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AND

GENERAL LAND OFFICE

IN

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FROM JULY 1, 1899, TO APRIL 30, 1900.

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DECISIONS  
RELATING TO  
THE PUBLIC LANDS.

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RIGHT OF WAY—TELEPHONE LINE—INDIAN RESERVATIONS.

OPINION.

The act of July 24, 1866, authorizing the construction and maintenance of telegraph lines through and over the public domain, and along military or post roads of the United States, contains no grant or authority for the construction and maintenance of telephone lines.

A telephone company that, without statutory authority, enters upon and constructs a telephone line across an Indian reservation may be dealt with as a trespasser for such unlawful invasion.

Under a right of way grant to a railway company across an Indian reservation, where the statute authorizes the construction and maintenance of a telephone line upon said right of way, it is immaterial, so far as the United States and Indians are concerned, whether said railway company constructs and operates the telephone line or permits another party so to do.

Whether a person is in an Indian country "without authority" of law, or whether his "presence within the limits of the reservation" is "detrimental to the peace and welfare of the Indians," must be determined by the Commissioner of Indian Affairs, acting under the direction of the Secretary of the Interior; but if so found, the offender may be summarily removed from any tribal reservation.

The authority to remove property, wrongfully brought upon an Indian reservation, or the presence of which upon a reservation is detrimental to the peace and welfare of the Indians, necessarily follows from the authority to remove persons under like circumstances, and from the general power of management of Indian affairs committed to the Commissioner of Indian Affairs, acting under the direction of the Secretary of the Interior.

*Assistant Attorney General Van Devanter to the Secretary of the Interior,  
July 1, 1899. (E. B., JR.)*

In his report, dated October 15, 1898, relative to the application of the Arkansas Valley Telephone Company for permission to extend its lines through the Otoe and Missouri and Pouca Indian reservations, the Acting Commissioner of Indian Affairs invites attention to two telephone lines which have already been built across Indian reservations, one by the Inland Telephone and Telegraph Company across the Umatilla Indian reservation in the State of Oregon and the other by

the Rocky Mountain Bell Telephone Company across the Fort Hall Indian reservation in the State of Idaho, and asks to be directed as to the action to be taken in the premises. By reference of October 17, 1898, from the Acting Secretary, I am in receipt of the above report and accompanying correspondence for an opinion—

as to the right of the Inland Telephone and Telegraph Company and the Rocky Mountain Bell Telephone Company to build telephone lines on the Umatilla and Fort Hall Indian reservations, respectively; and whether or not in so building lines they have unlawfully invaded the reservations and committed trespasses for which they may be proceeded against by the Department; and in case they did so unlawfully invade the reservations and commit trespasses, by what means may the Department proceed against them. Has the Secretary power to take down the wires and expel the agents of the companies?

It appears from the correspondence had that the telephone lines across the Umatilla and Fort Hall Indian reservations were constructed by the respective companies during 1898 and prior to October first of that year; that the Inland Telephone and Telegraph Company's line runs from Athena to Meacham, Oregon, *via* Thorn Hollow, a distance of about fifteen miles, entering the Umatilla reservation at a point about one mile south of Athena and leaving it at a point about four miles north of Meacham, passing through the reservation, partly on and partly off public roads on legal subdivision lines, and most of the way over or along allotted lands; that the Rocky Mountain Bell Telephone Company's line enters the Fort Hall reservation on its southern boundary near McCammon, Idaho, follows a wagon road on Indian lands to Pocatello, a distance of about twenty-four miles, and is extended thence on the right of way of the Utah Northern Railroad, a distance of about twenty-three miles, to the north boundary of the reservation; and that the chiefs and headmen of the Indians on the Fort Hall reservation filed a protest, September 14, 1898, against the building of the telephone line on their reservation.

The Inland Telephone and Telegraph Company, as appears from the letter of its general manager, dated August 3, 1898, to the U. S. Indian agent at the Umatilla agency, contends that it had the right to build its line over the Umatilla reservation by virtue of compliance with the act of July 24, 1866 (14 Stat., 221), the provisions of which are preserved in sections 5263 to 5268, inclusive, of the Revised Statutes. The act reads as follows:

That any telegraph company now organized, or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States: *Provided*, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber, and

other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which its said lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

SEC. 2. That telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General.

SEC. 3. That the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association, or person: *Provided, however,* That the United States may at any time after the expiration of five years from the date of the passage of this act, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

SEC. 4. That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by this act.

The recent decision of the supreme court in the case of *The City of Richmond v. The Southern Bell Telephone and Telegraph Company* (174 U. S., ) is against the above contention of the Inland Telephone and Telegraph Company. In that case the Southern Bell Telephone and Telegraph Company filed a bill for an injunction to restrain the city of Richmond, its agents, officers and all others from cutting, removing or in any way injuring the company's lines, poles and wires within that city and from preventing or interfering with the exercise of the rights claimed by the company under the act of July 24, 1866, *supra*, and also from taking proceedings to inflict and enforce fines and penalties on said company for exercising its alleged rights. The circuit court granted the injunction as prayed, and its decree, though modified in certain particulars, was affirmed by the circuit court of appeals. The case presented the question whether a telephone line was a telegraph line within the meaning and intent of the said act of 1866 and upon that question the court said:

But independently of any question as to the extent of the authority granted to "telegraph" companies by the act of 1866, we are of opinion that the courts below erred in holding that the plaintiff, in respect of the particular business it was conducting, could invoke the protection of that act. The plaintiff's charter, it is true, describes it as a telephone and telegraph company. Still, as disclosed by the bill and the evidence in the cause, the business in which it was engaged and for the protection of which against hostile local action it invoked the aid of the federal court, was the business transacted by using what is commonly called a "telephone," which is described in an agreement between the Western Union Telegraph Company and the National Bell Telephone Company, in 1879, as "an instrument for electrically transmitting or receiving *articulate speech*."

It may be that the public policy intended to be promoted by the act of Congress of 1866 would suggest the granting to telephone companies of the rights and privi-

leges accorded to telegraph companies. And it may be that if the telephone had been known and in use when that act was passed, Congress would have embraced in its provisions companies employing instruments for electrically transmitting articulate speech. But the question is, not what Congress might have done in 1866 nor what it may or ought now to do, but what was in its mind when enacting the statute in question. Nothing was then distinctly known of any device by which articulate speech could be electrically transmitted or received between different points, more or less distant from each other, nor of companies organized for transmitting messages in that mode. Bell's invention was not made public until 1876. Of the different modes now employed to electrically transmit messages between distant points, Congress in 1866 knew only of the invention then and now popularly called the telegraph. When therefore the act of 1866 speaks of telegraph companies, it could have meant only such companies as employed the means then used or embraced by existing inventions for the purpose of transmitting messages merely by sounds of instruments and by signs or writings.

In 1887 the Postmaster General submitted to the Attorney General the question whether a telephone company or line, offering to accept the conditions prescribed in Title LXV of the Revised Statutes (being the act of 1866), could obtain the privileges therein specified. Attorney General Garland replied: "The subject of Title LXV of Revised Statutes is telegraphs. In all its sections the words 'telegraph,' 'telegraph company' and 'telegram' define and limit the subject of the legislation. When the law was made, the electric telegraph, as distinguished from the older forms, was what the lawmakers had in view. The electric telegraph, when the law was made, as to the general public, transmitted only written communications. Its mode of conduct is yet substantially the same. This transmission of written messages is closely analogous to the United States mail service. Hence the acceptance of the provisions of the law by the telegraph company was required to be filed with the Postmaster General, who has charge of the mail service. Under the several sections embraced in the Title, in consideration of the right of way and the grant of the right to pre-empt forty acres of land for stations at intervals of not less than fifteen miles, certain privileges as to priority of right over the line, also the right to purchase, with power to annually fix the rate of compensation, were secured to the government. Governmental communications to all distant points are almost all, if not all, in writing. The useful government privileges which formed an important element in the legislation would be entirely inapplicable to telephone lines, by which oral communications only are transmitted. A purchase of a telephone line certainly was not in the mind of the lawmakers. In common and technical language alike, telegraphy and telephony have different significations. Neither includes all of the other. The science of telephony as now understood was little known as to practical utility in 1866, when the greater part of the law contained in the Title was passed. Telephone companies therefore are not within the 'category of the grantees of the privileges conferred by the statute.' If similar privileges ought to be granted to telephone companies, such a grant would come within the scope of legislative rather than administrative power." (19 Opin. 37.)

It is not the function of the judiciary, because of discoveries after the act of 1866, to broaden the provisions of that act so that it will include corporations or companies that were not, and could not have been at that time, within the contemplation of Congress . . . . The conclusion that the act of 1866 confers upon telephone companies the valuable rights and privileges therein specified is not authorized by any explicit language used by Congress, and can be justified by implication only. But we are unwilling to rest the construction of an important act of Congress upon implication merely; particularly if that construction might tend to narrow the full control always exercised by the local authorities of the States over streets and alleys within their respective jurisdictions. If Congress desires to extend the provisions

of the act of 1866 to companies engaged in the business of electrically transmitting articulate speech—that is, to companies popularly known as telephone companies, and never otherwise designated in common speech—let it do so in plain words. It will be time enough when such legislation is enacted to consider any questions of constitutional law that may be suggested by it.

It is clear under this authoritative decision of the supreme court that no grant or authority exists in the act of 1866 for the construction of the aforesaid telephone lines across the Umatilla and the Fort Hall Indian reservations. Except as to that portion of the Rocky Mountain Bell Telephone Company's line which is upon the right of way of the Utah Northern railroad, I am unable to find any grant or authority for the construction of either line within the limits of these reservations, and am of opinion that, with this exception, the companies in question by entering upon and constructing their respective lines unlawfully invaded and trespassed upon the reservations, and are liable, therefore, to be dealt with as trespassers.

The eleventh section of the act of September 1, 1888 (25 Stat., 452, 456), entitled—

An act to accept and ratify an agreement made with the Shoshone and Bannack Indians, for the surrender and relinquishment to the United States of a portion of the Fort Hall reservation, in the Territory of Idaho, for the purpose of a town-site, and for the grant of a right of way through said reservation to the Utah and Northern Railway Company, and for other purposes,

authorizes the use of the lands taken by said railway company thereunder for its right of way and station grounds—

for such purposes only as shall be necessary for the construction, maintenance, and convenient operation of a railway, telegraph or telephone lines.

It is not deemed material under the quoted provision, so far as the United States or the Indians are concerned, whether the railway company constructs, maintains and operates the telephone line or permits or authorizes another party to do so. As to that portion of its line within the limits of the reservation which is on the railroad company's right of way, I am of opinion that the Rocky Mountain Bell Telephone Company is not a trespasser against the government or the Indians.

The Indians within the United States stand in their relation to the United States as wards to a guardian (*Cherokee Nation v. The State of Georgia*, 5 Peters, 1, 17; *Worcester v. State of Georgia*, 6 Peters, 515, 559; *United States v. Kagama*, 118 U. S., 375; *Choctaw Nation v. United States*, 119 U. S., 1, 27; and *Stephens v. Cherokee Nation*, 174 U. S., 445, 484). In view of the paramount authority of Congress over the Indian tribes and of the duties imposed on the government by their condition of dependency, congress has from time to time passed laws for the government of the Indian country. By section 441 of the Revised Statutes the Secretary of the Interior is charged with the supervision of public business relating to the Indians; and by section 463 is committed to the Commissioner of Indian Affairs, under the

direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, "the management of all Indian affairs, and all matters arising out of Indian relations." Sections 2147 and 2149 of the Revised Statutes, respectively, provide:

SEC. 2147. The superintendent of Indian affairs, and the Indian agents and sub-agents, shall have authority to remove from the Indian country all persons found therein contrary to law; and the President is authorized to direct the military force to be employed in such removal.

SEC. 2149. The Commissioner of Indian Affairs is authorized and required, with the approval of the Secretary of the Interior, to remove from any tribal reservation any person being therein without authority of law, or whose presence within the limits of the reservation may, in the judgment of the Commissioner, be detrimental to the peace and welfare of the Indians; and may employ for the purpose such force as may be necessary to enable the agent to effect the removal of such person.

Relative to the exercise of the authority to remove persons under sections 2147 and 2149 Assistant Attorney General Shields in an opinion dated October 19, 1889, said:

Whether a person is in an Indian country "without authority" of law, or whether his "presence within the limits of the reservation" is "detrimental to the peace and welfare of the Indians" must be determined primarily by the enlightened judgment of the Commissioner of Indian Affairs. But, if so found, with the approval of the Secretary of the Interior, the offending person or persons may be summarily removed from any tribal reservation.

This opinion has received the approval of several Secretaries of the Interior, and I concur in the views expressed therein.

While authority is thus explicitly given to remove persons from tribal reservations, I am not aware of any express statutory authority for the removal therefrom of the property of trespassers. I think, however, that such express authority is not necessary. The authority to remove property, brought upon a reservation without authority of law, or the presence of which upon a reservation is detrimental to the peace and welfare of the Indians, seems necessarily to follow from the authority to remove persons under like circumstances, and from the general power of management of Indian affairs with which the Commissioner of Indian Affairs, acting under the direction of the Secretary of the Interior, is clothed.

I am therefore of opinion that the Commissioner of Indian Affairs, with the approval of the Secretary, may remove from these reservations the agents and employes of these companies, and also the wires, poles and other property of the companies where the same are upon the reservations without authority of law as aforesaid.

The propriety of citing each company to withdraw its agents and employes, and its wires, poles and other property within a stated time, before exercising the aforesaid authority to remove them from the reservations, will be so readily appreciated as to render any suggestion upon that point unnecessary on my part.

The method of proceeding against the companies for any injury done or damage inflicted by their unlawful invasion of and trespass upon the reservations is by the institution of appropriate actions in the courts.

Approved, July 1, 1899.

E. A. HITCHCOCK,  
*Secretary.*

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DEVER ET AL. *v.* AYARS.

Motion for review of departmental decision of March 6, 1899, 28 L. D., 169, denied by Secretary Hitchcock, July 1, 1899.

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MINING CLAIM—PATENT—EXPENDITURE.

MAYFLOWER GOLD MINING CO.

A single application may embrace, and a single patent issue for placer and lode claims, where the land involved lies in one body or piece, has been claimed or located for valuable deposits, and the several claims have a common ownership. Under an application for mineral patent, which embraces several locations held in common, and is made and passed to entry prior to July 1, 1898, proof of an expenditure of five hundred dollars on the group of claims is sufficient, under amended rule 53 of the mining regulations.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *July 3, 1899.* (G. B. G.)

July 13, 1895, the Mayflower Gold Mining Company made its application for a patent under section 2325 of the Revised Statutes for the Beaver Springs placer No. 1, the Beaver Springs placer No. 2, and the Mayflower and Highland Chief lode claims.

These claims are contiguous, the two placer claims adjoining each other, the Mayflower lode adjoining the Beaver Springs placer No. 2 on the southwest, and the Highland Chief lode adjoining the Beaver Springs placer No. 1 on the northwest.

An entry of these claims was allowed, and patent certificate issued October 12, 1895. This entry was before the Department once before upon another question. Elda Mining and Milling Company *v.* Mayflower Gold Mining Company (26 L. D., 573).

August 18, 1898, your office, upon an examination of the evidence submitted in support of the application for patent, found that the said Highland Chief and Mayflower lode claims were contiguous to but not embraced within either of the placer claims, and held that "there is no authority under the mining laws for embracing in an application for patent a lode and a placer claim, where the lode is not within the exterior limits of the placer location." The claimant company was thereupon notified that it would be required to elect whether it desired to retain in its entry the placer claims or one of the lode claims (the

exclusion of the placer claims rendering the lode claims non-contiguous), and that upon such election the entry would be canceled as to the other claims.

August 29, 1898, claimant requested that the entry be referred to the board of equitable adjudication for approval, but your office, September 29, 1898, held that the entry having been allowed in violation of the mining regulations, the request could not be granted. In that decision it was further found upon a re-examination of the record that the amount of labor and improvements upon each location were as follows: Beaver Springs placer No. 1, \$100; Beaver Springs placer No. 2, \$700; Mayflower lode claim, \$460; Highland Chief lode claim, \$560; and it was thereupon held that, should claimant

make a selection of any of the locations embraced in said entry, evidence must be furnished that the statutory expenditure of \$500 in labor or improvements has been made thereon prior to or during the local period of publication.

Claimant has appealed to the Department, its contention being, in substance, that the entry as made should stand and be passed to patent.

Your office holding that there is no authority under the mining laws for embracing in the same application for patent a lode claim and a placer claim, covering adjoining but different tracts of ground, is made to rest upon section 2333 of the Revised Statutes. That section is as follows:

Where the same person, association, or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer-claim, with the statement that it includes such vein or lode, and in such a case a patent shall issue for the placer-claim, subject to the provisions of this chapter, including such vein or lode.

This section does not support the conclusion reached by your office. It directs in what manner an application shall be made for a placer claim which includes within its boundaries a known vein or lode in the possession of the applicant. There is no rule of construction under which it can be well said that a statute, which directs how an application shall be made for a placer claim which includes a known vein or lode, prohibits the inclusion in an application for patent of a placer claim and a lode claim covering adjoining but different tracts of ground.

No good reason has been given by your office, and none is suggested by the record in this case or by a careful investigation of the subject, why a single application may not embrace and a single patent be issued for placer and lode claims situated as these are, if the applicant has complied with the law. Section 2325 expressly authorizes the inclusion in an application for patent of "any land claimed and located for valuable deposits" otherwise spoken of as "a piece of land," and as "the claim or claims in common." The land in question lies in one body or piece, has been claimed and located for valuable deposits, and the several claims have a common ownership.

