of said Bourret to appeal from your said decision.

Your office held that the rights of William C. Wertz were superior to those of Nolan as to the tracts in conflict between them in said section 27. Cox was also accorded a superior right of entry as against Nolan for all the lands in conflict between them in said section 28. The right of Nolan under her application was thus limited to the SE.¼ NE.¼ and NE.¼ SE.¼ of said section 29.

The action of your office is based upon the finding that Nolan had failed to observe the requirement of the statute that the land entered should be located in as compact form as possible.

The land described in Nolan's application lies in rectangular form one and a half miles long and a half-mile wide, but the whole area embraced in said application and in the original entry, upon which

the right asserted depends, is irregular in shape. Your office held that in applying the rule as to compactness the original entry must be taken into account. This view accords with the rule adopted for determining the length of similar entries (James Dinan, 35 L. D., 102, 104), and the same reasons exist for observing such practice with respect to the question of compactness.

Counsel for Nolan contends that the term "compact" has no well settled meaning, and inasmuch as the statute itself fails to define it, the Department would be unwarranted in so construing it as to limit the exercise of a wide discretion on the part of the entryman. In the absence of an express definition of the term by the language of the statute itself, it is the plain duty of the Department to so construe it as to give proper effect to the law which it is its duty to wisely administer. To give any controlling effect to the "opinion" of an applicant in each of the many cases arising under the statute, would invite confusion and prevent the adoption of any settled rule.

The requirement governing the location of the land sought to be entered is that it be "as nearly compact in form as possible." It is clear that Congress intended to prescribe one form of location to which all entries should approximate. That form is a square, and any departure therefrom will only be permitted where it is impossible, under the circumstances existing at the date of filing the application to enter, to secure the full area allowed by taking land in such form. This is the view adopted by the Department with respect to desert land entries under the act of March 3, 1877 (19 Stat., 377). See Maren Christensen (4 L. D., 317); J. H. Christensen (9 L. D., 202); Joseph Shineberger, on review (9 L. D., 379, 380). The same rule was applied to entries made under the act of March 3, 1891 (26 Stat., 1095). (Circular of November 28, 1902, 31 L. D., 441.) The meaning of the term as thus applied is not without judicial sanction. In the case of Davenport *et al. v.* Kirkland (40 N. E., 304, 315), wherein a construction of the term "compact" arose, the court said:

> The most compact district, territorially, would be a circular plane, every point on the boundary of which would be equidistant from the center. Next would come the square.

The Department relying upon the decisions cited is unwilling to accede to the view of counsel that the manner of compliance with this requirement of the statute is a mere matter of opinion. The only logical inference is that Congress intended that all entries made under the act in question should be located as nearly as possible, under the circumstances presented at the date of filing the application to enter, in a square form, and this inference is strengthened by the other limitation imposed that no entry shall, *in any event*, exceed more than two miles in extreme length.

It is clear, therefore, that Nolan's application, as presented, can

not be allowed, and as it further appears that she has, since filing the same, become disqualified by marriage from making other entry, she is not entitled to amend. She can therefore be permitted to take only such of the lands applied for as would have been embraced in her application had it included, in addition thereto, such other tracts as would have rendered it as compact in form as possible. In addition to the 80 acres in section 29, which your office held subject to her application, she would have been compelled, in order to have secured the 480 acres to which she was entitled, to include therein at least 200 acres in section 28, even though she had taken all the vacant lands surrounding her original entry. As held by your office, 80 acres of the 200 acres situated in section 28, and not included in her application, must necessarily in conformity with the rule announced, have been the NW.¼ NW.¼ and SW.¼ SW.¼ of said section. But she was entitled, in addition to the tracts last described, which she should have taken, and the 80-acre tract lying between them included in her application, to another tract of 40 acres. This tract could only have been taken from one of the four 40-acre tracts composing the E. ½ W. ½ of section 28, and your office found that she was limited in her selection to the SE.¼ SW.¼ of said section. In the opinion of the Department this limitation was unwarranted, and had she taken all of the W.½ W.½ of said section as she should have done she might have completed her entry by taking any one of the 40-acre tracts in the E.½ W.½ of the section. Neither can it be held that Nolan, by her failure to observe the rule as to compactness, waived her right to take under her application such of the tracts applied for as she would have been entitled to take had the rule been fully observed. As to those tracts she had a preference right of entry as against which no right could be initiated by Cox prior to the expiration of the period allowed her within which to assert it. Her application may, therefore, be allowed for the SW.¼ NW.¼, NW.¼ SW.¼ and also either the SE.¼ NW.¼ or the NE.¼ SW.¼, Sec. 28, as she may elect, in addition to the tracts in section 29, awarded her by your office decision.

This disposition of the matter eliminates all conflicts with the declaratory statement of William C. Wertz. It is noted in this connection that an application to enter, based upon declaratory statement, is executed by agent. Wertz should be advised that *entry* can only be made by him in person.

The same is true as to the papers filed on behalf of Cox, and the declaratory statement filed by her agent does not clearly show that she is entitled to proceed in this manner, as it nowhere appears in her affidavit that her deceased husband never exercised his rights under section 2304, Revised Statutes. Inasmuch, however, as Cox will now be compelled to amend her declaratory statement by eliminating therefrom the tracts awarded to Nolan, in the event the latter

perfects her entry as herein directed, she may at the same time cure any defects in the papers now on file. Nolan should be required to complete her entry within 30 days from notice in order that Cox may proceed intelligently and without delay. Cox may, under the provisions of the act, take other lands in lieu of those in section 28 awarded to Nolan or, if she so desires, may withdraw her declaratory statement without prejudice to the future assertion of whatever rights she may possess.

The decision appealed from is modified accordingly.

RAILROAD GRANT—WITHDRAWAL ON GENERAL ROUTE—PRIVATE CASH ENTRY.

NORTHERN PACIFIC RAILWAY COMPANY.

No such vested interest is acquired to land within the primary limits of a railroad grant by the filing of a map of general route and withdrawal based thereon as will prevent disposition of the land by the United States prior to the filing of the map of definite location; and where entry is allowed prior to definite location, and afterwards canceled under an erroneous construction of the grant, the conflicting claims are subject to adjustment under the provisions of the act of July 1, 1898, unless the entryman had prior to January 1, 1898, by the acceptance of the money paid upon said entry, or otherwise, abandoned his claim to the land.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *June 10, 1907.* (F. W. C.)

The Department is in receipt of your letter of the 4th instant recommending suit against the Northern Pacific Railway Company, as successor in interest to the Northern Pacific Railroad Company, to recover title to the SE.¼ of NE.¼ of Sec. 3, T. 16 N., R. 5 W., Olympia land district, Washington.

This tract was within the primary limits of the grant made by the joint resolution of May 31, 1870 (16 Stat., 378), in aid of the construction of that portion of the Northern Pacific railroad extending northward from Portland to Puget Sound. A map of general route of this portion of the line was filed August 13, 1870, the road being definitely located opposite the tract in question May 14, 1874.

Under the mistaken construction of the decision of the Supreme Court in Buttz *v.* Northern Pacific Railroad Co. (119 U. S., 55), this Department for many years held that a legislative withdrawal attached upon the filing of the map of general route and that thereafter, and even before notice of such withdrawal was received at the local land office, the lands falling within the limits adjusted to the line of general route were reserved from all classes of appropriation under the public land laws.

Notice of withdrawal upon the map of general route was not received at the local land office until October 19, 1870. The tract in question was, however, purchased at private entry by one Andrew J. Gibson, September 19, 1870, and on May 1, 1872, a form of patent was prepared, signed, and recorded, to be issued upon Gibson's entry, but failed of its purpose to pass the title of the United States because it was neither sealed nor delivered.

Acting under the erroneous interpretation of the decision of the court referred to, your office on November 26, 1894, held Gibson's entry and incompleted patent for cancellation, and upon appeal this decision was affirmed by the Department, March 16, 1896. A motion for review was denied October 6, 1896, and thereafter the entry of Gibson and the incompleted patent were canceled October 30, 1896. January 3, 1899, the railway company listed the tract on account of its grant and the patent of the United States issued to the company for this land March 6, 1902.

January 26, 1903, the Supreme Court, in the case of Nelson *v.* Northern Pacific Railroad Company (188 U. S., 108, 121), after a most careful review of the previous decisions of the court bearing upon the question as to rights secured by the Northern Pacific Railroad Company by reason of the filing of a map of general route, held:

> It results that the railroad company did not acquire any vested interest in the land here in dispute in virtue of its map of general route or the withdrawal order based on such map; and if such land was not "free from preemption or other claims or rights," or was "occupied by homestead settlers" at the date of the definite location on December 8, 1884, it did not pass by the grant of 1864.

Under this decision it seems clear that the adjudication of this Department against Gibson was erroneous, and unless he had by receiving the return of his purchase money paid on the entry of this land, or otherwise abandoned his claim, he had such a conflicting claim on January 1, 1898, as was subject to adjustment under the provisions of the act of July 1, 1898 (30 Stat., 597, 620).

From the statement in the papers now before the Department it appears that on April 28, 1906, Gibson filed his election to retain this tract under the provisions of the act of 1898; that this application was denied by your office upon the theory that there was no pending controversy on January 1, 1898, because of the previous adverse adjudication against Gibson, but it is because of his purchase made, as before stated, September 19, 1870, which was still of record, uncanceled, at the date of the definite location of the road, May 14, 1874, that suit is now recommended to set aside the title issued under the railroad grant and restore the title in the United States.

From a review of the matter it is believed that the better course would be to review the adverse adjudication of your office upon Gib-

son's election to retain this tract under the act of 1898, with direction that the tract be listed for relinquishment under said act upon Gibson's election, and that upon approval of such list that demand be made upon the company for the reconveyance of this land preliminary to any action looking to a recovery of title. Should the company make reconveyance, as requested, after the tract is listed for relinquishment under the act of 1898, suit will be unnecessary; otherwise, a record of the entire proceeding should then be submitted to the Department when request will be made of the Attorney General for the institution of a suit to clear the record of the outstanding erroneous patent under the railroad grant.

SECOND HOMESTEAD ENTRIES.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 11, 1907.

Registers and Receivers, United States Land Offices:

1. Section 1 of the act of April 28, 1904 (33 Stat., 527), allows second entries by persons otherwise qualified who *made* homestead entries and *lost, forfeited, or abandoned them before the date of the act*, after a *bona fide* effort to comply with the homestead law, because they were unable to perfect same on account of an unavoidable complication of their personal or business affairs, or on account of an honest mistake in the character of the land, and who did not relinquish their entries or abandon their claims for a consideration.

2. The person applying to make second homestead entry under the act described in paragraph 1 must file in the local land office an application to enter a specific tract of public land subject to homestead entry, accompanied by his affidavit executed before an officer authorized to administer oaths in homestead cases, stating—

a. Description of former entry by section, township, and range numbers (or number of entry and name of land office where made), date of entry, *when* he lost, forfeited, or abandoned the same, and whether he received anything for abandoning his claim or relinquishing the entry.

b. When he established residence on the land first entered, how long he lived thereon, what improvements were placed on the land, and their value; what land was cultivated and what crops were raised thereon, if any.

c. If failure to perfect original entry was due to a complication of personal or business affairs, the facts constituting the al-

leged complication must be fully set out, as well as the time when they occurred. If mistake in the character of the land is alleged, applicant must explain fully how the mistake occurred, when and how he discovered his error, what reasons render the land worthless so that he was unable to perfect entry.

d. The affidavit of applicant must be corroborated by the affidavit of one or more persons having knowledge of the facts, which corroborative affidavit may be executed before any officer authorized to administer oaths and having an official seal.

3. When an application is presented, the register and receiver will examine same, and if not executed before a proper officer, if not corroborated, or if otherwise fatally defective in form, they will return same to the applicant, advising him wherein his application is defective, and no right will be recognized as having attached under such informal application. Applications in due form will be noted upon the records of the local office and promptly forwarded to this office for consideration, accompanied by a brief report from the register and receiver as to facts shown by their records, or otherwise in their knowledge, not appearing in the application. If the application for second entry is accompanied by a relinquishment of the original entry, you will at once note such relinquishment upon your records and hold the lands relinquished subject to disposition to the first qualified applicant.

4. The act forbids the commutation of second entries allowed under its provisions, and upon the register's certificate and the receiver's receipts of such entries, as are allowed by this office, the register and receiver will indorse "Allowed under section 1, act of April 28, 1904, 33 Stats., 527."

SECOND ENTRIES BY THOSE WHO HAVE HERETOFORE PERFECTED HOMESTEAD ENTRIES.

5. Section 2 of the act of June 5, 1900 (31 Stat., 267), allows second homestead entries to persons otherwise qualified who, prior to the date of the act, made homestead entries and commuted same under the provisions of section 2301, R. S., and the amendments thereto, but second entries so allowed are not subject to commutation.

6. The act of May 22, 1902 (32 Stat., 203), allows second entries to persons otherwise qualified who, prior to May 17, 1900, made and perfected homestead entries, paying therefor the price provided under the law opening the land for settlement, but to which land, had they not perfected title prior to the date mentioned, they would have been entitled to receive a patent without payment under the

"Free homes act." Said act does not allow commutation unless proof submitted on land first entered shows five years' residence.

7. A person applying to make second entry under the provisions of the acts described in paragraphs 5 and 6, of a specific tract of public land subject to homestead entry, must file with such application his affidavit, describing his original entry by section, township, and range numbers (or number of the entry and name of the land office where made), date of the entry, and date when final entry was made therefor. Upon such showing the register and receiver may, if the person is entitled thereto, allow second entry to be made, and must indorse upon the register's final certificate and receiver's receipt "Allowed under section 2, act of June 5, 1900," or "act of May 22, 1902," as the case may be.

8. In addition to the general acts hereinbefore mentioned, there are a number of acts of Congress applicable only to limited areas which, in certain contingencies, permit the allowance of second homestead entries. For specific information relative thereto, reference is made to the general circular of this office, issued January 25, 1904, and to the special acts of Congress applicable to the areas in question.

9. In the absence of legislation by Congress, restoring the homestead right, the making of one homestead entry for the maximum area allowed by law exhausts the homestead right, and this Department is without authority to allow second homestead entries to be made. When applications to make second entry are presented, and applicants fail to show that they come within the purview of any of the acts of Congress allowing second homestead entries, registers and receivers will reject such applications, giving the reasons therefor and allowing the usual right of appeal.

10. All pending applications will be considered and disposed of under these regulations.

Very respectfully,

FRED DENNETT,
Acting Commissioner.

Approved:

JAMES RUDOLPH GARFIELD,
Secretary.

LODE MINING CLAIM—END LINES.

PILOT HILL AND OTHER LODES.

A lode locator may not, in the same location, lawfully include any surface area, or acquire any incidental mining rights therein, outside of the course of, or vertical planes drawn downward through, the established end lines of his claim extended in their own direction.

Acting Secretary Woodruff to the Commissioner of the General Land Office, June 14, 1907.

(S. V. P.) (F. H. B.)

September 7, 1905, the Interstate Mining Corporation made entry for the Pilot Hill, Bowland, Guilbert, F & A, and Constitution lode mining claims, survey No. 787, Waterville, Washington, land district.

The record having been forwarded and examined in due course, your office, by decision of March 27, 1906, held the entry for cancelation to the extent of the Pilot Hill claim, for reasons which may be stated thus:

As shown by the official survey, the Pilot Hill claim, at its northwesterly extremity, adjoins for 152 feet the east end line of the F & A claim, upon which its contiguity as to the rest of the entered group depends. The line of contact is not parallel to the Pilot Hill end lines (southwesterly and northeasterly in direction), but deflects to the north from the westerly end line at its termination at returned corner No. 3 of the claim, also the southeast corner of the F & A claim and the northeast corner of the adjoining and patented Delate claim. With the easterly end line of the latter the westerly end line of the Pilot Hill claim is throughout its length coincidental. See the annexed diagram, reproduced from the official plat of the survey.

Your office held the Pilot Hill location to be illegal in so far as it embraces the land beyond the course of its westerly end line if extended to intersect the northerly side line, and, in effect, that the elimination of the excess would leave the claim in contact with the F & A claim only at the latter's corner and thus destroy the contiguity. The company has appealed to the Department.

Under the original lode law of July 26, 1866 (14 Stat., 251), a miner located the vein or lode itself, and could take patent thereunder for such incidental or enclosing surface as was accorded by the local customs and rules of miners or was necessary for convenient working, with the right to follow the vein or lode, with its dips, angles and variations, to any depth though entering adjoining land. The locations were often partly areal and partly linear and so patented. In that act end lines are not in terms mentioned, but, according to early judicial interpretation, they were implied in the necessity for defining the claimed longitudinal segment of the vein or lode; the locator having the right to follow his vein for that distance on its course or strike and to any depth within that distance. The locator could take but the one vein or lode, though his surface area might contain another, and beyond the planes of those end lines, as they may therefore be called, he could not go in pursuit of the vein or lode either upon its apex or underground extension. Eureka Consoli-

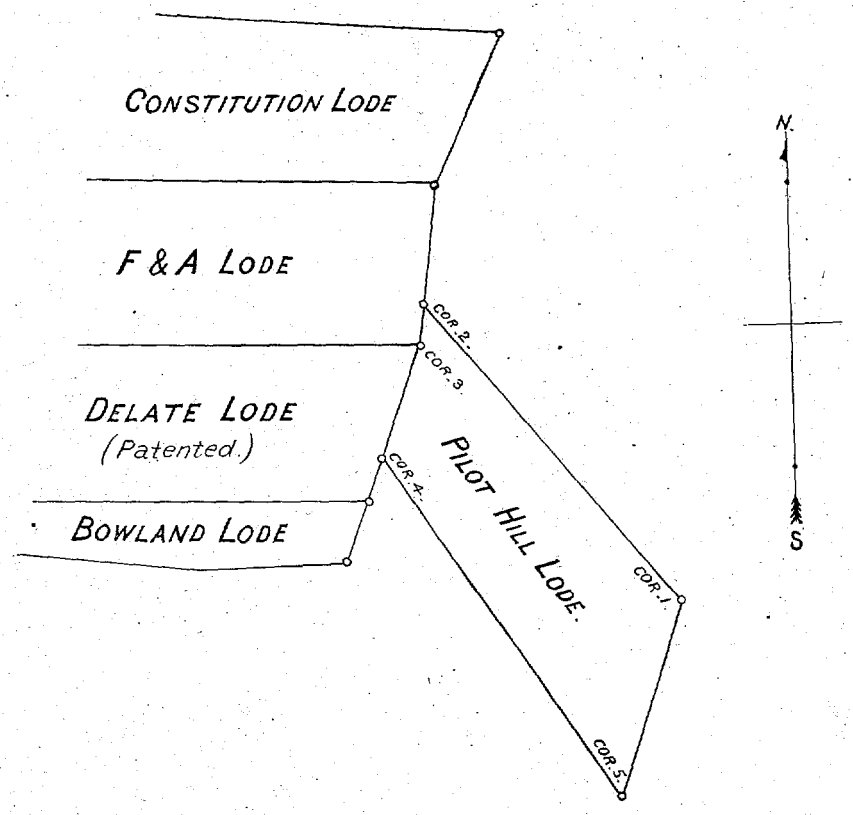
dated Mining Co. *v.* Richmond Mining Co. (4 Saw., 302; Fed. Cases, No. 4, 548); Mining Co. *v.* Tarbet (98 U. S., 463).

The act of May 10, 1872 (17 Stat., 91), provided for the location of a piece of land containing the apex of the vein or lode, made specific provision for parallel end lines, and gave to the locator all veins, lodes, or ledges, throughout their entire depth, apexing within the surface lines of his location extended downward vertically and notwithstanding the departure of the veins beyond the side lines, but explicitly confined the right of pursuit between vertical planes drawn downward through the end lines projected in their own direction.

Under the original statute the miner located the lode—under the later and present law he locates a definite piece of land containing the apex of the lode; and the merely implied end lines under the primary act are now expressly provided for. Where formerly, therefore, the linear bounds of his location were by implication to be defined, distinct surface boundary lines, both side and end, are now in terms required to be established. These prescribed lines upon the ground bound absolutely the surface rights acquired, and the end lines of the location bound as absolutely the portion of the vein or lode which they intersect and at the same time the corresponding zone of the underground extralateral right thereto. Both surface and mineral rights, respectively, are thus to be defined by one set of boundary lines, and the grant and limitations of mineral rights are at once of and as to all veins or lodes apexing within those limits. Certainly, under the positive requirements of the present law the office of the end lines of a location is not less complete and absolute than that of the implied end lines under the original law. It follows, therefore, that the locator may not, in the same location, lawfully include any surface area, or acquire any incidental mining rights therein, outside of the course of, or vertical planes drawn downward through, the established end lines extended in their own direction.

Dealing with a location made prior to and patented under the original lode law, but involving a question of the additional rights granted by the act of 1872, the case of Walrath *v.* Champion Mining Co. (171 U. S., 293, 311–2) clearly sanctions this view.

In this case, therefore, to obviate the existing objection and preserve the integrity of the Pilot Hill location, the excess must be eliminated either by extension of the westerly end line so as to intersect the northerly side line, or by changing the position of the latter so as to close it upon corner No. 3. Whilst in either event the claim would touch merely at the corner of the F & A, and fall within the purview of the recent departmental decision in the case of Hidden Treasure Consolidated Quartz Mine (35 L. D., 485), yet as individual improvements are returned in excess of the statutory amount the case


CONSTITUTION LODE
F & A LODE
DELATE LODE
(Patented.)
BOWLAND LODE
COR. 2.
COR. 3.
COR. 4.
PILOT HILL LODE.
COR. 1.
COR. 5.
N.
S

will be reconsidered by your office in connection with the special directions in the Hidden Treasure case, upon amendment of the location accordingly.

That portion of the decision of your office from which the appeal is taken is modified accordingly.

JAMES J. BELL.

Motion for review of departmental decision of September 18, 1906, 35 L. D., 159, denied by Acting Secretary Woodruff, June 14, 1907.

LAND DISTRICT BOUNDARY—MONTROSE AND DURANGO DISTRICTS, COLORADO.

FOOLKILLER LODE CLAIM.

Determination relative to the location of that portion of the boundary line common to the Montrose and Durango land districts, Colorado, described in the executive order of April 14, 1888, defining the limits of the Durango district, as following the township line common to townships 42 and 43 N., R. 8 W., N. M. M.

Acting Secretary Woodruff to the Commissioner of the General Land Office, June 14, 1907.

(S. V. P.) (G. J. H.)

April 9, 1906, The Mountain Lion Gold Mines Company made mineral entry No 1615 (survey No. 17446) for the Foolkiller lode mining claim, Montrose, Colorado, land district.

March 8, 1907, your office held the entry for cancellation, for the reason that the patent proceedings resulting in the entry were not conducted in the proper land district.

The company has appealed to the Department.

It appears from the official plat of survey that the major portion of this claim lies in suspended township 43 N., R. 8 W., N. M. P. M., and that the southerly end thereof extends for a short distance into suspended township 42. The boundary between the Montrose and Durango land districts in the vicinity of this land, as defined by executive order of April 14, 1888, fixing the limits of the Durango district (Notice No. 916, G. L. O., April 20, 1888), follows the township line common to townships 42 and 43. These two townships were surveyed in 1882, the surveys were approved, and plats thereof filed in the respective local offices in 1883. Shortly thereafter the surveys of both townships were suspended because of alleged fraud and irregularity therein. No resurveys have since been made, and the

suspension still continues. These townships are treated by your office as unsurveyed. As a consequence of this situation, that portion of the land-district boundary defined in the executive order as lying between said townships is not definitely fixed upon the ground, and considerable uncertainty and confusion has resulted, particularly in the prosecution of patent proceedings for mining claims in that vicinity.

By letter "E" of October 23, 1905, your office, in response to a letter from the surveyor-general relating to Durango M. E. No. 1571, Kokomo and other lodes, wherein he reported that two corners had been found on the line between suspended townships 42 and 43, stated that—

> The surveys in Tps. 42 and 43 N., R. 8 W., N. M. P. M., have been suspended since 1884 and the two corners (presumed to be those originally established), found on the township line between said Tps. 42 and 43 N., R. 8 W., are, as reported by you, widely in error as to both direction and distance.
>
> For the purpose of defining the line separating the Durango and Montrose land districts, you may consider said line to be a straight line joining the two public-land corners shown on your diagram, viz., corner of Secs. 32, 33, 4 and 5, and 35, 36, 1 and 2.
>
> The present rule of the office is to decline to make resurveys except under authorization of Congress, and it will be necessary to wait until such authority be given as will result not only in the resurvey of this township line, but of all other lines, township and subdivision, in that vicinity.

One of the corners mentioned in your office letter (that common to Secs. 32, 33, 4 and 5) is located S. 89° 12′ 40″ E. 11843.1 ft. from the corner common to Tps. 42 and 43 N., Rgs. 8 and 9 W., N. M. P. M. (in good standing), and the other (that common to Secs. 35, 36, 1 and 2) is located S. 80° 26′ E. 21392.6 ft. from the first. The line fixed by your office, connecting the two points mentioned, did not run directly east-and-west, but in a northwesterly-and-southeasterly direction. It is this line which is shown upon the plat of survey of the claim here in question, and with reference to which it appears that the claim lies partly in the Montrose and partly in the Durango district. The major portion of the claim being shown by the official plat to lie in the Montrose district, the applicant for patent conducted the patent proceedings entirely in that district, notwithstanding the departmental decision in the Alaska Placer case (34 L. D., 40), rendered more than six months prior to the filing of the application for patent for the claim in question, to the effect that proceedings for patent to a mining claim embracing land lying partly within one land district and partly within another, conducted wholly within one land district, and the allowance of entry thereon covering the entire claim, are in no wise effective as to the lands lying without such land district.

By letter of February 6, 1906, relative to Montrose M. E. No. 1676, Alaska Placer Claim, the surveyor-general requested instructions relative to the boundary line between the land districts mentioned, as follows:

In your letter "E" dated October 23, 1905, *in re.* Kokomo *et al.* lodes, Denver [Durango] mineral entry No. 1571, you directed this office to disregard the returns of the deputy surveyor and to show the intersecting land district line as a straight line joining the NW. Cor. Sec. 4, T. 42 N., R. 8 W., and the N. W. Cor. Sec. 1, T. 42 N., R. 8 W., although the relative positions of these corners disagreed greatly with the field notes of the township survey.

This survey being in the same neighborhood, one of its ties being to the same corner of the public survey involved in the Kokomo case and the conditions being somewhat similar, I have the honor to request that your office advise me regarding the position in which this land district boundary line should be shown.

By letter "N" of June 13, 1906, addressed to the Department, your office, among other things, stated as follows:

In reply to office letter to the surveyor-general, that officer, on February 6, 1906, submitted his letter with a tracing showing that as a fact the condition of the public surveys in the vicinity of the Alaska placer claim is such that it is wholly impossible to determine whether said claim is in the Montrose or Durango district. The condition of the public surveys in the immediate neighborhood of the Alaska claim fully appears in the surveyor-general's said letter, which is enclosed herewith, special reference being made thereto.

A careful investigation by the Division of Public Surveys of this office resulted in the conclusion that, in the absence of a resurvey of the affected townships, or of the establishment of a new and determinate boundary line between said land districts, which is recommended, it is altogether impossible to positively state in which of said land districts the Alaska placer claim is situated.

Responding to the surveyor-general's letter of February 6, 1906, your office by letter "E" of July 28, 1906, after very full and careful consideration of the matter, instructed the surveyor-general, among other things, as follows:

While the orders suspending the townships in question do not specifically include or name the exterior lines, neither did they specify the section lines, but the examiner of surveys, under date of February 12, 1884, was instructed to make a careful examination of certain section lines, and if they were found to disagree with the field notes, he was required to extend his examination, and to determine how much of both T. 42 N., R. 8 W., and T. 43 N., R. 7 W., were surveyed in 1882, as represented. The examiner's report was adverse to the acceptance of the surveys, and since both the township and section lines were run by the same surveyors, under the same contracts and at the same times, the assumption that but a portion of the fraudulent surveys, lying in and between these townships, was suspended, is untenable. The orders of suspension have never been modified, and townships 42 and 43 N., Rs. 7 and 8 W., N. M. M., Colorado, are accordingly unsurveyed; and neither the subdivisional corners, nor the exterior corners upon the boundaries common to any two of these townships, alleged to have been established by either said Clark or Boggs, under their contracts of June 29, 1882, are lawfully or availably evidence of the location of township or sectional lines.

There being no lawful survey either of section lines or of the north boundary of T. 42 N., R. 8 W., N. M. M., all corners alleged to exist upon such lines are erroneous and void, and it is manifest that none of such corners could be properly used in determining the location of land-district boundaries.

The conclusion as to the location of the common boundary of the Montrose and Durango land districts heretofore reached, must therefore stand, until a survey of the section and township lines referred to in the land office circular of April 20, 1888, fixing the boundaries of the Durango land district has been made and accepted by this office.

The surveyor-general indicating by his letter of October 5, 1906, relative to Montrose M. E. No. 1816, Newton and Mountain Belle lode claims, that he did not clearly comprehend the instructions contained in your said letter of July 28, 1906, was further instructed by your office letter "N" of October 18, 1906, that the instructions of July 28th contemplated "that the corrected line should run approximately east and west," and was directed to "give this matter further consideration and to report."

By letter of October 27, 1906, the surveyor-general reported, in connection with the claim here in question, that in the light of your office letters of July 28, and October 18, 1906, *supra*—

The position for said common boundary line is determined in conformity with the United States system of public-land surveys by projecting a line due east a distance of three miles from the corner common to Tps. 42 and 43 N., Rgs. 8 and 9 W., N. M. P. M. (being the nearest corner of the public survey and recently reported to this office as a sandstone properly marked) to a point presumably the position for the NW. Cor. Sec. 3, T. 42 N., R. 8 W., N. M. P. M., said point being mentioned in General Land Office circular dated April 20, 1888, fixing the boundaries of the Durango land district, thence east a distance of six miles or as defined in said circular, east to the NW. Cor. Sec. 3, T. 42 N., R. 7 W., N. M. P. M.—

and that said boundary line as thus located is—

about 1590 feet north of corner No. 3 [the northernmost corner] of said Foolkiller lode, and that the same lies wholly within the confines of the Durango land district.

The line designated by your office letter of October 23, 1905, *supra*, as boundary between the Montrose and Durango land districts, and which was repudiated by your letter of July 28, 1906, *supra*, can not be recognized by the Department as having fixed this portion of the common boundary of said districts for any purpose whatever. The points designated between which it should run on a straight course were merely "presumed" corners upon a line of a fraudulent and discredited survey, admittedly "widely in error as to both direction and distance." It did not even run in an east-and-west course, and was not in conformity with the system of public-land surveys nor in harmony with the executive order, *supra*, establishing the boundary, which contemplates a line running "east."

The boundary line reported by the surveyor-general as having been determined in the light of your office letter of July 28, 1906, and

which is now recognized by your office as fixing the position of this portion of the common land-district boundary, was determined by protraction from an established survey corner, runs east-and-west, is in conformity with the public-land system of surveys and in harmony with the executive order. The line thus established probably locates the position of the boundary contemplated by the executive order as accurately as can be done in the absence of a resurvey of the townships and a definite ascertainment of the location of the lines defined by said order, and it will be recognized by the Department as fixing this portion of the boundary between the land districts mentioned, unless and until there shall be a resurvey of the suspended townships, which may or may not show the line defined by the executive order to vary from the line so established.

With reference to such line, the claim in question is reported by the surveyor-general to lie wholly within the Durango land district. The proceedings heretofore had in the Montrose district were therefore without jurisdiction and ineffective. (See Alaska Placer Claim, *supra.*) The entry will be canceled, without prejudice to the right of the claimant to commence patent proceedings anew in the proper land district.

It is observed that the showing as to the expenditure of $500 upon or for the benefit of this claim is not sufficient. Among the improvements which it is sought to accredit to the claim is an interest in a tunnel constructed for the development of several claims. It is stated by the mineral surveyor in his report that "the first 125 ft. of this tunnel is to be charged to development of the Foolkiller, Newton, and Mountain Belle lodes." The showing as to this alleged common improvement should be made in accordance with the principles announced in the case of James Carretto and Other Lode Claims (35 L. D., 361).

Your office decision is affirmed.

REPAYMENT—EXCESS—ACT OF MARCH 2, 1907.

DAVID K. EMMONS.

Congress having failed to make the necessary appropriation for carrying into effect the provisions of the act of March 2, 1907, relating to repayments, said act is inoperative; but even if an appropriation for that purpose were available, the act does not contemplate repayment of the excess over $1.25 per acre, where the land was properly rated and sold at double minimum.

Acting Secretary Woodruff to the Commissioner of the General Land Office, June 17, 1907.

(S. V. P.) (C. J. G.)

An appeal has been filed by David K. Emmons from the decision of your office of May 29, 1907, denying his application for repayment

of alleged double-minimum excess paid by him on cash entry No. 5660 (commutation homestead entry No. 2764), made March 27, 1893, for the N. ½ NW. ¼, SW. ¼ NW. ¼ and NW. ¼ SW. ¼, Sec. 30, T. 50 N., R. 5 W., Ashland, Wisconsin.

Repayment is claimed under the act of March 2, 1907 (Public—No 227), which provides:

> That in all cases in which homestead entrymen upon final proof or commutation shall have been required to pay more than the lawful purchase money for their lands, the Secretary of the Interior shall cause the excess to be repaid to the entryman or his heirs or assigns.

It was provided in section 9 of the act of June 30, 1906 (34 Stat., 697, 764):

> No act of Congress hereafter passed shall be construed to make an appropriation out of the Treasury of the United States or to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such act shall in specific terms declare an appropriation to be made or that a contract may be executed.

The attention of the Comptroller of the Treasury having been called to the act of March 2, 1907, in connection with the foregoing section 9, that officer on March 22, 1907, decided that said act was inoperative, the same not declaring in specific terms an appropriation to be made, and that repayment of excess purchase money referred to therein was not authorized. In pursuance of said decision an appropriate circular was issued April 2, 1907 (35 L. D., 492), addressed to registers and receivers, who were instructed therein:

> You will, therefore, furnish a copy of this circular in answer to any inquiries regarding the act in question, and will advise all parties who contemplate filing claims under the act that by so doing they will, for the present at least, incur a useless expense.

It is urged in the appeal that notwithstanding the character of the act of March 2, 1907, the applicant herein should be declared to be entitled to repayment and the matter reported to the Auditor for the Interior Department in accordance with the act of July 7, 1884 (23 Stat., 236, 254). An examination of said act, however, clearly discloses that its provisions were not intended to include cases such as the one here under consideration.

Section 2 of the act of June 16, 1880 (21 Stat., 287), provides, among other things:

> and in all cases where parties have paid double-minimum price for land which has afterward been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to the heirs or assigns.

The land embraced in Emmons's entry is within the limits of the grant to what is known as the Chicago, St. Paul, Minneapolis and Omaha Railway Company, as shown by map of definite location

filed June 17, 1858, and its price was thereby increased to double minimum. It was offered at that price prior to January, 1861. Section 3 of the act of June 15, 1880 (21 Stat., 237), provides:

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

The land in question subsequently fell within the limits of the grant to the Northern Pacific Railroad Company, by definite location of July 6, 1882, and the price of said land was again increased thereby to double minimum, which was prior to Emmons's entry. It is contended in the appeal that this was impossible after the act of June 15, 1880. But it was determined in the case of John Baxter (11 L. D., 99), which has since been followed, that—

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

So that, at the time Emmons made his entry he properly paid $2.50 per acre for the land embraced therein. Referring to the portion of section 2 of the repayment act of June 16, 1880, above quoted, it was said in the case of Luretta R. Medbury (25 L. D., 308):

> It has uniformly been ruled by this Department that the proper construction of said section makes the condition at the time of the entry the criterion in determining the question as to whether repayment should be made under said section.

And in the case of Medbury *v.* United States (173 U. S., 492, 499), the supreme court said:

> Whatever may have been the reason of Congress in making the charge of $2.50 per acre the minimum price for alternate sections along the line of railroads within the place limits of the grant, the meaning of the act of 1880 is not in anywise affected thereby. The act plainly referred to the case of a mistake in location at the time when the entry was made. There the parties supposed that the land entered was within the limits of the land grant, and where subsequently it is discovered that the lands were not within those limits, that a mistake had been made, and that the party had not obtained the lands which he thought he was obtaining by virtue of his entry, then the act of 1880 applies.

Here no mistake was made. The land purchased by Emmons was within the limits of a railroad grant at the time of his entry and the proper price of the same for that reason was $2.50 per acre. Hence, regardless of the act of March 2, 1907, whether the same be treated as operative or not, there is no authority for repaying the money applied for by Emmons, as said act itself provides for repayment only where an entryman has been required to pay more than the lawful purchase money for his land, which is not the case here.

The decision of your office herein is affirmed.

SMALL HOLDING CLAIM—SECTION 16, ACT OF MARCH 3, 1891.

BACA *v.* CHAVES.

Section 16 of the act of March 3, 1891, was designed to protect the rights of actual settlers on public lands in the States and Territories named in the act, to the extent of the land actually occupied by the settler, not exceeding 160 acres, as a donation, where the settlement right had been actual and continuous for twenty years preceding the township survey; and the subsequent amendment of said section, by striking out the words "residing thereon as his home," did not modify the character of the settlement contemplated by the act as originally passed, or grant as a donation lands upon which no actual settlement had been made and maintained and where actual possession was maintained only by another, as agent or tenant.

Acting Secretary Woodruff to the Commissioner of the General Land Office, June 17, 1907.

(S. V. P.) (E. F. B.)

This controversy arose upon the protest of Roman L. Baca against the granting of the application of Amado Chaves for the NW. ¼ of Sec. 23, T. 15 N., R. 7 W., Santa Fe, New Mexico, claimed under the 16th section of the act of March 3, 1891 (26 Stat., 854), as amended by the act of February 21, 1893 (27 Stat., 470).

The 16th section of the act of March 3, 1891, provides—

That in township surveys hereafter to be made in the Territories of New Mexico, Arizona and Utah, and in the States of Colorado, Nevada and Wyoming, if it shall be made to appear to the satisfaction of the deputy surveyor making such survey that any person has, through himself, his ancestors, grantors, or their lawful successors in title or possession, been in the continuous adverse actual *bona fide* possession, residing thereon as his home, of any tract of land or in connection therewith of other lands, all together not exceeding one hundred and sixty acres in such township for twenty years next preceding the time of making such survey, the deputy surveyor shall recognize and establish the lines of such possession and make the subdivision of the adjoining lands in accordance therewith.

The act of February 21, 1893, amended said section by striking out the words, "residing thereon as his home," so that proof of "continuous adverse actual *bona fide* possession" for twenty years next preceding the time of making the township survey is sufficient to entitle the claimant to the donation.

The time allowed for the assertion of claims under said section was finally extended by the act of June 27, 1898 (30 Stat., 495), to March 4, 1901.

Chaves filed notice of his claim with the surveyor-general November 3, 1899. The township plat of survey was filed in the local office September 26, 1904, and on October 22, thereafter, claimant submitted proof, upon which the local officers issued final certificate.

A hearing was subsequently ordered upon a protest filed by Roman L. Baca, October 19, 1904, which has been overlooked by the local officers when they issued the final certificate.

The land in question was included in a preliminary survey of the Filipe Tafoya grant made in 1877 by the Surveyor-General of New Mexico under authority of the 8th section of the act of July 22, 1854 (10 Stat., 308), and is also within the primary limits of the grant to the Atlantic and Pacific Railroad Company, made by the act of July 27, 1866 (14 Stat., 292, 294). The map of definite location opposite the land in controversy was filed July 27, 1866.

After the establishment of the court of private land claims, Roman A. Baca, the father of protestant, presented his petition to the court for confirmation of the grant, and upon that petition a decree was rendered at the January term, 1905, of said court, confirming the title to said grant in the heirs, legal representatives and assigns of the original grantees, "Filipe Tafoya, Diego Antonio Chaves and Pedro Chaves." The tract in question was excluded from the grant by the survey made under that decree.

Amado Chaves, the claimant, is a direct descendant of Pedro Chaves, one of the original grantees, who was a son of Diego Antonio Chaves, another of said original grantees. He claims that his right of possession was acquired originally through his father, Manuel Chaves, one of the heirs of said original owners, and that in virtue of such right he has been in the continuous adverse actual *bona fide* possession of the land for twenty years next preceding the survey of the township.

Protestant is the son of Roman A. Baca, who presented to the court the petition for confirmation of the grant. He was not related by blood with either of the original grantees, but he married an heir of one of the grantees and purchased the interests of the other heirs.

Prior to 1877 the heirs and legal representatives of the original grantees had no clear proof of the validity of the grant or of its precise location. The tract in question was part of a tract then known as "El Ojo del Llano del Dao," and up to 1873, and for some time prior thereto had been in possession of Leonor Anzures.

January 30, 1873, Anzures sold whatever right he had in the land to Roman A. Baca. It was not then known to be a part of the Filipe Tafoya grant, but in 1877, after the original papers of the grant had been found, the grant was surveyed to include the land in question.

Protestant testified that his father claimed the entire grant by purchase of various interests and by undisputed possession for ten years, that he paid the taxes and attorneys' fees for obtaining confirmation, and has always been recognized as the only party in interest in said proceeding.

Claimant testified that when his father and his uncle, Roman A. Baca, obtained possession of the original grant papers in 1877, they bought out several interests in the grant and it was then agreed between them that claimant's father should take that part of the tract

including the land in question as his share of the grant. Under this agreement his father went into possession of the land, which he continued to hold until it was taken possession of by claimant as his successor in interest, who has since occupied it.

He further testified that in 1877 his father donated to him his whole interest in the grant, "not in the particular small holding, but in the grant, and under that donation I took that particular portion of the grant which I have claimed as a small holding."

As the land is not a part of the Filipe Tafoya grant, but is either public land of the United States or the title has vested in the successors of the Atlantic and Pacific Railroad Company under its grant, as to which no ruling is made herein, and as Roman L. Baca, the protestant, is not asserting any right to the land adverse to claimant, or seeking to acquire title to it under any right whatever, a consideration of the question as to who was the rightful claimant at the time of Chaves's original occupancy is material only so far as to determine whether his possession originated under a claim of right that was generally recognized at that time.

If the land is public land of the United States, and if claimant's possession was commenced under such right and has been maintained continuously for twenty years next preceding the survey of the township, he will be entitled, upon proof of such fact, to a patent for the land as a donation, whether he took possession under the claimed right of his father as one of the heirs of the original grantee or under the admitted possession given to claimant by Roman A. Baca, to enter upon the land. The material question is whether claimant has "through himself, his ancestors, grantors, or their lawful successors in title or possession, been in the continuous adverse actual *bona fide* possession" of the tract for twenty years preceding the township survey.

Claimant testified that in 1876 his father, who was a half-brother of Roman A. Baca, moved from San Miguel county, where he then lived, to San Mateo in Valencia county, taking with him 800 sheep. That from that time he (claimant) commenced to use this tract for grazing sheep, which he took on shares. He says, "I took on shares 2200 sheep, which my uncle, Mr. Baca, had on shares from Don Manuel Antonio Otero. Mr. Baca gave them to me himself, with the same terms and conditions which he had. After that I took 4000 sheep on shares from the Perea family of Bernalillo."

He testified that he ranged these sheep all over that section of country in San Mateo, and in the Bartolome Fernandez, the Ceboletta, the Filipe Tafoya and the Ignacio Chaves grants for a distance of fifty miles.

As to actual possession it is shown by claimant's own testimony that he did not occupy the land in person, but he claims to have main-

tained continuity of possession by his agents and tenants. He testified that he frequently went on the land for the purpose of rounding up his horses and counting his sheep, sometimes staying a few days and sometimes only one day; that from 1880 to 1891 his legal residence was in San Mateo, about fifteen miles from the land, but that during that period he lived part of the time in Santa Fe, about 103 miles from the tract. From 1891 his permanent residence was in Santa Fe.

He testified that in 1889 and 1890 he was on the Bartolome Fernandez grant, which he called his home ranch, "gathering my horses, mares and colts, branding, and I believe I was getting my sheep together, getting ready to move to Santa Fe." As to the tract in controversy he testified that from 1880 it was in his actual continuous adverse possession, and added, "but not personal occupancy; the place was occupied temporarily by my herders only a few days at a time, but at one time I loaned the ranch to Leonor Anzures, who lived there with his family for quite a long time, but I do not know how long." Again he testified: "Nobody ever lived there as a home except my herders, who would stay there a few days at a time . . . They were only there whenever I sent them; at such times I would give them the key of the house and they would return it to me."

The character of his possession is shown by the following excerpt from his testimony:

Q. Who, if any one, was in the actual, continuous possession of this land in question from the year 1885 until the year 1890?—A. I was in possession of that land during those years.

Q. Who, if any one, lived there during those years and for how long?—A. Nobody lived there; my men only occupied it temporarily, when sent there on business.

Q. Who, if any one, was in the actual, continuous possession of this place from the year 1890 until 1901, if you know?—A. In the year 1890 I had possession myself. From 1891 to 1901 I do not know who had possession or lived there. I turned the ranch over to Frank Montoya when I left there in 1891.

Q. Then you do not know that any person was in possession of that ranch from the year 1891 to the year 1901?—A. I know that Frank Montoya had possession of the ranch at that time only from his reports he sent me from time to time, but not of my own personal knowledge.

The weight of evidence is to the effect that claimant was not in the continuous adverse actual possession of the land in question for twenty years preceding the township survey, even by his agents or tenants, except for very short periods and at long intervals. He did not, according to his own testimony, personally occupy the land nor was it *actually* occupied continuously by the persons who he claims held possession for him. He said that in 1880 he loaned his ranch to Anzures for five years when he (Anzures) took a lot of cattle from Jose Antonio Montoya to graze on shares, but long before that time expired the cattle were taken from him and he then moved back to San Mateo with his family.

He also testified that in 1891, before leaving for Santa Fe—

> I sold all my sheep and other stock that I had with the exception of two bands of mares and horses, and having no particular use for my ranches I turned over this particular ranch to my brother-in-law Francisco Montoya and requested him to take care of it for me and to use it as his own until I could return there.

Claimant left instructions with his brother to round up the mares and horses from time to time and to brand the colts, but they were gradually being stolen by the Navajo Indians and other people until there were only a few left, "and then I sent word to the people of San Mateo that they could go and round them up and give me one half of whatever they could get. They rounded them up and whatever they found they kept in their hands and gave me nothing; they only found a few."

From this it would appear that if claimant ever had at any time such possession of the land as was contemplated by the statute, he abandoned it when he ceased to pursue the business of herding and grazing cattle. Besides, the testimony shows that Dr. Daville Valle was in actual possession of the land for a considerable part of the twenty years next preceding the township survey and was claiming it adversely to everyone under a right inherited from Roman A. Baca, whose daughter he married.

The right protected and recognized by the 16th section of the act of March 3, 1891, was a settlement right. It was designed to give to an actual settler on public lands in the States and Territories named in the act a tract of land occupied by him, not exceeding 160 acres, as a donation, where his settlement right had been actual and continuous for twenty years preceding the township survey. When the act was amended by striking out the words "residing thereon as his home," it did not modify the character of settlement contemplated by the act as originally passed, or grant as a donation lands upon which no actual settlement had been made and maintained and where actual possession was maintained only by another, as agent or tenant.

The following extract from the House Committee, in reporting the bill amending the act, indicates the character of the possession and occupancy required by the act:

> It is proposed to strike out the words underlined, viz, "residing thereon as his home." Many actual *bona fide* settlers, by themselves, their ancestors, grantors, or their lawful successors in title and possession, have been in the continuous adverse actual *bona fide* possession and occupation of certain tracts of land without *actually residing on the same as their home.* For the common safety they have actually resided in small villages, forts, stockades, or other inclosures, going out daily to occupy, possess and work these tracts of land. In some cases this mode of occupation and possession continued for many years, and this mode of living was made necessary by the unsettled and disturbed state of the country, rendering it unsafe to live in a house on the premises, especially at night.

It is evident from this that Amado Chaves was not in such continuous adverse actual *bona fide* possession of the land for twenty years preceding the township survey as would entitle him to the land as a donation, and your decision is therefore reversed. The entry will be cancelled.

MONSTER LODE MINING CLAIM.

Motion for review of departmental decision of April 9, 1907, 35 L. D., 493, denied by Acting Secretary Woodruff, June 19, 1907.

HOMESTEAD CONTEST—ABANDONMENT—PROOF—ACT OF JUNE 16, 1898.

HARRIS *v.* VANGNES.

Proof of non-military service under the act of June 16, 1898, need not be made in specific words; it is sufficient if facts appear which necessarily preclude the existence of the fact necessary to be disproved.

Acting Secretary Woodruff to the Commissioner of the General Land Office, June 19, 1907.

(S. V. P.) (J. R. W.)

Helen Vangnes, formerly, Nilson, appealed from your decision of November 26, 1906, canceling her homestead entry for the SE. ¼, Sec. 35, T. 124 N., R. 79 W., Aberdeen, South Dakota.

July 6, 1899, Helen Nilson made entry, against which Ezekiel Harris, September 5, 1905, filed contest for abandonment for more than six months, failure to establish residence, and lack of any habitable house—not due to military or naval service.

After proceedings not here material, hearing was had at the local office, November 8, 1905, in which both parties, aided by counsel, participated. November 16, 1905, the local office found in favor of contestant and recommended cancellation of the entry. On Vangnes's appeal you affirmed that action. The ground of appeal to your office and to the Department is, that no proof was made that contestee's default was not due to military or naval service. You held that "proof on the charge of non-military service is not required in case of a female."

Counsel argue that the requirement is statutory, and that the interpretation of the Honorable Commissioner "that a woman was not intended to be included is a wrong interpretation of the statute."

This question is not necessarily presented by the present record, and the foregoing quotation from your decision is mere *obiter*, not well founded on the record. The record shows (page 2 of evidence):

Q. Where has she been living the last six years?—A. Living at the river; holding claim at the river and holding the old farm down, back and forth ever

since I knew them. Three houses she has been holding. The other land she has lived on was section 2-123-79.

Another witness testified to seeing her "a number of times on the claim," and another of knowing her as living at two other houses, one a log house and one a sod house, in one of which she lived in the winter and in the other, by the river, where she lived in the summer. These other houses were on other land. One witness testified that during the past six years contestee "had been living with her husband," and another that she had been living "most of the time with her husband" during the last six years.

Aside from this, the contestee testified to her absence from the vicinity to go to Minneapolis for a surgical operation; that she, when in the vicinity of the land, has been accustomed most every day to look after the cattle and drive them to water.

Proof of non-military service need not be made in specific words. It is sufficient proof of the negative fact that facts appear which exclude existence of that necessary to be disproved. This evidence would be sufficient to prove non-military cause for absence of a male contestee. He could not be absent in military or naval service if he was accustomed to drive his cattle to water on his farm and was living with his wife on land held or owned by her. The averment of non-military cause for absence was fully and sufficiently proved.

Your decision is affirmed.

CHIPPEWA INDIAN LANDS—TURTLE MOUNTAIN BAND—TRUST PATENTS.

INSTRUCTIONS.

In the absence of legislative authority therefor, first or trust patents can not be issued upon selections made by members of the Turtle Mountain band of Chippewa Indians under the agreement ratified by act of April 21, 1904.

Acting Secretary Woodruff to the Commissioner of Indian Affairs,
(S. V. P.) *June 20, 1907.* (C. J. G.)

Under date of May 24, 1907, your office requested to be advised whether first or trust patents can be issued upon selections made by members of the Turtle Mountain band of Chippewa Indians under their agreement amended and ratified by act of April 21, 1904 (33 Stat., 189, 194), or whether it will be necessary to await further action by Congress in the matter.

The agreement with these Indians provides in article 7 thereof:

So long as the United States retains and holds the title to any land in the use or occupation of any member of the Turtle Mountain band of Chippewa Indians or the title to other property in the possession of any Indian of said band,

which it may do for twenty years, there shall be no tax or other duty levied or assessed upon the property, the title to which is held or retained by the United States.

Evidently it was understood that the other provisions of the agreement relating to selections of individual allotments or homesteads, articles 3 and 6, did not of themselves operate to convey the title to the tracts selected. In confirming said agreement Congress did not add anything to these provisions or make any declaration as to the time when the holdings by the government should cease. That is a matter peculiarly within the province of Congress. Nothing in the confirmatory act indicates any intention of relinquishing that control. Until some action is taken by Congress this Department is not authorized to issue instruments to these selectors fixing a time when the government will cease to retain and hold title to the lands selected.

MILITARY BOUNTY LAND WARRANTS—CERTIFICATES OF LOCATION.

LAWRENCE W. SIMPSON (ON REVIEW).

Departmental decision of January 31, 1907, 35 L. D., 399, modified by eliminating therefrom the paragraph which provides that all locations or applications to locate military bounty land warrants or certificates issued under the act of June 2, 1858, made prior to that decision, or locations of such warrants or certificates thereafter made by innocent purchasers who acquired their title after the ruling of the Department in the cases of Victor H. Provensal, J. L. Bradford, and Charles P. Maginnis, would be allowed to proceed in accordance with the ruling in said decisions, it being now held that the Department is without power to grant the privileges contemplated by said paragraph.

Acting Secretary Woodruff to the Commissioner of the General Land Office, June 20, 1907.

(S. V. P.) (J. R. W.)

Lawrence W. Simpson filed a motion for a review of departmental decision of January 31, 1907 (35 L. D., 399), rejecting his application to locate military bounty land warrant 97076, one hundred and twenty acres, act of 1855, upon the SE. ¼ SW. ¼, SW. ¼ SE. ¼, Sec. 27, and NE. ¼ NW. ¼, Sec. 34, T. 37 N., R. 8 E., M. D. M., Susanville, California.

The grounds of the motion are that:

1. The application . . . . was placed of record in the local office by direction of the General Land Office . . . and that since said time property rights have been acquired to the located land by said transferee.

2. The rule applied . . . . to warrants located prior to this decision in case of Provensal (30 L. D., 616), J. L. Bradford (31 L. D., 132), and Charles P. Maginnis (ib. 222), should be applied in this case.

The argument states that:

> We do not ask that the principle, as applicable to military bounty land warrants generally, enunciated by the said decision, be set aside, for examination of said decision satisfies us that the same was rendered only after mature deliberation *and that it is fully supported by law.*
>
> We do ask that under the equities presented . . . . the decision be modified so as to make this an exception, and that the lands be passed to patent.