In the matter of the expenditure upon these claims, the attention of your office is directed to circular of March 14, 1898 (26 L. D., 378), amending paragraph 53 of the mining regulations approved December 15, 1897, to read as follows:

The claimant at the time of filing the application for patent, or at any time within the sixty days of publication, is required to file with the register, a certificate of the surveyor-general that not less than five hundred dollars' worth of labor has been expended or improvements made, by the applicant or his grantors upon each location embraced in the application, or if the application embraces several locations held in common, that an amount equal to five hundred dollars for each location, has been so expended upon, and for the benefit of, the entire group; that the plat filed by the claimant is correct; that the field notes of the survey, as filed, furnish such an accurate description of the claim as will if incorporated in a patent serve to fully identify the premises and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the locus thereof; *Provided*, That as to all applications for patent made and passed to entry before July 1, 1898, or which are by protests or adverse claims prevented from being passed to entry before that time, where the application embraces several locations held in common, proof of an expenditure of five hundred dollars upon the group will be sufficient and an expenditure of that amount need not be shown to have been made upon, or for the benefit of, each location embraced in the application.

This entry was made October 12, 1895, and, under the proviso in the circular above quoted, the application for patent having been made and passed to entry before July 1, 1898, and the application embracing several locations held in common, the proof of the expenditure herein is sufficient. R. S. Hale (28 L. D., 524).

The decision appealed from is reversed, and the papers are herewith returned, with directions to pass the entry to patent unless other objection appears.

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JUNKIN *v.* NILSSON.

Motion for review of departmental decision of April 28, 1899, 28 L. D., 333, denied by Secretary Hitchcock July 3, 1899.

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RAILROAD LANDS—CONFIRMATION—ACT OF MARCH 2, 1896.

J. A. CONAWAY ET AL.

Under the act of March 2, 1896, it is the duty of the Secretary of the Interior to investigate the claims of all persons who assert that they are *bona fide* purchasers of lands erroneously patented or certified under a railroad grant, and who present their claims under said statute prior to the institution of suit to cancel the erroneous patent or certification.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *July 3, 1899.* (F. W. C.)

With your office letter of November 30, 1898, were transmitted petitions of J. A. Conaway *et al.*, asserting a confirmation of title in them, under the provisions of the act of March 2, 1896 (29 Stat., 42), to certain

described land purchased by them from the Southern Pacific Railroad Company.

Upon the showing made the title of these purchasers was by this Department, on February 6, 1899, held to have been confirmed by said act, and your office was directed to make demand upon the company for the value of said lands.

The Department is now in receipt of your office letter of the 22nd ultimo, in which it is stated that:

In accordance with said departmental instructions this office, by letter dated February 28, 1899, made demand upon Mr. C. P. Huntington, President of said Southern Pacific Railroad Company for the value of the land. More than ninety days have since elapsed and no response has been received thereto.

In said letter it is further stated that:

It has recently been learned that said tracts are included in the bill of complaint filed April 13, 1899, in cause No. 878, the United States v. Southern Pacific R. R. Co. *et al.*, now pending in the United States circuit court, ninth circuit, southern district of California.

In addition to the cases above mentioned there are a number of cases where the Department has upon the recommendation of this office, held that the title of petitioners was confirmed under the act of March 2, 1896, *supra*, to tracts which are involved in said cause 878, but this office has not as yet noted the confirmation on the tract-books of this office or made demand upon the company for the value of the land and there is also pending in this office a number of petitions for confirmation of title for tracts so involved, which have not yet been reported to the Department for confirmation.

In closing, your office letter states that:

In view of the pending suit, it would seem that no further demand should be made upon the company for the value of any of the tracts therein involved and I recommend that this office be directed to suspend action on all petitions for lands involved in said cause 878 until the case is finally determined by the courts.

The act of March 2, 1896, *supra*, is as follows:

That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: *Provided*, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the government or its officers to withdraw the same from sale or entry.

SEC. 2. That if any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person or association of persons, for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum government price thereof, and the title of such claimant shall stand confirmed. An

adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person or association of persons for whose benefit the certification was made for the value of the land as hereinbefore provided. Any bona fide purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject-matter, or at his option, as prescribed in sections three and four of chapter three hundred and seventy-six of the acts of the second session of the Forty-ninth Congress.

SEC. 3. That if at any time prior to the institution of suit by the Attorney-General to cancel any patent or certification of lands erroneously patented or certified a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a bona fide purchaser or are bona fide purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that said person or corporation is a bona fide purchaser as aforesaid, or that such persons or corporations are such bona fide purchasers, then no suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified.

Under this act it is made the duty of the Secretary of the Interior to investigate the claims of all persons who assert that they are bona fide purchasers of lands erroneously patented or certified and who present their claims prior to the institution of suit to cancel the erroneous patent or certification. The petitions of Conaway *et al.* were presented before the institution of said suit on April 13, 1899, and therefore it was the duty of the land department to proceed with the investigations of these claims, and if the claim of confirmation was sustained to demand of the railroad company the value of the lands, to the end that a full statement of the matter could be transmitted to the Department of Justice with a request for appropriate action thereon, so that a decree for the value of the land might be sought in the pending suit or in some future suit.

Other claims of confirmation of title under said act heretofore or hereafter presented to this Department prior to the institution of suit to cancel the patent or certificate will be disposed of in like manner. Claims presented after the institution of suit will not be acted upon pending its determination, but the claimants should be advised that under the statute they can probably present their claims in the suit wherein cancellation is sought and can there obtain a judicial determination of their right and title.

## MINING CLAIM—PLACER ENTRY—DISCOVERY.

FERRELL ET AL. *v.* HOGE ET AL. (ON REVIEW).

Section 2325 of the Revised Statutes is a statute of repose only so far as to bar the assertion of adverse mining claims not filed within the period of publication, and does not relieve the Land Department from the duty of ascertaining whether the land sought to be patented is mineral in character, and therefore subject to disposition under the mining laws.

A single discovery is sufficient to authorize the location of a placer claim, and may, in the absence of any claim or evidence to the contrary, be accepted as establishing the mineral character of the entire claim sufficiently to justify the patenting thereof, but such single discovery does not conclusively establish the mineral character of all the land included in the claim, so as to preclude further inquiry in respect thereto.

The entire area that may be taken as a placer claim can not be acquired as appurtenant to placer deposits which are shown to exist only in a portion thereof.

Where a part of the area embraced within a placer entry, in this instance twenty acres, is shown to contain no valuable mineral deposit subject to placer location, such part of the claim will be excluded from the entry.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) July 7, 1899. (E. F. B.) (G. B. G.)

This controversy, involving the Horse Shoe Quarry placer mining claim, survey No. 2602, Helena, Montana, land district, of which Hoge *et al.* made mineral entry January 6, 1890, has been pending before the land department since February 12, 1891, and its history is given in departmental decisions of February 12, 1894 (18 L. D., 81), December 22, 1894 (19 L. D., 568), and July 1, 1898 (27 L. D., 129).

The claim, which is upon unsurveyed land, embraces 159.97 acres and was located by an association of eight persons, upon a single discovery within its limits of a deposit of lime and iron rock valuable for fluxing purposes. No adverse claim was filed during the period of publication, but a protest was subsequently filed against the mineral entry by persons claiming that the land was not subject to the operation of the mining laws, which resulted in the decision of July 1, 1898, wherein it was held that the portion of the claim which the parties have for convenience denominated the Heel Calk subdivision, being the extreme northeasterly twenty acres, is not mineral in character and should therefore be excepted from the entry.

The case is now here upon the mineral claimants' motion for review of that decision, the grounds of which motion may be summarized as follows:

1. That as no adverse claim was filed during the period of publication, the right to the tract in controversy vested in the entrymen, and thereafter third parties could not object to the issuance of patent except it be shown that the applicants had failed to comply with the mining laws.
2. That one discovery of mineral within its limits was sufficient to establish the mineral character of the entire claim to such an extent that no one could be heard to allege that any part thereof is non-mineral.

3. That the evidence shows that the twenty acres denominated as the Heel Calk sub-division, contain a valuable deposit of sandstone which is sufficient to sustain that portion of the entry, even though it be a different kind of mineral from that for which the claim was originally located.

As to the first proposition, it may be said that section 2325 of the Revised Statutes, is a statute of repose only so far as to bar the assertion of adverse mining claims not filed within the period of publication, and that it does not relieve the land department from ascertaining whether the land sought to be patented is mineral in character and therefore subject to disposition under the mining laws. The land department is charged with the duty of disposing of the public lands in the manner provided by law, and its officers must determine the character of the land and dispose of it only under the law applicable thereto. That non-mineral land can not be disposed of under the mining laws is a cardinal rule in the administration of the public land laws.

The second proposition was practically rejected by the decision under review, but it is insisted by the mineral claimants that that decision and the rule announced in the Union Oil Company case (25 L. D., 351), can not both stand, and that if the former prevails it is a repudiation of the latter.

There is no such conflict. In both decisions it is held that one discovery upon a claim, whether it be of twenty acres or of one hundred and sixty acres, is sufficient to authorize a placer location thereof, but in neither case is it held, either directly or by intendment, that such discovery is conclusive as to the mineral character of the entire claim, or that all the land therein can be acquired as appurtenant to the mineral deposits in the portion containing the discovery.

Under section 2320 of the Revised Statutes a lode claim may extend fifteen hundred feet along a discovered vein or lode and, to secure the convenient working of the claim and give location and precision to its boundaries, may incidentally include surface ground to the extent of three hundred feet on each side of the middle of the vein at the surface, irrespective of the character of such surface ground.

It is contended that a like principle applies to placer claims and that as an incident to the mineral deposits developed by the discovery and for which the location is made the claim may include the full area of twenty acres for each person participating in the location, not exceeding in all one hundred and sixty acres, irrespective of its character; in other words, that a discovery of placer mineral deposits will support a location of twenty acres by a single individual or one hundred and sixty acres by an association of eight persons whether the mineral deposits extend throughout the entire claim or are confined to the immediate locality of the discovery. This contention is based upon section 2329 of the Revised Statutes, which makes placer claims "subject to entry and patent under like circumstances and conditions and upon similar proceedings as are provided for vein or lode claims."

Section 12 of the act of July 9, 1870 (16 Stat., 217), from which this section was taken, reads as follows:

*And be it further enacted*, That 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 this act, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims: *Provided*, That where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands, no further survey or plat in such case being required, and the lands may be paid for at the rate of two dollars and fifty cents per acre: *Provided further*, That legal subdivisions of forty acres may be subdivided into ten-acre tracts; and that two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof: *And provided further*, That no location of a placer claim, hereafter made, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona fide pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona fide settler to any purchaser.

While this statute remained in full force placer claims upon surveyed lands had to be so located that their exterior limits would conform to the legal subdivisions of the public lands. These subdivisions were established by the rectangular system of public surveys which of course were not coincident with the lines which separate mineral lands from non-mineral lands, and therefore placer claims located upon surveyed lands during the continuance of this act frequently had to include within their exterior limits some non-mineral lands in order to embrace the desired mineral lands and at the same time conform to the legal subdivisions of the public lands. But the extent to which non-mineral lands would have been otherwise included in placer locations made under this act was greatly lessened by the provision for the subdivision into ten acre tracts of forty acre legal subdivisions, the smallest theretofore recognized by law.

The provision in the act of July 9, 1870, in respect to the necessity of conforming placer claims upon surveyed lands to the legal subdivisions of the public surveys was modified by section 10 of the act of May 10, 1872 (17 Stat., 91; Rev. Stat., Sec. 2331), which declared:

and all placer mining claims heretofore located shall conform as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, . . . but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands: . . . and provided, also, that where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, said fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes.

The purpose of this modification is well stated in the case of William Rablin (2 L. D., 764).

The provisions in the later act to the effect that placer claims thereafter located should conform "as near as practicable" to the public

surveys and the rectangular subdivisions thereof, and that where they could not be so conformed they should be surveyed and platted as on unsurveyed lands, and the recognition therein given to the segregation of mineral lands from non-mineral lands in legal subdivisions of forty acres or more, make it evident that the discovery of placer mineral deposits within a legal subdivision of forty acres or more was not intended to necessarily establish the mineral character of the entire subdivision.

Considering all the statutes relating to mining claims it seems clear that it was not their purpose to permit the entire area allowed as a placer claim to be acquired as appurtenant to placer deposits irrespective of their extent. Under the law discovery of mineral deposits is an essential act in the acquisition of mineral land, and while a single discovery is sufficient to authorize the location of a placer claim and may, in the absence of any claim or evidence to the contrary, be treated as sufficiently establishing the mineral character of the entire claim to justify the patenting thereof, such single discovery does not conclusively establish the mineral character of all the land included in the claim so as to preclude further inquiry in respect thereto.

It would not comport with the spirit of the mining laws to hold that where a placer mineral deposit is discovered in any forty acre subdivision of the public lands, an association of eight persons is authorized to embrace in a mining location founded upon such discovery three other contiguous forty acre subdivisions of non-mineral land and to receive a patent for the same as a part of their mining claim, and yet this would logically follow if the contention of these mineral claimants were sustained.

The claim is upon unsurveyed lands and therefore is only indirectly affected by the statutes relating to the form of placer claims located upon surveyed lands.

As to the third proposition, if it is shown that what is denominated the Heel Calk subdivision contains any valuable mineral deposit subject to placer location, even though it be different from the one for which the location was originally made, that so-called subdivision should not be excluded from the entry. The decision under review finds that this twenty acres does not contain any mineral deposit of practical value and subject to placer location, and a careful examination of the evidence made in the light of the motion for review shows that this finding is fully sustained. While there was testimony tending to show that it contains a deposit of sandstone, the great weight of the evidence clearly demonstrates that the only stone found therein is a rotten sandstone which can be readily broken with the hand. A sample of this was offered in evidence, and by the testimony of disinterested stone masons and quarrymen it is shown to be without value.

The motion is denied.

## SECOND CONTEST—RESIDENCE—FINAL PROOF.

HANSING *v.* ROYSTON.

The institution of a second contest, by one who has theretofore filed affidavit of contest against the same entry, is a waiver of any right on the part of such contestant to proceed under the first charge.

The law does not require residence of a homesteader after the submission of final proof, if such proof upon examination is found satisfactory.

No one but a claimant of record is entitled to special notice of the intention of a homestead entryman to submit final proof.

A slight mistake in the spelling of the applicant's name in the published notice of his intention to submit final proof is immaterial, where no one is misled thereby, and the identity of the applicant is undisputed.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *July 10, 1899.* (G. B. G.)

September 20, 1893, Florence Royston made homestead entry for the S.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 27, T. 21 N., R. 1 W., Perry, Oklahoma.

December 12, 1893, Richard Hansing filed his affidavit of contest against said entry, alleging prior settlement.

A hearing was ordered and had, and August 29, 1895, the local officers rendered a decision in the case recommending that the entry be sustained.

October 10, 1896, upon the appeal of Hansing, your office sustained the decision of the local officers and held that the plaintiff had "failed to establish by a preponderance of proof that he was the prior settler."

January 2, 1897, Hansing filed a motion for a rehearing, alleging that since the trial of the case before the local office he had discovered witnesses who would swear that Royston entered the territory of Oklahoma during the prohibited period. This motion was supported by a number of affidavits.

January 4, 1897, Hansing appealed from your office decision of October 10, 1896, and July 22, 1898, the Department affirmed the decision appealed from and overruled the motion for a rehearing, on the ground that the showing made did not authorize a reopening of the case, because the statements made in the motion and affidavits filed in support thereof were inadequate to overcome the testimony already in the record upon the question of soonerism.

Hansing filed a motion for a review of this decision, which was denied by the Department, October 8, 1898.

In the meantime, and on December 14, 1895, "Florence B. Hinchey, *nee* Royston," submitted final proof, which was suspended to await a final disposition of the contest then pending, and, June 17, 1896, Hansing filed a second affidavit of contest, alleging that the defendant had wholly abandoned said land for more than six months since making said entry and removed therefrom her household goods, and that she had not resided thereon any portion of the time since about December 16,

1895, and that the default existed at the date of the execution of his affidavit.

No action appears to have been taken by the local officers upon this affidavit, but, October 15, 1898, Hansing filed an "affidavit of protest and contest," alleging prior settlement, residence and permanent improvements, that the entryman was disqualified by reason of her premature and unlawful entrance into the Territory, and protesting against the approval of the final proof, for the reason that affiant was not given special notice that the entrywoman would submit final proof on December 14, 1895, and that the receiver's duplicate receipt shows that said entry was made under the name of Florence Royston, that the published notice calls for a person by the name of Florence B. Hinchey, *nee* Florence "B. Rayston," and that said notice is therefore irregular and void, and insufficient to support the final proof.

October 29, 1898, upon the motion of the defendant, the local officers dismissed this protest, and, October 31, 1898, approved the entrywoman's final proof.

Hansing again appealed to your office, and in that appeal reference is made to his contest affidavit, filed June 17, 1896, and it is alleged that notice of that contest affidavit was served upon the defendant.

January 19, 1899, your office dismissed Hansing's contest affidavit, filed June 17, 1896, and sustained the action of the local officers dismissing the "protest and contest" filed October 15, 1898.

The further appeal of Hansing brings the case to the Department.

In consideration of the foregoing history of the case, it will be disposed of as current work.

The action of your office dismissing Hansing's affidavit of contest, filed June 17, 1896, was correct. The institution of a second contest is a waiver of any rights the contestant may have had under the first. When Hansing filed his affidavit of contest, October 15, 1898, he waived his right to prosecute a contest under his affidavit of June 17, 1896. *Waters et al. v. Sheldon* (7 L. D., 346). Besides, the abandonment charged in that affidavit is alleged to have occurred after the submission of final proof, and the law does not require residence of a homesteader after the submission of final proof, if such proof upon examination shows compliance with law.

Every allegation contained in the affidavit of October 15, 1898, has been already decided adversely to the contestant, except the allegation of irregularity in the submission of final proof.

There has been a final adjudication here that Hansing was not, and that Royston was, the prior settler upon the land involved; that the evidence offered by Hansing in support of his motion for a new trial, on the ground of the alleged soonerism of the defendant, was not sufficient to reopen this case, and no additional proof of such charge has since been offered.

It is not material that Hansing was not given special notice that the

entrywoman would submit final proof on the day named. No one but a claimant of record is entitled to special notice of the intention of a homestead entryman to submit final proof, and Hansing was not a claimant of record. It was finally determined that as against Royston he had no valid claim to the land, and the final proof was not accepted until his claim had been denied.

There was no such irregularity in the notice as warrants the rejection of the final proof. The small mistake in writing the name Florence "B. Rayston," instead of Florence Royston, did not mislead Hansing, nor is it alleged that he was misled thereby, or that the person who published the notice is not the same person who made the entry.

The final proof upon this case has been examined and is found sufficient.

The decision appealed from is affirmed.

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GOURLEY *v.* COUNTRYMAN.

Petition for re-review filed by contestant denied July 10, 1899, by Secretary Hitchcock. See 27 L. D., 702, and 28 L. D., 198.

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RIGHT OF WAY—RAILROAD—CANALS AND DITCHES.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

The approval of a map of location, or a plat of station grounds, under the provisions of the act of March 3, 1875, affects only public lands, and if there are no public lands to be affected by the claimed right of way the maps should not be approved by the Department.

Regulations of November 4, 1898, 27 L. D., 663, with respect to railroad right of way applications amended as to paragraphs 11 and 22, and directions given as to the amendment of the regulations of July 8, 1898, 27 L. D., 200, governing applications for right of way for canals, ditches and reservoirs.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *July 10, 1899.* (F. W. C.)

With your office letter of June 19, last, was forwarded a map of location and two plats of station grounds filed by the St. Paul, Minneapolis and Manitoba Railway Company, for approval by the Secretary of the Interior under the provisions of the act of March 3, 1875 (18 Stat., 482). The date of the filing of the map of location and station plats is not given, but from your letter it appears that the same were filed within twelve months after the filing of the approved plat of survey of the townships included within the location and the ground claimed for station purposes. It further appears that they were filed prior to the approval of the circular of November 4, 1898 (27 L. D.,

663), and that they were prepared in conformity with the regulations in force at the date of their filing.

An examination of these maps by your office disclosed certain minor defects, and they were returned to the company for correction March 1, 1899, and in the letter returning the maps the company was directed to comply with the requirements of said circular of November 4, 1898. From your letter it appears that the company has complied fully with all the requirements of your office except the marking of the vacant tracts crossed by the right of way as required by paragraph eleven of the circular of November 4, 1898.

It is stated by the attorney for the company, in his letter of April 14, 1899, returning said maps, that:

The company has not, however, indicated upon said maps the vacant lands through which the road passes or upon which said station grounds may be situated as required by paragraph 11 of the circular of November 4, 1898, concerning railroad right of way, for the following reasons: The act of March 3, 1875, provides that any company desiring to secure the benefits of the said act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed land, and if upon unsurveyed land, within twelve months after the survey thereof by the United States, file a map of its road with the register of the land office for the district where such land is located. The act clearly contemplates, or at least permits, the location and construction of the road over unsurveyed land and allows the company twelve months after the survey within which to file a map of its road.

The line represented upon the map filed under the act of 1875 was, as shown by the affidavit of the chief engineer, located during the month of September, 1886, and was actually constructed between the 15th of October, 1886, and the 28th day of May, 1887, and has since been constantly operated and the grounds selected for stations occupied by the company. Any question of priority of right which may be raised between the railway company and persons who have settled upon, occupied or entered the land since the actual location of the road or occupation of the station must be determined by the courts and not by the Department. Should the company designate upon the map filed by it the lands that are now vacant its action in so doing might be construed by the courts as limiting and restricting its application for right of way to such lands only.

In your office letter submitting these maps you state that:

Since the date when this company was required to comply with the regulations of November 4, 1898, I have decided that such compliance would not be insisted upon where the application was filed before the promulgation of said circular, and was prepared in other respects in conformity with the regulations in force at the date of filing; and I, therefore, recommend that, as the application is prepared in accordance with the regulations in force at the date of filing, the map and plats be approved, subject to all valid existing rights.

As the company has raised the question concerning the marking of the vacant tracts in connection with this application, I have deemed it proper to submit it; and would respectfully request that the question involved be considered, and that instructions be given this office for its future guidance in considering these applications. I would say, also, that the same questions arise under paragraph 11, circular of July 8, 1898, concerning right of way for canals and reservoirs under Secs. 18 to 21, act of March 3, 1891 (26 Stat., 1095).

The company having complied fully with the regulations in force at the time of the filing of these maps, they are, in accordance with the recommendation of your office, herewith returned, approved, subject to any valid existing rights.

Referring to the portion of your office letter submitting these maps in which you request instructions for your future guidance in the matter of the requirements contained in paragraph eleven of the instructions of November 4, 1898, making it the duty of the applicant to mark each subdivision affected by the right of way "V" or "Vacant" if it belongs to the public domain at the time of the filing of the map in the local land office, and further requiring a verification thereof by the register of the local land office, you are informed that, after careful consideration of the matter, as the act making the grant does not contain such requirement, and as no good reason appears therefor, you will not in future exact compliance therewith. It is clear, however, that the approval of a map of location or of a plat of station grounds under the provisions of the act of March 3, 1875, *supra*, affects only public lands, and if there are no public lands to be affected by the claimed right of way the maps should not be approved by the Department. When maps of location or station plats are filed in the local land office they should therefore be examined by the register, in connection with the plats and records of his office, to ascertain whether there are any public lands falling within the claimed right of way. It is not necessary that all the lands to be affected by the right of way should be indicated upon the map of location. If, upon an examination of the records, it does not appear that some portion of the public land would be affected by the approval of the map, the local officers should return it, advising the applicant of that fact. Paragraph 22 of the regulations approved November 4, 1898, will therefore be amended by adding the following:

"If it does not appear that some portion of the public land would be affected by the approval of such maps, they will be returned, advising the applicant of that fact."

In this connection it is directed that the regulations approved July 8, 1898 (27 L. D., 200), relating to right of way for canals, ditches and reservoirs over the public lands and reservations, be likewise amended or modified.

## TOWNSITE ENTRY—MINERAL LANDS—SECTION 16, ACT OF MARCH 3, 1891.

HULINGS *v.* WARD TOWNSITE.

A townsite entry made on mineral lands under the provisions of section 16, act of March 3, 1891, should not be allowed to include lands theretofore patented under the mining law.

A townsite patent issued under the provisions of said section will not disturb or impair rights under any valid mining claim or possession existing at the time of the townsite entry, or deprive the Department of jurisdiction to subsequently issue patent for any such mining claim or possession on due showing of compliance with the mining law.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) July 10, 1899. (L. L. B.)

The record in this case shows that September 28, 1897, James A. Rundell, mayor of the incorporated town of Ward, in the State of Colorado, made townsite entry, as trustee for the inhabitants of said town, for the S.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$ , Sec. 1, and the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 12, T. 1 N., R. 73 W., Denver, Colorado, under the provisions of section 2387 of the Revised Statutes, and of section 16 of the act of March 3, 1891 (26 Stat., 1095, 1101).

November 29, 1897, W. W. Hulings filed in the local office a protest against the issue of patent upon said townsite entry, alleging, in substance, that the land embraced in said entry is mineral in character; that at the time said entry was made, and for many years prior thereto, there were a great many locations of veins or lodes of mineral within the limits thereof; that such locations were possessed and owned by protestant and others, and such possession and ownership were recognized by local authority and by the laws of the United States; that at the date of the townsite application, the protestant was and still is the owner and in possession of the following lode mining claims: The Columbia Extension lode; the South Columbia lode; the North Columbia lode; The Lucy Avendale lode; The St. Lawrence lode; The Bancroft lode; and the Montrose lode, all located on lands covered by said application, and also a mill-site known as the Columbia mill-site, situated adjacent to the said St. Lawrence lode; that within each of said mining claims mineral bearing rock has been discovered and developed, the existence of which was well known to the inhabitants of said town of Ward long prior to the townsite application; that the possession and ownership of said mining claims by protestant were also well known to the inhabitants of said town and to said Rundell, when the townsite application was filed; that since the location of four of said mining claims, squatters have gone upon the land embraced within them and are now claiming surface rights therein as against the rights of this protestant; that said Rundell has published notice calling upon

mining claimants within the limits of the townsite entry to file their claims within ninety days, setting forth their rights, etc., and has announced that he would not recognize any claim by protestant to any of the surface ground within his said mining claims, for the alleged reason that under the townsite entry, he as trustee, has received the full title to all the land covered thereby and that protestant can have no surface rights therein based on the location, possession and ownership of his said mining claims; that protestant has expended \$50,000 in working and developing his said several mining claims and has taken therefrom more than \$200,000 worth of mineral; that he has placed upon said claims which are adjacent to one another, and constitute a group, improvements of the value of \$12,000; that the surface ground embraced by said mining claims is absolutely necessary to the proper working and development of said claims; and that under the laws of the United States he is entitled to a patent to three of said lode claims and has already had surveys made for such purpose. He asks that a hearing be had, to the end that his said mining claims may be segregated and excepted from the townsite entry and from any patent that may be issued thereon.

The protest was forwarded to your office and there acted upon March 25, 1898. By decision of that date it is set forth, in substance, that in addition to the allegations of the protest relative to the existence of the mining claims upon land embraced by the townsite entry, the records of your office show that a very large number of mining claims have been applied for and entered covering a considerable portion of said land; that there are not less than twenty-five approved surveys of mining claims situated, in whole or in part, upon said lands some of which have been patented and some have not; that four classes of mining claims are involved in this case, namely: (1) claims for which patents had issued at the date of the townsite entry, (2) claims applied for but not patented at that date (some entered and some not), (3) claims which had been surveyed but not applied for, and (4) claims which are held under possessory title based upon alleged mining locations, etc.

Upon consideration of the matters thus set forth, your office held, in substance and effect:

1. That the townsite entry, in so far as it embraces patented lands, was improperly allowed, and that all such patented lands should be excluded therefrom;
2. That all unpatented mining claims on lands covered by the townsite entry, and for which applications were on file at the date of said entry, should also be excluded therefrom, unless it be shown that such claims had been abandoned or forfeited; and
3. That all other mining claims, surveyed or unsurveyed, existing within said townsite entry at the date thereof, were sufficiently protected by the provisions of section 16 of said act of March 3, 1891,

and there was therefore no necessity for their segregation, and exclusion in terms from the townsite entry and patent.

The protest was thereupon dismissed and Hulings has appealed to the Department.

Strictly speaking, the protest of Hulings involves only alleged existing mining claims, surveyed or unsurveyed, unpatented and not yet applied for at the date of the townsite entry, the ownership and possession whereof, it is averred, were recognized by local authority and by the laws of the United States at and prior to the date of such entry. The only questions presented by the protest, therefore, relate to the rights of owners, at the date of the townsite entry, of claims of the third and fourth classes, considered in your said office decision, and to the manner of protecting or enforcing those rights under said section 16 of the act of March 3, 1891. That section provides:

That town-site entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law. When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof and when entry has been made or patent issued for such town sites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto: *Provided*, That no entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein applicant.

Under this statute it is plain that whatever action is taken upon the present protest, the rights of Hulings and others under their mining locations, if such locations in fact existed and possession thereof was recognized as alleged, can not be disturbed for the reason that the act expressly provides for the protection of possessory rights under existing valid mining claims, and also, that entry for the mineral veins so possessed may be made and patent issued therefor, after patent has issued for the townsite.

The issuance of patent on the townsite entry, under the statute referred to, will not determine the rights of the protestant, in the premises, nor will such patent convey title "to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law" within the townsite limits, by the protestant or any other person, at the date of the townsite entry. The statute excludes from the operation of the townsite patent any such existing mineral vein, mining claim, or possession.

The townsite patent when issued will not, therefore, deprive the protestant or any other person, of any rights existing at the date of the townsite entry under any valid mining claim, or possession so recognized as aforesaid, within the patented area. All such rights are pro-

tected by the statute in terms. Nor will the townsite patent deprive the Department of jurisdiction to issue patent for any such mining claim upon application therefor supported by proper proofs, for the reason that the statute also provides that patent may be issued to the possessor of any such mining claim after the townsite patent has been issued. All rights of mineral claimants existing at the date of the townsite entry being thus reserved and fully protected by the statute, there would seem to be no necessity for the segregation, prior to the issuance of the townsite patent, for the purpose of excluding the same from the patent, of any mining claims, surveyed or unsurveyed, for which applications had not been filed at the date of the townsite entry. All such claims, if subsisting and valid at the date aforesaid, may be carried to entry and patent, upon proper proofs showing that the mining laws have been complied with and that the claims are within the protection of the statute, notwithstanding the townsite entry and patent, provided only that such mineral entry and patent shall not embrace surface ground "where the owner or occupier of the surface ground shall have had possession of the same before the inception of title of the mineral-vein claimant."

This disposes of all the matters, technically speaking, presented by Hulings' protest and appeal.

It is deemed proper to state, however, in view of your office decision relative to the stated second class of mining claims shown to have existed within the limits of the townsite at the date of the entry thereof, that what has been said on the subject of valid mining claims existing within said limits, but not applied for, at the date of the townsite entry, applies with equal force to all unpatented mining claims within such limits, though applications therefor may have been filed and entries made prior to said townsite entry. Under the provisions of the statute aforesaid the townsite entry and patent can not interfere with the rights of such mineral applicants, or entrymen as the case may be, any more than such entry and patent could interfere with the rights of mineral claimants prior to application or entry, and there would seem to be no good reason why such applications or entries may not be carried to patent, upon proper proofs in support thereof, the same as claims of the third and fourth classes mentioned in your office decision notwithstanding the townsite entry or patent.

The townsite entry, however, in so far as it embraces lands previously patented should be amended so as to exclude therefrom all such patented lands, as held in your said office decision. In this respect and also in so far as said decision dismisses the protest filed by Hulings, the same is hereby affirmed. In other respects said decision is modified to conform to the views herein expressed.

## SIMULTANEOUS CONTESTS—RIGHT TO HIGHEST BIDDER.

WEIMER *v.* SCOFFIN.

An applicant for the right of contesting an entry, who does not give his proper post-office address, will not be heard to complain that he was not notified that the right of contest would be awarded to the highest bidder.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *July 12, 1899.* (G. C. R.)

This case involves a controversy between Henry Weimer and Charles R. Scoffin as to which has the better right to proceed under his contest filed against the unknown heirs of John Harkness, deceased, who, May 16, 1892, made homestead entry for the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  and the S.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  sec. 4, and the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ , sec. 9, T. 28 N., R. 5 W., Helena, Montana.

It appears that Weimer and Scoffin sent, through the mail, their respective contest affidavits, each alleging, substantially, the same cause of action—namely, the death of the entryman, and that the unknown heirs had, for a period of more than six months next preceding the date of their affidavits, abandoned the land, &c.

The contest affidavits appear to have been received at the local office at the same time, and were each filed at 10:30 a. m., April 29, 1897. Under the rule announced in *Nichols et al. v. Darroch*, 14 L. D., 506, the register and receiver, April 30, 1897, notified both applicants, by registered letter, addressed to Dupuyer, Montana, the post-office nearest the land in question, that they would, on Friday, May 21, 1897, at ten o'clock a. m., offer to the highest bidder the right to contest said entry, and that bids would be entertained from the applicants only. On the day so fixed, Scoffin did not appear, and the right of contest was awarded to Weimer on his bid of \$1.00. Notice was had by publication, and the hearing set for July 12, 1897, the testimony to be submitted before C. E. Trescott, U. S. Commissioner, on July 8, 1897.

Testimony was taken, showing the death of the entryman, October 26, 1896; that the tract had never been cultivated, and that the only improvement thereon was a small log cabin. It appears that Scoffin did not receive the notice of his right to bid until May 28, 1897. July 2, 1897, he filed an affidavit, stating that the reason he did not receive said notice was because it was not sent to his post-office address; he asked that the local officers reconsider their action and again offer for sale the right to contest the entry.

The register and receiver, July 7, 1897, notified both parties by registered letters that the motion to reconsider would be entertained, and that the right to contest the entry would again be offered to the highest bidder on August 20, 1897. From that action Weimer, August 18, 1897, appealed. Scoffin alone appeared on the day fixed, and bid \$10.00.

Your office, November 3, 1897, held that Scoffin's failure to receive notice of the first sale was due to his own negligence, and that the register and receiver erred in setting a second day for bidding. Weimer's contest was remanded for new hearing for insufficient notice, and Scoffin's contest was held subordinate thereto.

Your office, February 15, 1898, denied Scoffin's motion for review, and his appeal brings the case to this Department.

It was clearly Scoffin's fault that he did not get the notice sent to him of his right to bid. He does not claim that his contest affidavit was accompanied by a letter of transmittal giving his proper post-office address, and the affidavit itself simply bears upon its face his own name as "of Teton county, State of Montana;" the notice was addressed in his name to Dupuyer, Montana, that being within the county named by him and the nearest post-office to the land. His failure to have the notice sent to his proper address, which appears to have been Pondera, Montana, was due entirely to his own carelessness or neglect. Weimer, on the other hand, gave his proper address, and received and acted on the notice; he bid for and obtained the right to contest the entry, and thereafter, at no inconsiderable expense, prosecuted his contest.

The decision appealed from is affirmed.

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RAILROAD GRANT—PATENTEE—SUCCESSOR IN INTEREST.