With the motion is submitted certified copy of a deed by Simpson conveying the land to Thomas B. Walker for consideration of $600 paid May 20, 1905, eleven days after the warrant location. The motion expressly concedes the correctness of the decision, but asks that the land should be patented upon this location, unauthorized by law, merely because in faith of the location and expected issue of patent a transfer has been made for value by the unlawful locator.

February 23, 1907, S. A. Keane, claiming to "represent holders of military bounty land warrants whose rights are seriously affected by this decision without having had any opportunity to be heard," wrote the Secretary of the Interior, substantially applying for reconsideration of the case, and February 27, 1907, was allowed "a reasonable time within which to present any views . . . with respect to the decision," and has presented his contentions, viz:

1. That as Simpson's location and appeal only necessarily involved the question whether such warrants may be located on unoffered lands, but the decision "went beyond the question . . . in derogation of rights of holders of warrants purchased solely for location of offered lands."

2. The act of March 2, 1889 (25 Stat., 854), was a general statute, and could not be held to impair or affect that of March 3, 1855 (10 Stat., 701), investing holders of warrants with certain rights and benefits specially granted."

Pending the motion is also filed a letter of March 1, 1907, of Ira G. Whitney, assistant secretary of the Ingram-Day Lumber Company, of Lyman, Mississippi, stating that his company owns a warrant for one hundred and sixty acres, for which it paid six dollars and fifty cents per acre, and saying:

> We would be pleased to know whether the government intends to redeem these land warrants or whether this decision by you has simply destroyed the value of these warrants to all persons holding them.

Simpson's motion presents only the simple question whether the Department can authorize the disposal of public lands in a manner not authorized by law. In Burfenning *v.* The Chicago, St. Paul, Minneapolis and Omaha Railway Company (163 U. S., 321, 323) the court answered that question by saying: "The action of the land

department cannot override the will of Congress or convey away public lands in disregard or defiance thereof." Congress alone can provide how the public domain shall be disposed of, and public lands can not be alienated by the land department except pursuant to some law authorizing such action. Gibson *v.* Chouteau (13 Wall., 92, 99); Morris *v.* United States (174 U. S., 196, 243); Smelting Company *v.* Kemp (104 U. S., 636, 641); Wright *v.* Roseberry (121 U. S., 488, 519); Knight *v.* Land Association (142 U. S., 161, 176). Many other decisions might be cited. When it is shown that the mode of attempted appropriation of public land in any case is not authorized by any law of Congress, no power exists in the land department to convey it by patent or otherwise to grant the title.

The contention of S. A. Keane is the precise one fully considered in the decision, and that contention is clearly against the intent of Congress. The bill, which finally became the act of December 13, 1894 (28 Stat., 594), in express terms authorized location of these warrants on any land subject to entry at one dollar and twenty-five cents per acre on or prior to May 14, 1888 (35 L. D., 402). Congress deemed that against public policy, and by striking out all the bill after the enacting clause expressly refused to authorize location of these warrants and certificates upon such lands once subject to such locations, but since that time withdrawn from cash purchase and warrant locations. The Department can not override the clearly expressed will of Congress and uphold this contention, fully considered and clearly excluded by Congress.

The inquiry of Mr. Whitney on behalf of the Ingram-Day Lumber Company is proper to be addressed to Congress, but was substantially answered by the report of the Senate Committee on Public Lands that:

> By the passage of the bill [act of December 13, 1894] justice will be done the holders of the bounty land warrants and certificates of location, yet these warrants and certificates cannot become the subjects of speculation, for their greatest value will be at the rate of $1.25 an acre, as was originally intended by Congress.

Congress has never intended to increase their value in the hands of purchasers from the original objects of its bounty by making them receivable for lands not subject to entry at one dollar and twenty-five cents per acre, except to permit their use in the manner provided by the act of December 13, 1894. Congress deemed that thereby "justice will be done the holders." Any other use that will give them an enhanced value, or will allow their use to defeat the policy declared by the act of March 2, 1889 (25 Stat., 854), foreshadowed by the resolution of May 14, 1888 (ib., 622), is clearly without authority of any law and was by Congress intended to be prevented.

The decision of January 31, 1907, was, however, in one respect erroneous. It provided that:

> As property rights may have been acquired in the purchase of such warrants and certificates upon the faith of those decisions, all locations or applications to locate such warrants and certificates hereafter made by innocent purchasers who acquired their title after the date of those decisions, will be allowed to proceed in accordance therewith.

The first of the decisions referred to was Victor H. Provensal (30 L. D., 616), which was rendered June 5, 1901. There can be no property right acquired in defiance of law. The only power of the land department to dispose of public lands, as above shown, is by grant of Congress. When it develops that a departmental construction is erroneous, the improper construction can not be further allowed and the will of Congress further overborne by the executive. To do so is to legislate. It is not a finding and determination of fact, but a construction of law, not conclusive upon the courts or upon the Department itself. If patent issued upon it or if an account were closed, and the money supposed to be due were paid upon it, the United States, wronged by such construction, can sue to cancel the patent, or to recover the money erroneously paid. Mullan *v.* United States (118 U. S., 271, 278); Wisconsin Central Railroad Company *v.* Forsythe (159 U. S., 46, 61); United States *v.* Stone (2 Wall., 525, 535); Merritt *v.* Cameron (137 U. S., 542, 552); Steele *v.* United States (113 U. S., 128, 133); Wisconsin Central Railroad Company *v.* United States (164 U. S., 190, 206, 210); Studebaker *v.* Perry (184 U. S., 258, 269). The obvious purpose of an act of Congress is to be attained notwithstanding any contrary construction by an executive department. Webster *v.* Luther (163 U. S., 331, 342).

So long as title to public lands remains in the United States the title of one seeking to appropriate it is *sub judice*. There can arise no equity that countervails the inhibition of a statute, or avails to vest the land department with power to grant a title when Congress has not granted it. As to such claims of equitable right, the court in Hawley *v.* Diller (178 U. S., 476, 486) held:

> The purchaser is chargeable with knowledge of the law, which includes knowledge of this law; and is chargeable with knowledge of the state of the title which he buys, in so far, at least, as that the legal title remains in the United States, subject to the necessary inquiry and determination by the land office and Department upon which a patent may issue. He is not then an "innocent purchaser," so far as there may exist reasons why that patent should not issue.

The changed relations of parties pending the erroneous decisions overruled, by purchase of these warrants and certificates, is not within the powers of the executive department to consider, but is one that Congress alone has power to relieve, if they have any equity to be relieved. The decision in question is modified, to the extent that the paragraph looking to recognition of right to locate any of such war-

rants and certificates upon lands not subject thereto, because of a supposed equity of those purchasing them after June 5, 1901, is eliminated therefrom, and will be disregarded. In other respects the motion presents no reason to recall, vacate, or modify said decision, and none appearing otherwise, the motion is denied, and the decision is adhered to, except as so modified.

HOMESTEAD ENTRY—KINKAID ACT—MILITARY SERVICE—FINAL PROOF—IMPROVEMENTS.

LEVI OVERMAN.

By virtue of the provisions of section 2 of the act of March 2, 1907, credit for military service may be allowed in entries under the act of April 28, 1904, commonly known as the Kinkaid act.

The provision of the act of April 28, 1904, that the entryman at the time of making final proof must show affirmatively that he has placed upon the land permanent improvements of the value of not less than $1.25 per acre for each acre included in his entry, contemplates, in case of an additional entry under said act, that the entryman shall make the required expenditure for improvements exclusive of and in addition to the improvements on his original homestead.

Acting Secretary Woodruff to the Commissioner of the General Land Office, June 24, 1907.

(S. V. P.) (C. J. G.)

An appeal has been filed by Levi Overman from the decision of your office of January 2, 1906, holding for cancellation his additional homestead entry, made under the act of April 28, 1904 (33 Stat., 547), the Kinkaid act, for the SE. ¼ SW. ¼ and SW. ¼ SE. ¼, Sec. 5, NW. ¼ NE. ¼, E. ½ NW. ¼ and W. ½ SE. ¼, Sec. 8, T. 6 N., R. 36 W., Lincoln, Nebraska.

January 27, 1903, Overman made original homestead entry for the E. ½ SE. ¼ and S. ½ NE. ¼, Sec. 8, T. 6 N., R. 36 W., and June 30, 1904, the additional entry above described. July 6, 1906, he submitted final proof on both entries, and July 17, 1906, final certificates were issued to him. The proof shows that he established residence on the land embraced in the original homestead entry in June, 1903, has made valuable improvements thereon, and that he has resided there continuously since. Overman claims, and the records of the War Department show, that he served in the Army of the United States during the civil war, in Co. "H," 36th Reg't, Iowa Infantry, having been mustered into service August 11, 1862, and mustered out with his company August 24, 1865.

In view of section 2 of the act of April 28, 1904, *supra*, under which Overman made his additional entry, and which provides: "But residence upon the original homestead or the additional land

must be continued for the period of five years from the date of the additional entry," your office held said additional entry for cancellation subject to a showing why the same should not be canceled, Overman's original entry being allowed to stand. He claims, however, that he should be credited for his military service in computing the period of his required compliance with law under said act. Since the rendition of your office decision Congress has passed the act of March 2, 1907 (34 Stat., 1224), wherein it is provided in section 2 thereof:

> That the benefits of military service in the Army or Navy of the United States granted under the homestead laws shall apply to entries made under the aforesaid act approved April twenty-eighth, nineteen hundred and four, and all homestead entries hereafter made within the territory described in the aforesaid act shall be subject to all the provisions thereof.

Under this provision Overman is entitled to have the period of his military service deducted from the five years' residence otherwise required by the act of April 28, 1904, upon his original homestead or the additional land. Such service amounted to something over three years, so that, his additional entry having been made June 30, 1904, his final proof thereon was not prematurely submitted July 6, 1906, he having to show residence for only two years from the date of said entry. That, in view of credit for his military service and the act of March 2, 1907, becomes his statutory period for complying with law. The determination of his case here therefore, goes to the regularity and sufficiency of said proof.

Overman has offered one final proof covering his original homestead and the additional land, that is, both tracts are included in the one set of proofs. The improvements described by him, which are evidently on his original homestead, are thus made to apply to both tracts. This will not do. As to entries under the act of April 28, 1904, said act provides that—

> 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.

This expenditure must be in addition to that for improvements on his original homestead, as the act only provides that "residence upon the original homestead shall be accepted as equivalent to residence upon the additional land so entered." As to time and manner of submitting final proofs the circular of April 10, 1906 (34 L. D., 546), under the act of April 28, 1904, provides:

> 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 on the original entry within the statutory period therefor, and final proof upon the additional entry must also be submitted within the statutory period from date of that entry.

Overman's proof already submitted may, therefore, be accepted as to his original homestead but he will be required to submit other and new proof on his additional entry showing the necessary expenditure thereunder required by the act of April 28, 1904, and that he has continued to reside upon his original homestead for the requisite time from the date of said additional entry, credit to be given him for the period of his military service.

The decision of your office herein is accordingly vacated, and the papers are herewith returned for appropriate action, as above indicated.

HOMESTEAD ENTRY—DISQUALIFICATION—OWNERSHIP OF LAND—CONTRACT OF PURCHASE.

JACOB J. REHART.

The disqualification imposed under the homestead law on one who is the "proprietor of more than 160 acres of land," extends to one who holds under a contract of purchase lands selected by the State, even though the title may yet be in the government and the payments under the contract have not been completed.

Acting Secretary Woodruff to the Commissioner of the General Land office, June 24, 1907.

(S. V. P.) (C. J. G.)

An appeal has been filed by Jacob J. Rehart from the decision of your office of October 17, 1906, holding for cancellation his homestead entry for the W.½ lot 6, all lot 7, and NW.¼ SE.¼, Sec. 3, T. 4 N., R. 19 W., Los Angeles, California.

The entry was made October 17, 1898, upon which final proof was submitted July 5, 1905. The decision of your office against Rehart turns upon the question of his disqualification to make said homestead entry by reason of ownership at the time of more than 160 acres of land. In an affidavit accompanying the final proof and executed same date, Rehart stated:

> At this time I am the owner of half interest in 150 acres bought by my brother and myself and I own about six hundred (600) acres of land I bought of the State and also I own 480 acres in T. 4 N., R. 17 W., S. B. M.

A special agent reported under date of August 10, 1905, that he was present at time final proof was submitted and cross-examined Rehart and his witnesses, it being developed that Rehart was the owner of land far in excess of the statutory limit. The agent subsequently ascertained from the records of Ventura County that Rehart was the owner by deed dated August 13, 1897, of 150.11 acres, and by certificate of purchase from the State of California, dated

March 4, 1898, of 523.32 acres, a total of 673.43 acres. In a supplemental affidavit dated August 21, 1905, Rehart stated:

> At the time I made my homestead entry I had no title to any of the lands herein mentioned except the 150.11 acres which was patented April 6th, 1898, and in this, although I held the legal title, my brother George Rehart had a half interest, and so far as the State lands are concerned, these had been purchased by my wife's money and were her property in equity, although the certificates of purchase from the State were in my name.

Your office states that—

> The records of this office show that the land purchased from the State was selected by the State September 18, 1897, which selection was approved by the Department July 6, 1899, under certificate of purchase from the State, which the records of Ventura Co. show was executed prior to Rehart's entry, and was presumably in force at the time said entry was made.

Your office accordingly called upon Rehart to show cause why his entry should not be canceled for the reason that at date of entry he was the proprietor of more than 160 acres of land. No further evidence is produced here but appellant stands upon the record as made, it being contended that Rehart was not at the date of his entry the owner or proprietor of the lands purchased by him from the State, as at that time title to said lands was in the government and did not pass from it until the lands had been approved to the State, which was not for several months after the date of Rehart's entry. The opinion is also expressed that it is doubtful whether it was intended by Congress in specifying that a homestead claimant should not be the "proprietor" of more than 160 acres of land at the date of his entry, should apply to anything less than a fee simple title.

The lands were selected by the State September 18, 1897, Rehart purchased said lands March 4, 1898, his homestead entry was made October 17, 1898, and the State selection was approved by the Department July 6, 1899. His contract with the State to purchase is not in the record, but in his statement is sufficient to show that payments were made, whether in full does not appear. In any event it is not alleged that he has abandoned his right to make the payments or that his contract does not remain in full force. The county records show the property to be in his name, and in the absence of competent evidence to the contrary he is bound thereby.

In the case of Leitch *v.* Moen (18 L. D., 397), cited by your office, it was held that the disqualification imposed under the homestead law on persons who own more than 160 acres of land extends equally to those who hold land under a contract of purchase, even though the payments thereunder have not been completed. In the case of Boyce *v.* Burnett (16 L. D., 562, 563), involving a preemption claim, it was said:

> The railroad company obtained title to the land, and if Burnett has a contract from the company, a consideration being paid therefor, by the terms of which

he is to obtain title to said section 25, when all the payments have been made, he is disqualified.

It is true that the company did not own the land at the date when Burnett is alleged to have sworn that he purchased the right to buy. The company did not select the land until one month later; but its right to select the land was then doubtless known, and it did select it, and received patent therefor; and in this respect the case differs from that of Mantle *v.* McQueeny, 14 L. D., 313, where it was held that a contract for the purchase of land does not bring the holder within the inhibition of section 2260 of the Revised Statutes, when the title to said land is not in the vendor named in the contract.

In the case just cited, it was alleged that McQueeny had a contract with the Northern Pacific Railroad Company for the purchase of a section of land, and that, while holding the contract, he could not pre-empt other lands. It appeared, however, that the company did not own the land, and therefore the contract for its sale could not be enforced; hence, he was not prohibited from pre-empting other land. Not so however in the case at bar, if Burnett really has such contract, capable of being enforced. Although the company did not own said section 25 at the date of its alleged contract to sell the same to Burnett yet the selection of the section was made prior to Burnett's alleged settlement on the land in controversy. The company, having subsequently obtained patent, would be estopped from denying that it owned the land when the alleged contract was made, and, if made, the same could be enforced in the courts, upon the performance by Burnett of his part of the contract.

The decision of your office herein holding that Rehart is shown to have been disqualified to make the entry in question by reason of the ownership of more than 160 acres of land was proper and is hereby affirmed. In addition to the cases referred to see also those of Ole K. Bergan (7 L. D., 472); David T. Petty (13 L. D., 95); and Smith *v.* Longpre (32 L. D., 226). In the latter case it was said:

> 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, though less than an absolute fee.

MINING CLAIM—LODE—EXTRALATERAL RIGHTS.

PATTEN ET AL. *v.* CONGLOMERATE MINING CO.

The law grants to the locator and owner of a vein or lode the right to follow such vein or lode on its dip outside the vertical side lines of his location for the purpose of appropriating the mineral of such vein or lode, but does not authorize him to use the sub-surface of the outside ground, when owned or claimed by another, for the purpose of exploring, reaching, or developing any other veins or claims, or for any other purpose.

Acting Secretary Woodruff to the Commissioner of the General Land Office, June 24, 1907.

(S. V. P.) (J. T.)

August 21, 1900, George W. Keel filed application for patent to the Walcott lode mining claim, survey No. 4115, Salt Lake City,

Utah, and December 24, 1900, made entry thereon. For reasons not material to be here stated the entry was canceled September 30, 1904.

November 22, 1904, the Conglomerate Mining Company (hereinafter called the applicant) filed application for patent to the identical Walcott lode mining claim, survey No. 4115, the same survey upon which the application and entry by Keel had been based. Publication was commenced November 25, 1904.

January 24, 1905, an adverse claim was filed by the New York and Great Western Mining, Smelting and Development Company, claiming the Weber and Lake View lode mining claims, but it appears that no suit was commenced thereon.

January 16, 1905, Alonzo Van Patten and the New York and Great Western Mining, Smelting and Development Company (hereinafter called the protestants) filed their duly corroborated protest against the application for patent, alleging in substance that no discovery of a vein or lode had been made within the boundaries of the Walcott claim; that $500 had not been expended in labor or improvements upon or for the benefit of the claim by the applicant or its grantors; that the work claimed by the applicant was done on a claim other than the Walcott, and in the sole interest of such other claim and upon ground owned and claimed by parties who had no interest in the Walcott claim; that there was no ownership in common in the claim upon which the work was done and the Walcott claim; that the patented Little Joker mining claim, belonging to one of the protestants, intervenes between the drift in which the work relied upon by the applicant was done, and the Walcott claim; and that no right of way through any part of the Little Joker claim or any easement or license to construct a tunnel or drift through any part of it was ever procured by applicant or its grantors. Thereupon the local officers ordered a hearing, which was commenced May 22, 1905.

On the evidence submitted the local officers, October 12, 1905, found as follows:

> We find the testimony to be very conflicting in many important details, but, after a careful consideration of the entire record, we reach the conclusion that the development work relied upon by the applicant company is not such as can be recognized by this office, as a compliance with the law and regulations, in the absence of a showing of title to intervening ground.
>
> This work is located off of the claim applied for, and there is intervening, between the claim involved and the claim upon which said work is done, a patented location, known as the Little Joker, title to which is not now, and never has been, in this applicant; neither has said applicant any right of way through that ground to the Walcott claim, and, therefore, the application for the Walcott claim can not be approved.
>
> As to the question of apex or any alleged extralateral rights, claimed by this applicant, about which much testimony was introduced, this office holds that it has no jurisdiction, that being a matter for the proper courts to determine.

By decision of September 12, 1906, your office held that protestants' allegation relative to discovery of mineral within the Walcott claim has not been sustained, and held the application for patent for rejection because of applicant's failure to show that five hundred dollars' worth of labor had been expended or improvements made upon the claim by itself or grantors. Applicant appealed to the Department.

The voluminous record of the hearing has been carefully examined. Much of the testimony is immaterial to the case. It appears from the various abstracts of title filed in evidence that the Walcott claim was located June 30, 1890, by Michael Gibbons, who, December 13, 1892, conveyed it to George W. Keel; that by order of the Third Judicial District Court of the State of Utah, for Salt Lake County, in the case of Wood Grocer and Produce Company, etc. *v.* Butterfield Mining Company, George W. Keel was, January 7, 1902, appointed receiver of all the property and effects of the Butterfield Mining Company, and authorized to take charge of and hold and dispose of the same under the order of said court, and that, as such receiver, he did on July 31, 1903, convey the Walcott and also the Northern Chief, Little Nelly, Johnson and Eagle Bird mining claims to the Conglomerate Mining Company. From these abstracts of title, which have been brought down to November 14, 19, and 21, 1904, and some to a later date, it appears that the present applicant became the owner of all the claims last above mentioned.

From the plat of survey filed with the original applications by Keel, and refiled without change with the present proceedings, it appears that extending southerly from near the south end of the Walcott claim is the Eagle Bird lode claim, and adjoining the southwest end of the Walcott is the Northern Chief lode claim, and then adjoining and extending in a southerly and easterly direction are the Little Nelly and Johnson lode claims, all of which form one group of contiguous claims. Excepting the Walcott these claims have all been patented, the Eagle Bird in 1873, the Northern Chief in 1881, the Little Nelly in 1882, and the Johnson in 1902.

Lying between these patented claims and the Walcott, and overlapping in part the southwestern end of the Walcott, is the Little Joker lode mining claim, patented in 1890, and not owned by the applicant.

The same certificate of the surveyor-general as to expenditures, attached to the original field notes of the survey of the claim, and which had been filed with the proceedings upon the original Keel application for patent, was filed to support the present application. That certificate is dated January 29, 1900, and relates to alleged expenditures by Keel or his grantors, and not to expenditures made by the present applicant, which did not become the owner of the

claim until 1903. It relates to conditions existing nearly five years prior to filing the present application.

When the hearing was commenced, May 22, 1905, the applicant had filed no evidence other than the said certificate and field notes to show that the required expenditure had been made upon the claim.

During the progress of the hearing applicant's counsel gave notice that it would claim not only the work returned in the said field notes of the survey, but also other work; and that it would introduce in evidence a certificate by the surveyor-general upon a "supplemental return" of the mineral surveyor, showing the work to have been done prior to the expiration of the period of publication, and such certificate and supplemental return were filed, but not until June 10, 1905, which was after the testimony in the case had been closed.

The surveyor-general in his said certificate, which is dated June 9, 1905, states that five hundred dollars' worth of labor has been expended or improvements made by claimant or its grantors upon the claim—

> that said improvements consist of 433.7 feet of drifts, and reopening and retimbering 107.7 feet of the east drift, as described in the supplemental report of expenditures upon mining claim, filed by U. S. Deputy Mineral Surveyor after return of survey; that said improvements were made prior to January 21, 1905, and that no portion of said labor or improvements has been included in the estimate of expenditures upon any other claim. A copy of the supplemental report of . . . U. S. Deputy Mineral Surveyor, dated May 27, 1905, is hereto attached.

Attached thereto is what is styled "supplemental report" of the mineral surveyor, in which the improvements sought to be applied to this claim are described, and valued at $3,600. He further reports:

> The Eagle Bird shaft and those parts of the Eagle Bird drifts not herein applied belong to claimant herein and have not been applied upon any claim.
>
> Claimant herein owns the Eagle Bird lode, lot No. 49; the Drum Lummon lode, lot No. 281; and the Johnson lode, survey No. 4477, and by reason of having the apex or outcrop of the Eagle Bird vein or lode along the Eagle Bird lode, lot No. 49, and having followed said vein or lode on its dip through the entire depth of the Eagle Bird shaft, and along its strike throughout the Eagle Bird drifts, now claims a right to continue said drifts along said vein or lode under and through the Little Joker lode, lot No. 363, in order to reach and develop this claim.
>
> The Eagle Bird drifts, hereinbefore described, are part of a centrally located system of works intended for the development and exploration of a group of claims of which the Walcott lode is a contiguous part. These drifts have a depth of 700 feet below the surface of the Walcott lode, and are now being extended for the purpose of entering and exploring said lode, which in this manner can be most practically and economically developed. These drifts also tend to drain the lode, and thereby make it better adapted for exploration work.

The applicant contends, in substance, that the easterly branch of the drift to its face is driven upon the Eagle Bird vein; that inasmuch as it owns the Eagle Bird vein beneath the surface of the Little

Joker claim at the point where the drift is being driven, it has a right of way or easement beneath the Little Joker surface along such vein to and into the Walcott claim, and that this work tends to develop the group of claims before mentioned, including the Walcott. It is further contended that the west drift was run to intersect, if possible, the Northern Chief vein, and with the intention also to explore and develop that small part of the Walcott claim lying south and west of the Little Joker.

The Little Joker claim, not owned by the applicant, lies between the improvements relied upon and the Walcott claim. The first question is whether the applicant has any legal right, by reason of his claimed right on the dip of the Eagle Bird vein, to use the sub-surface of the Little Joker claim for the purpose of developing the Walcott claim.

Section 2322, Revised Statutes, grants to locators:

> The exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.

While the law grants to the locator and owner of a vein or lode the right to follow such vein or lode on its dip outside the vertical side lines of his location, no right is granted him to use the sub-surface of such outside ground, when owned or claimed by another, for the purpose of exploring, reaching, or developing other claims. In extending its said drifts along the Eagle Bird vein for the purpose of securing the mineral in that vein under the Little Joker claim, the applicant has not thereby acquired any right of way or easement for any other purpose. It has no right to use the sub-surface of the Little Joker as a means to reach and develop the Walcott claim, as contended.

These views are fully sustained by the decision of the Supreme Court in the case of the St. Louis Mining and Milling Company of Montana *v.* Montana Mining Company, Limited (194 U. S., 235).

In that case the St. Louis Company owned the St. Louis claim in which was a vein having its apex within the surface lines but on its dip passing out of the side lines into and under the Nine Hour claim owned by the Montana Company. The Court stated and held as follows:

> The St. Louis Company being the owner of the vein, may pursue and appropriate that vein on its course downward, although it extends outside the vertical side lines of its claim and beneath the surface of the Nine Hour lode claim. Such is the plain language of section 2322, Rev. Stat. . . . Is it, in pursuing and appropriating this vein, confined to work in or upon the vein, or is it at liberty to enter upon and appropriate other portions of the Nine Hour ground in order

that it may more conveniently reach and work the vein which it owns? Its contention is that the mining patent conveys title to only the surface of the ground and the veins which go with the claim, and that the balance of the underground territory is open to any one seeking to explore for mineral, or at least may be taken possession of by one other than the owner of the claim for the purpose of conveniently working a vein which belongs to him. The question may be stated in another form: Does the patent for a lode claim take the sub-surface as well as the surface, and is there any other right to disturb the sub-surface than that given to the owner of a vein apexing without its surface but descending on its dip into the sub-surface to pursue and develop that vein?

We are of opinion that the patent conveys the sub-surface as well as the surface, and that, so far as this case discloses, the only limitation on the exclusive title thus conveyed is the right given to pursue a vein which on its dip enters the sub-surface.

As shown by the mineral surveyor's supplemental report, that part of the west drift sought to be applied upon the Walcott claim ends several hundred feet from the southwest end of the Walcott claim. As to this west drift, the evidence fails to show that it in any way tends to the development of the Walcott claim.

Therefore the drifts sought to be applied as improvements upon this claim, can not under the law be recognized as improvements made for the development of the Walcott claim, and without approving all the reasons stated in your office decision as ground for the judgment therein, the same is affirmed.

KIOWA, COMANCHE, AND APACHE LANDS—SECOND ENTRY—ACT JUNE 6, 1900.

WALLACE *v.* CLARK.

The term "under existing laws," occurring in the provision of the act of June 6, 1900, "that any person who having attempted to, but for any cause failed to secure title in fee to a homestead under existing laws, ... shall be qualified to make a homestead entry upon said lands," refers to laws existing at the date of the passage of the act, and does not contemplate that said act itself shall be embraced within that term; hence one who made entry under said act, which was subsequently relinquished, is not entitled to make a second entry under said provision.

The act of June 6, 1900, contemplates that but one homestead entry may be made under its provisions by the same person.

Acting Secretary Woodruff to the Commissioner of the General Land Office; June 24, 1907.

(S. V. P.) (G. B. G.)

November 3, 1906, the Department entertained a motion for review and rehearing filed on behalf of George W. Clark in the case of William V. Wallace *v.* George W. Clark, wherein by unreported decision of October 3, 1905, was affirmed your office decision of November 18, 1904, affirming the action of the local officers and holding for can-

celation Clark's homestead entry for the E. ½ of the SE. ¼ of Sec. 19, T. 4 N., R. 8 W., Lawton land district, Oklahoma, upon the contest initiated against said entry by Wallace.

The contest affidavit of Wallace was filed October 16, 1903, charging:

> That said homestead entry is void and fraudulent for the following reasons, to wit: entryman George W. Clark filed on October 21, 1901, on the W. ½ SE. ¼, 19, 4 N., R. 8 W., filing No. 6377, and on Sept. 2nd, 1902, relinquished the same for a valuable consideration; also the entryman herein, George W. Clark, had, at the time of filing of above homestead entry, a homestead entry standing intact in the Dardanelle U. S. land district, of the State of Arkansas. The last part of the above I have been informed and verily believe.

On the day appointed for the hearing the parties appeared by their attorneys, and plaintiff offered in evidence certain entries and notation appearing upon the land office records showing that the said Clark had, as charged in the affidavit of contest, filed on October 21, 1901, upon the W. ½ of the SE. ¼ of Sec. 19, T. 4 N., R. 8 W., which land adjoined the land in contest. This entry had been relinquished by Clark, as charged, whether for a consideration does not appear, nor is it in view of the Department deemed material.

It is also shown that a person, or persons, by the name of George W. Clark had made in the fall of 1890 a homestead entry at the Dardanelle land office for eighty acres of land, and August 22, 1900, a homestead entry for one hundred and sixty acres of land at the same office.

The case went to trial upon this record evidence, and nothing was offered by Clark in rebuttal.

Upon this record the local officers held that the entryman was disqualified to make either of the entries at the Lawton land office, and excused the office for having allowed the entries upon the ground that the applications therefor failed to state the facts. The entryman appealed, and by your office decision of November 18, 1904, the decision of the local officers was affirmed. Clark filed a motion for rehearing, accompanied by his corroborated affidavit, in which he, in substance, says that he failed to put in a defense at the hearing upon the advice of his attorneys, who told him that no case against him had been made out, and that evidence was unnecessary. This same affidavit also admits that in the fall of 1890 he made an entry at the Dardanelle land office, Arkansas, but that he afterwards abandoned the same, never having attempted to complete title thereto, and that the same was canceled by that office in due course.

Considering this motion, your office by said decision of April 22, 1905, held that the defendant was bound by the record; that upon the admitted facts of the case he was disqualified to make the entry under attack, and that judging from similarity of handwriting he

was the same George W. Clark who had made both of the entries at the Dardanelle land office. The decision of the local officers was thereupon re-affirmed. This decision was formally affirmed by the Department, as above stated, October 3, 1905.

In the said departmental order of November 3, 1906, entertaining Clark's motion for review, it was said:

> This motion is entertained because the Department is not satisfied with the grounds upon which your said office decision and that of the Department in affirmance thereof rest. It does not follow, however, because there is probable error in these decisions, that the entry in question can in any state of the case be sustained, but the entire matter considered, this case is reopened for argument, which is especially invited upon the question, whether having previously made an entry of one hundred and sixty acres at the Dardanelle land office, Arkansas, and a further entry under the provisions of the act of June 6, 1900 (31 Stat., 672, 680), of the ceded Kiowa, Comanche, and Apache lands, he is entitled to further benefits under said act, and generally whether the entry in question can be sustained under the provisions of the act of June 5, 1900 (31 Stat., 267), as extended by the act of April 28, 1904 (33 Stat., 527), or any other law governing the disposition of these lands.

After most careful consideration and some delay, hoping that justifiable means might be found to protect the admitted equities of the defendant in this land, it does not appear that this entry can be sustained. For the purposes of this decision it may be admitted that the defendant is not the same George W. Clark who made both the entries referred to at the Dardanelle land office, Arkansas. He admits having made one of them. The plain, uncontroverted, and admitted fact is, that on October 21, 1901, he made an entry for eighty acres of land in the Lawton land district, Oklahoma, of that body of land open to settlement and entry under the act of June 6, 1900 (31 Stat., 672, 680), and relinquished the same—whether for a consideration or not does not appear and is not material.

To sustain the entry involved in this contest the defendant relies upon a provision of said act "that any person who having attempted to, but for any cause failed to secure title in fee to a homestead under existing laws . . . . shall be qualified to make a homestead entry upon said lands."

There are two insuperable difficulties in the way of the application of this provision to the case under consideration. First: Clark's prior homestead entry made at the Lawton land office was not made "under existing laws" within the meaning of that phrase as found in the paragraph above quoted from said act. That phrase meant, in the judgment of this Department, laws existing at the date of the passage of the act of June 6, 1900, and this act may not be considered as one of these laws. Second: The qualification is "to make *a* homestead entry upon said land," and this Department can not consent to the

construction that a person may make a homestead entry upon the lands open to settlement and entry under said act and continue indefinitely to make another and another homestead entry because of this provision. To admit such construction as this would be to say that a person might make a homestead entry of these lands today, relinquish it tomorrow, and make another entry, and so on indefinitely. Upon this question the defendant cites the case of Winborn *v.* Bell (33 L. D., 125), and argues that the case at bar is on all fours with that case. This is clearly not so. In that case the original entry had been made of lands other than those open to settlement and entry by the act of June 6, 1900, and prior to the passage of that act. The difference is too apparent to justify argument.

Nothing is found in the acts of June 5, 1900, and April 28, 1904, *supra*, to justify sustaining this entry. In so far as an original entry may be made the basis of a second entry under the act of June 5, 1900, that act has no prospective operation, and the original entry at Lawton was made after the passage of said act. Besides, as has been seen, the entry in contest was not made under that act. but under the act of June 6, 1900, and is subject to the limitations and conditions thereby imposed.

Under the facts of this case the act of April 28, 1904, has no application whatever.

No reason has been shown and none occurs to this Department why its said decision of October 3, 1905, should be vacated, and the same is hereby sustained and re-affirmed. The motion is denied.

HOMESTEAD CONTEST—ABANDONMENT—MILITARY SERVICE—PROOF—ACT OF JUNE 16, 1898.

HALLQUIST *v.* COTTON.

The land department will take judicial notice of the existence of any war in which the United States is engaged; and the fact that during the period of abandonment charged in a contest against a homestead entry the United States was not engaged in any war, is *prima facie* evidence that the entryman's alleged absence was not due to military service.

A woman is disqualified to legally engage in the service of the United States as a "private soldier, officer, seaman or marine;" and where a homesteader against whom contest has been brought on the ground of abandonment is a woman, such fact sufficiently proves, in the absence of any other evidence, that the default alleged was not due to service in the army, navy or marine corps within the meaning of the act of June 16, 1898.

Acting Secretary Woodruff to the Commissioner of the General Land
(S. V. P.) *Office, June 25, 1907.* (E. O. P.)

Mary C. Cotton has appealed to the Department from your office decision of October 11, 1906, holding for cancellation her homestead entry made May 29, 1903, for the SW. ¼, Sec. 34 T. 13 N., R. 43 W., North Platte land district, Nebraska, upon contest instituted by Annie S. Hallquist.

The facts disclosed by the record fully warrant the action taken by your office upon the merits of the case.

Counsel for claimant has interposed objections to the manner of procedure and the failure to demand more direct proof that the default established was not due to service in the army, navy or marine corps of the United States in time of war.

It is contended that error was committed in not allowing motion for continuance filed prior to the date set for hearing. It does not appear that action on said motion was insisted upon at the hearing, nor was any error alleged in the appeal from the decision of the local officers, based upon this ground, and it comes too late when presented for the first time on appeal here, when no effort was made to obtain a ruling thereon in the first instance.

The Department is bound to take judicial notice of the existence of any war in which the United States is engaged. (Prize Cases, 2 Black, 635, 667; Underhill *v.* Hernandez, 168 U. S., 250, 253.) The same is true as to executive orders and proclamations. (Armstrong *v.* United States, 13 Wall., 154.) Not only must the latter be judicially noticed, but in addition accorded all the force of public law. (Jenkins *v.* Collard, 145 U. S., 546, 561.) The President, by proclamation of July 4, 1902 (32 Stat., 2014), declared the Philippine insurrection at an end, except as to the country inhabited by the Moro tribes, over which territory civil government was established July 15, 1903, under authority of an act of the Philippine Commission of June 1, 1903.

The date of initiation of contest is disclosed by the record. The default alleged is clearly established by the testimony of competent witnesses and these facts considered in connection with the matters judicially noticed, and the further fact that the claimant is a woman and disqualified to legally engage in the service of the United States as a " private soldier, officer, seaman, or marine," sufficiently proves, in the absence of any other evidence, that the default alleged was not due to service in the army, navy or marine corps within the meaning of the act of June 16, 1898 (30 Stat., 473).

The decision appealed from is hereby affirmed.

MILITARY BOUNTY LAND WARRANT—ASSIGNMENT—ADMINISTRATOR.

WILLIAM C. MCGEHEE.

A military bounty land right existing in the claimant at the time of his death, whether the certificate of that right has or has not issued, immediately vests in the next beneficiary in the order of succession fixed by statute and cannot in anywise become an asset of the estate of the deceased claimant.

The sale and assignment of a military bounty land warrant by the administrator of the estate of a deceased claimant, to whom the warrant issued subsequent to the death of the claimant, will not be recognized by the land department in the absence of a satisfactory showing that the sale and assignment were made at the instance and for the sole use and benefit of the person or persons designated by statute as entitled to succeed to the rights of the claimant.

Acting Secretary Woodruff to the Commissioner of the General Land Office, June 25, 1907.

(S. V. P.) (E. F. B.)

With your letter of June 7, 1907, you transmitted the appeal of William C. McGehee from the decision of your office of April 13, 1907, rejecting the location by appellant, as assignee, of military bounty land warrant issued April 4, 1851, under the act of September 28, 1850 (9 Stat., 520), to Peter Overly, private in Captain Pugh's company, 1st Regiment, Kentucky Militia, War of 1812, on the E. ½ NE. ¼, Sec. 27, T. 6 N., R. 4 E., Jackson, Mississippi.

The location was rejected because of imperfect assignment, it not appearing that the warrant was assigned by the soldier, while in life, or by his widow, heirs or legatees after his death.

On the back of the warrant is an endorsement, executed July 6, 1904, signed by John L. Carmack, as "Public Administrator of Platte County, Missouri, in charge of the estate of Peter Overly, deceased," purporting to "assign, transfer and set over unto James A. Baldwin, of Platte County, Missouri, all the right, title and interest of the estate of Peter Overly, deceased, of Platte County, Missouri, in and to the within land warrant."

By a second endorsement on the warrant, made December 28, 1905, the said Carmack, as public administrator, purports to sell and assign, for the use of the heirs only, to James A. Baldwin, the right, title and interest in said warrant, and below said endorsement is the certificate of a notary public that "the said John L. Carmack is public administrator of Platte County, Missouri, in charge of the estate of the warrantee, Peter Overly, deceased."

It is presumed this second assignment was intended to cure defects and omissions in the first.

There is also a certificate from the Judge of the Probate Court of Platte County, Missouri, that at the date of said assignment John L.

Carmack was the duly appointed, qualified and acting public administrator of Platte County, Missouri, in charge of the estate of Peter Overly, who died intestate on or about the 20th day of October, 1857.

With the papers is also an assignment of said warrant from Baldwin to the "Moses Land Scrip and Realty Company," and from said company to William C. McGehee, appellant herein, who made the location now in question.

You refused to approve the location because of insufficient proof that the sale and assignment were made in the interest and for the benefit of the true beneficiaries of the right secured by said warrant, and a showing was required to be made by the locator, under the seal of said court, "setting forth the names of the present sole surviving heirs of the warrantee and also at whose instance said administrator took charge of said estate and for whose benefit said sale was made."

A land warrant is the bounty of the Government in consideration of meritorious services, and in granting the bounty it is competent for Congress to fix the terms and conditions of assignment or devolution of the bounty it confers. (Homer Guerry, 35 L. D., 310, 313.)

The fourth section of the act of September 28, 1850 (9 Stat., 520), under which this warrant issued, and now embodied in section 2436, Revised Statutes, declares that:

> All sales, mortgages, letters of attorney, or other instruments of writing going to affect the title or claim to any warrant issued or to be issued, or any land granted or to be granted, under the preceding provisions of this chapter, made or executed prior to the issue of such warrant, shall be null and void to all intents and purposes whatsoever; nor shall such warrant or the land obtained thereby be in any wise affected by, or charged with, or subject to the payment of any debt or claim incurred by any officer or soldier prior to the issuing of the patent.

The right to assign a warrant after the issue is provided for by section 2414, Revised Statutes, taken from the act of March 22, 1852 (10 Stat., 3), which is as follows:

> All warrants for military bounty lands which have been or may hereafter be issued under any law of the United States, and all valid locations of the same which have been or may hereafter be made, are declared to be assignable by deed or instrument of writing, made and executed according to such form and pursuant to such regulations as may be prescribed by the Commissioner of the General Land Office, so as to vest the assignee with all the rights of the original owner of the warrant or location.

The act of June 3, 1858 (11 Stat., 308), which is carried into the Revised Statutes as section 2444, provides that where warrants are issued subsequent to the death of the claimant, "the title to such warrants shall vest in his widow, if there be one, and if there be no widow, then in the heirs or legatees of the claimant; and all military bounty land warrants issued pursuant to law shall be treated as per-

sonal chattels, and may be conveyed by assignment of such widow, heirs or legatees or by the legal representatives of the deceased claimant, for the use of such heirs or legatees only."

The express purpose of this legislation was to provide for the vesting of the title to a warrant issued in the name of the claimant subsequent to his death; but it also served to designate the order of succession to the bounty of the government, where the claimant had not, while in life, located the warrant or exercised the right granted by the statute to assign such warrant by deed or instrument of writing, vesting in such assignee all the rights of the original owner of the warrant or location.

This view finds support in the several acts of Congress granting bounty for military services, the substance of which is embodied in the Revised Statutes. It is provided (Section 2418, Revised Statutes) that "each of the surviving, or the widow or minor children" of a deceased officer, soldier or seaman who served in the wars named therein, shall be entitled to such bounty, and in the event of the death of such claimant, before the issuance of a certificate or warrant, "the warrant or scrip shall be issued in favor of his family or relatives: first, to the widow and his children; second, his father; third, his mother; fourth, his brothers and sisters."

Congress deemed it necessary to guard the rights of the beneficiaries contemplated by the act in order that the benefits conferred should not be defeated nor its objects perverted to the profits of land speculation. It provided that all sales, mortgages or other instruments of writing going to affect the title or claim to the warrant executed prior to the issue of the warrant shall be null and void, nor shall such warrant or the land obtained thereby be in anywise affected by, or charged with, or subject to the payment of any debt or claim incurred by any officer or soldier prior to the issuing of the patent. Until the warrant has issued, the claimant can not dispose of the right. If at the time of his death he is entitled to a military bounty right for which no warrant has issued, such right immediately vests in the widow, heirs or legatees of the deceased claimant, so that a military bounty right existing in the claimant at the time of his death, whether the certification of that right has or has not been issued, immediately vests in the next beneficiary in the order of succession and can not in anywise become an asset of the estate of the deceased claimant.

Section 24 of the regulations governing the assignment of military bounty land warrants (27 L. D., 218, 222) authorizes the administrator of a deceased warrantee who died intestate, to assign the warrant *for the use of the heirs only*, following the provisions of section 2444, Revised Statutes. It was not contemplated by the act

nor by the regulations issued thereunder that the sale of such warrant could be made by the administrator as an asset of the estate of the deceased warrantee, or to authorize such administrator to sell and assign the warrant merely for the purpose of conveying the title, as was evidently the sole object in this case, it not appearing that such sale and assignment were made at the instance and for the use of the heirs.

The statute intended merely to designate an agency by which the heirs could have the assignment executed as a matter of convenience and not to confer a power upon the administrator to act and assign without their consent and authority. The heirs are authorized by the act to execute the assignment in person, or they may act through the legal representative of the estate as their agent, who acts for "the use of such heirs or legatees only." The purpose of the statute is not accomplished by selling and assigning the warrant as an asset of the estate, even though the proceeds of the sale may not be diverted to other uses.

No hardship or unreasonable demand was imposed upon this appellant in requiring him to submit a showing "setting forth the names of the present sole surviving heirs of the warrantee, and also at whose instance said administrator took charge of the estate and for whose benefit said sale was made." He should be required to show further that the sale and assignment were made at the instance of such heirs and for their sole use and benefit.

Your decision is affirmed.

MILITARY BOUNTY LAND WARRANT—ASSIGNMENT—RIGHTS OF ASSIGNEE.

THOMAS N. LADNIER.

A military bounty land warrant issued to the original claimant and by him regularly assigned in writing, thereby becomes the absolute property of the assignee, free from the conditions attaching to it in the hands of the warrantee, and upon the death of the assignee becomes an asset of his estate, having the same character as other personal assets.

A military bounty land warrant, after assignment, is no longer protected by the provision of section 2436 of the Revised Statutes that the warrant, or the land obtained thereby, shall not in anywise be affected by, or charged with, or subject to the payment of any debt or claim incurred by any officer or soldier prior to the issuing of the patent.

Acting Secretary Woodruff to the Commissioner of the General Land Office, June 26, 1907.

(S. V. P.) (E. F. B.)

The appeal is filed by Thomas N. Ladnier from the decision of your office of April 26, 1907, rejecting the location by appellant, as

assignee, of the SE. ¼ NW. ¼ and SW. ¼ NE. ¼, Sec. 35, T. 5 S., R. 13 W., Jackson, Mississippi, with military bounty land warrant No. 21667, issued November 19, 1851, to William Lent, private, Kentucky Militia, War of 1812, under the act of September 28, 1850.

The location was rejected because of imperfect assignment, title being claimed under an assignment by John L. Carmack, public administrator of Madison Owens, to whom the warrant had been assigned by the warrantee.

You required the locator to show that the sale by the administrator was at the instance of some person lawfully entitled to the warrant or that a new assignment should be obtained from the heirs or legal representatives of Madison Owens, as prescribed by the circular of March 28, 1902 (27 L. D., 218; 31 L. D., 277).

The case of E. Tyson Ware, administrator of Badders, decided by the Department May 15, 1906 (unreported), is cited as authority for your ruling.

In that case as in the case of William C. McGehee, decided June 25, 1907 (35 L. D., 627), no assignment had been made by the soldier while in life or by his widow, heirs or legatees after his death. It was held that where the right to a military bounty land warrant existed in the claimant at the time of his death, whether the certificate of that right had or had not been issued, it immediately vested in the next beneficiary in the order of succession, and can not in anywise become an asset of the estate of the deceased claimant.

In this case the warrant had issued and had been regularly assigned by the warrantee in writing, vesting in such assignee all the rights of the original owner of the warrant.

It thereupon became the absolute property of the assignee, free from the conditions that attached to it in the hands of the warrantee, and upon the death of the assignee it became an asset of his estate, having the same character as other personal assets; nor was it, after such assignment, protected by that provision of the statute that the warrant or the land obtained thereby shall not in anywise be affected by, or charged with, or subject to the payment of any debt or claim incurred by *any officer or soldier* prior to the issuing of the patent.

It not appearing that there was any irregularity in the proceedings of the court in ordering the sale and assignment of this warrant as an unadministered asset of the estate of Madison Owens, your decision rejecting the assignment by said administrator is reversed.

FOREST RESERVES—HEARINGS ON CHARGES BY FOREST OFFICERS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 26, 1907.

To Registers and Receivers and Special Agents of the General Land Office.

The following circular is substituted for circular of May 3, 1907 [35 L. D., 547]:

1. A government officer in charge of any national forest may initiate a contest or other proceeding before the land department, respecting the unlawful occupation or use of land within a national forest by reason of a claim made thereto under any of the public land laws.

2. As a basis for such proceeding such officer shall file in the local land office for the district in which the lands involved are located a complaint signed by him in his official capacity, but not under oath or corroborated, setting forth facts respecting the alleged unlawful occupation or use of the public lands.

3. Upon the filing of a sufficient complaint in any case in which final certificate has not issued, the register and receiver will issue a notice with a copy of such complaint attached thereto to the defendant, notifying him that unless he within thirty days from the receipt of such notice files in their office a denial or answer to such charges in writing and under oath, the truth of such charges will be taken as confessed by him and any entry, filing or claim asserted to such land, under the land laws by such party may be declared forfeited or canceled without further notice to him.

4. When a complaint has been filed respecting any claim upon which final certificate has issued, or where denial under oath is filed in answer to a notice issued under the preceding paragraph, the same will be at once forwarded to the Commissioner of the General Land Office and the further progress of the matter will be in accordance with the circular of February 14, 1906 [34 L. D., 439], defining the manner of proceeding upon special agents' reports.

Very respectfully,

FRED DENNETT,
Acting Commissioner.

Approved, June 26, 1907.

GEORGE W. WOODRUFF,
Acting Secretary.

YOUNG *v.* TRUMBLE ET AL.

Motion for review of departmental decision of April 16, 1907, 35 L. D., 515, denied by Acting Secretary Woodruff, June 27, 1907.

ACCOUNTS OF RECEIVERS AND SPECIAL DISBURSING AGENTS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 27, 1907.

Receivers and Special Disbursing Agents at United States District Land Offices.

GENTLEMEN: Whereas the Comptroller of the Treasury, under authority conferred by section five of the act of July 31, 1894 (28 Stat., 206), has directed that all accounts of disbursing and collecting agents of the government shall be rendered and stated in one consolidated account and settlement, without regard to the number of appropriations or headings involved, it is hereby ordered that:

1. After the quarter ending June 30, 1907, the following quarterly accounts and statements shall be discontinued:

Form No. 4–106, Receiver's detailed account current.

Form No. 4–104, Receiver's condensed account current.

Form No. 4–157, Receiver's recapitulation of cash receipts.

Form No. 4–103a, Receiver's account of unearned fees and unofficial moneys.

Form No. 4–097, Receiver's recapitulation of original homestead entries.

Form No. 4–099, Receiver's recapitulation of final homestead entries.

Form No. 4–103, Special disbursing agent's accounts under the appropriation for salaries and commissions of registers and receivers, contingent expenses, or other appropriation.

2. To prevent the use of obsolete forms, receivers are directed to return to the Commissioner of the General Land Office, Washington, D. C., all the above-mentioned blanks in their possession after transmitting their accounts for the quarter ending June 30, 1907. Packages should be sent by mail and marked "Obsolete Forms." Advice of transmittal of obsolete forms should be sent in a separate letter.

3. It is further ordered that, for the quarter commencing July 1, 1907, and for periods thereafter, the following quarterly accounts

and abstracts, prescribed and approved by the Comptroller of the Treasury, shall be rendered by receivers of public moneys and special disbursing agents at district land offices:

Form No. 4–104a, Receiver's consolidated account current.

Form No. 4–106, Receiver's abstract of collections.

Form No. 4–106a, Receiver's abstract of deposits, scrip and warrants.

Form No. 4–157, Receiver's recapitulation of abstract of collections.

Form No. 4–103, Receiver's abstract of unearned fees received.

Form No. 4–103a, Receiver's abstract of unearned fees disbursed.

Form No. 4–103e, Special disbursing agent's consolidated account current.

Form No. 4–104, Special disbursing agent's abstract of expenditures—a separate abstract for each appropriation.

4. Receivers will specify in the account current, form 4–104a, under the appropriate column headings, the amounts debited to the United States during the period covered by the account. The description of the first debit item on said form should be amended by substituting the word *abstract* in lieu of "accounts," so as to read, "To deposits to credit of the United States, as per quarterly *abstract* herewith." The total of each class under each column heading in the abstract of deposits, scrip and warrants, form 4–106a, is to be debited under like heading in the account current, form 4–104a. Likewise debit the several balances, if any, due to the United States at the close of the period. Credits in the receiver's account current, form 4–104a, will include the several balances due to the United States, brought forward from the preceding quarter, and the receipts during the quarter, as shown by the several abstracts of collections, form 4–106. The segregate and aggregate totals of the debits must correspond with the segregate and aggregate totals of the credits in the account current, form 4–104a, and the balance therein certified as due to the United States must be the true amount of all moneys, official and unofficial, from whatever source received and in whatsoever manner held, with which the receiver is chargeable by virtue of his office.

5. A separate abstract of collections, form 4–106, is required for each heading of account, under which an amount is credited in the receiver's consolidated account current, except that such abstract is not required for fees and commissions. In the abstract of collections for sales of public lands, the receiver will segregate the various classes of entries, first entering in detail all commuted homestead entries at $1.25; then following with commuted homestead entries at $2.50; excesses at $1.25 and $2.50, respectively; timber and stone

entries at $2.50; etc. The footing of each class of entries must agree with the corresponding item in the recapitulation of abstract of collections, form 4–157. Commuted entries and installment payments should be similarly segregated in receivers' abstracts of collections on account of Indian lands. For collections on account of the Reclamation Fund, a separate abstract of collections (4–106) should be rendered under each irrigation project, the heading of said abstract being modified so as to show the amount paid for cost of construction and the amount paid for operation and maintenance.

6. The recapitulation of abstract of collections, form No. 4–157, corresponds to the recapitulation of cash receipts heretofore rendered, and shows the total number of entries, area and amount for each class of lands. This recapitulation should *not* be duplicated on the receiver's abstract of collections, 4–106.

7. The abstract of deposits, scrip and warrants, form No. 4–106a, is a detailed statement, designed to show (1) the date and number of each certificate of deposit for money deposited to the credit of the Treasurer of the United States, and the particular fund to be credited therewith; (2) certificates of deposit on account of surveys, specifying amount, date of receipt and number of entry on which they are credited; and (3) the number and description of scrip or warrants received in lieu of cash, date when received, and the entry credited therewith.

8. The abstract of unearned fees received, form No. 4–103, will show in detail each item of such moneys received, corresponding with the credit side of the receiver's record, 4–987. The total receipts of such moneys for the quarter will be credited to the United States on the receiver's account current, 4–104a.

9. The abstract of unearned fees disbursed, form 4–103a, will show in detail each item of such moneys applied, earned, returned or transferred to the Treasury under the act of March 2, 1907, and correspond with the debit side of the receiver's record, 4–987. The total of such moneys disbursed during the quarter will be debited to the United States on the receiver's account current, 4–104a.

10. Special disbursing agents will debit to the United States in the consolidated account current, form No. 4–103e, the total amount disbursed under each of the appropriations during the period covered by the account. Money columns are ruled for two years under each heading of appropriation, so that the specific appropriation for each fiscal year may be properly charged. Deposits to the credit of the Treasurer of the United States on account of the several appropriations are likewise to be debited, the entry showing, in addition to the amount, the number and date of each certificate of deposit.