UNION PACIFIC R. R. Co.

Directions given that hereafter patents shall issue to the "Union Pacific Railroad Company," as the successor in interest of the Union Pacific Railway Company, for any lands which the latter company was entitled to under the grants of July 1, 1862, and July 2, 1864, on account of the construction of the main line of the Union Pacific railroad.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *July 10, 1899.* (V. B.)

On June 7, 1899, the attorney for "Union Pacific Railroad Company" filed a petition and exhibits in this Department praying that an order be entered requiring and directing that, on the payment of the proper fees and charges, patents be issued to said company for all the lands heretofore granted to and earned by "The Union Pacific Railroad Company" under the provisions of the acts of Congress of July 1, 1862 (12 Stat., 489), and of July 2, 1864 (13 Stat., 356), of which lands petitioner claims to have become owner by virtue of sales and conveyances made in pursuance of decrees rendered in causes pending, respectively, in the circuit courts of the United States for the districts of Nebraska, Colorado, Wyoming and Utah.

The exhibits filed with the petition consist of certified copies of the records in the respective cases referred to, and also a certified copy of

the articles of incorporation, under the laws of Utah, of said "Union Pacific Railroad Company." From these records it appears that under certain foreclosure proceedings at the instance of a mortgagee of "The Union Pacific Railroad Company," The Kansas Pacific Railway Company and the Denver Pacific Railway and Telegraph Company, the right, title, and interest of the said "The Union Pacific Railway Company" in and to the lands granted by the said acts of Congress to aid in the construction of the Union Pacific Railroad, main line, were duly sold and conveyed to the petitioner company, which under its articles of incorporation is competent to purchase said property.

In view of said sale and transfer and of the further fact that the subsidy debt due the government on account of the main line of the Union Pacific Railroad, has been paid, as shown by departmental letter of February 12, 1898 (Book M. 367, p. 247), no reason appears for denying the application of the petitioner, and it is accordingly granted.

You will hereafter issue patents to said "Union Pacific Railroad Company," the successor in interest of the Union Pacific Railway Company, for any lands which the latter company was entitled to under the congressional grants aforesaid on account of the construction of the main line of the Union Pacific Railroad.

Herewith are sent to you said petition and the papers accompanying the same, to be placed in the files of your office, and you will notify the resident counsel of the petitioner of the conclusion herein reached.

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RAILROAD GRANT—MINERAL CLAIMANT—NOTICE OF HEARING.

McCLOUD *v* CENTRAL PACIFIC R. R. CO.

The publication and posting of a notice of a hearing ordered on the application of a mineral claimant, to determine the character of a tract of land returned as agricultural, and listed as part of an odd numbered section within the primary limits of a railroad grant, is not sufficient notice to the company of said hearing.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) July 13, 1899. (G. B. G.)

The land involved in this case is lot 2 of the SW.  $\frac{1}{4}$  of Sec. 15, T. 12 N., R. 8 E., Sacramento, California, and is within the primary limits of the grant made to the Central Pacific Railroad Company by the acts of July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 356).

Your office erroneously reports that this tract was returned as mineral land, and an examination of the field notes of survey and the plats thereof on file in the surveying and mineral divisions of your office discloses that it was returned as agricultural land by the surveyor-general of California, July 22, 1871. May 10, 1884, the company filed a list, No. 16, embracing this tract, and also applied to the local officers for a hearing, at which to show that said supposed mineral

return was erroneous. A hearing was ordered, which was had, July 27, 1885, the scope of the inquiry extending to other tracts of land which had in fact been returned as mineral land. As a result of that hearing the local officers found from the evidence that the tract above described was non-mineral in character.

Before the matter was taken up for consideration in your office, J. G. McCloud applied for another hearing as to the character of the land, and in his petition in support thereof alleged that on March 16, 1895, he entered upon and located a certain quartz mining claim, therein described, and known as the Big Lead Quartz Mine, and caused notice of location to be posted thereon and a copy of said notice to be recorded in the recorder's office of Placer county, California; that immediately after entering upon said claim he sunk a shaft thereon to a depth of about fifty feet, and that as a result of said exploration he has discovered and developed a well defined ledge of mineral bearing quartz, which can be worked at large profit. June 1, 1896, the local officers were directed by your office to allow the mineral claimant a hearing.

The local officers issued notice of a hearing to be held July 27, 1896, and the notice was published in a newspaper from June 10, 1896, to July 24, 1896, and a copy thereof was posted in the local office during such period of publication. (See instructions of July 9, 1894, 19 L. D., 21, and regulation 110 of mining regulations approved December 10, 1891.)

The railroad company was not served personally with notice of the hearing. After the issuance of notice, one Gomes applied to intervene, claiming ownership of the tract in controversy by purchase from the railroad company. By stipulation of counsel for Gomes and counsel for the mineral claimant, a continuance was had until August 25, 1896. It appears also that counsel for Gomes announced to the register and receiver that he represented the Central Pacific Railroad Company, but he does not appear to have filed a written appearance on behalf of the company. A hearing was had, and October 12, 1896, the local officers decided that the ground included in the Big Lead mining location is mineral in character and more valuable for the mineral it contained than for agricultural purposes, and recommended that the company's list No. 16 be canceled as to the conflict. The attorneys who appeared at the hearing were notified of that decision, but no appeal was taken. The record was transmitted for final action, and, January 26, 1897, your office considering the matter held that the conclusion reached by the local officers was undoubtedly correct as to the character of the land, but further held that the company having a pending list, which included the land involved, should have had personal notice of the hearing, and it was directed that the local officers notify the company that it would be allowed sixty days to show cause why their recommendation should not be concurred in and list No. 16 canceled to the extent of the conflict with said mineral claim, and that, in the

absence of a showing, such action would be taken without further notice. On receipt of this notice the company represented to your office that it had had no notice of the hearing, and showed, by the oath of the general land agent of the company and by the oath of the general attorney in charge of the land matters in which the road is interested, that the attorney who assumed to represent the company at said hearing was without authority to represent it in the matter.

Thereupon your office, September 15, 1897, remanded the case for a new hearing.

The mineral claimant appealed to the Department from this decision, and the company has filed a motion to dismiss the appeal.

The question raised by the appeal and motion to dismiss is an important one. The land in controversy being an odd numbered section within the primary limits of the grant to the Central Pacific Railroad Company, the title thereto passed to that company under the grant at the date of the definite location of its road, unless the land is shown to be mineral in character. The company was entitled to notice of the hearing had in this case, because it was and is a claimant of record for the land involved. The publication and posting of the notice of the hearing held July 27, 1896, was not sufficient notice to the company; nor was notice waived by the appearance of an attorney who was not authorized, either generally or specially, to represent the company in that matter. The company was entitled to be represented by counsel of its own choosing.

The land had been returned by the surveyor-general as of a class subject to the operation of the company's grant, and the company had demonstrated at a hearing, ordered because of a misapprehension as to the character of that return, that the return in fact made by the surveyor-general was correct, and that the land, so far as then known, was agricultural land, and it is believed that the company is entitled, both in law and equity, to be further heard before a final determination of the merits of the controversy.

The motion to dismiss the appeal herein is allowed, and your office will carry into effect the decision appealed from.

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APPLICATION TO ENTER—CANCELLATION.

CIRCULAR.

*Commissioner Hermann to registers and receivers, July 14, 1899.*

In accordance with departmental instruction in the case of *John Stewart v. Minnie S. Peterson* (28 L. D., 515), it is hereby directed that no application will be received, or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been canceled upon the records of the local

office. Thereafter, and until the period accorded a successful contestant has expired, or he has waived his preferred right, applications may be received, entered, and held subject to the rights of the contestant, the same to be disposed of in the order of filing upon the expiration of the period accorded the successful contestant or upon the filing of his waiver of his preferred right.

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

Approved,

E. A. HITCHCOCK,

*Secretary.*

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SETTLEMENT RIGHT—UNSURVEYED LAND—ADVERSE CLAIM.

NORTHERN PACIFIC R. R. CO. ET AL. *v.* McCABE.

Priority of settlement on unsurveyed land must be followed by the maintenance of residence, and the timely assertion of right, to operate as a bar to the acquisition of an adverse settlement claim.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *July 14, 1899.* (F. W. C.)

With your office letter of November 10, 1897, were forwarded appeals by the Northern Pacific Railroad Company and John B. Brown from your office decision of January 29, 1897, involving the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  and lots 12 and 13, Sec. 1, and lots 9 and 16, Sec. 2, T. 14 N., R. 23 W., Missoula land district, Montana, in which the claim of the railroad company to the tract within the odd-numbered section was rejected, and the homestead entry by John B. Brown covering the entire tract was held for cancellation with a view of allowing the application of Jane McCabe to make homestead entry of said land.

In view of the provisions of the act of July 1, 1898 (30 Stat., 620), it is unnecessary to consider this case so far as it affects the railroad claim to the tract within the odd-numbered section, because the facts in the case bring it within said act and the regulations issued thereunder, and it but remains to determine the respective rights of Brown and McCabe under their entry and application covering this land.

The township plat was filed in the local office July 26, 1895. On September 26, 1895, John B. Brown filed preemption declaratory statement covering the entire land here in controversy, and on December 9, following, made homestead entry thereof.

In accordance with published notice he made final proof January 20, 1896, in which it was shown that he established actual residence upon the land in January, 1891, which he had maintained to the date of his offer of proof, and that he had placed improvements upon the land to the value of about \$1,000.

On April 11, 1896, Jane McCabe presented to the local office her homestead application covering the same land, which was rejected for conflict with the entry by Brown; from which action she appealed, and by your office letter of June 13, 1896, a hearing was ordered upon her allegation of settlement antedating the allowance of Brown's application.

After reviewing the testimony offered at this hearing at some length, the local officers in their opinion make the following findings of fact:

Jane McCabe, who was qualified to make entry, settled upon the land in 1871 and continued to reside there until 1889, and during that time she placed improvements on the land of the value of several hundred dollars. In the year of 1889, on account of sickness, she left the premises and went to her daughter's home in an adjoining county, a distance of about ninety miles from this land, where she has ever since remained. When she left the premises part of her household effects were taken with her and part of them stored with a neighbor in the vicinity of the land. Her live stock was subsequently removed from the place and disposed of. She has not seen the land since leaving in 1889.

In 1891 John B. Brown, the claimant, settled upon this land and has continued to reside there from that date. He has placed improvements on the land of the value of several hundred dollars.

The local officers recommended that McCabe's contest be dismissed because she failed to tender an application or to initiate a contest within ninety days from the date the land became subject to entry, but, in conclusion, state in their decision:

We do not desire to be understood as saying that the result of this contest would be different had the contest been initiated within ninety days after the land became subject to entry, for it will be remembered that for seven years contestant has been absent from the land, and for more than five years claimant has been in peaceable possession of the same. This, however, only raises a question that is not properly before us for decision.

Upon appeal, your office decision of January 29, 1897, reversed the decision of the local officers as between Brown and McCabe, holding, in effect, that as Brown at the time of his settlement was aware of the improvements placed upon the land by McCabe, and of her claim thereto, and was further advised thereof shortly after making his settlement, such notice prevented him from making lawful claim to the land as against McCabe. In support thereof reference is made to the departmental ruling in the case of *Keeler v. Landry* (22 L. D., 465). From said decision Brown has appealed to this Department.

In the decision in the case of *Keeler v. Landry*, *supra*, the facts are not set out. The decision of your office holding for cancellation the homestead entry of Landry is affirmed because, as stated in said decision, "all the facts in the case at bar, taken together, warrant the conclusion reached by your office." The decision in said case will not be recognized as controlling the case under consideration.

In this case the record does not disclose any act of violence or fraud upon the part of Brown in the initiation or maintenance of his claim to this land. At the time of his settlement in 1891, while it was apparent that the land had been occupied and improved by others prior to

his settlement, yet the land was at that time unsurveyed and so remained for a number of years after his settlement. It is true the record shows that McCabe settled upon this land as early as 1871, and with the exception of a few periods of absence due to sickness, maintained her residence upon the land until 1889, when, due to her condition of mind and body, she was forced to leave the land and was not in condition to return to and reside upon the land even at the date of the hearing. During her residence upon this land she married, but, as shown by the record, her husband afterwards deserted her. Two years elapsed, however, after she left the land, before Brown made settlement thereon, and during this time no repairs had been made of the improvements upon the land. It will not be held, therefore, even if Brown be charged with full notice of McCabe's claim, that such claim prevented his initiating an adverse claim to the land under the settlement laws. His compliance with law since settlement evidences his good faith in the matter, and, in view of the period that elapsed before assertion of McCabe's claim by a proceeding in the local land office, it is held that Brown has the superior claim to the land, and your office decision is, to this extent, reversed, and in the disposition of this case under the provisions of the act of July 1, 1898, *supra*, in advising the settler of his right of election and transfer, the claim of Brown will be recognized as the claim conflicting with that of the railroad company under its grant.

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HAWAIIAN ISLANDS—PUBLIC LANDS—MILITARY RESERVATION.

OPINION.

The government lands of the Republic of Hawaii, ceded to the United States, are by the terms of the joint resolution of July 7, 1898, a part of the territory thereof, and though not subject to disposition under existing laws, are, as the property of the government, public lands of the United States.

The President of the United States, in the exercise of his general authority, may, under the provisions of said joint resolution, reserve for military purposes public lands in the Hawaiian Islands.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,*  
July 17, 1899. (W. C. P.)

The Acting Secretary of War has recommended to the President that certain tracts of government lands in Oahu, Hawaiian Islands, be set aside for military purposes and declared military reservations, subject to any outstanding leases thereof. This recommendation was referred to you with request for report as to whether it meets with the approval of this Department. You have referred the matter to me "for opinion as to whether under the joint resolution, approved July 7, 1898, the within described lands can be set aside by the President for the purpose indicated."

The joint resolution of July 7, 1898 (30 Stat., 750), recites in the preamble the cession by the government of the Republic of Hawaii to the United States of all rights, of sovereignty over the Hawaiian Islands and the absolute fee and ownership of all public, government or crown lands, and all other public property, and then it is declared that said cession is accepted, ratified and confirmed, and said Islands are declared annexed as a part of the territory of the United States. In regard to the public lands it is provided as follows:

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

It is further declared that until Congress shall provide for the government of such Islands the civil, judicial, and military powers exercised by the officers of the existing government in said Islands shall be vested in such person and exercised in such manner as the President of the United States shall direct.

These lands became the property of the United States by the terms of the cession and annexation of the Islands and as such may be disposed of only under the direction of Congress. The resolution declaring the annexation specifically says that Congress shall enact special laws for the management and disposition of these lands, but at the same time recognizes the necessity of using a part of such lands for the civil, military and naval purposes of the United States. While there is no specific statutory authority empowering the President to reserve lands of the United States for military purposes, yet the right to direct the use of such lands for public purposes, including military, has been asserted by this Department in numerous instances, and has been expressly recognized by the courts and inferentially by various acts of Congress. In *Grisar v. McDowell* (6 Wall., 363-381), Justice Field said:

From an early period in the history of the government it has been the practice of the President to order from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.

The land involved there had been reserved for military purposes. In an opinion rendered October 15, 1853 (6 Op. Att'y Gen., 157), Attorney General Cushing uses the following language:

In general, the decision as to the quantity of land to be reserved for public use, and the places where to be located, rests in the discretion of the President, subject to such regulations as Congress may from time to time make, either as to the particular public use or the quantity capable of reservation therefor, or as to the disposal, for private use, of the whole or any part of that which may have been set apart for public use.

In his opinion of July 15, 1881 (17 Op. Att'y Gen., 160), Attorney General MacVeagh said:

That the President has power to reserve from sale and to set apart for public uses such portions of the public domain as are required by the exigencies of the public service to be appropriated to those uses is too well established to admit of doubt.

And again he said:

It should be borne in mind that the power of the President here referred to is recognized by Congress (Grisar *v.* McDowell, *supra.*). Such recognition is equivalent to a grant. Hence, in reserving and setting apart a particular piece of land for a special public use, the President must be regarded as acting by authority of Congress, and unless this is so restricted as not to extend to land covered by a pre-emption filing (and I am not aware of any restriction of that sort) I do not see why such land may not be as effectually reserved and set apart by the President thereunder as by direct action of Congress.

In his opinion of July 31, 1889 (19 Op. Att'y Gen., 370), Attorney General Miller, after discussing certain legislation which limited the quantity of land to be included in reservations for military purposes in the Territory of Oregon, said that the validity of the Executive order then under consideration rested not on the statute referred to but on a long-established and long-recognized power in the President to withhold from sale or settlement at discretion portions of the public domain, said:

This power Congress recognizes in the legislation above discussed, which does not grant any such power, but only seeks to restrict one already existing. When Congress creates an exception from a power, it necessarily affirms the existence of such power, and hence the well known axiom that the exception proves the rule.

There can be no doubt as to the general authority of the President to direct the use of such of the lands of the United States as may in his opinion be necessary therefor, for military purposes. The lands here in question are the property of the United States, and under the joint resolution of July 7, 1898, *supra.*, a part of the territory thereof. They are not subject to disposition and sale under the existing laws of the United States relative to public lands, but they are public lands in that they are the property of the government. In fact, they are spoken of in said joint resolution as public lands. The phrase "such lands in the Hawaiian Islands" can refer only to public lands.

That Congress recognized that some of the lands thus acquired by the United States would be reserved for military and other public purposes, is shown by the provision excepting lands so used from the provision that all revenue derived from the public lands should be used solely for the benefit of the inhabitants of said Islands. The President has authority to designate such lands as may be necessary for military purposes not by virtue of any express law relating to the public lands but by virtue of a long recognized power in him, and hence the provision that "the existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands" should not be considered as intended to prohibit the exercise

of this power with respect to these lands. Such a prohibition might and probably would prove a very serious obstacle to the proper conduct of affairs in those Islands during the time that must necessarily elapse before provision can be made by Congress for the government thereof.

After a careful consideration of this matter, I am of opinion, and so advise you, that said lands "can be set aside by the President for the purpose indicated."

Approved, July 17, 1899,

E. A. HITCHCOCK,

*Secretary.*

RAILROAD LANDS—BONA FIDE PURCHASER—ACT OF FEBRUARY 12, 1896.

RAY ET AL. v. GROSS.

The act of February 12, 1896, amendatory of section 4, act of March 3, 1887, has no application in the matter of issuing patents to *bona fide* purchasers, or making demand of the company, where the contracts in question are fully completed prior to the passage of said act.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *July 20, 1899.* (F. W. C.)

The Department is in receipt of your office letter of May 11, last, relating to departmental decision of December 22, 1898, in the case of *Ray et al. v. Gross* (27 L. D., 707), in which Gross was held to be a *bona fide* purchaser, through mesne conveyances from the Mobile and Girard Railroad Company, of certain described lands within the limits of its grant, and raising the question as to the amount of the demand to be made of the railroad company upon patenting the land to Gross under the fourth section of the act of March 3, 1887 (24 Stat., 556), under which he had applied for patent.

In this connection you state that Gross, in an affidavit furnished in response to call made by your office, swears that he paid to Charles Ewing, his immediate grantor, at the rate of \$2.50 per acre (in cash and its equivalent) for these lands, but that "no money was paid to the railroad company by Abraham Edwards its immediate vendee, nor was any money paid by Charles Ewing to Edwards.

The fourth section of the act of March 3, 1887 (*supra*) provides:

That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land-office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such

lands of an amount equal to the government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the Attorney-General shall cause suit or suits to be brought against such company for the said amount: *Provided*, That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified, or patented as aforesaid from recovering the purchase-money therefor from the grantee company less the amount paid to the United States by such company, as by this act required. *And provided*, That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land-grant for conditions broken, or as authorizing an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions.

The provisions of this section will govern the disposition of the case under consideration both in the matter of issuing patent to Gross and making demand of the railroad company. The amendment of said section by the act of February 12, 1896 (29 Stat., 6), can have no application, because it does not appear that Edwards and those claiming through him, had "paid only a portion of the purchase price to the company;" on the contrary, the considerations for the transfer from the railroad company to Edwards, from Edwards to Ewing and from Ewing to Gross were all performed, their contracts being fully executed prior to the passage of said act.

You will be governed accordingly.

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#### RIGHT OF WAY—ADDITIONAL STATION GROUNDS.

##### SANTA FE PACIFIC R. R. Co.

A homestead entry allowed of land in the prior actual use and occupancy of a railroad company in the necessary operation and maintenance of its road, must be held subject to the prior right of use in the company under its application for additional station grounds.

A selection of lands for station purposes, in addition to the granted right of way, must be supported by a showing of the necessity for such additional lands. (Section 2, act of July 27, 1866 (14 Stat., 292.)

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *July 20, 1899.* (F. W. C.)

With your office letter of June 13, 1899, was forwarded the record made at the hearing ordered in accordance with departmental decision of October 15, 1898 (27 L. D., 547), in the matter of the application made by the Santa Fe Pacific Railroad Company, as successor in interest to the Atlantic Pacific Railroad Company, for additional station grounds at Bellemont, Arizona. Said additional station grounds covering 21.52 acres are within the NW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  of Sec. 2, R. 21 N., R. 5 E., Prescott land district, Arizona, as shown upon the map filed in this Department October 20, 1897.

At the time of filing said map, the tract desired for additional station grounds was embraced in the homestead entry of one Charles J.

Barry, made February 10, 1896, covering said NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 2, which entry was canceled upon relinquishment November 4, 1897, and on the following day Henry S. Buckner was permitted to make entry of said NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 2.

In considering the application for additional station grounds it was held in the case of Santa Fe Pacific R. R. Co. (27 L. D., 322), syllabus:

The right to take additional station grounds under section 2, act of July 27, 1866, can not be recognized in the absence of a satisfactory showing of the necessity for the use of such additional ground.

The grant of necessary lands for station and other purposes, outside of the limits of the general right of way, does not, like the grant of the general right of way, relate back to the date of the act making the grant; hence no rights are acquired, as against an adverse claimant, by an application for additional station grounds tendered in advance of actual use and occupancy and at a time when the lands are appropriated by an existing entry.

Subsequently, upon the showing filed by the company in support of its motion for review of said decision, in which it was alleged that the company was in actual occupancy of the land at the time Buckner was permitted to make entry thereof, a hearing was had—

to determine the exact condition of the land at the date of Buckner's entry and the necessities for the occupancy and use of the tract by the company in connection with the operation and maintenance of its road.

Upon the showing made at said hearing, now before this Department, it appears that four or five sidings or tracks had been actually constructed upon and across the land embraced in Buckner's entry prior to November 5, 1897, the same being constructed for use in connection with the tie-treating plant then in course of construction, and it must therefore be held that the company was in actual occupation of the land at the date of Buckner's entry and that he had full knowledge thereof at the time of making the same. The remaining portion of the land covered by the application for additional station purposes, not covered by the tracks, is shown to be necessary for the storage of the ties and timber in process of drying after being subjected to the treatment at the company's plant. Treatment of ties and timber by the process installed at this plant greatly lengthens the period of their use in connection with the maintenance of the railroad and as this tract is shown to be necessary to the successful operation of said plant, a proper use is shown to authorize its taking under the act, and Buckner's entry is therefore held subject to the prior right of use in the company under its application for additional station grounds.

In this connection your office letter transmitting the record made at the said hearing makes a statement relative to the original station grounds at Bellemont, from which it appears that the tract previously claimed is 1200 feet wide, 600 feet on each side of the track, and 6000 feet long, comprising an area of 165 acres. The selection of said station grounds was first shown upon a map filed December 19, 1882, upon which was delineated the constructed line of the Atlantic and Pacific

Railroad. Subsequently, to wit, on December 22, 1884, the Atlantic and Pacific Railroad Company filed in your office plats showing the selection of a number of tracts for station purposes, among which was the tract at Bellemont, the selection coinciding with that shown upon the map of constructed road before referred to. As the land embraced in the original selection for station purposes at Bellemont comprises a tract 6000 feet long and 500 feet on each side of the track, in addition to the granted right of way (100 feet wide on each side of the track), the same should be supported by a showing of necessity for such additional amount of land. On February 11, 1898, your office called upon the railroad company to make a showing in connection with the several selections of lands for station purposes, in addition to lands covered by the right of way, and up to the time of your report the company had failed to make a showing relative to the selection at Bellemont.

The previous decision of this Department of August 12, 1898, *supra*, in so far as it refuses to entertain the application for additional station grounds at Bellemont is, in view of the showing now submitted, recalled, but the approval of the plat of these additional grounds will be withheld until in response to the requirement of your office, a showing is made of the necessity for the original selection of lands for station purposes at Bellemont.

The papers forwarded with your office letter of June 13, 1899, are herewith returned and you will advise the company accordingly.

#### RAILROAD GRANT—COMPLETION OF ROAD—DISPOSAL OF GRANT.

##### UNION PACIFIC R. R. CO.

Until the completion in 1872, of the Union Pacific bridge across the Missouri river from Omaha to Council Bluffs the entire road constructed by the Union Pacific railroad company under the acts of July 1, 1862, and July 2, 1864, was not completed, and until such time the period of "three years after the entire road shall have been completed," during which the company was authorized to sell or dispose of the granted lands, did not begin to run.

The execution of the "sinking fund mortgage" on the granted lands by the railroad company in 1873, constituted an authorized disposition of said lands, within the meaning of the last clause of section 3, act of July 1, 1862.

The provisions in the acts of March 3, 1887, and March 2, 1896, fixing the liability to make payment to the United States for lands erroneously patented on account of a railroad grant and sold to *bona fide* purchasers, are not broad enough to include those who, after patents are erroneously issued and the lands included therein are sold to *bona fide* purchasers, and after the title of such purchasers has been confirmed by act of Congress, become purchasers at a foreclosure sale of that portion of the land grant not theretofore sold.

*Secretary Hitchcock to the Commissioner of the General Land Office, July (W. V. D.) 21, 1899.*

Letters were received by this Department from Mr. W. J. Carroll of Omaha, Nebraska, dated November 26, 1898, and December 7, 1898,

referring to the suit in the circuit courts of the United States for the districts of Nebraska, Colorado, Wyoming and Utah, commenced by the Union Trust Company of New York against the Union Pacific Railway Company *et al.* to foreclose what is known as the "sinking fund mortgage" upon the lands granted to the Union Pacific Railroad Company by the acts of July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 356), and suggesting and urging, in effect:

First. That the said sinking fund mortgage was not executed within three years after the completion of the Union Pacific Railroad, and therefore was not a sale or disposition of any of said lands within the meaning of the last clause of section 3 of the act of July 1, 1862; that consequently no foreclosure sale could properly be had under said mortgage of any of said lands which were not otherwise sold or disposed of within three years after the completion of said railroad, and that the United States should intervene in the said suit for the purpose of protecting from said foreclosure, and subjecting to settlement and pre-emption the lands not sold or otherwise disposed of within three years after the completion of said railroad.

Second. That the Union Pacific Railway Company, the successor by consolidation of the original The Union Pacific Railroad Company, is insolvent; that some patents were erroneously issued to it for lands which have been sold by it to *bona fide* purchasers whose title has since been confirmed by the act of March 2, 1896 (29 Stat., 42); that therefore the United States will be unable to recover, under said confirmation act, from the Union Pacific Railway Company the value of the lands so erroneously patented and sold, and that the United States should intervene in the said suit for the purpose of securing the insertion in any foreclosure decree rendered therein of a provision whereby the purchaser or purchasers at any foreclosure sale thereunder will be liable to the United States for the value of the lands so erroneously patented and sold.

While matters of this nature were at the time largely under the control and supervision of the Department of Justice and of special counsel employed for that purpose, the suggestions made in these letters were nevertheless given careful consideration by this Department.

After the receipt of said letters of November 26, 1898, and before the receipt of the letter of December 7, 1898, a foreclosure decree was entered in said suit, wherein it was found that the Union Pacific bridge across the Missouri River between Omaha, Nebraska, and Council Bluffs, Iowa,

was a part of the railroad required to be built under said acts of Congress and was completed in the year 1872, and that thereupon, to wit, in the year 1872, and not before, the entire railroad of the said The Union Pacific Railroad Company was completed as provided for and as required by the said acts of Congress, [and that the sinking fund mortgage was made] on or about the 18th day of December, 1873, and within a period of three years after the entire railroad of said company had been completed.

Section 3 of the act of July 1, 1862, is as follows, the last clause being the one of special application here:

SEC. 3. *And be it further enacted*, That there be, and is hereby granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided*, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preemption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

In *Union Pacific Railroad Company v. Hall et al.* (91 U. S., 343), it is held that the act of July 1, 1862, and the act of July 2, 1864, required the eastern terminus of the Union Pacific Railroad to be located on the eastern shore of the Missouri river in the State of Iowa, and that the Union Pacific bridge across that river is part of the railroad. The court in that case said, at pp. 352, 353:

Our conclusion, therefore, is that the initial point of the Iowa branch of the Union Pacific Railroad was fixed by the act of Congress on the Iowa bank of the Missouri river.

If we are correct in this conclusion, it seems to be clear that the bridge over the river, built by the railroad company, is a part of their railroad, and required by law to be so operated. It was commenced in 1869 under the acts of 1862 and 1864. These acts were the only authority the company had at the time of its commencement for building it. It is a railroad bridge, a continuation of the line west of the river; and it connects the road with its required eastern terminus. The acts chartering the company manifest no intention to distinguish between the bridge over the Missouri river and other bridges on the line of their road. If it is not a part of their road, neither is any bridge between the Missouri and the western boundary of Nevada; for the power to build all bridges was given in the same words.

\* \* \* \* \*

Holding then, as we do, that the legal terminus of the railroad is fixed by law on the Iowa shore of the river, and that the bridge is a part of the railroad, there can be no doubt that the company is under obligation to operate and run the whole road, including the bridge, as one connected and continuous line. This is a duty expressly imposed by the acts of 1862 and 1864, and recognized by that of 1871.

In *Union Pacific Railway Co. v. United States* (117 U. S., 355, 361), in determining the rates of transportation over the bridge to be paid by the government, the court said:

The Omaha bridge of the Union Pacific Railway Company was not constructed under the act of 1866. It was constructed under the original acts incorporating the company—the acts of July 1, 1862, and of July 2, 1864, and the act of February 24, 1871; and the reference in the last named act to the act of 1866 was for the purpose of extending the provisions of the latter, so far as necessary to confer additional powers upon the railway company for the use and protection of the bridge, and

contains no evidence of any intent on the part of Congress to change the rule as to rates of transportation over the line of the railway company as prescribed by section six of the act of July 1, 1862. In the case of the Union Pacific Railroad Company *v. Hall* (91 U. S., 343), it was decided that the bridge in question became part of the railroad of the company, and that the company was bound to run and operate its whole road, including the bridge, as one connected and continuous line. The bridge, therefore, as part of the railroad, became subject to the provisions of the act of July 1, 1862, as to the rates to be paid by the government for transportation service over it, and there is nothing in the act of 1871 that changes the application of the rule fixing these rates.

This bridge was also treated as a part of the Union Pacific Railroad, constructed under the acts of July 1, 1862, and July 2, 1864, in *Union Pacific Railway Co. et al. v. Chicago, Rock Island and Pacific Railway Co.* (163 U. S., 564).

The bridge being thus a necessary part of the railroad, it follows that the period of "three years after the *entire* road shall have been completed" during which the railroad company was authorized to sell or dispose of the lands granted did not begin to run until the bridge was completed. This was in 1872, and the sinking fund mortgage was executed December 18, 1873, which was within the prescribed period of three years.

In *Platt v. Union Pacific Railroad Co.* (99 U. S., 48), it was held that the execution of a mortgage upon the lands granted constituted a disposition thereof within the meaning of the last clause of section 3 of the act of July 1, 1862, and this notwithstanding the intervention of the United States in that case, and the contention of the Attorney General to the contrary. (See also *Doering v. Union Pacific Ry. Co.*, 20 L. D., 466.)

Default having occurred in the payment of interest on the indebtedness secured by the sinking fund mortgage, the suit aforesaid was brought to foreclose the mortgage and to secure payment of that indebtedness. The giving of the mortgage within the prescribed three years being an authorized disposition of the lands, it results that whatever was necessary to consummate the purpose for which the mortgage was given was also authorized. The purpose of the mortgage was to enable the holders of the mortgage debt to enforce payment thereof by a sale of the mortgaged lands if payment of such debt was not voluntarily made as stipulated. A foreclosure suit seeking a judicial ascertainment of the occurrence of the default and of the amount due and a direction that the mortgaged property be sold and the proceeds applied to the liquidation of the debt, all under the supervision of the court, is the appropriate and authorized method of consummating this purpose. That being the object of this suit, and the decree rendered therein and the contemplated sale conforming to the rights of the parties, the United States was not in a position to complain of that which Congress had authorized by section 3 of the act of July 1, 1862.

The government was not a party to the sinking fund mortgage foreclosure suit and therefore was not bound by the findings therein that

the entire railroad was completed in 1872 and not before, and that the sinking fund mortgage was executed within a period of three years thereafter; but these findings are otherwise shown to be correct. In the suit of the United States *v.* Union Pacific Railway Co. *et al.*, in the circuit courts of the United States for the district of Nebraska and other districts, instituted to foreclose the subsidy lien or *ipso facto* mortgage of the United States, the special master reported and found that the railroad company "built and completed a permanent railroad bridge across the Missouri river between Omaha, Nebraska, and Council Bluffs, Iowa, with the approaches and appurtenances thereto, during the years 1871 and 1872, and that the same was completed in the year 1872." This finding of the special master was not excepted to, but in excepting to other matters reported and found by him, the United States stated that "the said point or station in Council Bluffs of said Union Pacific Railroad was finally adopted immediately after the construction of said bridge in the year 1872, as the eastern terminus of said railroad." In the final decree entered July 29, 1897, the court approved and confirmed the report of the special master, and among other things declared:

And said The Union Pacific Railroad Company was, by the legislation aforesaid, authorized to lay out, locate, construct, furnish, maintain and enjoy the continuous railroad and telegraph described and embraced in the first mortgage of said railroad company hereafter described, and which said railroad extends from Council Bluffs, on the Iowa bank of the Missouri river, across said river and through the States of Nebraska, Wyoming and Colorado, into the State of Utah, to a connection with the railroad of the Central Pacific Railroad Company, at a point about five miles west of the city of Ogden, in the State of Utah, a distance of 1,042.41 miles, more or less, of main line, including the bridge over the Missouri river between Council Bluffs, in the State of Iowa, and Omaha, in the State of Nebraska; all of which line of railroad and telegraph and bridge, with the branches and appurtenances thereof, were located, constructed, equipped and furnished by the Union Pacific Railroad Company, as, in the manner and upon the conditions, within the times and upon the approvals and consents contemplated, defined and described in said legislation. . . . and said sinking fund mortgage is a first and paramount lien upon all the lands and land grant therein described and thereby conveyed.