Space is provided for debit items, when necessary to make corrections on account of errors or erroneous balances in the disbursing agent's preceding account. The balancing entry is the amount due under each appropriation or fiscal year, at the close of the period covered by the account. Under "Credits," the special disbursing agent will enter in said account current the several balances due to the United States at the close of the preceding period; the several advances received during the period, specifying warrant number and date; also the corrections on account of disallowances in the Auditor's settlement of the disbursing agent's preceding account. The segregate and aggregate totals of the debits in the disbursing agent's account current, 4–103e, must agree with the corresponding totals of the credits appearing therein. The balance certified as due to the United States at the close of the period should be the amount with which the special disbursing agent is chargeable under all the appropriations from which advances have been made to him. The amount held in the designated depository or as cash in the office should be stated, and the amount kept in any other repository, or in any other manner, together with the authority for so keeping, should be specified.

11. A separate abstract of expenditures, form No. 4–104, must support the amount charged in the account current, 4–103e, under such appropriation and fiscal year. The abstract of expenditures, 4–104, must show in detail the date, purpose and amount of each payment and to whom paid. Disbursing agents are advised that such items as rent, salaries, etc., should, if possible, be paid and receipts dated on the last day of the quarter. If a receipt or voucher for services rendered or supplies furnished bears date subsequent to the period covered by the account, credit will not be allowed on said voucher in the settlement of the disbursing agent's account for that period. *Abstracts of expenditures must be rendered in duplicate.*

12. Balances brought from preceding accounts or to be carried into subsequent accounts should be entered in red ink. Receivers and special disbursing agents must certify to the correctness of the accounts current 4–104a and 4–103e, and also sign the first indorsement on the last outer fold thereof. The several abstracts should be indorsed by the receiver and special disbursing agent, respectively. Abstracts should be typewritten, if practicable, and will be prepared from the record books which heretofore furnished data for the several quarterly accounts. With the discontinuance of the receiver's condensed quarterly account (4–104), the record thereof (4–957) is dropped. Until otherwise instructed each receiver will retain, for reference purposes, a duplicate of the receiver's new account current, 4–104a, and of the special disbursing agent's new account 4–103e, as transmitted to this office. A supply of the new

forms of quarterly accounts and abstracts, sufficient to last until March 31, 1908, inclusive, will be forwarded immediately from the Department.

Please acknowledge receipt of this circular.

Very respectfully,

FRED DENNETT,
Acting Commissioner.

Approved, June 27, 1907:

GEORGE W. WOODRUFF,
Acting Secretary.

RIGHT OF WAY—CANYON OR DEFILE—ACT OF FEBRUARY 15, 1901.

NEVADA POWER, MINING AND MILLING CO. *v.* OWENS RIVER WATER AND POWER CO.

Exclusive occupation or use of a canyon or defile will not be permitted under an approval by the Department of a right of way under the act of February 15, 1901; but the expense incident to any change or readjustment enabling use by a subsequent applicant must be borne by him, and the approval of the subsequent application will be so conditioned.

Acting Secretary Woodruff to the Commissioner of the General Land Office, June 27, 1907.

(S. V. P.) (F. W. C.)

There is before the Department the record in the matter of the conflicting applications by the Nevada Power, Mining and Milling Company and the Owens River Water and Power Company for permission to use rights of way under the act of February 15, 1901 (31 Stat., 790), for transmission lines delineated upon the maps filed by the Nevada company, March 13, 1905, and by the Owens River company, March 1 and 27, 1905.

In your office decision of July 24, 1906, it was stated that an examination of these maps and the records shows that the chief conflict, and the only one that need be considered, occurs where the locations traverse Silver Canyon. Silver Canyon is described as being a comparatively narrow gorge or canyon through the White mountains and is the only convenient pass for this use, in the vicinity. Many questions are pressed for consideration by the opposing interests, involving technical rights under location and construction, but in the view taken of this matter by the Department, and tentatively acquiesced in by the opposing parties at the time of the oral argument before the Acting Secretary, they need not be given serious consideration at this time.

No exclusive occupation or use of a canyon or defile will be permitted under an approval given by this Department under the act

of 1901, and, after a full hearing accorded to these conflicting claimants, it has been determined to approve simultaneously the application filed by each, showing its full transmission line.

It is alleged that there is in fact no actual conflict between the two lines within this canyon, as shown upon their maps of location as filed, and that the real conflict is occasioned by the construction heretofore made by the Nevada company through this canyon, in which construction it has deviated or departed from its located line. It is deemed unnecessary at this time to enter into a hearing upon this matter, or to make further order than that, in the adjustment of the conflicting interests within this canyon, if the Nevada company has departed from its line of location and thereby caused the conflict or interference with the Owens River company, it should make the necessary changes in order to relieve the situation; otherwise, the expense incident to any necessary changes should be amicably adjust. With regard to any further applications involving the use of this canyon, the right will be granted only upon the condition that the expense incident to any change or readjustment should be borne by the person or company applying for such further right of way.

It is noted that in your decision of July 24, 1906, it is stated that the several maps of location filed by these companies will, when perfected, be recommended for approval, etc., and for that reason the record is herewith returned with direction that early consideration be given to these maps of location to the end that they may be submitted for departmental approval, in accordance with the direction herein given, at the earliest practical date.

It but remains to consider an appeal filed on behalf of the city of Los Angeles. It is not made to appear to the satisfaction of this Department that the granting of these applications can in anywise seriously interfere with any claimed rights of the city or that their rejection is necessary for the protection of the water supply of that city. They involve no rights to the use of water, and it is represented that the several companies are fully possessed of rights necessary to the generation of the electrical energy which it is proposed to transmit across these lines. Resident counsel for the city of Los Angeles was present at the oral hearing in this matter and interposed no objection to the action herein taken.

DESERT LAND ENTRY—PERMANENT IMPROVEMENTS—WELL-BORING MACHINERY.

NELSON J. LITTLEJOHN.

Expenditures for machinery for boring wells with a view to developing a water supply for irrigation of the land, can not be accepted toward meeting the statutory requirement relative to expenditures for permanent improvements upon desert land entries.

Acting Secretary Woodruff to the Commissioner of the General Land Office, June 27, 1907.
(S. V. P.) (J. R. W.)

Nelson J. Littlejohn appealed from your decision of February 9, 1907, holding insufficient his first yearly proof of expenditure on his desert-land entry for lot 1, Sec. 5, N. ½ of SW. ¼, S. ½ NW. ¼, lot 4, Sec. 4, T. 14 N., R. 13 E., and W. ½ SW. ¼, Sec. 33, T. 15 N., R. 13 E., 316.48 acres, Lewistown, Montana.

January 30, 1906, Littlejohn made entry and, in proper time, made annual proof of expenditure, viz: fencing, $106; purchasing artesian well machinery, $106; work done in prospecting development and drilling, $108. None of these items profess to be expenditures on the land itself, but are proportions of larger sums expended in connection with reclamation of these and other lands by an association of entrymen, which are deemed to be chargeable to the particular lands here involved. You rejected the item of well drilling machinery because it "cannot be considered as a permanent improvement of the land." It is argued that proportionate parts of joint expenditure should be allowed and may be credited by authority of sections 4 and 5 of the act of March 3, 1891 (26 Stat., 1095), which, among other things, provide that persons having separate entries "may associate together in construction of canals and ditches for irrigating and reclaiming all of said tracts," and that patent shall not issue unless the entryman shall have expended in "irrigation, reclamation and cultivation thereof by means of main canals and branch ditches, and in permanent improvements upon the land and in the purchase of water rights for the irrigation of the same, at least $3.00 per acre."

It is argued that the purchase of machinery for the purpose of boring a well as source of water supply, if done in good faith in belief of obtaining subterranean water to flow to the surface for irrigation, is the full equivalent of expenditure in making a main canal to conduct available surface waters. This might be conceded without affecting the result. It is, however, obvious that they are not full equivalents. The well-boring machinery is utilizable anywhere. On the contrary a canal is utilizable only for service of the particular lands lying along its course and below its levels, so that its area of service is restricted by the topography of the region. One is movable property that may be sold and removed anywhere; the other an immovable property, usable and valuable only where it lies, and to serve the locality to which its usefulness is confined by topographical conditions.

Besides this obvious difference, heed must be given to the words and general purpose of the statute. Its general object was to require improvement of the land and secure its reclamation and cultivation. It permits credit for expenditures not made on the land itself, but

does that by specific mention of main canals and branch ditches and water rights for irrigation of the particular lands—appurtenant to such land. These all savor of real property servient to the particular estate of the entry and dedicated to it.

The well boring machinery has no such character. It is a mere movable chattel, subject to will of its owner—removable anywhere without serious impairment, unattached. It is not generically similar to the things specified in the statute that are not on the land. The case is essentially like Wilkinson *v.* Stillwell (35 L. D., 92). Your decision is affirmed.

ABOLD *v.* MEER.

Motion for review of departmental decision of May 9, 1907, 35 L. D., 560, denied by Acting Secretary Woodruff, June 28, 1907.

STATE SELECTION—SETTLEMENT RIGHTS—ACT OF AUGUST 18, 1894.

THORPE ET AL. *v.* STATE OF IDAHO.

The preference right of selection granted the State by the act of August 18, 1894, is not conditioned upon an advance deposit for survey by the State, as permitted by the act, and where the State has otherwise complied with the provisions of the act, its preferred right is in no wise affected by the fact that the survey was made upon the advance deposit of another.

The filing on behalf of a State of an application for the survey of lands under the act of August 18, 1894, and the publication of notice thereof as provided by the act, operate as a withdrawal thereof, and all settlements subsequently made are subject to the preference right of the State.

Notice to the local officers of the withdrawal of lands embraced in an application for survey by the State, as provided by the act of August 18, 1894, is intended primarily for their information, in order that proper notation may be made upon their records, and is not essential to the protection of the rights of the State.

Secretary Garfield to the Commissioner of the General Land Office,
(G. W. W.) *June 27, 1907.* (F. W. C.)

The Department has considered the appeal on behalf of Stephen A. Thorpe *et al.* from your office decision of March 27, 1906, holding for cancellation their homestead entries covering lands in T. 44 N., R. 2 E., B. M., Coeur d'Alene land district, Idaho, for conflict with selection made of said land by the State as school land indemnity within the period of preference right granted the State by the act of August 18, 1894 (28 Stat., 372, 394).

The approved plat of survey of this township was officially filed

July 5, 1905, upon which date the homestead entries in question were made, in most, if not in all, instances based upon a preceding settlement. Three days thereafter, to wit, on July 8, 1905, the State filed an indemnity school land list of selections embracing 6649.09 acres within this township. It is this selection that conflicted with the homestead entries in question and the list was for that reason rejected by the local officers. Upon appeal, however, your office decision of March 27, 1906, in so far as entries were based upon settlement alleged after July 6, 1901, held the same for cancellation with a view to allowing completion of the selection, a preference right of selection under the act of 1894 being accorded the State by reason of an application filed for survey of the township in question on July 6, 1901.

Since the case has been pending upon appeal, application has been made for oral argument, which was granted, and at this hearing both the State and the settlers were represented, as was also the Northern Pacific Railway Company, which company has selection pending for lands in this township claimed by the State, not involved in the case under consideration but in other cases pending upon appeal.

The State's claim to a preferential right under the act of 1894 is based upon the following. March 15, 1899, the governor of the State of Idaho made application for the survey of the township in question, and acting thereon withdrawal was made of said township by your office letter "E" of March 29, 1899. Your office decision finds that no evidence was ever filed of the publication of this application, as required by the act of 1894; that on July 6, 1901, a second application was filed by the State for the survey of this township, among others, and evidence was thereafter filed showing publication of this application in the "Idaho State Tribune," of Wallace, Idaho, the publication beginning with the issue of July 10, 1901, and continuing to and including August 14, 1901. No formal order of withdrawal ever issued from your office under the application of 1901, as contemplated by the provisions of the act of 1894, but this was presumably because of the fact that the township had been ordered withdrawn upon the first application for survey filed in 1899, which order stood unrevoked.

The first question for consideration is whether the State has entitled itself to the preferential right of selection for a period of sixty days from the date of the filing of the township plat of survey in the district land office, as granted by the act of 1894. The portion of said act bearing upon this question is as follows:

That it shall be lawful for the governors of the States of Washington, Idaho, Montana, North Dakota, South Dakota, and Wyoming to apply to the Commissioner of the General Land Office for the survey of any township or townships

of public land then remaining unsurveyed in any of the several surveying districts, with a view to satisfy the public land grants made by the several acts admitting the said States into the Union to the extent of the full quantity of land called for thereby; and 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 the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim, for the satisfaction of such grants, with the condition, however, that the governor of the State, within thirty days from the date of such filing of the application for survey, shall cause a notice to be published, which publication shall be continued for thirty days from the first publication, in some newspaper of general circulation in the vicinity of the lands likely to be embraced in such township or townships, giving notice to all parties interested of the fact of such application for survey and the exclusive right of selection by the State for the aforesaid period of sixty days as herein provided for; and after the expiration of such period of sixty days any lands which may remain unselected by the State, and not otherwise appropriated according to law, shall be subject to disposal under general laws as other public lands: *And provided further*, That the Commissioner of the General Land Office shall give notice immediately of the reservation of any township or townships to the local land office in which the land is situate of the withdrawal of such township or townships, for the purpose hereinbefore provided: *And provided further*, That the governors of the several States herein named are authorized to advance money from time to time for the survey of the townships withdrawn at such United States depositary as may be designated by the Commissioner of the General Land Office, and the moneys so advanced shall be reimbursable. The foregoing provisions shall be applicable to Utah when admitted as a State into the Union and a governor is duly inaugurated and acting.

With regard to the survey of the township in question your office decision finds that "on December 4, 1904, the State made a deposit of $20,000 to cover cost of the survey of the townships embraced in its application, and the surveys were embraced in contracts 249 and 250, approved January 18, 1905." The impression gained therefrom is that the survey of the township in question was made on account of the deposit made by the State. The appeal urges error "in not finding and deciding that the State of Idaho acquired no rights thereunder." In reply thereto the State admits that the survey of the township in question was made under contract No. 247 and at the expense of the Northern Pacific Railway Company and states that there were three several applications filed for the survey of this township: one by the State, another by the railway company, and a

third on behalf of settlers, and that in forwarding these several applications the surveyor-general suggested that the survey be made upon the application of the railway company "provided that this would in nowise affect the existing rights of the settlers or of the State," and that in approving the recommendation of the surveyor-general your office attached a like provision.

In disposing of this objection of appellant it is but necessary to say that while the act of 1894 made it possible for a deposit to be made by the State for the purpose of facilitating surveys made upon its application, the preferential right granted by that act is not conditioned upon such advance payment and that if the State has otherwise complied with the provisions of the act its preferential right is not affected by the fact that the survey was made upon the advance deposit of the railway company.

As before stated, notice of the withdrawal of the lands in this township, as provided for in the act of 1894, was given by your office upon the application for the survey thereof filed by the State, March 15, 1899. The State contends that the statute withdraws lands embraced in the governor's application as soon as filed; that your office has no discretion in the matter, and that the giving of the notice of the withdrawal to the local officers is purely ministerial. The Department is not prepared to grant this contention and thus admit that it is within the power of the governor to withdraw from settlement, by a blanket application, all the unsurveyed lands within the State, even though the remainder of the unsatisfied State grants was very small.

The Department has heretofore determined that the reservation under the act of 1894 is conditioned upon the publication of the notice of the application for survey within thirty days from the filing of the application, the publication to be made "in some newspaper of general circulation in the vicinity of the lands to be embraced in such township or townships, the same to continue for thirty days from the first publication." With regard to the application of March 15, 1899, as before stated, no evidence has ever been filed of the publication of the notice of such application and it was admitted at the hearing that none could be furnished. It necessarily follows, under previous adjudications, no reservation of the lands on account of such application was effected by the statute. At the time of the filing of the second application for the survey of this township, in July, 1901, no attention seems to have been given to the fact that no showing had been made of the publication of the notice, as required by the statute, with respect to the first application. Indeed, it does not seem to have been the practice at that time to exact evidence of publication. An inquiry was, however, instituted with regard to the withdrawals theretofore made under the statute, the purpose being to determine

whether sufficient withdrawal had not already been made on account of previous applications to satisfy the several grants to the State, and to determine, as a consequence, the necessity for further reservations upon the State's application for survey. As before stated, the authority to institute this inquiry is now disputed, but this need be given no further consideration at this time because response was made on behalf of the State, which was evidently considered entirely satisfactory from the fact that many other applications have since been filed, respected, and notice of withdrawals issued thereon by your office.

No formal notice of withdrawal of the township was given by your office after the filing of the second application, but in your office decision you find that the publication of notice of this application was made in full compliance with the conditions of the statute, and, as a consequence, a statutory reservation attached; further, that a notice of the withdrawal or reservation addressed to the local officers was not necessary for the protection of the rights of the State thereunder.

The appeal, under several specifications of error, questions the conclusion of your office with respect to these matters.

After a careful consideration thereof, the Department is of opinion that the decision of your office in this respect is substantially correct. If the State had fully performed the conditions upon which a reservation was directed by the statute, the mere failure on the part of your office to give proper notice to the local officers or the miscarriage of such a notice, in the event it was directed by your office, should not prejudice the rights of the State. The law prescribes the publication for the purpose of giving information to the public of each application for survey, and the direction with respect to the notice to be given the local officers, while it would serve, in a measure, the same purpose, was primarily intended for information to the local officers, that their records might be properly noted. In this case, however, the question is not material because notice of the withdrawal of the township had been given upon the first application, and stood unrevoked. Thus, there was no real necessity for making a further order upon the second application.

The appeal, however, urges further error in this: it is claimed that the publication of notice of the second application was not a compliance with the statute, the paper used not being a paper of general circulation in the vicinity of the lands likely to be embraced in this township. In response thereto it is said on behalf of the State:

The publication was made in the "Idaho State Tribune," of Wallace, Idaho. Wallace is the county seat of Shoshone County, within which the land is situated. It is by far the largest town in the county. It is not over twenty-

five miles from the actual land here in controversy. The "Idaho State Tribune" was at that time the most widely circulated paper in Northern Idaho. Reference to the "Newspaper Annual" for 1901 will show that its circulation was equal to all the other papers in that region put together.

The appeal filed in this case failed to name a better medium for the purpose of giving the notice required by the statute. At the hearing two papers were named, but no satisfactory showing was made in support of their claimed superiority over the paper used by the State.

Upon the whole, therefore, it must be held that the State has shown itself entitled to claim the preferential right of selection for a period of sixty days from the date of the filing of the plat of survey of this township in the district land office, as granted by the act of 1894.

There is no question but that the selection was filed within the time allowed by the statute and as a consequence it must be held as to the entrymen alleging settlement subsequently to the filing of the application for survey in July, 1901, that their rights are subordinate to the right of the State under the act of 1894, and that its selection, if otherwise regular and satisfactory, must be accepted, in which event the entries in question will be canceled.

In a brief filed on behalf of appellants the validity of the selections in question is attacked because made in lieu of parts of sections 16 and 36, unsurveyed lands within the Coeur d'Alene Indian reservation, and it is urged that the selection is invalid because there was no loss to the State and the officers of the State are without authority to surrender the base lands for the purpose of making selections of other lands in lieu thereof. This is a feature of the case not considered by your office and in disposing thereof it is but necessary to say that if the facts are as alleged they do not affect the validity of the selections, which are clearly permitted by the provisions of the act of February 28, 1891 (26 Stat., 796). See State of California, on review (28 L. D., 57).

But one further objection is made to the selection—that is, that any right gained by reason of the State's application for the survey of this township under the act of 1894, was waived by a letter of the governor of the State, dated October 13, 1903, addressed to the surveyor-general, in which, after referring to the State's application of July 5, 1901, he says:

> It having been represented to the State Land Department that settlers living in the above named township are ready and willing to advance moneys necessary to secure their survey, the State hereby expresses its willingness to have the survey made at this time and joins in their request for survey.

This falls far short of waiving any rights granted the State by the act of 1894, if indeed, the governor was empowered to waive such right. The language rather indicates that the governor sought to urge his influence in behalf of settlers within the township who were

entitled to claim the lands as against the State, and your decision shows that there were many such settlers whose rights are fully protected under your decision, which is hereby affirmed.

The following, taken from the State's brief, is not material in the view of the law of 1894 and of compliance therewith by the State as herein expressed, but is added in order that the record may show the real position of the State in this matter:

> There is all through the appellant's brief the assumption of some wrong done the settlers by the State. It is asserted that the grants to the State were "in derogation of the common rights of the settlers," "must be strictly construed," and that its selections in this case were in some way irregular or unfair. The officers who are representing the State in this matter feel, on the other hand, that in seeking to satisfy the grants for common school purposes, they are in the highest sense endeavoring to acquire this land as a heritage of the whole people. These very settlers who are appellants here will share in the benefits of the State's success.

DISPOSAL OF LANDS IN THE FORMER DEVIL'S LAKE INDIAN RESERVATION, NORTH DAKOTA.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas, the act of Congress approved April 27, 1904 (33 Stats., 319, 324), providing for the disposition of lands in the former Devil's Lake Indian Reservation in North Dakota, under the general provisions of the homestead and townsite laws of the United States, at the price of Four Dollars and Fifty Cents per acre, which lands were opened by Proclamation of June 2, 1904 (33 Stats., 2368, 2372), provides that when in the judgment of the President no more of the lands can be disposed of at the said price, he may by proclamation, sell the remaining lands under such laws, at such price and upon such terms as he may deem best for all interests concerned.

And, Whereas, it appears that such tracts of said lands now remaining undisposed of, are small in acreage, or hilly and stony and cannot be disposed of at the price named;

Now, Therefore, I, Theodore Roosevelt, President of the United States, by virtue of the authority in me vested by said act of April 27, 1904, do hereby declare and make known that such of said lands as are unreserved and undisposed of shall on and after date hereof be subject to disposition under the general provisions of the homestead, townsite laws and of Sec. 2455, R. S., as amended by act of Congress, approved June 27, 1906 (34 Stats., 517), at the price of not less than Two Dollars and Fifty Cents per acre in cash payable at date of final proof upon entries made under the homestead and townsite laws and at time of sale under Sec. 2455, amended. In addition,

entrymen must pay the same fees and commissions now required by said laws where the price of land is One Dollar and Twenty Five Cents per acre.

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 8th day of June, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-first.

[SEAL.] THEODORE ROOSEVELT.

By the President:

ELIHU ROOT,

Secretary of State.

DEVILS LAKE INDIAN RESERVATION—DISPOSAL OF REMAINING LANDS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 28, 1907.

Register and Receiver, Devils Lake, North Dakota.

GENTLEMEN: I inclose you copy of the proclamation of the President dated June 8, 1907, providing that such of the lands in the former Devils Lake Indian reservation as were unreserved and undisposed of at the date of said proclamation shall on and thereafter be subject to disposition under the general provisions of the homestead and townsite laws and of section 2455, R. S., as amended by the act of Congress approved June 27, 1906 (34 Stat., 517), at a price of not less than $2.50 per acre, cash, in addition to the usual fees.

The 3rd proviso to section 4, act of April 27, 1904 (33 Stat., 319), in regard to the disposal of said reservation, reads as follows:

> That the lands embraced within such canceled entry shall, after the cancellation of such entry, be subject to entry under the provisions of the homestead law at four dollars and fifty cents per acre up to and until provision may be made for the disposition of said land by proclamation of the President as hereinafter provided.

You will be governed accordingly in disposing of the "remaining" lands in said reservation.

Very respectfully,

FRED DENNETT,
Acting Commissioner.

ELFERS *v.* KNAUFF.

Motion for review of departmental decision of April 30, 1907, 35 L. D., 524, denied by Acting Secretary Woodruff, June 29, 1907.

INDIAN LAND—ALLOTMENT—CONDEMNATION—PATENT—ACT OF MARCH 3, 1901.

INSTRUCTIONS.

A decree of condemnation by a court of competent jurisdiction, in proceedings under the act of March 3, 1901, which provides for condemnation for public purposes of lands allotted in severalty to Indians, has the effect to vest title in fee, and the issuance of patent to the Indian allottee for the land covered by the decree is not necessary.

Acting Secretary Woodruff to the Commissioner of the General Land Office, June 29, 1907.

(S. V. P.) (C. J. G.)

June 22, 1907, your office requested instructions in the matter of issuing trust patents on certain Indian allotments made under the general allotment act in the Susanville, California, land district, the lands covered by said allotments having been in whole or in part condemned for public uses under the act of March 3, 1901 (31 Stat., 1058, 1084), which provides:

> That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

It appears that under this provision of law final order and decree of condemnation for a public use were rendered by the Superior Court of Plumas County, California, against certain enumerated Indian allotments, in favor of the Western Power Company, said decree vesting in said company fee-simple title to certain lands described and embraced in said allotments.

The allotments in question, with others, were approved by the Department February 24, 1897, and your office was authorized September 24, 1898, to suspend the same for investigation. April 22, 1907, the Department directed your office to issue patents on all allotments theretofore approved against which no specific charges had been filed. This is apparently the basis for bringing up the matter at this time, as neither the allottee nor the company has seemingly requested the issuance of trust patents, or raised any question in the premises. Your office concludes:

> I am of opinion that Congress did not intend by the act above quoted to authorize the conveyance by condemnatory proceedings of any greater title than that possessed by the Indian allottee. It therefore seems necessary to now issue patent in trust, under the 5th section of the act of February 8, 1887 (24 Stats., 388), as amended by the act of May 8, 1906 (34 Stats., 182), to the Indian allottees in question, including the lands which have been so condemned.

The Department does not concur in this view. The condemnation proceedings and decree of the court, the same being in all respects regular and complete under the laws of the State, in pursuance of

said act of March 3, 1901, took these allotments, or the portions thereof appropriated, out of the category of those upon which patents were directed by the Department to be issued, just as effectually as if the allottees had in the meantime relinquished their allotments and the same had been canceled. The decree of the court vested fee simple title in the company, leaving nothing in the allottees upon which to issue patents. No further action by the Department is necessary or required, as to those allotments and parts of allotments thus appropriated. These cases can be closed by making proper notations upon the records of your office in accordance with the decree of the court.

LANDS WITHDRAWN UNDER RECLAMATION ACT—APPLICATION TO ENTER—SETTLEMENT RIGHTS.

CHARLES G. CARLISLE.

No such right is acquired against the government by the mere tender of an application to enter public land as entitles the applicant to even equitable consideration where interests of the government intervene.

The practice of designating certain of the withdrawals made under the act of June 17, 1902, as "temporary" discontinued.

Directions given that all uncompleted applications pending at the time of withdrawal of lands for use in the construction and operation of irrigation works, or of lands susceptible of irrigation thereunder, be rejected or disregarded, except that homestead entries may be allowed for lands susceptible of irrigation, subject to the conditions and limitations of the act of June 17, 1902.

Where the application is based upon actual settlement preceding withdrawal, notice thereof should be given the Reclamation Service and favorable consideration made contingent upon the exclusion of the land from the withdrawal.

Mercer *v.* Buford Townsite, 35 L. D., 119, overruled.

Acting Secretary Woodruff to the Commissioner of the General Land Office, June 29, 1907.

(S. V. P.) (E. O. P.)