Thus in a suit in which the United States was a party it was ascertained and determined that the Union Pacific bridge across the Missouri river from Omaha, Nebraska, to Council Bluffs, Iowa, is a part of the railroad constructed by the Union Pacific Railroad Company under the acts of July 1, 1862, and July 2, 1864; that the bridge was completed in the year 1872, and that the sinking fund mortgage constituted a first and paramount lien upon all the lands and land grant therein described and thereby conveyed. Better evidence that the entire railroad was not completed until 1872 and that the sinking fund mortgage was an authorized disposition of the lands therein described and thereby conveyed within the meaning of the last clause of section 3 of the act of July 1, 1862, could hardly be obtained. Any possible questions growing out of the difference between the character of this mort-

gage and the one in *Platt v. Union Pacific Railroad Co.* were adjudicated and determined in favor of the mortgage by this decree rendered July 29, 1897, in a suit to which the United States, the railway company and the Union Trust Company of New York, the mortgagee, were all parties.

Mr. Carroll's letters do not mention the Missouri river bridge or the time of its construction, and it may be that he had in contemplation the completion of the railroad to the west bank of the river, it having been formerly contended by the railroad company, as shown in *Union Pacific Railroad Company v. Hall et al., supra*, that the eastern terminus of the road was on the west bank of the river and that the bridge was not a part of the railroad. In his letter of December 7, 1898, in referring to the decree in the sinking fund mortgage foreclosure case, Mr. Carroll says:

As a matter of fact the supreme court of the United States in the case of *Union Pacific R. R. Co. v. United States* (99 U. S., 402), has already determined and found that the date of the completion of the Union Pacific Railroad was November 6, 1869. Consequently . . . the mortgage in question for which foreclosure is decreed was executed as stated upon December 18, 1873—four years after the completion of the railroad.

But an examination of the opinion in the case cited shows unmistakably that the court and the parties were considering only the road "west from Omaha," and that the part of the road between Omaha and Council Bluffs, which includes the bridge, was not made an element in the decision of the case. Not only is there nothing in that decision which purports to overrule the prior decision in *Union Pacific Railroad Company v. Hall et al.*, but the latter is approved and followed in the still later case reported in 117 U. S., *supra*.

It is thus certain that Mr. Carroll's first suggestion could not be sustained, and we now come to his second suggestion.

By the act of March 3, 1887 (24 Stat., 556), the liability to make payment to the United States for lands erroneously patented or certified on account of a railroad land grant and sold by the grantee company to *bona fide* purchasers was placed upon "the company which has so disposed of such lands," and by the act of March 2, 1895 (29 Stat., 42), this liability was placed upon "the patentee, or the corporation, company, person or association of persons for whose benefit the patent was issued or certification was made." Whether this legislation be considered as creating a liability not theretofore existing or as intending to enforce a liability theretofore incurred, the designation of those upon whom the liability rests is not broad enough to include those who, after patents are erroneously issued or certifications erroneously made and after the lands included therein are sold to *bona fide* purchasers and after the title of such purchasers has been confirmed by act of Congress, become purchasers, at a foreclosure sale had pursuant to a decree against the grantee company, of that portion of the land grant not theretofore sold. Nor is it believed that it would be competent or

equitable for the court in the case of a prior and authorized mortgage, like the one here in question, to place upon the purchasers at a foreclosure sale thereunder a liability for obligations incurred by the mortgagee respecting lands not embraced in the foreclosure and for which liability no lien or encumbrance attached to the lands included in the foreclosure. If a court could do that it could attach conditions, not contemplated or authorized by the terms of the mortgage or by the law in force at the time of its execution, which would deter all persons from becoming purchasers at the sale and thereby deprive the mortgagee of the right to subject the mortgaged property to the payment of the mortgage debt and render the mortgage of no value whatever.

The second suggestion was therefore also untenable.

For these reasons Mr. Carroll's suggestions could not be followed, and the right of the purchasers at the foreclosure sale having been recognized in departmental letter of the 10th inst., Mr. Carroll's letters are herewith transmitted for the files of your office.

Your office will transmit a copy hereof to Mr. Carroll.

PRIVATE CLAIM—SELECTION—CHARACTER OF LAND.

BACA FLOAT NO. THREE.

Section 6, act of June 21, 1860, authorized the heirs of Baca to select, in place of the land claimed by them under a prior Mexican grant, "an equal quantity of vacant land, not mineral," and made it the duty of the surveyor-general to survey and locate the lands so selected, subject to the proviso "that the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer." Held:

1. A selection regularly made by the grant claimants within the time fixed by said act, cannot, after the expiration of said period, be changed, by an alleged amendment, to embrace lands not covered by the previous selection.
2. The time with reference to which the character of the land selected, whether vacant and not mineral, is to be determined, is the date of the selection, and not the date of the approval of the survey of the claim.
3. The duty of investigating and determining, in the first instance, the character of the land selected, rests upon the surveyor general, who should conduct such investigation and make such determination as the work of the survey progresses in the field.

The former departmental decisions herein of June 15, 1887, 5 L. D., 705, June 24, 1891, 12 L. D., 676, and November 28, 1891, 13 L. D., 624, so far as in conflict herewith, recalled and vacated.

*Secretary Hitchcock to the Commissioner of the General Land Office, July*  
(W. V. D.) 25, 1899. (A. B. P.)

May 6, 1899, your office transmitted to the Department an application by the present owners of the grant known as "Baca Float No. 3," for the survey of said grant as selected or located in the Territory of Arizona, formerly a part of the Territory of New Mexico.

The matter of the survey and location of this grant has been several times before the Department and the action taken therein will be seen

by reference to the former departmental decisions of June 15, 1887 (5 L. D., 705), June 24, 1891 (12 L. D., 676), and November 28, 1891 (13 L. D., 624).

The facts relative to the grant are as follows:

By section 6 of the act of June 21, 1860 (12 Stat., 71-2), Congress, for the purpose of settling a dispute between certain claimants under conflicting Mexican grants to a large body of land in the vicinity of Las Vegas, New Mexico, provided:

That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said [same] tract of land as is claimed by the town of Las Vegas [Vegas], to select instead of the land claimed by them an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number. And it shall be the duty of the surveyor-general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them; *Provided, however*, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

It was subsequently ascertained that the grant to the town of Las Vegas embraced an area of 496,446.96 acres of land, and in accordance with that ascertainment the Baca heirs were entitled, under the act aforesaid, to select and locate five different tracts or bodies of land, of 99,289.39 acres each, in square form, within what was, at the date of the act, known as the Territory of New Mexico. The grant now under consideration is the third of the series of selections or locations thus authorized. Hence, its name: Baca Float No. 3.

October 31, 1862, John S. Watts, as attorney for the Baca heirs, filed in the office of the surveyor-general of New Mexico a memorandum dated October 30, 1862, in which he set forth that he had that day selected as one of the five tracts authorized to be selected by said act of June 21, 1860—

a place called and known as the Bosque Redondo, on the river Pecos, the centre of said location to be a point on the north east bank of the river Pecos, five miles below the mouth of the canon forming the valley of said river Pecos, the location being so surveyed as to form a square on that centre, with the lines running east and west north and south, the distance required to form the area of said location.

November 8, 1862, the register and receiver of the land office at Santa Fe, New Mexico, certified that there was nothing of record in their office showing the lands to be occupied or that any portion thereof was mineral. The surveyor-general reported the selection to your office, accompanied by the certificate of the register and receiver, and his own certificate stating the selection to be the third of the series authorized by said act of 1860, and that he believed the lands embraced thereby to be vacant and not mineral.

January 18, 1863, application was made to your office by said John S. Watts, attorney for the Baca heirs, to be allowed to withdraw the selection thus made with a view of making another selection within the time prescribed by the act in a more desirable locality. This applica-

tion was allowed by your office February 5, 1863, and no further mention of the prior selection need be made.

Thereupon a new selection was made June 17, 1863, within the time prescribed by the statute, by said John S. Watts, attorney for the Baca heirs. The tract selected was described in the application filed in the office of the surveyor-general having jurisdiction in the premises, as follows:

Commencing at a point one mile and a half from the base of the Salero mountain, in a direction north forty five degrees east of the highest point of said mountain, running thence from said beginning point, west, twelve miles, thirty six chains and forty four links, thence south, twelve miles, thirty six chains and forty four links, thence east twelve miles thirty six chains, and forty four links, thence north twelve miles, thirty six chains and forty four links, to the place of beginning; the same being situate in that portion of New Mexico, now included by act of Congress, approved February 24th, 1863, in the Territory of Arizona.

It was further stated by the applicant that "Said tract of land is entirely vacant, unclaimed by anyone, and is not mineral to my knowledge."

The selection thus described was approved by the surveyor-general, and June 18, 1863, the papers in the case were by him forwarded to your office accompanied by a statement of his said approval, and the further statement that as the land selected was situated far beyond the public surveys he had not deemed it necessary to procure any certificate from the register and receiver of the local land office because, from the nature of the case, they could not officially know anything concerning it.

July 18, 1863, your office acknowledged receipt of the papers forwarded by the surveyor-general as stated, but held that before the selection could be approved by your office a statement from the surveyor-general and register and receiver to the effect that the land embraced by the selection is vacant and not mineral should be furnished.

March 27, 1864, the attorney for the Baca heirs furnished certificates from the register and receiver at Santa Fe, New Mexico, to the effect that the lands embraced by the selection were unsurveyed, vacant and not mineral as far as they had any information on the subject; and April 2, 1864, the surveyor-general, replying to your said office communication of July 18, 1863, stated in substance that there was no evidence in his office tending to show that the land selected is mineral or that it is occupied; that there had been as yet no public surveys in the neighborhood of the tract, and for that reason there was no record of or concerning the land in his office, or in the local land office of New Mexico; that he was personally unacquainted with the land and therefore could not certify that it was vacant and not mineral; that such facts could only be ascertained by actual examination and survey.

April 9, 1864, your office appears to have taken the matter up for further consideration, and the same "having undergone a careful examination", as stated in your office communication of that date

addressed to the surveyor-general of Arizona, the certificate of approval by the surveyor-general of New Mexico "under whose jurisdiction the application properly came at the date of its approval", was accepted as sufficient and a survey of the grant under the selection thus approved was authorized and directed to be made. Instructions for the survey were given in minute detail to the surveyor-general of Arizona who was required to proceed with the work without delay whenever the grant claimant should pay or secure to be paid a sum of money sufficient to cover the costs of the same, and to make return of "complete survey and plat to be placed on file for future reference as required by law." The survey was not made, however, and thus the matter seems to have rested until April 30, 1866, when the said John S. Watts as attorney for the Baca heirs, addressed to your office a communication which purported to be an amended application for the "relocation" of said claim No. 3, wherein, after referring to the original selection of June 17, 1863, it was said:

I further state that the existence of war in that part of the Territory of Arizona and the hostility of the Indians prevented a personal examination of the locality prior to the location and not having a clear idea as to the direction of the different points of the compass when the subsequent examination of the location was being made by Mr. Wrightson in order to have the location surveyed it was found that the mistake made would result in leaving out most of the land designed or intended to be included in said location. Mr. Wrightson was killed by the Indians and no survey has been made, because of said mistake in the initial point of said location. Under these circumstances I beg leave to ask that the surveyor-general of New Mexico be authorized to change the initial point so as to commence at a point three miles west by south from the building known as the Hacienda de Santa Rita running thence from said beginning point north twelve miles 36 chains and 44 links, thence east twelve miles 36 chains and 44 links, thence south twelve miles 36 chains and 44 links thence west twelve miles 36 chains and 44 links to the place of beginning. I beg leave further to state that the land which will be embraced by this change of the initial point is of the same character of unsurveyed vacant public land as that which would have been set apart by the location as first solicited but it is not the land intended to have been covered by said location but the land to be included within the boundaries above designated is the land that was intended to be located and was believed to have been located upon until preparations were made to survey said location. Under this state of the case it is hoped that directions will be given to the surveyor-general to correct the mistake.

By communication of your office dated May 21, 1866, addressed to the surveyor-general at Santa Fe, New Mexico, (the Territories of New Mexico and Arizona having been by act of July 2, 1864, 13 Stat., 344, 353, consolidated into one surveyor-general's district) reference was made to the previous instructions of April 9, 1864, to the surveyor-general of Arizona for the survey of the grant under the original selection or location of 1863, and also to the said amended application of April 30, 1866, and thereupon further directions were given for the execution of the survey—

in accordance with the amended description of the beginning point which is described in Mr. Watts's application of the 30th of April last, provided by so doing the out boundaries of the grant thus surveyed will embrace vacant lands, not mineral.

It does not appear that this so-called amended application was ever approved by the surveyor-general, or that any action was taken by that officer looking to such approval. June 11, 1866, he acknowledged receipt of your said office communication of May 21, 1866, and submitted an estimate of the probable cost of the survey, accompanied by the statement that upon being advised of the deposit of such estimated sum of money for the purposes of the survey, he would proceed to have the same executed in accordance with the said instructions of April 9, 1864, and of May 21, 1866. July 2, 1866, the attorney for the Baca heirs was notified of the estimated cost of the survey and required to make deposit of the amount thereof, but the deposit was never made nor was the survey ever executed.

From a diagram or plat prepared in your office apparently for the purpose of showing the proximate position on the face of the earth of the selection or location as made, June 17, 1863, and the relative position of the selection or location under the so-called amended application of April 30, 1866, it appears that the latter lies almost wholly to the east and north of the former, and that but a very small portion of the land embraced by the latter is within the limits of the former.

August 15, 1877, John H. Watts, representing himself to be the son of the aforesaid John S. Watts (then deceased), and as attorney for the heirs of his father, and part owner of the grant, addressed a communication to your office in which he requested that permission be given him to "relocate" said Baca Float No. 3, on the stated ground that the lands embraced by the selection or location previously made by his father were supposed to be mineral, though thought to be vacant and not mineral when the selection was made. This request was denied by your office September 20, 1877, on the ground that the act of June 21, 1860, expressly limited the right of selection thereunder to the period of three years from its date. October 10, 1877, another application was made to "relocate" the grant on the alleged ground that subsequently to the former "location," mineral had been discovered thereon by various persons and companies who were then engaged in hunting for gold, silver, and other precious metals within the boundaries of said claim to the ouster of the owners thereof. This application was also denied for the reasons given in the denial of the former one.

Thus the matter remained, apparently, until February 13, 1885, when John C. Robinson, an alleged owner of the grant, addressed to your office a communication setting forth the selection of June 17, 1863, and the so-called amended selection of April 30, 1866, respectively; stating in substance that, on account of the hostility of the Indians, no survey of the claim had ever been made; that no definite action had been taken by your office in the premises, "nor could the locations selected have been confirmed for the reason that the land was mineral;" and asking that he be authorized to "locate" the grant on land non-mineral within the limits of what was known as the Territory of New Mexico on June 21, 1860.

March 21, 1885, your office considered the application of Robinson and held that the same should be allowed.

The matter subsequently came before the Department, however, and by decision of June 15, 1887, *supra*, the action of your office was disapproved and it was held that there is no power or authority in the Land Department to authorize a selection or location under the grant after the expiration of the time limited by the statute.

Following this decision numerous protests against both the selection of 1863 and the so called amended selection of 1866 were forwarded to your office by various and sundry persons alleging in substance that about three-fourths of the lands embraced in the selection of 1863 were mineral; that nearly all the lands covered by the amended selection of 1866 were mineral; and that such had been the known character of the lands for over one hundred years. Considerable correspondence was had by your office with the protestants and others relative to the subject matter of said protests, during the years 1887 and 1888, but no definite action looking to the survey of the grant or to a final adjustment of the controversy resulted therefrom.

December 21, 1888, the attorney for said John C. Robinson filed in your office a formal application for the survey of the grant under the existing selection, and offered to make deposit of the necessary funds to cover the cost of such survey. Upon consideration of this application your office, in a communication of March 5, 1889, addressed to the surveyor-general of Arizona, directed that a hearing be had for the purpose of determining the known character of the lands claimed, at the date of the selection of 1863 and at the time of said amendment of 1866, and as an incident to said hearing, but as such only, the surveyor-general was authorized to make preliminary survey of the out boundaries of the claim upon payment of the cost thereof by the grant claimant, as far as deemed necessary or advisable to aid in the determination of the question submitted, but no farther.

An appeal was taken from that action to the Department, resulting in the decision of June 24, 1891, *supra*, adhered to on review, November 28, 1891, *supra*, wherein the order for the hearing was approved with the modification that the inquiry should be directed to the known character of the land at the date of the hearing, and not the dates of the selection of 1863 and so-called amendment thereof, as specified in the order of your office. The hearing thus ordered has never been had, and so the matter has stood until the receipt of your office communication of May 6, 1899, first above mentioned.

Such are the facts shown by the record as far as deemed material to the consideration and determination of the pending controversy.

The present applicants express a willingness to deposit to the credit of the surveyor-general of Arizona a sum of money sufficient to pay the cost of an official survey of the grant as soon as notified of the amount required. Your office in the said communication of May 6,

1899, recommends that a survey of the exterior lines of the claim, at least, be authorized, and that all questions relating to the character of the lands be left for future determination by the Department and the courts.

It must be apparent to all concerned that the interests of the government and the grant claimants alike demand that this matter—so long pending before the Land Department—should be speedily and finally adjusted.

There can be no doubt that the heirs of Luis Maria Baca had the right for the period of three years after the act of June 21, 1860, to select in one square body within the Territory of New Mexico as it then existed, as and for the one-fifth part of their grant made by said act, and as No. 3 of the series of selections thereby authorized, vacant lands, not mineral, to the full quantity now claimed in this case.

The questions presented by the record are:

1. Is the selection of June 17, 1863, binding upon the applicants for survey, or are they entitled to claim under the so-called amended selection of April 30, 1866?

2. Is the question as to the character of the land selected—that is, whether vacant and not mineral and therefore subject to the grant, or occupied, or mineral, and for that reason not subject to the grant—to be determined with relation to the date of the selection, or with reference to the date of the approval of the survey of the claim?