Charles G. Carlisle has filed a motion for re-review of departmental decision of April 21, 1906, motion for review of which was denied August 25, 1906 [unreported]. The decision complained of affirmed the action of your office in rejecting Carlisle's homestead application for the SW. ¼, Sec. 12, T. 152 N., R. 103 W., Minot land district, North Dakota.

Carlisle made settlement on the land about May 1, 1903, which settlement he has since maintained. Plat of survey of the land was filed in the local office July 15, 1903. October 10, following, the application under consideration was presented but no action was taken thereon because one forty-acre tract covered thereby was

included in the prior application of one Bostrom to make second homestead entry. This impediment to the allowance of Carlisle's application, as presented, was removed January 16, 1905. January 20, 1905, the entire tract applied for, with other lands, was withdrawn for use in connection with the Buford-Trenton irrigation project, Carlisle's application not having been yet permitted to go of record. Said withdrawal was made upon the recommendation of the Director of the Geological Survey that certain described lands, "excepting any tracts the title to which has passed out of the United States, be withdrawn from public entry for irrigation works under the first form of withdrawal, as provided by section 3 of the act of June 17, 1902 (32 Stat., 388)." Your office was, however, directed to "temporarily withdraw from any form of disposition whatever the lands within the areas described," and the withdrawal ordered thereunder constitutes the basis for the action heretofore taken.

The motion under consideration is based entirely upon the recent decision of this Department in the case of Mercer *v.* Buford Townsite (35 L. D., 119), wherein a pending homestead application at the date of the withdrawal here under consideration was directed to be allowed upon the theory that this withdrawal was a temporary withdrawal resting alone upon executive action not specifically directed by the statute, and, for that reason, should not be construed as affecting inchoate rights, and if said decision is to be adhered to the motion under consideration must be granted for the cases are in all important particulars the same.

In order to remove any apparent conflict and to provide for a uniform rule in the matter of disposing of applications in conflict with the different classes of withdrawals made under the reclamation act, the designation of any of these withdrawals as temporary will be discontinued.

They are made in furtherance of the act and to accomplish the same end whether they be of lands susceptible of irrigation or for use in the construction and operation of the works, and while the effect of the two classes of withdrawals is different, that is, those made for use in construction and operation of the works exclude *all* forms of entry, and those made of lands susceptible of irrigation yet remain open to homestead entry, subject to the limitations named in the act, when ordered they should have immediate operation. As against other claimants under the land laws the rights of a mere applicant are respected as of the date the application is filed, if the party is shown to be qualified and the land is then subject to such application, and it is in this sense that the application is considered as the equivalent of an entry, but because thereof the erroneous conclusion seems to have been reached in Mercer *v.* Buford Townsite, *supra*, that rights are secured by the proffer of such an application which the govern-

ment is bound to respect. Upon further consideration of the matter, however, it is believed that no such right is acquired as against the government by the mere tender of an application to enter public land as entitles the party to even equitable consideration where interests of the government intervene.

It is therefore directed that all uncompleted applications pending at the time of withdrawal of the lands for use in the construction and operation of irrigation works or of lands susceptible of irrigation be rejected or disregarded, except that homestead entries may continue to be allowed for lands susceptible of irrigation, subject to the conditions and limitations of the act of 1902, and as hereinafter provided, where the application is based upon actual settlement preceding the withdrawal.

In this connection I invite especial attention to that portion of the instructions of October 12, 1905 (34 L. D., 159), wherein it was said:

> Care must be taken to confine such withdrawals strictly to lands of the character and class authorized to be withdrawn and not to embrace lands of one class in the withdrawal of lands of the other class, nor to make any unnecessary withdrawal of land, as far as it can be prevented.

To this point the claim of Carlisle has been considered as resting alone upon his formal application, but an allegation of settlement antedating the proffer of his application and of the withdrawal does not present any legal objection to withdrawal of the land. It is not intended hereby to disregard his settlement or to refuse allowance for improvements made thereunder, upon proper showing, prior to the final ascertainment of the particular lands needed for use in the construction and operation of the works (Opinion 34 L. D., 156), and in such case it might be advisable, before denying the application, to advise the reclamation service thereof, to the end that the tract may be eliminated from the withdrawal, if not needed, at once. Should the reclamation service report adversely to restoration, the settler might nevertheless continue in his use and occupation thereof, so long as it does not interfere with the government use, until it is finally ascertained that his land is actually needed. Should it not be needed and upon such final ascertainment be restored, he will be fully protected in his settlement. Even though his entry were allowed he could not complete his claim and receive a final certificate during the period of withdrawal, and to deny him the right to make entry of the land, pending its withdrawal, imposes no particular hardship upon him nor deprives him of any substantial right. Should his settlement be eventually disturbed by reason of the actual use of the land by the government, he may, as before stated, be paid for the damages he has sustained by reason of his settlement and improvement prior thereto. He is not entitled to claim more.

For the reasons herein given the motion under consideration is denied, the decision in the case of Mercer *v.* Buford Townsite, *supra*, is hereby overruled and vacated, and all decisions or regulations in conflict herewith will no longer be followed.

MINING CLAIM—VEIN OR LODE—MARBLE DEPOSITS.

HENDERSON ET AL. *v.* FULTON.

To determine whether lands containing a given mineral deposit are of the class subject to location and patent under the law applicable to vein or lode claims, resort is to be had to the language of the statute, rather than to definitions of the terms "vein," "lode," and "ledge," given by geologists from a scientific viewpoint.

The statute is to be construed in the light of the prevailing and commonly known use of the terms "vein," and "lode," as defined by miners—the result of practical experience in mining, so as to avoid any limitation in the application of the law which a scientific definition of the terms might impose; and as well in the light of the general purpose and policy which Congress had in view, namely, the protection of *bona fide* locators of the mineral lands of the United States, and the development of the mineral resources of the country.

A vein or lode, to be locatable and patentable under the mining laws, must possess the elements of rock in place bearing one or more of the minerals specified in the statute, or some other mineral that would be embraced within the added words "other valuable deposits."

Minerals of the non-metallic as well as the metallic class, wherever found in rock in place, are within the purview of the mining laws relating to veins or lodes.

Marble which does not bear any of the minerals named in the statute, or any other mineral substance of value, is not a deposit of the kind or character contemplated by sections 2320 and 2322 of the Revised Statutes, as subject to location and patent under the law applicable to vein or lode claims; but may be located and patented under the law applicable to placer claims.

Acting Secretary Woodruff to the Commissioner of the General Land Office, June 29, 1907.

(S. V. P.) (A. B. P.)

May 27, 1903, the local officers at Los Angeles, California, allowed Stephen E. Fulton to make entry of certain alleged mineral lands described as the "Alamo Consolidated Marble Mine," Survey No. 4025, consisting of three contiguous claims, located as vein or lode claims, and situated in Sec. 28, T. 7 N., R. 2 W., S. B. M.

March 26, 1904, Walter J. Henderson and Herbert J. Findley filed a protest against the entry, on which a hearing was ordered by your office May 24, 1904.

The charges of the protest relate chiefly to the character and value of the improvements claimed to support the entry proceedings. Considerable of the testimony introduced at the hearing, had in Decem-

ber, 1904, however, relates to the character and extent of the alleged mineral deposits upon which the locations are based. This testimony is to the effect that the lands embraced in the locations contain extensive and valuable deposits of marble; that large quantities of marble have been taken from one of the claims and sold for building purposes; that no known mineral of value other than marble exists in the lands; and that the several locations were made for the marble deposits only.

September 28, 1905, the local officers, upon the evidence relating to the question of the improvements, found for the entryman, and the protestants appealed.

By decision of May 25, 1906, your office, after discussing at length the entire evidence, held the expenditure in improvements to be insufficient for patent purposes, except as to the Alamo claim, and further stated and held as follows:

> An examination of the record, however, shows that the mining claims in question are valuable for deposits of marble which from the testimony and from the whole record as it now stands appears to lie in beds and not in vein or lode formation. It is nothing more than a quarry so far as can be seen from the testimony and accordingly is not subject to purchase and entry under the lode mining laws. It should have been located and entered as placer by legal subdivisions. For this reason the entry is illegal and you will advise the parties that for this reason alone the entire entry will have to be canceled.

The entryman has appealed to the Department. The appeal presents, amongst other matters, the question whether lands containing deposits of marble, valuable for building purposes, may be located and held, and patent therefor obtained, under the law relating to vein or lode claims. This question is vital, and therefore of first importance.

The first general mining statute passed by Congress was the act of July 26, 1866 (14 Stat., 251). Provision was made for locating, working and holding, and obtaining patent for, any "vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper."

By the act of July 9, 1870 (16 Stat., 217, Sec. 12), it was provided that claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, should be subject to entry and patent under like circumstances and conditions, and upon similar proceedings, as were provided for vein or lode claims.

By the act of May 10, 1872 (17 Stat., 91), the terms of the act of 1866 were enlarged in their scope. *Lead* and *tin* were included amongst the specifically mentioned minerals, and the words "other valuable deposits" were added. The act also contains, amongst other provisions not in the act of 1866, certain requirements as to the manner of locating vein or lode claims, as to the length and width of the

locations, and as to parallelism of the end lines; and it is declared that no location shall be made until the discovery of a vein or lode within the limits thereof. Rights under the location are enlarged so as to embrace not only the located vein or lode, as under the act of 1866, but in addition thereto, the exclusive right to the possession of the surface within the lines of the location, and to *all* veins, lodes, and ledges, throughout their entire depth, which apex within such surface lines. It is further provided that patent may be obtained for a vein or lode within the boundaries of a placer claim by the owner of such vein or lode, whether he be the owner of the placer claim or not.

These provisions are all incorporated in the Revised Statutes, and, so far as need be here set out, are contained in the following sections:

SEC. 2320. Mining-claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall exceed more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other.

SEC. 2322. The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges, may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie within vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

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 pre-

viously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

SEC. 2333. Where the same person, association, or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer-claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer-claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer claim not embracing any vein or lode-claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer-claim, an application for a patent for such placer-claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof.

From this resume of the legislation on the subject, it clearly appears that Congress, in providing for the use, occupancy, and sale of the mineral lands of the United States (other than coal lands: Secs. 2347–2352, Revised Statutes, and salt lands prior to the act of January 31, 1901, 31 Stat., 745; Morton *v.* Nebraska, 21 Wall., 660), has divided such lands into two distinct classes, namely:

(1) Those which contain veins or lodes of quartz or other rock in place bearing mineral of value, of any kind or character that may be found in rock in place;

(2) Those containing what are usually called placers, including all forms of deposit, of whatever kind or nature, other than the deposits described in the first class.

It is also apparent that Congress had in mind and fully recognized, what experience had theretofore abundantly shown, that these two classes of mineral deposits are so different in their character and formation, and so completely separate and distinct from each other, that even when found to exist in the same superficial area, they may be located and held by different persons, and patented accordingly (Sec. 2333). This principle has been recognized and followed in both judicial and departmental decisions (Reynolds *v.* Iron Silver Mining Company, 116 U. S., 687, 695–7; Aurora Lode *v.* Bulger Hill and Nugget Gulch Placer, 23 L. D., 95, 99–100; Daphne Lode Claim, 32 L. D., 513; Jaw Bone Lode *v.* Damon Placer, 34 L. D., 72).

The question here is whether the deposits of marble shown to exist in the several locations of the so-called "Alamo Consolidated Marble Mine," are within the first or the second class. If within the first,

the locations were rightly and lawfully made. If not within the first class, they necessarily fall within the second, and the locations are unlawful and the entry can not stand.

The question as to what constitutes a vein or lode within the meaning of the legislation referred to has been, in various forms and under varying conditions, frequently before the courts. The first case of importance on the subject is that of Eureka Consolidated Mining Company *v.* Richmond Mining Company, commonly known as the *Eureka Case*, decided in 1877, by the Circuit Court for the District of Nevada (4 Sawyer, 302, 310–312). In the course of its opinion, by Justice Field (sitting at Circuit), the court said:

> The act of 1866 provided for the acquisition of a patent by any person or association of persons claiming "a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar or copper." The act of 1872 speaks of veins or lodes of quartz or other rock in place, bearing similar metals or ores. Any definition of the term should, therefore, be sufficiently broad to embrace deposits of the several metals or ores here mentioned. In the construction of statutes, general terms must receive that interpretation which will include all the instances enumerated as comprehended by them. The definition of a lode given by geologists is, that of a fissure in the earth's crust filled with mineral matter, or more accurately, as aggregations of mineral matter containing ores in fissures. (See Van Cotta's Treatise on Ore Deposits, Prime's Translation, 26.) But miners used the term before geologists attempted to give it a definition.

The court quoted with approval from the testimony of one of the expert witnesses in the case, who was for many years in the service of the general governmert as Commissioner of Mining Statistics, as follows:

> The miners made the definition first. As used by miners, before being defined by any authority, the term lode simply meant that formation by which the miner could be led or guided; it is an alteration of the verb lead; and whatever the miner could follow, expecting to find ore, was his lode. Some formation within which he could find ore, and out of which he could not expect to find ore, was his lode.

It was then further said:

> Cinnabar is not found in any fissure of the earth's crust, or in any lode, as defined by geologists, yet the acts of Congress speak, as already seen, of lodes of quartz, or rock in place, bearing cinnabar. Any definition of lode, as there used, which did not embrace deposits of cinnabar, would be as defective as if it did not embrace deposits of gold or silver. The definition must apply to deposits of all the metals named, if it apply to a deposit of any one of them.
>
> Those acts were not drawn by geologists or for geologists; they were not framed in the interests of science, and consequently with scientific accuracy in the use of terms. They were framed for the protection of miners in the claims which they had located and developed, and should receive such a construction as will carry out this purpose. The use of the terms vein and lode in connection with each other in the act of 1866, and their use in connection with the term ledge in the act of 1872, would seem to indicate that it was the object of the legislator to avoid any limitation in the application of the acts, which a scientific definition of any one of these terms might impose.

It is difficult to give any definition of the term as understood and used in the acts of Congress, which will not be open to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode, in the judgment of geologists. But to the practical miner the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock lying within any other well-defined boundaries of the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term as used in the acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock.

In the case of Iron Silver Mining Company *v.* Cheesman (decided in 1885, 116 U. S., 529, 533–534), the Supreme Court, speaking on the same subject, said:

What constitutes a lode or vein of mineral matter has been no easy thing to define. In this court no clear definition has been given. On the circuit it has been often attempted. Mr. Justice Field, in the *Eureka Case*, 4 Sawyer, 302, 311, shows that the word is not always used in the same sense by scientific works on geology and mineralogy, and by those engaged in the actual working of mines.

After quoting the definition given in the *Eureka Case*, the court further said:

This definition has received repeated commendation in other cases, especially in Stevens *v.* Williams, 1 McCrary, 480, 488, where a shorter definition by Judge Hallett, of the Colorado Circuit Court, is also approved, to wit: "In general it may be said that a lode or vein is a body of mineral, or mineral body of rock, within defined boundaries, in the general mass of the mountain."

United States *v.* Iron Silver Mining Company (128 U. S., 673), involved a construction of section 2333 relating to veins or lodes within placer claims. Referring specially to that section and to section 2329 in connection therewith, the court, after defining the term "placer claim" as commonly used, said:

By "veins or lodes," as here used, are meant lines or aggregations of metal embedded in quartz or other rock in place. The terms are found together in the statutes, and both are intended to indicate the presence of metal in rock. Yet a lode may and often does contain more than one vein. In Iron Silver Mining Co. *v.* Cheesman, 116 U. S., 529, 533, a definition of a lode is given, so far as it is practicable to define it with accuracy, and it is not necessary to repeat it. What is important here is, that the amount of land which may be taken up as a placer claim and the amount as a lode claim, and the price per acre to be paid to the government in the two cases, when patents are obtained, are different. And the rights conferred by the respective patents, and the conditions upon which they are held, are also different. Rev. Stat. Secs. 2320, 2322, 2333; Smelting Co. *v.* Kemp, 104 U. S., 636, 651; Iron Silver Mining Co. *v.* Reynolds, 124 U. S., 374.

In the case of Jupiter Mining Company *v.* Bodie Consolidated

Mining Company (11 Fed. Rep., 666, 675), the Circuit Court for the District of California, speaking of the provision in section 2320 which declares that "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located," said:

> A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or with some other kind of rock, in place, carrying gold, silver, or other valuable mineral deposits named in the statute.

See also North Noonday Mining Co. *v.* Orient Mining Co. (1 Fed. Rep., 522).

In Book *v.* Justice Mining Company (58 Fed. Rep., 106, 120–127), the Circuit Court for the District of Nevada, speaking through Judge Hawley, said:

> This statute was intended to be liberal and broad enough to apply to any kind of a lode or vein of quartz or other rock bearing mineral, in whatever kind, character, or formation the mineral might be found. It should be so construed as to protect locators of mining claims, who have discovered rock in place, bearing any of the precious metals named therein, sufficient to justify the locators in expending their time and money in prospecting and developing the ground located. It must be borne in mind that the veins and lodes are not always of the same character. In some mining districts the veins, lodes, and ore deposits are so well and clearly defined as to avoid any questions being raised. In other localities the mineral is found in seams, narrow crevices, cracks, or fissures in the earth, the precise extent and character of which cannot be fully ascertained until extensive explorations are made, and the continuity of the ore and existence of the rock in place, bearing mineral, is established . . . . When the locator finds rock in place, containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim.
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> * * * * * * *
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> Various courts have at different times given a definition of what constitutes a vein or lode, within the meaning of the act of Congress; but the definitions that have been given, as a general rule, apply to the peculiar character and formation of the ore deposits or vein matter, and of the country rock, in the particular district where the claims are located. There is no conflict in the decisions; but the result is that some definitions have been given in some of the states that are not deemed applicable to the conditions and surroundings of mining districts in other states, or other districts in the same state.

After stating that the definitions of a vein or lode, as given in the authorities, are instructive, and worthy of consideration, the court further says that the application of such definitions to any given case must be determined by reference to the special facts which existed in the particular mining district where the veins or lodes under consideration were located, in connection with the facts of the case before the court.

In the case of Migeon *v.* Montana Central Railway Company (77

Fed. Rep., 249, 254–5), Judge Hawley, sitting as circuit judge, stated and held as follows:

> There are four classes of cases where the courts have been called upon to determine what constitutes a lode or vein within the intent and meaning of different sections of the Revised Statutes: (1) Between miners who have located claims on the same lode, under the provisions of section 2320; (2) between placer and lode claimants, under the provisions of section 2333; (3) between mineral claimants and parties holding town-site patents to the same ground; (4) between mineral and agricultural claimants of the same land. The mining laws of the United States were drafted for the purpose of protecting the bona fide locators of mining ground, and at the same time to make necessary provision as to the rights of agriculturists and claimants of town-site lands. The object of each section, and of the whole policy of the entire statute, should not be overlooked. The particular character of each case necessarily determines the rights of the respective parties, and must be kept constantly in view, in order to enable the court to arrive at a correct conclusion. What is said in one character of cases may or may not be applicable in the other. Whatever variance, if any, may be found in the views expressed in the different decisions touching these questions arises from the difference in the facts and a difference in the character of the cases, and the advanced knowledge which experience in the trial of the different kinds of cases brings to the court.

The views thus expressed were restated by the same judge (again sitting as circuit judge), in the case of Shoshone Mining Company *v.* Rutter (87 Fed. Rep., 801, 807).

In Hayes *et al. v.* Lavagnino (1898; 53 Pac. Rep., 1029), the supreme court of Utah, upon a somewhat extended discussion of the subject and the citation of numerous authorities, stated its conclusion, in the syllabus prepared by it, as follows:

> In practical mining, the terms "vein" and "lode" apply to all deposits of mineralized matter within any zone or belt of mineralized rock separated from the neighboring rock by well-defined boundaries, and the discoverer of such a deposit may locate it as a vein or lode. In this sense, these terms were employed in the several acts of Congress relating to mining locations.

In Beals *v.* Cone (1900; 62 Pac. Rep., 948, 952–953), the supreme court of Colorado said:

> Many definitions of veins have been given, varying according to the facts under consideration. The term is not susceptible of an arbitrary definition, applicable to every case. It must be controlled in a measure, at least, by the conditions of locality and deposit. Cheesman *v.* Shreeve (C. C.) 40 Fed. 787. The distinguishing feature between a vein and the formation enclosing it may be visible. It must have boundaries, but it is not necessary that they be seen. Their existence may be determined by assay and analysis. Id.; Hyman *v.* Wheeler (C. C.) 29 Fed. 347; Mining Co. *v.* Cheesman 116 U. S. 529, 6 Sup. Ct. 481, 29 L. Ed. 712. The controlling characteristic of a vein is a continuous body of mineral-bearing rock in place, in the general mass of the surrounding formation. If it possess these requisites, and carry mineral in appreciable quantities, it is a mineral-bearing vein, within the meaning of the law, even though its boundaries may not have been ascertained.

The views expressed by text writers on the subject are also important, and should be here stated.

Lindley, in his work on Mines, discusses the subject at length and cites many authorities (Vol. 1, Secs. 286 to 301, inclusive, and Secs. 322 and 323). At page 582 (Sec. 323) he says:

> The act of July 26, 1866, provided for the acquisition of title to veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, or copper. By necessary intendment it excluded all other classes of metallic substances, as well as all which were non-metalliferous. The placer law of July 9, 1870, extended the right of entry and patent "to claims usually called 'placers,' including all forms of deposit, excepting veins of quartz or other rock in place."
>
> The act of May 10, 1872, provided in terms for the appropriation of lands containing veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other *valuable deposits.*
>
> This is preserved in the Revised Statutes, which also contain the provisions of the placer law of 1870, heretofore referred to. Therefore, under the existing law we find the classification to be as follows—
>
> (1) Lands containing veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other *valuable deposits;*
>
> (2) Claims usually called "placers," including all forms of deposit, excepting veins of quartz or other rock in place.

In another part of his work, after stating that to determine the proper manner of appropriating public lands containing valuable mineral deposits it is necessary first to determine whether or not the deposits are found in veins or lodes of quartz or other rock in place, and that if so found the method of appropriation differs from that applicable to other deposits, and that the nature and extent of the rights conferred also differ, the author further says (Sec. 299):

> A vein, or lode, is necessarily "in place." The condition of being "in place" is one of its essential attributes. The term "quartz or other rock in place," as used in section twenty-three hundred and twenty of the Revised Statutes, refers to its constituent elements, or the "filing" of veins and lodes. Experience has shown that mineral substances in veins, or lodes, are not always found in quartz. Sometimes the vein material is composed mainly of the same character of rock as the inclosing walls—the occurrence of mineral being in the form of impregnations, penetrating the country rock, or the mineral may be but a replacement of the original rocks. So the statute recognizing that while the material of most veins consists of quartz, yet, as this is not universally true, the alternative, "or other rock in place," was introduced. As quartz in a vein is rock in place, the statute would have been equally as comprehensive if instead of saying "veins, or lodes, of quartz or other rock in place," it had simply said "veins, or lodes, of rock in place."

In Snyder on Mines, after a brief discussion of the subject, and after observing that no general definition controlling in all cases can be given, that author epitomizes his views as to what lands may be located as vein or lode claims, and what as placer claims, as follows (p. 307):

> *First.* That any lode, vein or deposit of rock in place between defined or definable boundaries containing any of the precious or economic metals or min-

erals, excepting coal, whether metallic or non-metallic, should be held to be and is locatable and patentable as a lode claim.

Second. That placer includes all forms of mineral or metal-bearing earth not comprehended by the term "rock in place," and that it is again subdivided into—

(a) Gold-bearing gravel or placer, whether it be found in gravel beds, that is, the beds of ancient rivers or glaciers, or whether it be in the slide or drift of the mountain side or beneath the surface of a river, lake or sea.

(b) All other forms of valuable deposit of mineral or metal-bearing earth, including all forms of building or other stone deposits that are not within defined boundaries, whether they are mineral or metal bearing, or classed as non-metallic or merely as building stone.

In Barringer & Adams on the Law of Mines and Mining, at pages 437–438, it is said:

Lode claims are described in the statute as "mining claims upon veins or lodes of quartz or other rock *in place* bearing gold, silver, cinnabar, lead, copper, or other valuable deposits" (Rev. Stats. 2320), and as "mining locations . . . on any mineral vein, lode, or ledge situated on the public domain" (Rev. Stats. 2322). The primary requisite of such a claim, therefore, "is that *it shall be upon a lode or vein of mineral-bearing rock.*" The meaning of these terms hence becomes of vital importance. The definitions thereof adopted by the courts are not the definitions of the geologists. These words are used in the statutes in the signification which they convey, not to the scientific man, *but to the practical miner.*

A lode, therefore, in the above clauses means a body of mineral-bearing rock lying within walls (which should be well defined, but sometimes are not) of neighboring rock, usually of a different kind, but sometimes of the same kind, and extending longitudinally between those walls in a continuous zone or belt.

* * * * * * *

The only essential quality of the rock included within the boundaries is that it must contain a trace of valuable mineral. It may be loose and friable, or very hard. Still it is vein matter if it is inclosed within the country rock. Thus the two essential elements of a lode are (a) the mineral-bearing rock, which must be in place and have reasonable trend and continuity, and (b) the reasonably distinct boundaries on each side of the same.

In Morrison's Mining Rights, pages 150, 153, it is said:

The word "lode" and the word "vein" are used indiscriminately in the acts of Congress as well as in the popular language, to signify the same thing. In Bainbridge on Mines, the text, page 2, defines them in the same sentence: "A mineral lode or vein is a flattened mass of metallic or earthy matter, differing materially from the rocks or strata in which it occurs."

* * * * * * *

Whatever a miner would follow with the expectation of finding ore, or similar phrases, have been adopted as a practical test of what is to be considered a lode under the Act of Congress.—Eureka Co. *v.* Richmond Co., 9 M. R., 578; Harrington *v.* Chambers, 1 Pac., 362. Any body or belt of mineralized rock is a lode.—Book *v.* Justice Co., 58 Fed., 106; Shoshone Co. *v.* Rutter, 87 Fed., 801.

At page 192 of the same work, in speaking of the distinction between lode and placer claims, the same author says:

But the U. S. Mining Acts make an arbitrary division of all minerals into two classes, to wit: lodes and placers. All deposits of metallic minerals in place

are called, when located, lode claims, and all deposits of other minerals, in place or not in place, are placers. Arbitrary as this division is, it is the only construction allowable to the statute, was at once adopted by the Land Office and has been followed by the Courts.—Gregory *v.* Pershbaker, 15 M. R., 602.

There are no reported departmental decisions which bear directly on the question. As long ago as 1873, however, in a circular letter issued to surveyors-general and registers and receivers (Copp's U. S. Mining Decisions, 316–319), Commissioner Drummond, of your office, referring to the statutes relating both to vein or lode claims and to placer claims, and observing the importance of a construction by the land department of the phrase "veins or lodes of quartz or other rock in place," to prevent mistakes in locating the two classes of minerals, and stating that there was no reason for supposing that the terms of the lode statute were employed in their strict geological signification, held that "all lands wherein the mineral matter is contained in veins or ledges, occupying the original habitat or location of the metal or mineral, whether in true or false veins, in zones, in pockets, or in the several other forms in which minerals are found in the original rock, whether the gangue, or matrix, is disintegrated at the surface or not, are embraced within the terms "veins or lodes of quartz, or other rock in place."

From these authorities, and many others that might be cited, the following propositions are fairly deducible:

(1) That to determine whether lands containing a given mineral deposit are of the class subject to location and patent under the law applicable to vein or lode claims, resort is to be had to the language of the statute, rather than to definitions of the terms "vein," "lode," and "ledge," given by geologists from a scientific viewpoint.

(2) That the statute is to be construed in the light of the prevailing and commonly known use of the terms "vein," and "lode," as defined by miners—the result of practical experience in mining, so as to avoid any limitation in the application of the law which a scientific definition of the terms might impose; and as well in the light of the general purpose and policy which Congress had in view, namely, the protection of *bona fide* locators of the mineral lands of the United States, and the development of the mineral resources of the country. The definitions by the courts are not the definitions of geologists; and the terms are to be considered as used in the signification which they convey to the practical miner, and not in the sense generally used by the scientific man.

It may well be further stated, as a proposition equally supported by the authorities, that the amount of land which may be located as a vein or lode claim and the amount which may be located as a placer claim, and the price per acre required to be paid to the Government in the two cases when patents are obtained, and the rights conferred

by the respective locations and patents, and the conditions upon which such rights are held, differ so materially as to make the question whether mineral lands claimed in any given case belong to one class or to the other, a matter of importance both to the Government and to the mining claimant. And, it is also true, mineral lands of either class can not be lawfully located and patented except under the provisions of the statute applicable to such class. Veins or lodes may be located and patented only under the law applicable to veins or lodes. Deposits other than veins or lodes are subject to location and patent only under the law applicable to placer claims.

Some of the authorities hold the view that only minerals of the metallic class are within the statute relating to veins or lodes, but the great weight of authority is the other way; and the Department is of opinion that the latter is the better view. That the statute is broad enough to embrace minerals of the non-metallic as well as the metallic class, wherever found in rock in place, was distinctly held, after careful consideration and full discussion, in the case of Pacific Coast Marble Company *v.* Northern Pacific Railroad Company (25 L. D., 233, 241–243). See also 1 Lindley on Mines, Secs. 86, 323; 1 Snyder on Mines, Sec. 337.

With practical unanimity the authorities are to the effect that to constitute a vein or lode within the meaning of the statute the mineral deposit must be borne in rock in place. Mineral-bearing rock, in place, or equivalent terms, are invariably used in defining what the law contemplates as a vein or lode. "Quartz or other rock in place bearing gold, silver," etc., are the terms used in the statute. Two distinct constituent elements of vein matter or substance are clearly recognized as essential: the *rock*, and the *mineral* borne in the rock. To this extent, therefore, a general definition applicable to all cases may be given, namely: that a vein or lode, to be locatable and patentable under the mining laws, must possess the elements of rock in place bearing one or more of the minerals specified in the statute, or some other mineral that would be embraced within the added words "other valuable deposits."

That it has been difficult, if not impracticable, to give any broad and general definition controlling as to all features and in all cases is beyond doubt, but the difficulty has not been with respect to the terms "quartz or other rock," but rather with respect to the term "in place," as applied to a given deposit of mineral-bearing rock. As to this feature of the statute the varying conditions existing in different States and mining districts have resulted in apparently inharmonious definitions by the courts. But there is no substantial conflict. The definitions are simply predicated upon different conditions, each upon the peculiar situation, formation, and boundaries of the ore deposits or vein matter, in the particular mining district

where the claims involved were located. The authorities recognize that definitions have been given in some of the States and mining districts that would not be applicable to conditions in other States or mining districts.

Further than as above indicated it is not here necessary, nor is it intended, to give any general definition of the terms under consideration. In view of the authorities, and of the considerations already stated, the Department is clearly of opinion that the deposits of marble in the claims in question are not vein or lode deposits within the meaning of the statute, and that the lands embraced in the entry are therefore not subject to location and patent under the provisions applicable to vein or lode claims. This is not because the deposits are not "in vein or lode formation," as stated in your office decision, but rather, or at least primarily, because the deposits are not of the kind, or character, contemplated by sections 2320 and 2322. The marble involved is not mineral-bearing rock in the sense of the statute. There is no claim or contention that it contains even a trace of any of the minerals named in the statute, or of any other mineral substance, distinct from the rock itself.

The lands can be located and patented, therefore, only under the laws applicable to placer claims. As strengthening this view, and as unmistakably showing the mind of Congress as to the manner of obtaining title to lands containing valuable deposits of marble, or building stone, it is important to refer to the act of August 4, 1892 (27 Stat., 348), wherein it is expressly declared that lands chiefly valuable for building stone shall be subject to entry "under the provisions of the law in relation to placer-mineral claims."

It would serve no useful purpose to pursue the subject further. It is clear that the entry in question was unlawfully allowed and must be canceled. This conclusion renders it unnecessary to consider any other question raised by the appeal.

As modified by the views herein expressed, the decision of your office on the one question considered is affirmed.

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 May 21, 1907, without substantial change therein except the substitution of amended paragraphs 18, 37, 44, 90 and 147, and the insertion of legislation relating to mineral lands enacted since the former approval of said circular.

COAL-LAND LAWS AND REGULATIONS THEREUNDER.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 12, 1907.

The following coal-land laws relating to the public-land States and Territories and to the district of Alaska, together with the rules and regulations as now applicable, are herewith published for the instruction of the local land officers and the information of intending applicants. All rules and regulations heretofore issued under said laws are hereby abrogated.

PART I.

TITLE XXXII, CHAPTER SIX.

MINERAL LANDS AND MINING RESOURCES.

SEC. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

Entry of coal lands, 3 March, 1873, c. 279, s. 1, v. 17, p. 607.

SEC. 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

Preemption of coal lands. *Ibid.*, s. 2.

SEC. 2349. All claims under the preceding section must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

Preemption claims of coal land to be presented within sixty days, &c. *Ibid.*, s. 3.

SEC. 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

Only one entry allowed. *Ibid.*, s. 4.

SEC. 2351. In case of conflicting claims upon coal-lands where the improvements shall be commenced, after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference-right to purchase. And also where improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

Conflicting claim. *Ibid.*, s. 5.

SEC. 2352. Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver, or copper.

Rights reserved. *Ibid.*, s. 6.

RULES AND REGULATIONS.

1. The sale of coal lands is provided for—

(*a*) By ordinary *cash entry* under section 2347;

(*b*) By *cash entry* under a *preference* right to purchase acquired by compliance with the provisions of section 2348.

2. Coal lands may be entered only after survey and by legal subdivisions. The lands must be vacant and unappropriated and must contain workable deposits of coal and must not be valuable for mines of gold, silver, or copper. Lands containing lignites are included under the term "coal lands."

3. Entry by an individual may be made only by a person above the age of 21 years who is a citizen of the United States or has declared his intention to become such, and shall not embrace more than 160 acres. Entry by an association of persons may embrace 320 acres, but each person composing the association must be qualified as in the case of an individual entryman. A corporation is held to be an association under the provisions of the coal-land law.

4. When an association of not less than four persons, severally qualified as required in the case of an individual entryman, shall have expended not less than $5,000 in working and improving a mine or mines of coal upon the public lands, such association may enter not exceeding 640 acres, including such mining improvements.

5. But one entry of coal lands by any person or association of persons is allowed by the law. No person who, and no association any member of which, either as an individual or as a member of an association, shall have had the benefits of the law may enter or hold any other coal lands thereunder. The right so to enter or hold is exhausted whether an entry embraces in any instance the maximum area allowed by the law or less; also by the acquisition of a preference right of entry unless sufficient cause for the abandonment thereof is shown. Assignment of a preference right of entry under section 2348, Revised Statutes, will not hereafter be recognized.

6. Information will be furnished registers and receivers by the Commissioner of the General Land Office of the price at which all coal lands in their respective districts will be offered. The local land offices will from time to time be furnished with schedules and maps (1) showing lands known to lie without ascertained coal areas and open to entry under the general land laws, according to the character of each particular tract; (2) showing lands known to contain workable deposits of coal, whereon prices will be fixed upon information derived from field examination; and (3) showing lands containing coal of such character as may, from their location at a distance from transportation lines, be sold at the minimum price fixed by the statute as hereinafter stated.

Local land officers will allow *coal* entries for lands in the first and third classes at the minimum price fixed by the statute, and for those in the second class at the prices stated in the schedules and maps furnished them. Lands listed in classes 2 and 3 are subject to entry under the coal-land laws only, unless shown by the applicant to be of such character as to be subject to entry under some other law. For those lands listed as of the first and third classes (when entered under the coal-land laws) the price is not less than $10 per acre when situated more than 15 miles from a completed railroad and $20 when situated within 15 miles of a completed railroad; and where the lands lie partly without such limit, the higher price must be paid for each smallest legal subdivision the greater part of which lies within 15 miles of such railroad. The term "completed railroad" is construed to mean a railroad *actually constructed, equipped,* and *operating* at the date of entry. The distance is to be calculated from the point on such railroad nearest the lands applied for, and the facts in each case must be shown by the affidavit of the applicant, corroborated by the affidavit of some disinterested credible person having actual knowledge thereof.

7. A preference right of entry accrues only where a person or association of persons, severally qualified, have opened and improved a coal mine or mines upon the public lands and shall be in actual possession thereof and not by the filing of a declaratory statement. A perfunctory compliance with the law in this respect will not suffice, but a mine or mines of coal must be in fact opened and improved on the land claimed.

There is no authority under which a coal mine upon public lands, entry not having be made, may be worked and operated for profit and sale of the coal, or beyond the *opening* and *improving* of the mine as a condition precedent to a preference right under section 2348 of the Revised Statutes. To preserve a preference right of entry specified in the statute the person or association of persons having acquired the same must present to the register of the proper land district, within sixty days from the date of actual possession and commencement of improvements upon the land, a declaratory statement therefor in all cases where the township plat has been filed. When the township plat is not on file at the date of such improvement such declaratory statement must be presented within sixty days from the receipt of such plat at the district land office.

8. After entry has been allowed the local officers have no authority to order a hearing or make further determination with respect to it, except upon instructions from the General Land Office. They will, however, receive all protests against it and promptly forward them, together with a statement of the facts shown by their records, for consideration and action.

9. Prior to entry it is competent for the local officers to order a hearing on sufficient grounds set forth under oath by any protestant.

10. When it is sought to purchase otherwise than in the exercise of a preference right the party will himself make oath to the following application, which must be presented to the register:

I, ——— ———, hereby apply, under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, to purchase the —— quarter of section ——, in township —— of range ——, in the district of lands subject to sale at the land office at ———, and containing —— acres; and I solemnly swear that no portion of said tract is in the possession of any other party or parties who has or have commenced improvements thereon for the development of coal; that I am twenty-one years of age; a citizen of the United States (or have declared my intention to become a citizen of the United States), and have never held, except ——— or purchased any lands under said act, either as an individual or as a member of an association; that I make this application in good faith for my own benefit, and not, directly or indirectly, in whole or in part, in behalf of any other person or persons whomsoever; and I do further swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that said land contains workable deposits of coal; that there is not to my knowledge within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

11. Where a preference right of entry is sought to be preserved the required declaratory statement must be substantially as follows:

I, ——— ———, do hereby declare my intention to purchase, in the exercise of a preference right, under the provisions of the Revised Statutes of the United States relating to the sale of the coal lands of the United States, the —— quarter of section —— of township —— of range ——, in the district of the lands subject to sale at the district land office at ———; and I do solemnly swear that I am —— years of age and a citizen of the United States (or have declared my intention to become a citizen of the United States); that I have never, either as an individual or as a member of an association, held, except ———, or purchased any coal lands under the aforesaid provisions of the Revised Statutes; that I was in possession of, and commenced improvements on, said tract on the —— day of ———, A. D. 19—, and have ever since remained in actual possession continuously; that I have opened and improved a valuable mine of coal thereon, and have expended in labor and improvements on said mine the sum of ——— dollars, the labor and improvements being as follows: (Here describe the nature and character of the improvements); and I do furthermore solemnly swear that I am well acquainted with the character of said described land and with each and every legal subdivision thereof; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that there is not, to my knowledge, within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

12. One year from and after the expiration of the period allowed for filing the declaratory statement is given within which to make

proof and payment; but the local officers will allow no party to make final proof and payment except on special written notice to all others who appear on their records as claimants to the same tract. No notice will be given to parties whose declaratory statements have expired by limitation under the law.

13. A declarant will not be permitted to file after the expiration of the sixty days allowed nor to exercise a preference right of purchase after the expiration of the year.

14. When it is sought to purchase, in the exercise of a preference right, the applicant must himself make the following affidavit, which must be presented to the register:

I, ——— ———, claiming, under the provisions of the Revised Statutes of the United States relating to the sale of the coal lands of the United States, the preference right to purchase the —— quarter of section ——, in township —— of range ——, subject to sale at the district land office at ———, hereby apply to purchase and enter the same; and I do solemnly swear that I have not hitherto held, except ———, or purchased, either as an individual or as a member of an association, any coal lands under the aforesaid provisions of the law; that I have expended in developing coal mines on said tract, in labor and improvements, the sum of ——— dollars, the nature of such improvement being as follows: ——— ———; that I am now in the actual possession of said mines, and make the entry in good faith for my own benefit, and not, directly or indirectly, in whole or in part, in behalf of any person or persons whomsoever; and I do furthermore swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that said land contains workable deposits of coal; that there is not, to my knowledge, within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposits of gold, silver, or copper. So help me God.

15. Where purchase and entry, whether in the exercise of a preference right or otherwise, is made by an association, each member thereof must subscribe and swear to the application or affidavit, the necessary changes being made to cover the joint possession and expenditure and the purchase and entry in their joint interest.

16. Each application, declaratory statement, and affidavit, forms whereof are given above, must be verified before the register or receiver in the land district wherein the lands involved are situate. Under this regulation no verification can be made outside of such land district.

17. Upon the filing of an application to purchase coal lands under the provisions of paragraphs 10 or 14 the applicant will be required, at his own expense, to publish a notice of said application in a newspaper nearest the lands, to be designated by the register, for a period of thirty days, during which time a similar notice must be posted in the local land office and in a conspicuous place on the land. The

notice should describe the land applied for and state that the purpose thereof is to allow all persons claiming the land applied for, or desiring to show that the applicant's coal entry should not be allowed for any reason, an opportunity to file objections with the local land officers.

Publication must be made sufficiently in advance to permit entry within the year specified by the statute.

18. After the thirty days period of newspaper publication has expired, the claimant will furnish from the office of publication a sworn statement (including an attached copy of the published notice) that the notice was published for the required period, giving the first and last date of such publication, and his own affidavit, or that of some credible person having personal knowledge of the fact, showing that the notice aforesaid remained conspicuously posted upon the land sought to be patented during said thirty days publication, giving the dates. The register shall certify to the fact that the notice was posted in his office for the full period of thirty days, the certificate to state distinctly when such posting was done and how long continued, giving the dates. In no case shall entry be allowed until the proofs specified have been filed.

19. Of the following forms, the one appropriate to the sections of the Revised Statutes under which application is made should be used for publication of all notices of application to enter coal lands:

Notice for publication.

COAL ENTRY.

(Sec. 2347, R. S.)

——— ——— Land Office,
——— ———, 19—.

Notice is hereby given that ——— ———, of ———, county of ———, State (or Territory) of ———, has this day filed in this office his application to purchase, under the provisions of section 2347, U. S. Revised Statutes, the —— of section No. ——, township No. ——, range No. ——.

Any and all persons claiming adversely the lands described, or desiring to object for any reason to the sale thereof to applicant, should file their affidavits of protest in this office on or before the —— day of ———, 19—, otherwise the application may be allowed.

——— ———, *Register.*

Notice for publication.

COAL ENTRY.

(Secs. 2348–52, R. S.)

——— ——— Land Office,
——— ———, 19—.

Notice is hereby given that ——— ———, of ———, county of ———, State (or Territory) of ———, who, on the —— day of ———, 19—, filed in this office

his coal declaratory statement for the —— of section No. ——, township No. ——, range No. ——, has this day filed in this office his application to purchase said land under the provisions of sections 2348 to 2352, U. S. Revised Statutes.

Any and all persons claiming adversely the lands described, or desiring to object for any reason to the entry thereof by applicant, should file their affidavits of protest in this office on or before the —— day of ———, 19—.

———— ————, *Register.*

20. When it is sought to purchase, either by ordinary cash entry or in the exercise of a preference right, the register, if he finds the tract applied for is vacant, surveyed, and unappropriated, and that the claimant has complied with all the laws and regulations relating to the acquisition of coal lands, will so certify to the receiver, stating the precribed purchase price, and the applicant must then pay the same.

21. The receiver will then issue to the purchaser a duplicate receipt, and at the close of the month the register and receiver will make returns of the sale to the General Land Office, whence, if the proceedings are found to be regular, a patent will be issued; and on surrender of the duplicate receipt such patent will be delivered, at the option of the patentee, either by the Commissioner at Washington or by the register at the district land office.

22. An application for cash entry will be subject to any valid adverse right which may have attached to the same land pursuant to section 2348, Revised Statutes.

23. Qualified persons or associations who are lawfully in possession of tracts of coal lands which are still unsurveyed may, under sections 2401, 2402, and 2403, Revised Statutes, as amended by the act of August 20, 1894, apply to the surveyor-general for the survey of the township or townships, or portions thereof, embracing the lands claimed, to be specified as nearly as practicable. Each such application must be accompanied by the affidavit of the applicant or applicants, duly corroborated by at least two competent persons, setting forth the qualifications of the former as claimant or claimants of the land, the facts constituting their possession, the character of the land, and such other facts in the case as are essential in that connection. If the surveyor-general approves the application he will thereupon transmit it to the General Land Office with the affidavits and his report.

24. The "Rules of practice in cases before the United States district land offices, the General Land Office, and the Department of the Interior" will, as far as applicable, govern all cases and proceedings arising under the statutes providing for the sale of coal lands.

25. Local officers will report at the close of each month as "sales of coal lands" all filings and entries in separate abstracts, commencing with No. 1 and thereafter proceeding consecutively in the

order of their reception. Where a series of numbers has already been commenced by sale of coal lands they will continue the same without change.

PART II.

COAL LANDS IN ALASKA.

[Act June 6, 1900 (31 Stat., 658).]

AN ACT To extend the coal-land laws to the district of Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of the public-land laws of the United States are hereby extended to the district of Alaska as relate to coal lands, namely, sections twenty-three hundred and forty-seven to twenty-three hundred and fifty-two, inclusive, of the Revised Statutes.

[Act April 28, 1904 (33 Stat., 525).]

AN ACT To amend an act entitled "An act to extend the coal-land laws to the district of Alaska," approved June sixth, nineteen hundred.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty, eighty, or one hundred and sixty acres, with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments, so that the boundaries thereof may be readily and easily traced. And all such locators shall, within one year from the passage of this Act, or within one year from making such location, file for record in the recording district, and with the register and receiver of the land district in which the lands are located or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same.

SEC. 2. That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated an application therefor, accompanied by a certified copy of a plat of survey and field notes thereof, made by

a United States deputy surveyor or a United States mineral surveyor duly approved by the surveyor-general for the district of Alaska, and a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the district of Alaska published nearest the location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat of survey, to have been kept posted in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located for a like period, and until after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal-land laws: *Provided,* 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.

SEC. 3. That during such period of posting and publication, or within six months thereafter, any person or association of persons having or asserting any adverse interest or claim to the tract of land or any part thereof sought to be purchased shall 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 an 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 such court therein.

SEC. 4. That all the provisions of the coal-land laws of the United States not in conflict with the provisions of this Act shall continue and be in full force in the district of Alaska.

RULES AND REGULATIONS.

1. Persons or associations of persons locating or entering coal lands in the district of Alaska under the provisions of the act of April 28, 1904 (33 Stat., 525), amendatory of the act of June 6, 1900 (31 Stat., 658), are required to possess the qualifications of persons or associations making entry under the general coal-land laws of the United States, and are subject to the same limitations.

2. The lands must be vacant and unappropriated, and must contain deposits of coal, and must not be valuable for mines of gold, silver, or copper. Lands containing lignites are included under the term "coal lands."

3. Entry by an individual may be made only by a person above the age of 21 years, who is a citizen of the United States, and shall not embrace more than 160 acres. Entry by an association of persons may embrace 320 acres, but each person composing the association must be qualified as in the case of an individual entryman. A corporation is held to be an association under the provisions of the coal-land law.

4. When an association of not less than four persons, severally qualified as required in the case of an individual entryman, shall have expended not less than $5,000 in working and improving a mine or mines of coal upon the public lands, such association may enter not exceeding 640 acres, including such mining improvements.

5. But one entry of coal lands by any person or association of persons is allowed by the law. No person who, and no association any member of which, either as an individual or as a member of an association, shall have had the benefits of the law may enter or hold other coal lands thereunder. The right so to enter or hold is exhausted, whether an entry embraces in any instance the maximum area allowed by the law or less.

6. There is no authority under which a coal mine upon public lands, entry not having been made, may be worked and operated for profit and sale of the coal, or beyond the *opening and improving* of the mine as a condition precedent to the right to apply for patent.

7. The requirement of the statute with respect to the form of the tract sought to be entered is construed to mean that the boundary lines of each entry must be run in cardinal directions, i. e., due north and south and east and west lines, by reference to a true meridian (not magnetic), with the exception of meander lines or meanderable streams and navigable waters forming a part of the boundary lines of a location. Those 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 meandered lines.

8. The permanent monuments to be placed at each of the four corners of the tract located may consist of—

First. A stone at least 24 inches long, set 12 inches in the ground, with a conical mound of stone 1½ feet high, 2 feet base, alongside.

Second. A post at least 3 feet long by 4 inches square, set 18 inches in the ground, and surrounded by a substantial mound of stone or earth.

Third. A rock in place; and, whenever possible, the identity of all corners should be perpetuated by taking courses and distances to bearing trees, rocks, or other objects, permanent objects being selected for bearings whenever possible.

9. It is further provided by the first section of the act that within one year from the date of the passage of the act or within one year from making the location there shall be filed for record in the recording district and with the register and receiver of the land district in which the land is situated a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same. In other words, the notice should contain a complete description in every particular of the claim as it is marked and monumented upon the ground.

10. By the second section of the act the locator or his assigns is allowed three years from the date of filing the notice prescribed in the first section of the act within which to file an application with the local land officers for a patent for the land claimed. It will thus be seen that persons or associations of persons claiming coal lands in that district at the date of the passage of the act have four years from location or from the date of the act within which to present their applications for patent.

11. Persons or associations of persons who fail to record their notices within the time prescribed by the first section of the act, or fail to file application for patent in the time prescribed by the second section, forfeit their rights to the particular tract located.

12. With the application for patent the claimant must file a certified copy of the plat of survey and field notes thereof made by a United States deputy surveyor or a United States mineral surveyor, duly approved by the surveyor-general for the district of Alaska. Under this clause of the act it will be allowable for the claimant, at his own expense, to procure the making of a survey by one of the officials mentioned without first making application to the surveyor-general, but the survey when made is to be submitted to and approved by the surveyor-general and by him numbered serially.

13. The survey must be made in strict conformity with or be embraced within the lines of the location as appears from the record thereof with the recorder in the recording district, and must be made in accordance with the regulations relative to lode and placer mining claims so far as they are applicable.

14. Upon the presentation of an application for patent, if no reason appears for rejecting it, it will be received by the register and receiver and the claimant required to publish a notice thereof for the period of sixty days in a newspaper in the district of Alaska published nearest the location of the particular lands, and to cause a copy thereof, together with a certified copy of the official plat of survey, to be posted and remain posted throughout the period of publication in a conspicuous place upon the land applied for, and the register

will post a copy of such notice and official plat in his office for the same period. When the notice is published in a weekly newspaper nine consecutive insertions are necessary; when in a daily newspaper, the notice must appear in each issue for sixty-one consecutive issues. In both cases the first day of issue must be excluded in estimating the period of sixty days.

15. The notice so published must embrace all the data given in the notice posted upon the claim and in the local land office. In addition to such data, the published notice must further indicate the locus of the claim by giving the connecting line, as shown by the field notes and plat, between a corner of the claim and a United States mineral monument or a corner of the public survey, if there is one, and fix the boundaries of the claim by courses and distances.

The publication in the newspaper and the posting upon the land and in the local land office must cover the same period of time.

16. Upon the expiration of the sixty-day period prescribed the claimant may file in the local land office a sworn statement from the office of publication, to which shall be attached a copy of the notice published, to the effect that the notice was published for the statutory period, giving the first and last day of such publication, and his own affidavit showing that the plat and notice aforesaid remained conspicuously posted upon the claim sought to be patented during the sixty-day period of publication, giving the dates. The register will also file with the record a certificate showing that the notice and plat were posted in his office for the full period of sixty days, such certificate to state distinctly when such posting was done and how long continued.

Not earlier than six months after the expiration of the period of publication, if no objections are interposed or adverse claim filed, entry may be allowed upon payment of the price per acre specified by the act, which is $10 per acre in all cases.

17. The proviso to the second section of the act is as follows:

> 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.

The term "shore" is defined to mean the land lying between high and low water marks of any navigable waters within said district.

18. Section 3 provides for the assertion by any person or association of persons of an adverse claim, and requires that such adverse claim shall be filed during the period of posting and publication or within six months thereafter; that it shall be under oath, and set forth the nature and extent thereof.

19. An adverse claim may be verified by the oath of the adverse claimant or by the oath of any duly authorized agent or attorney in

fact of the adverse claimant cognizant of the facts stated, and when verified by such agent or attorney in fact he must distinctly swear that he is such agent or attorney in fact and accompany his affidavit by proof thereof. The adverse claimant should set forth fully the nature and extent of the interference or conflict by filing with his adverse claim a plat showing his entire claim and its situation or position with relation to the one against which he claims; whether he claims as a purchaser for valuable consideration or as a locator; if the former, a certified copy of the original location, the original conveyance or duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished, or, if the transaction was a merely verbal one, he will narrate the circumstances attending the purchase, the date thereof, and amount paid, which facts will be supported by the affidavits of one or more witnesses, if any were present at the time; and if he claims as locator, he must file a duly certified copy of the location notice from the office of the proper recorder and his affidavit of continued ownership.

20. Upon the filing of such adverse claim within the sixty days period of posting and publication, or within six months thereafter, the party who files the adverse claim shall, under the act, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska.

21. All papers filed should have indorsed upon them the precise date of filing; and upon the filing of an adverse claim within the time prescribed by the statute all proceedings on the application for patent will be suspended, with the exception of the completion of the publication and posting of notice and plat and filing the necessary proof thereof, until final adjudication of the rights of the parties. In cases of final judgment rendered the party entitled under the decree must, before he is allowed to make entry, file a certified copy thereof.

22. Where such suit has been dismissed a certificate of the clerk of the court to that effect or a certified copy of the order of dismissal will be sufficient. Where no suit has been commenced against the application for patent within the statutory period, a certificate to that effect by the clerk of the Territorial court having jurisdiction will be required.

23. In connection with the foregoing, it is to be borne in mind that by section 4 of the act it is declared:

> That all the provisions of the coal-land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska.

24. An assignment to a qualified person of a preference right of entry under the act of April 28, 1904, will be recognized when prop-

erly executed. Proof and payment by the assignee must be made, however, in the same manner and within the same time as though there had been no assignment.

25. The following forms for notice of location and application for patent should be used:

NOTICE OF LOCATION.