3. By whom and in what manner is the character of the land to be ascertained and determined?

I. It will be observed that by express provision of the act of June 21, 1860, the right of selection thereby granted was to continue in force during the period of three years from the passage of the act, "and no longer." The language used is so clear and explicit on this point that there would seem to be scarcely room for construction. The right to select was to continue in force for three years, *and no longer*. If not exercised within that time the right no longer existed. In other words, if not previously exercised, the right of selection became extinct at the expiration of the time limited, and could not be exercised thereafter. This view is supported by the recent case of *Shaw v. Kellogg* (170 U. S., 312), and its correctness will hardly be questioned. How do the grant claimants in this case stand with reference to this matter?

The selection of June 17, 1863, was within time and appears to have been in all respects regular. It was approved by the surveyor-general, whose approval, subsequently supported by the certificates of the register and receiver as shown, was accepted by your office and the survey of the claim ordered.

The application of April 30, 1866, filed after the expiration of the three years' limitation, purported in name to be an amendment of the former application or selection, but the courses of the exterior lines of the claim as therein given are totally different from those of

the original selection, and besides, it is expressly stated in the new application that the lands embraced thereby are not the same as those covered by the original selection. These facts taken in connection with the diagram or plat hereinbefore referred to (which is a part of the record in the case) showing the relative positions on the earth's surface of the tracts embraced by the selection of 1863 and the so-called amended selection, indicate very clearly that instead of the application of April 30, 1866, having for its object the amendment of the selection of June 17, 1863, with a view to correcting mistakes in the description of the exterior lines thereof or of giving greater certainty thereto, it was in reality, except as to the very small area common to both, an application to make a new selection, with a situs almost wholly removed from that of the selection of 1863. It is not believed that such a change in the locus of the claim as was thus attempted to be made can be recognized under the pretext or claim that the change was simply by way of amendment of the existing selection.

It is not necessary to deny or even question that the Baca heirs would have had the right, after the expiration of the three years' limitation, or that their assignees would now have the right to make necessary amendments of description for the purpose of correcting ascertained mistakes, if any, so as to cause the record of the claim to conform to its position upon the earth's surface as actually selected within the time prescribed by the statute, if a selection had been made and marked upon the ground. But such is not the case here. The application of April 30, 1866, sets forth that owing to the hostility of the Indians a personal examination of the locality was prevented prior to the selection of June 17, 1863, and that upon such examination *subsequently* had it was found that a mistake had been made whereby most of the land designed to be included in the selection had not been so included. Manifestly if there had been no personal examination of the locality prior to the selection of 1863, there could have been no location or marking of the claim upon the earth's surface prior to that time, and consequently the selection of 1863 could have no fixed locus other than that indicated by the record of the selection itself. There was therefore no marked boundaries of the claim on the earth's surface, to conform to which it was necessary or proper that an amendment be made of the description contained in the selection of 1863.

It was not simply a "mistake in the initial point" of this selection that was sought to be corrected by the application of 1866, as therein suggested, but a complete change of the selection was thereby asked for, including as well the courses of the exterior lines of the claim, as the "initial point" thereof. Under these circumstances to allow the so-called amended selection to stand would be, in reality, to allow a new selection under the grant after the expiration of the time limited for the exercise of the right of selection, and for this there is no authority found in the statute making the grant or elsewhere. The Depart-

ment is therefore of the opinion that the grant claimants are bound by the selection of June 17, 1863, and that they can not be allowed to take under the application of April 30, 1866.

II. In the case of *Shaw v. Kellögg, supra*, the supreme court had under consideration selection No. 4 of the series authorized by said act of June 21, 1860, and in the discussion of the questions there presented it was said (page 332):

The grant was made in lieu of certain specific lands claimed by the Baca heirs in the vicinity of Las Vegas, and it was the purpose to permit the taking of a similar body of land anywhere within the limits of New Mexico. The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral. Congress did not intend to grant any mines or mineral lands, but with these exceptions their right of selection was coextensive with the limits of New Mexico. We say 'lands then known to contain mineral,' for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. The selection was to be made within three years. The title was then to pass, and it would be an insult to the good faith of Congress to suppose that it did not intend that the title when it passed should pass absolutely, and not contingently upon subsequent discoveries.

Under the authority of that case it would seem clear that the time with reference to which the character of the land is to be determined is the date of the selection and not the date of approval of the survey of the claim, as formerly held by the Department, and nothing further need be said here on that subject.

III. But by whom and in what manner is the character of the land to be determined? The granting act places the duty of surveying and locating the lands selected upon the surveyor-general of New Mexico. In the *Shaw-Kellogg* case, *supra*, this question was also considered by the supreme court, and it was there said (pages 333-334):

How was the character of the land to be determined, and by whom? The surveyor general of New Mexico was directed to make survey and location of the land selected. Upon that particular officer was cast the specific duty of seeing that the lands selected were such as the Baca heirs were entitled to select. It is not strange that he was the one named; for, in the original act of 1854, which made provision for the examination of these various claims, the duty of such examination was cast upon the same officer, and he was there required "to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico; and, for this purpose, may issue notices, summon witnesses, administer oaths and do and perform all other necessary acts in the premises," and it was upon his report that Congress acted. Further, he was the officer who, by virtue of his duties, was most competent to examine and pass upon the question of the character of the lands selected. We do not mean that Congress thereby created an independent tribunal outside of and apart from the general Land Department of the government. On the contrary, the act of 1854 provided that he should act under instructions from the Secretary of the Interior, and so undoubtedly in proceeding to make survey and location as required by section 6 of the act of 1860, he was still subject to the control and direction of the Land Department; but while he was not authorized by this section to act in defiance or independently of the Land Department, he was the particular officer charged with the duty of making survey

and location, and it was for him to say, in the first instance at least, whether the lands so selected, and by him surveyed and located, were lands vacant and non-mineral.

The act of 1854 thus referred to is the act of July 22, 1854 (10 Stat., 308), which, among other things, established the office of surveyor-general of New Mexico, and, in section 8 thereof, which was still in force when the survey in that case was made, defined the powers and duties of that officer as stated by the court. By a later act, to wit, the act of July 15, 1870 (16 Stat., 291, 304), it was provided:

That it shall be the duty of the surveyor-general of Arizona, under such instructions as may be given by the Secretary of the Interior, to ascertain and report upon the origin, nature, character, and extent of the claims to lands in said Territory, under the laws, usages, and customs of Spain and Mexico; and for this purpose he shall have all the powers conferred, and shall perform all the duties enjoined upon the surveyor-general of New Mexico by the eighth section of an act . . . approved July twenty-second, eighteen hundred and fifty-four.

While by the act of March 3, 1891 (26 Stat., 854, 861), establishing a court for the settlement of unconfirmed private land claims, said section 8 of the act of 1854, and all amendments or extensions thereof (which would include said extension act of July 15, 1870) were repealed, yet there has been no repeal of the specific provision of the act of 1860, placing the duty of surveying and locating the lands selected thereunder upon the surveyor-general. True the officer named was the surveyor-general of New Mexico, but the Territory of Arizona had not then been formed, and there can be no doubt that the surveyor-general of that Territory subsequently established, within whose present jurisdiction the lands are situated, lawfully succeeds with reference to the claim here in question to the duties imposed by said act upon the surveyor-general of New Mexico.

Nor can there be any doubt that the surveyor-general of Arizona, as an officer of the Land Department, by virtue of his office and in view of the duties imposed by said act of 1860, possesses the inherent power to examine witnesses, etc., and do and perform all necessary acts incident to the full discharge of the duties thus imposed.

In the light of what has been said the Department is of opinion that the duty of investigating and determining, in the first instance at least, the character of the lands here involved rests upon the surveyor-general of Arizona; and also that such investigation should be conducted and determination made as the work of the survey progresses in the field.

It does not appear that the adjustment of the present controversy would be expedited by having a hearing for the purpose of determining the character of the land independently of and before the survey of the claim is commenced.

The order for a hearing heretofore made by the Department is therefore recalled and vacated, and upon proper deposits of the cost thereof, you will cause a survey of the claim to be made by the surveyor-general

of Arizona, under the selection of June 17, 1863, in accordance with the principles and views herein set forth and expressed. Specific directions should be given that lands vacant, and not known to be mineral at the date of said selection are to be surveyed as subject to the grant, and that all lands ascertained by the surveyor-general to have been occupied, or known to be mineral, at such date, if any, within the boundaries of said selection, must be excluded from the survey as not being subject to the grant.

Before proceeding with the survey the surveyor-general will be required to give notice thereof for the period of sixty days by publication in two weekly newspapers published, and of general circulation, in the vicinity of the land and in one newspaper of general circulation throughout Arizona and published at the capital of the Territory, with a view to allowing all persons, if any, claiming an interest in the lands adverse to the grant claimants to be heard before him at such stated times and places during the progress of the survey, as he may appoint, on the question of the known character of the land and whether the same was vacant at the date of the selection of June 17, 1863.

The former departmental decisions hereinbefore referred to, in so far as they may be in conflict with the views herein expressed, are hereby recalled and vacated.

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SHELTON McCLAIN.

Motion for review of departmental decision of June 3, 1899, 28 L. D.; 456, denied by Secretary Hitchcock, July 25, 1899.

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O'HORNETT *v.* WAUGH *et al.*

Motion for review of departmental decision of April 12, 1899, 28 L. D., 267, denied by Secretary Hitchcock, July 25, 1899.

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RESIDENCE-COMPLIANCE WITH LAW PENDING CONTEST.

GLOVER *v.* SWARTS.

If an entryman fails to maintain the continuity of his residence, during the pendency of a contest involving priority of settlement, his laches can not be cured by the resumption of residence prior to the institution of proceedings by the adverse settler charging said default.

A leave of absence is no protection against a contest for abandonment, where the entryman, prior to such leave, has failed to comply with the law.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *July 25, 1899.* (H. G.)

The tracts involved in this controversy are lots 3 and 4, and the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 7, T. 26 N., R. 1 E., Perry land district, Oklahoma Territory.

The original contest between John B. Glover and Benjamin F. Swarts finally resulted in the departmental decision of December 15, 1896 (23 L. D., 480), holding that Swarts was not disqualified to claim residence upon the land in question at and from the date of his settlement. Upon a motion for a review, this decision was, on May 18, 1897, sustained (24 L. D., 447), and it was said therein (unreported):

It having been shown that Swarts was the prior settler, it was adjudged that he has the superior right. No sufficient ground appears in the motion for review for disturbing the conclusion heretofore reached. The said motion is, therefore, denied.

Accompanying the motion for review is one for a rehearing on the ground as alleged, that Swarts has abandoned the land since the date of the original hearing. This allegation, having reference to an event subsequent to the hearing, while it might possibly be made the basis for a new contest, can not be made the basis for a rehearing.

January 10, 1896, Swarts, the entryman, was granted a leave of absence for one year from that date.

December 17, 1896, Glover filed an affidavit of contest against said entry, charging, in substance, failure to comply with the requirement of the homestead law in regard to residence, which was rejected by the local officers for the reason that Swarts had been granted such leave of absence, which had not then expired.

January 14, 1897, Glover applied to the local office for the reinstatement of his contest, and to amend his former affidavit so as to make the charges therein more "full and specific," which was granted; whereupon he filed an amended affidavit, in which he charges, in substance, that Swarts wholly failed to maintain a residence in good faith upon said land at any time during the preceding two years and nine months, and during said period did not inhabit said land otherwise than by making visits thereto at intervals of from three to six months apart, on which occasions he remained on said land only from a few hours to one or two days, and was otherwise habitually absent from said land for the entire period of thirty-three months next preceding the date of the affidavit of contest; and further, that the leave of absence of said Swarts was fraudulently obtained by reason of the facts aforesaid.

No notice of the hearing was served upon Swarts, as he appeared personally on August 2, 1897, and entered a general appearance, waiving such notice and requesting that the case be set for a hearing, and thirty days' notice thereof was ordered to be given to Glover. At the same time he made application to commute his homestead entry, and September 14, 1897, was set for making his final proof and notice thereof was duly published. On such date the parties appeared, and the contest was called. Glover objected to going to trial because he had not been served with the notice ordered to be given to him by the local office, and had not been notified of the waiver of service of notice of the contest by Swarts. Swarts then began his final proof and introduced two witnesses, whose testimony was taken and who were cross-examined by the attorney for Glover. Swarts, as he was ill, did not give his tes-

timony on his final proof, and thereafter it was ordered, in the presence of the attorneys for the parties, that the contest would be consolidated with the hearing on the final proof, and that all matters at issue between Glover and Swarts would be heard and determined on October 19, 1897, at which date the parties appeared. The final proof papers were mislaid in the local office and testimony was heard in the contest proceeding, both parties introducing evidence. Owing to the loss of such papers, the attorney for Swarts dismissed his application for final proof. After the hearing was concluded the final proof papers were found in the local office, but were never completed, no application therefor having been made.

The local officers, in their joint opinion, state that the contest case was heard by their predecessors in office, and that they were "placed at great disadvantage by reason of that fact," as they did not have the opportunity of seeing the witnesses or observing their demeanor whilst testifying. They found, in effect, that Swarts had complied with the law as to improvements and cultivation, but had not complied with the law as to residence upon the land. In view of the departmental decision that he was the prior settler, and as he had been granted a leave of absence for one year, and before the expiration of that period he was married and his wife resided most of the time thereafter on the tract, his residence was resumed before the contest was initiated and before the entryman had notice that the contest had been filed, and his default was cured.

Your office affirmed the action of the local officers holding that:

If Glover had appealed from your (the local office) refusal to grant him a hearing, when on December 17, 1896, he filed another contest against Swarts' entry alleging his failure to comply with the requirements of the homestead law as to residence, he might have prevailed in that contest. But since Swarts re-established his residence on the land before the initiation of this contest, he cured his laches.

Glover has appealed to this Department.

The concurring decisions of your office and the local office find that Swarts did not comply with the homestead law as to maintaining his residence upon the tract, and it is apparent from the record that this finding must be sustained. He was engaged in mercantile business elsewhere, part of the time as post trader for certain Indians, and afterward as clerk upon a salary, and although his improvements on the premises were worth at least seven hundred dollars, the tract had been cultivated by others for him and was occupied by his employee, and he did not actually reside upon the tract, but made occasional visits thereto. The evidence taken at the hearing of this contest was restricted by counsel for contestant to the absences of the contestee from the land since the close of the testimony in the original contest on March 31, 1894. Since that date, excluding his leave of absence for one year after January 10, 1896, he has not complied with the law.

On the other hand, Glover, who was claiming adversely to Swarts, has complied with the homestead law as to improvement and cultivation, and since the opening of the tract and adjacent lands to settlement, to the date of the hearing in the case now under consideration, he has maintained a continuous residence thereon.

It is contended on behalf of Swarts, the entryman, that he cured his default, if any, by re-establishing or resuming his residence upon the land after his marriage and prior to any notice or knowledge of the present contest, and this contention is sustained by your office and the local office. It is a general rule that a contest must fail when the default charged is cured, in good faith, before the entryman had knowledge or notice of the contest. (*Davis v. Eisbert*, 26 L. D., 384, 388, and cases there cited.) While the present proceeding is in the nature of a new contest and covers matters not in issue in the original contest, it is based upon the failure of the entryman to comply with the law during the pendency of the original contest since the original hearing, a matter always the subject of an inquiry as germane to the original case.

A homestead entryman is held to a strict account in the matter of his compliance with the law, where an adverse settlement right exists, and if he fail to maintain the continuity of his residence during the pendency of a contest against him, his laches can not be cured by the resumption of his residence, even if his default is not challenged until protest is made against the acceptance of his final proof. (*Smith v. Nolan*, 19 L. D., 117, 119, 120.) In the presence of an adverse claim asserted in good faith for over three years by one residing on the land during that period and having valuable improvements thereon, a homestead entry was not allowed to stand, where the entryman had not maintained his residence upon the tract, even when he attempted to cure his default. (*Bates v. Bissell*, 9 L. D., 546, 551.) A contestant who relies upon his prior settlement must maintain his residence upon the land during the pendency of the contest (*Forman v. Healey*, 28 L. D., 266; *Rowan v. Kane*, 26 L. D., 341, 343), and it appears that the same rule applies to an entryman who makes the same claim and whose entry is contested by one who has established and maintained his residence upon the land and who has asserted his rights in a contest. An inquiry may be had in such cases, upon charges of failure to comply with the law during the pendency of the contest since the original hearing. (*Forman v. Healey*, *supra*; *Lark v. Livingston*, 26 L. D., 163.)

In ordinary cases a charge of abandonment will not lie against the entry of a homestead where leave of absence is granted under the act of March 2, 1889, until the expiration of six months after the time for which the leave was granted (*Hiltner v. Wortler*, 18 L. D., 331). Such leave of absence is, however, no protection against a contest for abandonment where the entryman, prior to such leave has failed to comply with the law, and the leave granted does not preclude the ini-

tiation of a contest during such period charging non-compliance with the law prior thereto (*Yarneau v. Graham*, 16 L. D., 348). But the application of Glover to contest the entry anew, made December 17, 1896, was properly rejected by the local office, as the leave of absence had then been granted and was in force, and while unassailed was a protection to the entryman. (*Quien v. Lewis*, 20 L. D., 319). This seems to have been well understood, as Glover did not appeal from such action, but filed an amended application specifically attacking the leave of absence as fraudulently obtained.

As it appears that Swarts failed to maintain his residence upon the tract for a period of over twenty-one months after the close of the hearing in the original contest and prior to the granting of his leave of absence, but attempted by occasional visits to the tract to make a showing of compliance with the law while he was engaged in business elsewhere, and maintained his possession of the tract through an employee, he did not cure his default by obtaining his leave of absence or by causing his wife to reside upon the tract after his marriage.

For the foregoing reasons the decision of your office is reversed. The contest of Glover must be sustained, and the entry of Swarts must be canceled.

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PROCEEDINGS TO VACATE PATENT—INADVERTENT ISSUE.