I, ——— ———, of ———, having on the —— day of ——, 19—, opened and improved a coal mine on the following-described tract (here describe the lands by metes and bounds in rectangular form with north and south boundary lines run according to the true meridian, and a reference to such natural or permanent objects as will readily identify the same), do hereby locate the same as provided by the Alaska coal-land act of April 28, 1904 (33 Stats., 525); and I do solemnly swear that I am a citizen of the United States (or have declared my intention to become a citizen of the United States); that I am over the age of 21 years; that I have never either as an individual or as a member of an association held, except ———, or purchased any coal lands of the United States; that I have remained in actual possession of said land continuously since the —— day of ——, 19—; that I have expended in labor and improvements on said mine the sum of ——— dollars, the labor and improvements being as follows (here describe the nature and character of such improvements); and I do furthermore solemnly swear that I am well acquainted with the character of said described lands and with each and every portion thereof; that my knowledge of said lands is such as to enable me to testify understandingly with regard thereto; that there is not, to my knowledge, within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver, copper, or other valuable minerals, and that there is not within the limits of said land, to my knowledge, any valuable deposits of gold, silver, or copper or other minerals. So help me God.

——— ———.

Dated ——, 19—.
(Jurat.)

APPLICATION FOR PATENT.

I, ——— ———, claiming under the provisions of the act of April 28, 1904 (33 Stats., 525), amendatory of the act of June 6, 1900 (31 Stats., 658), extending the coal-land laws to the district of Alaska, do hereby apply to purchase the lands described in the accompanying field notes and plat and subject to sale at the district land office at ———, Alaska; and do solemnly swear that my title to said tract is as follows: ———— as will more fully appear by the certified copy of location notice and abstract of title filed herewith; that I am above the age of 21 years, and a citizen of the United States; that I have not hitherto held, except ———, or purchased, either as an individual or as a member of an association, any coal lands under the provisions of the coal-land laws; that I have expended in developing coal mines on said tract, in labor and improvements, the sum of ——— dollars, the nature of said improvements being as follows: ————; that I am now in the actual possession of said mines and make the entry in good faith for my own benefit, and not, directly or indirectly, in whole or in part, in behalf of any person or persons whomsoever; and I do furthermore swear that I am well acquainted with the character of said

described land, and with each and every portion thereof; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that said land contains deposits of coal; that there is not, to my knowledge, within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver, copper, or other valuable minerals, and that there is not within the limits of said land, to my knowledge, any valuable deposits of gold, silver, copper, or other minerals. So help me God.

(Jurat.)

26. The notice of location and the application for patent, the forms of which are given above, may be sworn to by the claimant before any officer authorized by law to administer oaths, but the authority of said officer must be properly shown.

27. Any party duly qualified under the law, *after* swearing to his notice of location or application for patent, may, by a sufficient power of attorney duly executed under the laws of the State or Territory in which such party may be then residing, empower an agent to file with the register of the proper land office the notice of location or application for patent, and also authorize him to make payment for and entry of the lands in the name of such qualified party; and when such power of attorney shall have been filed in the local land office such agent may act thereunder as indicated, but no person will be permitted to act as such agent for more than four applicants.

28. Where a claimant shows by affidavit that he is not personally acquainted with the character of the land, any qualified person may make the required affidavit as to its character; but whether this affidavit is made by the claimant or by another it must be corroborated by the affidavits of two disinterested and credible witnesses having personal knowledge of the facts.

29. The "Rules of practice in cases before the United States district land offices, the General Land Office, and the Department of the Interior," will, as far as applicable, govern all cases and proceedings arising under the statutes providing for the sale of coal lands.

30. Local officers will report at the close of each month as "sales of coal lands" all filings and entries in separate abstracts, commencing with number one and thereafter proceeding consecutively in the order of their reception.

Where a series of numbers has already been commenced by sale of coal lands, they will continue the same without change.

R. A. BALLINGER,
Commissioner.

Approved, April 12, 1907,
JAMES RUDOLPH GARFIELD,
Secretary.

COAL LANDS—SUPPLEMENTAL REGULATIONS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 24, 1907.

Registers and Receivers, United States Land Offices.

SIRS: The following instructions are issued for your guidance:

COAL LANDS.

1. Lands heretofore withdrawn from coal entry and not released from such withdrawals shall be entered on the tract books as "coal lands."

2. No entries of lands so noted shall be permitted under the coal-land laws until the maps and lists, as hereinafter mentioned, are filed in the local land office. Provided, however, such lands are now open for location and entry under the general mining laws for valuable deposits of gold, silver, or copper, notwithstanding the fact that they may also contain workable deposits of coal. Lands noted on the tract books as coal lands may, if nonmineral in character, be entered under the appropriate land laws, but no final proof or entry will be allowed until receipt of a report from a field officer, in accordance with instructions from the Commissioner of the General Land Office, unless said lands have been restored to entry as hereinafter provided.

3. You will be furnished, from time to time, township maps showing the coal lands in the respective townships, containing thereon the price at which such coal lands will be sold. Lands not enumerated and priced as "coal lands" in any such township map shall be treated as restored to entry under the general land laws, and you will so note on your tract books. Upon the filing of such maps, coal claims may be received, as provided by the regulations of April 12, 1907 [35 L. D., 665], within the townships covered thereby.

All coal filings made within sixty days prior to withdrawals from coal entry may be completed within the time prescribed by the statutes, less the time from date of such withdrawals to date of special written notice of filing of the maps and lists in the local office, as herein provided, such notice to be given by you to all persons entitled thereto. Also persons who had, within sixty days prior to such withdrawal, opened and improved a coal mine upon public surveyed lands may file within the statutory period allowed, less that covered by the withdrawal. Claims upon unsurveyed lands classed as coal lands must be presented for filing within sixty days after the filing of the plat of survey, if the maps and plats are filed before the survey, or,

after the lands have been surveyed, within sixty days after the filing of the maps and lists herein required in the local office, if the maps and lists are filed after the survey. However, in cases of valid and existent rights, the price per acre to be paid will be the minimum price fixed by statute.

LANDS NOT "COAL LANDS."

4. Lands not listed as "coal lands," as hereinbefore mentioned, may be entered under any of the public land laws applicable to the particular tract. If any of these lands are found to contain workable deposits of coal they may be entered under the provisions of the coal land circular of April 12, 1907, at the minimum price fixed by the statute.

ACTION REQUIRED BY SPECIAL AGENTS.

5. In all cases of application to make final proof, final entry, or to purchase public lands under any public land law, the Register and Receiver will at once forward a copy thereof to the Chiefs of Field Division of Special Agents. Such copy will be indorsed "coal lands" or "not coal lands," as the case may be. Where the land is in a National Forest or other reservation, a second copy will be forwarded to the officer in charge thereof.

6. Registers and Receivers will not issue final certificate or its equivalent in any case until the copy of notice mentioned in paragraph 5 is returned with the Chief of Field Division's indorsement thereon. The Chief of Field Division will in every case return the copy of notice prior to date for final proof or purchase.

7. When the copy of notice is returned with an indorsement not protesting the validity of the entry, the Register and Receiver will act upon the merits of the proof as submitted. Where the returned indorsement of Chief of Field Division or other officer protests the validity of the entry, the Register and Receiver will forward all papers to this office without action.

8. The Chief of Field Division, on receipt of such copy of notice, will make a case thereof on his docket, and also make a field examination in the following cases:

(*a*) Cases wherein he has reason to believe a particular entry is fraudulent.

(*b*) Cases wherein the Register and Receiver have reason to believe a particular entry is fraudulent and have indorsed that fact upon the copy of the notice.

(*c*) Cases other than coal entries in lands classed as coal lands.

Chiefs of Field Division will exert every effort to make the field examination prior to date for final proof.

9. In cases not within paragraph 8 the Chief of Field Division will return such copy of notice indorsed over his signature "no protest against validity of this entry." In cases under paragraph 8 he will return to the Register and Receiver the copy of notice indorsed "protest against the validity of this entry is filed in this office." If investigation is completed before date for final proof, he will so notify the Register and Receiver, by letter; and if investigation is unfavorable to entry, he will submit his report to this office.

The circulars of January 21, 1907, March 15, 1907, and all parts of the circular of December 7, 1905, in conflict herewith, and all other regulations and circulars in conflict herewith are hereby revoked.

Very respectfully,

R. A. BALLINGER,
Commissioner.

Approved, April 24, 1907.

JAMES RUDOLPH GARFIELD,
Secretary.

COAL LANDS—SUPPLEMENTAL REGULATIONS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 20, 1907.

Registers and Receivers, United States Land Offices.

SIRS: The following instructions are issued for your further guidance in cases arising under the coal-land laws:

1. As soon as the maps showing the character of any part of any township or townships within your respective districts have been furnished you as prescribed in the coal-land regulations, approved April 12, 1907 [35 L. D., 665], you will at once post in your office a list of such townships, and furnish a copy of such list to the newspapers in your district for publication as a matter of news, but without cost to the government for such publication.

2. You are also directed to mail a copy of these instructions and a copy of the instructions of April 24, 1907 [35 L. D., 681], to all persons or associations of persons shown by your record to have or claim any interest in any land covered by any pending application to purchase under the coal-land laws or embraced in any valid unexpired coal declaratory statement.

All qualified persons or associations of qualified persons who legally and in good faith went into possession of and improved coal mines within less than sixty days preceding the date when the lands upon

which such mines are situated were withdrawn from coal entry, and who have not filed declaratory statements, may at once, or within the time prescribed by statute, namely, within sixty days after the date of actual possession, and the commencement of improvements on the land, not counting the time intervening between date of withdrawal and July 1, 1907, file such declaratory statements and proceed to obtain patent in the manner, at the minimum price, and within the time fixed by law, regardless of the fact that the maps required by the coal-land regulations of April 12, 1907, may not have been filed in your office, and regardless of the fact that a higher price may have been fixed for such lands under said regulations.

4. All qualified persons or associations of qualified persons who in good faith filed legal declaratory statements in your office prior to the date on which the lands covered thereby were withdrawn from coal entry, and all qualified persons legally holding as assignees under any such declaratory statement by assignment made prior to April 12, 1907, may proceed to obtain title in the manner, at the minimum price, and within the time fixed by the statute, namely, fourteen months after the date of actual possession and the commencement of improvements on the land, not counting the period intervening between date of withdrawal and the mailing of copies of regulations as prescribed by paragraph 2 hereof, regardless of the fact that the maps required by the coal-land regulations of April 12, 1907, may not have been filed in your office at the date upon which application to purchase is presented, and regardless of the fact that a higher price may have been fixed for the lands claimed under said regulations.

All parts of regulations in conflict herewith are hereby revoked.

Very respectfully,

R. A. BALLINGER,
Commissioner

OPENING OF THE LANDS IN THE HUNTLEY PROJECT.

BY THE PRESIDENT OF THE UNITED STATES.

A PROCLAMATION.

Whereas, pursuant to the act of April 27, 1904 (33 Stat., 352), entitled "An act to ratify and amend an agreement with the Indians of the Crow Reservation in Montana, and making appropriations to carry the same into effect," certain of the unallotted lands of the ceded Crow Indian Reservation in Montana have been withdrawn for disposition under the reclamation act of June 17, 1902 (32 Stat., 388), were for that reason excepted from the proclamation of May 24, 1906, opening the remaining portion of the ceded lands of said reservation

to settlement and entry, and have been subdivided and platted as farm units in the Huntley project;

And whereas it now becomes necessary to open the lands in the said Huntley project for disposition under the said reclamation act;

And whereas the great demand for these lands, because of their enhanced value by reason of the construction of irrigation works, makes it necessary to prescribe an orderly manner in which said lands may be settled upon, occupied, and entered by persons entitled to make entry thereof;

Now, therefore, I, Theodore Roosevelt, President of the United States, in furtherance of the provisions of said act of April 27, 1904, do hereby declare and make known that the lands shown upon the approved farm unit plats of said Huntley project will, on and after the 22d day of July, 1907, be opened to settlement, entry, and disposition under the provisions of the reclamation act and the act of April 27, 1904, in the manner hereinafter prescribed and not otherwise.

Any qualified person desiring to make entry of any of these lands shall execute in person within the limits of the Billings, Mont., land district an affidavit showing his qualifications to enter and means of identifying him (forms of such affidavits to be furnished by the officers of the land department). The affidavit must be presented in a sealed envelope, in person or by ordinary and not registered mail, at the district land office located at Billings, Mont., before 4.30 p. m., June 25, 1907. Thereafter at 9 a. m. on June 26, 1907, there shall be taken or drawn, impartially from the envelopes so filed, such number as may be necessary to carry into effect the provisions of the Proclamation, and the order of drawing such envelopes shall determine the order in which applicants shall be permitted to make entry of these lands.

Those successful as a result of the drawing must present formal application to enter a specific farm unit within the time fixed and assigned for making such application; show present qualifications; file a water-right application; make the required payments under the reclamation act and the act of April 27, 1904, and otherwise comply with the law.

Any person filing more than one affidavit, or in other than his true name, shall be denied any privilege he might otherwise have secured under this drawing, except that any honorably discharged soldier or sailor entitled to the benefits of section 2304 of the Revised Statutes of the United States, as amended by the act of March 1, 1901 (31 Stat., 847), may be represented by an agent of his own selection for the purpose of executing the affidavit herein required, due authority therefor being shown, but no person will be permitted to act as agent for more than one such soldier or sailor.

Envelopes showing on the outside distinctive marks of any character shall be eliminated from the drawing.

The plan herein provided for governing the manner of opening these lands shall have operation and control the order in which all entries of the lands are allowed until August 23, 1907, upon which date any portion of the lands then remaining undisposed of will be subject to settlement, occupation, and entry under the provisions of the reclamation act in like manner as if no special preliminary plan had been provided for.

All persons are especially admonished from attempting to settle upon, occupy, or improve any of these lands prior to August 23, 1907, except those making entry in accordance with the terms of this Proclamation.

The Secretary of the Interior shall make and publish such rules and regulations as may be necessary and proper to carry into full force and effect the manner of settlement, occupation, and entry as 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 21st day of May, in the year of our Lord one thousand nine hundred and seven and of the independence of the United States the one hundred and thirty-first.

[SEAL.] THEODORE ROOSEVELT.

By the President:

ELIHU ROOT,

Secretary of State.

OPENING OF LANDS IN HUNTLEY PROJECT TO SETTLEMENT, OCCUPATION, AND ENTRY.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
Washington, May 21, 1907.

The Commissioner of the General Land Office.

SIR: Pursuant to the proclamation of the President, dated May 21, 1907, prescribing the manner in which the lands in the Huntley project, within the ceded Crow Indian Reservation, shall be opened to settlement, occupation, and entry under the provisions of the acts of June 17, 1902 (32 Stat., 388), and April 27, 1904 (33 Stat., 352), and for the purpose of insuring the expeditious and orderly disposal of these lands, and to prevent conflicting claims, contests, and speculative entries, the following rules and regulations are issued to govern the opening of the lands in said Huntley project:

1. The lands shown on the approved farm unit plats of the project

shall be subject to entry in accordance with the public notice issued under the provisions of section 4 of the reclamation act of June 17, 1902, in the manner hereinafter described and in no other way.

2. Each entry shall be made for a farm unit, as designated on the approved plats, no subdivision or combination of farm units being allowed.

3. All persons who do not make entry in accordance with these rules and regulations are warned not to make settlement on said lands, and are informed that no rights will be recognized under any settlement so made.

AFFIDAVIT OF APPLICANTS.

4. Any person qualified and desiring to make entry of any of these lands may, either through the mails or otherwise, but not by registered mail, present to the register and receiver of the land office located at Billings, Mont., a sealed envelope containing his personal affidavit, showing his qualifications to make entry under the homestead laws, and means of identification, upon forms to be furnished by officers of the land department.

5. All persons who are qualified to make homestead entry of a quantity of land equal to the smallest farm unit, approximately 40 acres, may present affidavits under these regulations. Proof of naturalization and other proofs required, as in case of second homestead entry, will be exacted before *entry* is actually allowed, but should not accompany affidavit required by the preceding paragraph.

6. Affidavits required by paragraph 4 must be on forms similar to those attached hereto and sworn to within the Billings, Mont., land district before an officer authorized to administer oaths in that district.

7. No person is authorized to present more than one affidavit of the character mentioned above in his own behalf, nor in any other than his true name, or on behalf of any other person, except as herein provided, and if more than one affidavit is presented by any person in violation hereof he will be deemed to have waived and forfeited the right to have either or any of his affidavits considered, and they will not be considered, but any honorably discharged soldier or sailor entitled to the benefits of section 2304 of the Revised Statutes of the United States, as amended by the act of March 1, 1901 (31 Stat., 847), may be represented by an agent of his own selection for the purpose of executing the affidavit provided for in paragraph 4, due authority therefor, upon a form provided by the Commissioner of the General Land Office, being inclosed in the envelope with the affidavit. No person will, however, be permitted to act as agent for more than one such soldier or sailor.

METHOD AND TIME OF PRESENTING AFFIDAVITS.

8. No affidavit will be received or considered if it is presented to or reaches the land office at Billings, Mont., after 4.30 o'clock p. m. on Tuesday, June 25, 1907, nor will any affidavit be considered which is sworn to outside of the Billings, Mont., land district.

9. All envelopes containing affidavits should be plainly addressed to the "Register and Receiver, Billings, Mont.," and have indorsed upon the face near the left end the words "Huntley lands." No affidavit will be considered which is not received in an envelope so indorsed or which is received by *registered* mail, or received in an envelope which bears any mark that in any way indicates the person who executed the affidavit. No envelope should contain more than one affidavit or contain any other paper than the affidavit mentioned, except the authority to represent a soldier or sailor, as provided for in paragraph 7, when filed by an agent.

10. The blank forms of affidavits and the envelopes referred to above may be obtained by any prospective entryman upon application made either in person or by mail to the "Register and Receiver, Billings, Mont.," or to the "General Land Office, Washington, D. C."

METHOD OF RECEIVING, HOLDING, OPENING, AND LISTING.

11. The register and receiver of the Billings, Mont., land office will provide themselves with a strong box or boxes, securely closed, fastened, and sealed in such manner that they can not be opened and closed again without leaving evidence thereof. These boxes must be so constructed that the envelopes referred to may be deposited therein, but can not be extracted therefrom before the time hereinafter fixed for their opening without detection.

12. As soon as any envelope properly indorsed as herein provided has been received it will be numbered and deposited in one of the boxes, which will be guarded by a specially detailed representative of the Government until they are publicly opened as hereinafter provided.

13. Beginning on Wednesday, June 26, 1907, and continuing thereafter between the hours of 9 o'clock a. m. and 5 o'clock p. m., so long as may be necessary, the register and receiver of the Billings, Mont., land office will, under the supervision and direction of such person or persons as the Secretary of the Interior may designate, publicly open the box or boxes and thoroughly mix all the envelopes deposited therein, and after they have been so mixed 1,000 envelopes will be taken or drawn, and as taken or drawn will be numbered distinctively, beginning with No. 1 and continuing thereafter consecutively in the order in which they are taken or drawn, but no more than the 1,000 will be drawn and numbered, regardless of the number

which may have been received. All envelopes not so drawn and numbered will be opened and scrutinized for the purpose of determining whether any of the successful persons has presented more than one affidavit; and if it is discovered that any such person has presented more than one affidavit, or otherwise than provided for, his name will not be retained upon the list provided for in paragraph 14, and will be denied the privilege of entry he might otherwise have received under this drawing.

14. After each envelope has been drawn and numbered as prescribed above, it will be publicly opened, and the distinctive serial number of the envelope and the name and address of the person who executed the affidavit contained therein will be publicly announced and recorded in a book, to be known as "The list of authorized applicants for Huntley lands," in the numerical order in which the envelopes were drawn, and each affidavit will be stamped with the number corresponding to the number so indorsed on the envelope in which it was presented, and the number thus assigned to any applicant will control the time and order in which he may apply to make entry hereunder.

15. Copies of the list of authorized applicants above provided for, with an explanatory note attached showing the date on which each of the first 633 authorized applicants must apply to enter, will be posted in the land office at Billings, Mont., and furnished to the press for publication as a matter of news, and the register and receiver of the Billings, Mont., land office will at once notify each person whose name appears on the list of the number assigned to him and notify each of the first 633 persons on such list of the date upon which he must apply to make entry by a postal card mailed to him at the address given by him in his affidavit.

METHOD OF MAKING ENTRY.

16. Persons who have been assigned numbers in the manner hereinbefore prescribed may present their applications to make entry as follows:

Commencing on Monday, July 22, 1907, the applications of those persons who have been assigned Nos. 1 to 50, inclusive, must be presented in person or (in the case of soldiers and sailors) in the manner permitted by section 2309 of the Revised Statutes at the land office at Billings, Mont., and will be considered in their numerical order during that day, and the applications of those to whom have been assigned Nos. 51 to 100, inclusive, must be presented and will be considered in their numerical order during the next day, and so on from day to day, Sundays excepted, until the first 633 successful applicants have in this manner and order been afforded opportunity to make

entry, there being but 633 farm units in this project. 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 applicants 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 prior to August 23, 1907. In order to afford others upon the successful list above 633 an opportunity, when there is a failure to make entry at the time assigned, it is directed that on July 22 notice issue to such number of the consecutive persons on the list herein provided for (beginning with No. 634, as shall equal those failing to make entry on that day) to appear and make entry on Tuesday, August 6, and on July 23 advise others in numerical order equal to the failures occurring on that day to appear and make entry on August 7, and so on each day succeeding until all lands are entered, but no time may be fixed for making entry, nor shall any entry be allowed under this plan beyond August 22, 1907. No person to whom a number has not been assigned under these regulations will be permitted to make entry prior to August 23, 1907.

17. At the time of making entry the authorized applicant will be required to present his notification card and otherwise identify himself; make the usual affidavit showing his present qualifications; and in addition thereto make application for a water right on Form 4–021, in accordance with the public notice issued for this project by the Secretary of the Interior.

PROCEEDINGS ON CONTESTS AND REJECTED APPLICATIONS.

18. When the register and receiver of the Billings, Mont., land office for any reason reject the application of any person claiming right to make entry under any number assigned to him under these regulations, they will at once advise him of such rejection and of his right of appeal, and further action thereon shall be controlled by the following rules, and not otherwise:

(*a*) Applications either to file soldiers' declaratory statement or to make homestead entry of these lands must on presentation in accordance with these regulations be at once accepted or rejected, but the local land officers may, in their discretion, permit amendment of defective applications during the day only on which they are presented. If properly amended on the same day, entry may be permitted, after the numbers for the day have been exhausted, in their numerical order.

(*b*) No appeal to the General Land Office will be allowed or considered unless taken within one day (Sundays excepted) after the rejection of the application.

(*c*) After the 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 his application, if allowed, will be subject to the disposition of the prior application upon appeal, if any be taken, from the rejection thereof, which fact must be noted upon the receipt issued him and upon the application allowed.

(*d*) 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.

(*e*) Applications filed prior to August 23, 1907, to contest entries allowed for these lands 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 recommendations, when the matter will be promptly decided.

(*f*) These regulations will supersede during the period between July 22, 1907, and August 23, 1907, any rule of practice or other regulation governing the disposition of applications with which they may be in conflict, in so far as they relate to the land affected by these regulations, and will apply to all appeals taken from the action of the local land officers during that period affecting any of these lands.

PAYMENTS REQUIRED.

18. All persons who enter these lands will be required to pay the usual fees and commissions collected under homestead entries and the sum of $4 per acre due to the Indians as purchase price, and they must in addition thereto pay for each acre embraced in the designated irrigable area of the farm unit entered by them the sum of $30 as building charge, and such additional sum as may be fixed from time to time as charge for operation and maintenance. These payments must be made as follows: At the time of entry each applicant must pay to the receiver of the Billings, Mont., land office the usual fees and commissions and $1 of the Indian purchase price for each acre entered, and in addition thereto the following: $3 on account of the building charge and 60 cents as operating and maintenance charges for each irrigable acre embraced in his entry; and thereafter he must pay on the Indian purchase price 75 cents annually for four years, beginning with the end of the second year, for each acre embraced in his entry, and in addition thereto he must in accordance with notices issued by the Secretary of the Interior pay annually for each irrigable acre embraced in his entry not less than $3 on account of the

building charge and such sum as may from time to time be fixed as charges for operation and maintenance. The building charge of $30 per acre may be paid in not less than four nor more than nine annual installments in addition to the payment made at the time of entry.

19. Due to the incentive to speculate in these lands because of their enhanced value through the operation of the reclamation act, and in order to prevent as far as possible the securing of lands through indirect means in a body greater than the farm unit, it is directed that whenever an entry allowed under the plan herein provided for is relinquished such entry will be thereupon canceled and the land opened to settlement, but that applications to make further entry of such relinquished land presented within two days after the filing of the relinquishment be suspended until such investigation may be made as will disclose the circumstances under which the relinquishment was made and filed.

FRAUDULENT ENTRIES AND RELINQUISHMENTS.

20. If any person fraudulently makes entry in the interest of another, or makes entry for the purpose of selling his relinquishment, or makes entry with any other intent than to secure a bona fide home for himself, or if any person having honestly made entry afterwards enters into an agreement to hold the land and procure title in the interest of some other person, or if any entryman fails to make any of the payments above mentioned within the required time, or fails to comply with the requirements of the homestead law and the reclamation act, his entry will be canceled and all payments made by him on account of such entry will be forfeited.

Very respectfully,

JAMES RUDOLPH GARFIELD,
Secretary.

THE WHITE HOUSE.
Approved May 21, 1907.
THEODORE ROOSEVELT.

Affidavit of applicant.

I, ——— ———, of ——— post-office, do solemnly swear that I am —— years of age [a] and a citizen of the United States, or have lawfully declared my intention to become such; that I am not the owner of more than 160 acres of land and have not heretofore made any entry or acquired any title to public lands

[a] If the party making the affidavit is not 21 years of age, he must state in his affidavit that he is the head of a family.

which disqualifies me from making homestead entry; that I desire to enter a farm unit within the Huntley irrigation project for my own use and benefit as a home and not for speculative purposes or in the interest of any other person; that I have not presented and will not present any other affidavit of this kind, and that I am —— feet and —— inches in height and weigh —— pounds.

——— ———.

Subscribed and sworn to before me within the Billings, Mont., land district this —— day of June, 1907.

——— ———,

———.

Agent's affidavit.

I, ——— ———, of ——— post-office, do solemnly swear that I am the duly appointed agent of ——— ——— of ———, who desires to make entry within the Huntley irrigation project under the President's proclamation of May 21, 1907, and section 2304, Revised Statutes of the United States, as amended by the act of March 1, 1901; that I have not presented and will not present an affidavit of this character for any other person, and that I am —— feet and —— inches in height and weigh —— pounds.

——— ———.

Subscribed and sworn to before me within the Billings, Mont., land district this —— day of June, 1907.

——— ———,

———.

Soldier's and sailor's affidavit.

I, ——— ———, of ——— post-office, do solemnly swear that I am fully qualified to make homestead entry and entitled to the benefits of section 2304, Revised Statutes of the United States, as amended by the act of March 1, 1901; that I hereby appoint and make and constitute ——— ———, of ——— post-office, my true and lawful agent and attorney in fact to present the affidavit required of persons desiring to enter lands within the Huntley irrigation project and to thereafter file a declaratory statement for me under section 2309, Revised Statutes of the United States, and that I have not presented and will not personally present an affidavit for the purpose of securing the right to enter lands in said project nor authorize any other person than the person above named to present such an affidavit for me.

——— ———.

Subscribed and sworn to before me within the Billings, Mont., land district this —— day of June, 1907.

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