NORTHERN PACIFIC R. R. CO. *v.* GOSNELL.

Proceedings to vacate a patent should be instituted on behalf of the government, where said patent is wrongfully issued through inadvertence during the pendency of a controversy before the Land Department involving the land covered thereby.

*Secretary Hitchcock to the Commissioner of the General Land Office, July*  
(W. V. D.) 26, 1899. (F. W. C.)

Under date of February 25, 1899, the papers in the case of Northern Pacific Railroad Company *v.* Josiah Gosnell, involving the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  and the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 23, T. 3 S., R. 9 E., Bozeman land district, Montana, pending on appeal before this Department from your office decision of December 24, 1895, holding said land to have been excepted from the company's grant upon the contest instituted by the application of Gosnell to make homestead entry thereof, were returned to your office for disposition under the act of July 1, 1898 (30 Stat., 597, 620).

Said papers are again forwarded with your office letter of July 20, 1899, with the statement that—

While said case was pending before the Department on appeal by the company from office decision "F" of December 24, 1895, in favor of Gosnell, the land involved therein was inadvertently patented to the company November 3, 1897. Such patenting having occurred prior to the passage of the act of July 1, 1896, *supra*, the tract does not come within its provisions.

It thus appears that after your office in its decision of December 24, 1895, held the land above described to have been excepted from the grant to the Northern Pacific Railroad Company, and said company had appealed therefrom to this Department, and while said appeal was pending before this Department unacted upon, your office, through inadvertence or mistake, wrongfully issued a patent to the railroad company embracing said land.

In the case of the Germania Iron Company *v.* United States (165 U. S., 379) it was held:

When, while disputed matters of fact concerning a tract of public land, or the priority of right of claimants thereto, are pending unsettled in the land department, a patent wrongfully issues for the tract through inadvertence or mistake, by which the jurisdiction conferred by law upon the land department over these disputed questions of fact is lost, a court of equity may rightfully interfere, and restore such lost jurisdiction by cancelling the patent. (Syllabus.)

It is therefore directed that demand be made of the Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, for reconveyance of the land involved, thus wrongfully and inadvertently patented during the pendency of said case, to the end that upon restoration to the United States of the title thus inadvertently conveyed by reason of said patent the case may then be disposed of under the provisions of said act of July 1, 1898, *supra*. You will advise the company accordingly.

Should the company fail to make reconveyance of the land as demanded within ninety days from the date of demand, you will certify the entire record to this Department for such further action as the facts in the case may warrant.

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HOMESTEAD CONTEST—RESIDENCE—POSTMASTER.

KIRKENDALL *v.* GORDON.

In the case of a homesteader, who holds an appointment as postmaster, the Department will not, in passing upon his compliance with law in the matter of residence, undertake to determine whether such residence is compatible with the statutory requirement that "every postmaster shall reside within the delivery of the office to which he is appointed."

The case of Henry C. Hansbrough, 5 L. D., 155, overruled.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) July 26, 1899. (G. B. G.)

May 18, 1897, Peter Gordon made homestead entry for the W.  $\frac{1}{2}$  of the E.  $\frac{1}{2}$  of Sec. 23, Tp. 21 N., R. 116 W., Evanston, Wyoming.

November 29, 1897, Frank J. Kirkendall filed in the local office an affidavit of contest against said entry, alleging that the said Peter Gordon and family had wholly abandoned said tract for more than six months since making said entry and next prior to that date, and that

said tract was not then settled upon and cultivated by said Gordon as required by law. On the same day notice of a hearing, to be held January 10, 1898, issued from the local office, which notice was served upon Gordon by delivering to him a copy of the same, December 1, 1897.

On the day named in the notice the parties appeared at the local office, when the following proceedings were had:

The entryman Gordon was called by the contestant and testified that at the time he made entry for the land in controversy, he resided at Fossil, Wyoming, which place is eleven miles from the land; that he had been during the whole of the year 1897, and was at the time he was giving this testimony, postmaster of the post office at Fossil; that his then post office address was Diamondville, Wyoming, and that the land in controversy is within the post office delivery of Diamondville. Cross-examination was waived by Gordon's attorney, whereupon the attorney for the contestant moved a cancellation of said entry because the entry, having been made by a postmaster for land outside of the delivery of his office, being void, cannot be carried to patent.

The motion was denied, whereupon the contestant filed an amended complaint over the objection of the defendant, setting forth the fact of Gordon's postmastership, and the hearing proceeded, both parties offering testimony.

February 16, 1898, the local officers rendered a joint decision in the case, recommending that the entry be sustained, and upon Kirkendall's appeal to your office, the decision below was affirmed and the contest dismissed.

The further appeal of Kirkendall brings the case here.

The evidence in this case conclusively shows that the entryman established his residence upon the land in controversy before the expiration of six months from the date of his entry. That he was living on the land himself before that time is not seriously disputed, but the theory upon which this branch of the contest seemed to have proceeded was that he did not take his wife to the land within the six months next following the date of the entry, and that he did not therefore in fact or in law establish his residence during such time. It is shown that Mrs. Gordon was during this period very ill, with an incurable malady, and that the delay in moving her to the homestead was due to that cause. As a matter of fact, however, she was removed to the land, and took up her abode there with her husband, on the 28th day of November, 1897. This was the day before the contest affidavit in this case was filed and two days before notice of the contest was served. So, even if it be conceded that a residence was not in good faith established upon this land until the day that Mrs. Gordon arrived there, the entryman's laches were cured, and a contest for abandonment did not lie, either at the date of the filing of the affidavit of contest, or at the date of the service of notice thereof.

But it is urged, in view of section 3831 of the Revised Statutes,

which provides that "Every postmaster shall reside within the delivery of the office to which he is appointed," that Gordon could not have established a legal residence upon this land, and several decisions of the Department and the courts are relied upon in support of this contention. Of these the only one directly in point which seems to sustain this contention is the case of Henry C. Hansbrough, (5 L. D., 155), wherein it was held that—

A person holding a position of postmaster . . . cannot be heard to say that his residence is beyond the delivery of his office.

The records of the Post Office Department show, and it is admitted, that Gordon was postmaster at Fossil, eleven miles from his homestead claim, during the whole time that he is shown to have in fact resided upon this land. It is shown that he had long before turned the post office over to his son, who was his deputy, and that he personally performed no duties in relation to said position, except that he occasionally signed papers in the nature of reports, etc. The office had no salary attached to it, and the remuneration arising from the sale and cancellation of stamps was small.

In consideration of these facts it is urged that he was only postmaster in name and not in fact, and that the ruling in the Hansbrough case does not apply.

But the principal contention can not be allowed. A postmaster does not vacate his office by removing away from the neighborhood thereof, and unless he resigns or is removed by the appointing power, he and his sureties are responsible to the Department, and to individuals who should be injured by any neglect of duty in the office. The United States *v.* Josiah Pearce (2 McLean, 14).

The decision in the Hansbrough case, *supra*, stands alone. It does not seem to have been cited with approval since it was made, and the Department is now of opinion that the ruling therein is unsound. It does not follow because the law requires that a postmaster shall reside within the delivery of the office to which he is appointed that he in fact or in law resides there. Nor is it within the province of this Department to decide a question involving a charge of official delinquency within the exclusive jurisdiction of the Post Office Department. To decide whether or not a postmaster resides within the delivery of his office involves a ruling upon the question as to what is the delivery of his office, and this is an administrative question within the exclusive cognizance of the Post Office Department and would be controlled by considerations of public policy and private conveniences in the administration of the postal laws with which this Department has nothing to do.

From informal inquiry of officials connected with the Post Office Department, it is ascertained that the question of what is the delivery of a post office within the meaning of said section 3831 has never been definitely settled, each case being controlled by its own circumstances.

The question before this Department in this case is not whether Peter Gordon is complying with the law in the discharge of his official duties, but instead has he complied with the homestead law? The evidence shows that he has.

The decision appealed from is affirmed.

Since the appeal in this case, and, on May 1, 1899, one James Wanlass filed an affidavit of contest against Gordon's entry, wherein it is alleged that the land covered thereby and in controversy in this case is chiefly valuable for large and valuable deposits of coal contained therein, that the same is not agricultural land in any sense of the term, and that the said entryman knew all this at the time he made his entry.

June 21, 1899, your office transmitted to the Department the report of a special agent respecting the land involved, to the effect that it is valuable coal land and of little value for agricultural purposes, that the entry was fraudulently made to secure a valuable deposit of coal, and recommending that the entry be canceled, the contest dismissed, and the land held subject to cash entry only as coal land.

In view of the contest affidavit of said Wanlass, in view of this special agent's report, and in view of the record in this case and the files of your office, which show that the land covered by Gordon's entry is in the immediate vicinity of large and valuable coal mines which are being actively operated, it is directed that notice issue upon said contest affidavit to determine the character of the land.

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MINING CLAIM—APPLICATION—WAIVER—ENTRY.

CAIN ET AL. *v.* ADDENDA MINING CO. (ON REVIEW).

The mining laws contemplate that proceedings under an application for mineral patent should be prosecuted to completion within a reasonable period after the required publication, or after the termination of proceedings on adverse claims, if any are filed, and failure so to do constitutes a waiver of rights secured under the application.

A mineral entry should not be allowed at a time when the land covered thereby is embraced within a prior mineral entry standing of record, and involved in proceedings pending before the Land Department.

Departmental decision of January 8, 1897, 24 L. D., 18, recalled and vacated.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *July 25, 1899.* (E. B., Jr.)

This case comes again before the Department upon an entertained motion by the protestants, James S. Cain, John W. Kelly, and Alexander J. McCone, for review of the decision of the Department herein of January 8, 1897 (24 L. D., 18), and upon the showing filed by the Addenda Gold and Silver Mining Company in opposition to said motion. In its decision the Department dismissed the protest of Cain and others against Independence, California, mineral entry No. 240, made by said company for the Addenda lode mining claim, and directed

your office to "pass the Addenda claim to patent, subject, however, to any objections appearing in the record and not herein considered."

It was found in said decision that the Addenda claim was located May 19, 1877; that application for patent thereto was filed by the said company November 11, 1879; that during the period of publication, which ended January 17, 1880, adverse proceedings were instituted by the owner of the Concordia lode claim, resulting in a judgment April 13, 1882, in favor of the adverse claimant; that on December 10, 1894, the company made said entry for what remained of the Addenda location after excluding the conflicts with the Concordia and the Insurance lode claims; and that on April 27, 1895, there was filed the said protest of Cain and others.

It was alleged in the protest that subsequent to the application and prior to the said entry, the company had abandoned the Addenda location; that in 1894 and subsequent to the alleged abandonment portions of the Addenda ground had been relocated as the Black Rock Consolidated and the Contention lode claims; that protestants had become the owners of such ground under these relocations and by mesne conveyances; and that prior to said entry they had commenced suit against the company to quiet title, which suit was still pending.

The proceedings heretofore had in the case, in addition to what has already been stated herein, being sufficiently indicated in the decision under review, it is not deemed necessary to recite the same at length here.

No hearing was had upon the protest, your office and the Department depending for the facts necessary to the consideration thereof upon the ex parte evidence filed in support thereof, and in opposition thereto, a certified copy of the pleadings and decree in the suit aforesaid, the same having passed to a final decree pending the consideration of the protest, and a certified copy of a deposition of one P. Curtis taken in that suit, such certified copies being presented in support of the protest against the entry.

The said suit was brought in the local court in November 1894 to quiet title in the plaintiffs (protestants here) to certain lode mining claims known as the Black Rock, the Black Rock Consolidated, and the Contention, respectively, the last named claim including the Black Rock within its boundaries, plaintiffs claiming to trace the title to locations of the Black Rock and the Black Rock Consolidated claims made by said Curtis January 1, 1887, and January 1, 1894, respectively, and to the location of the Contention claim made by John W. Kelly, one of the said plaintiffs, June 20, 1894, which claims conflict with the Addenda claim. In its answer the Addenda company, denying the plaintiffs' alleged ownership and right of possession, averred that the locations of the Black Rock and Black Rock Consolidated claims were made by said Curtis in fraud of the rights of the company at times when he was its confidential and trusted agent to see that the law relative to the per-

formance of annual labor upon the Addenda and certain other locations of the company was duly complied with in its behalf; that plaintiffs knew of the relations existing between the company and said Curtis, and that the relocation of its said claims was made by him while acting as its agent; and that conveyances of the Black Rock and Black Rock Consolidated claims were made by him to said Kelly, and the location of the Contention claim was made by Kelly—all in pursuance of a conspiracy between Curtis and the plaintiffs to defraud the defendant.

Upon the issues presented the court duly rendered its decree, August 30, 1895, in favor of the plaintiffs, as follows:

In the Superior Court of the County of Mono.

State of California, James S. Cain, et al., plaintiffs.

vs.

The Addenda Gold and Silver Mining Company, defendant. }

This cause having been regularly called and tried by the court, and the findings of fact and conclusions of law having been expressly waived in open court by the respective parties, and such consent and waiver having been entered on the minutes of the court, and the court having duly rendered its decision, wherein judgment was awarded in favor of the plaintiffs in said action and against the defendant herein and for costs against the said defendant, on motion of Reddy, Campbell & Metson, attorneys for the plaintiffs.

It is now therefore, hereby, ordered, adjudged and decreed, that the plaintiffs have judgment as prayed for in their complaint herein against the defendant, that all adverse claims of the defendant and all persons claiming to claim said premises or any part thereof, through or under said defendant, are hereby adjudged and decreed to be invalid and groundless, and that the plaintiffs be and they are hereby declared and adjudged to be the true and lawful owners of the land described in the complaint, and hereinafter described, and every part and parcel thereof, and that their title thereto is adjudged to be quieted against all claims or demands of the defendant, who is hereby perpetually estopped from setting up any claims thereto, or any part thereof.

(Here follows description of the property and judgment for costs.)

This suit clearly involved the right to the possession of mining ground embraced in conflicting mining claims, a matter which the mining laws contemplate shall be settled and decided by a court of competent jurisdiction, and the decree awarded the right of possession to the plaintiffs and it has not been vacated, reversed or modified.

The Department, however, holding that the decree had not been rendered on an adverse claim pursuant to section 2326 of the Revised Statutes, and considering the evidence tending to show fraud on the part of Curtis, and knowledge thereof on the part of protestants at the time of their purchase, declined to recognize the decree as of binding force upon the land department or as effective against the company in its proceedings for patent. The evidence presented also tending to show as is more fully set out in the decision under review, that although the company had not in fact complied with the provisions of section 2324 of the Revised Statutes relative to annual expenditure upon the

Addenda claim for the year 1893, nor with the act of November 3, 1893 (28 Stat., 6), excusing such expenditure, it had, on the other hand, in good faith held and worked the claim from 1886 to 1892 inclusive, a period longer than the time prescribed by the statute of limitations for mining claims of the State of California, and this prior to the alleged relocation by Curtis in 1894, it was held, under authority of section 2332 of the Revised Statutes and the case of *Stewart et al. v. Rees et al.* (21 L. D., 446), that the company was entitled to have its entry passed to patent as against these protestants; and the protest was dismissed and direction given to pass the entry to patent, as hereinbefore stated.

Upon further and careful consideration, the Department is now of opinion that the ruling thus announced can not be sustained to the extent there stated. It is true the proceedings leading up to the decree of the court and the decree itself do not conform to sections 2325 and 2326 of the Revised Statutes. These sections require that such proceedings be initiated in the local land office during the period of publication of notice of the application for patent, but this was not possible in this instance because the mining locations under which protestants claim were not made until long after the publication of notice of the Addenda application was completed. These sections do not provide for a case like the present where the applicant for patent allows his application to lie dormant without payment for the land for several years after publication of notice. Where this is done valid adverse rights to the land, giving to others the lawful right of possession, may attach by reason of a relocation by another based upon the failure of the applicant to make the necessary annual expenditure or his abandonment of the claim; and where rights under such a relocation have been established in judicial proceedings, the land department can not ignore or disregard the court's decision. In the case of *Gillis v. Downey* (85 Fed. Rep., 483, 489), which was a suit in equity to quiet title to certain placer mining lands, it is said by the circuit court of appeals for the eighth circuit:

But it is insisted by defendant that, as he had made application to the land-office department for a patent, pursuant to the provisions of section 2325, Rev. St., and the sixty days prescribed therein for publication of notice of such application had expired before the complainant adversed the application, the complainant is precluded from contesting his right to a patent. It does not appear from the averments of the bill that the sixty days notice was ever published, as required by the statute. But, assume that it was, this fact has no application to the instance where the adverse claim does not arise until after the expiration of the sixty days limitation, and the applicant for the patent has let his application lie dormant for a number of years without either paying the purchase money or doing the required work of \$100 each year pending the application for patent. *Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.*, 32 U. S. App., 75, 13 C. C. A., 390, and 66 Fed., 200, affirmed in 167 U. S., 108, 17 Sup. Ct., 762. The filing of the application for a patent does not suspend the obligation to keep up the required work where, without paying the purchase money, the claimant permits his application to sleep for years, as in this case.

And "upon such failure to comply with these conditions the claim or mine upon which the failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made." *Black v. Mining Co.*, 163 U. S., 450, 16 Sup. Ct., 1101.

In the suit by Cain and others against it the company had ample opportunity to present every defense it had to the claim of the protestants. It might in that suit have pleaded the running of the statute of limitations under section 2332 of the Revised Statutes, which the decision under review invoked in its behalf, but this was not done. It did plead the claimed fraudulent character of the relocation by Curtis and protestants' knowledge thereof at the time of their purchase from him, but according to the decree this defense was not sustained. That decree is an adjudication adverse to the company's claimed right of possession from the time of the commencement of the suit which was anterior to the company's mineral entry. It is not believed that section 2332 of the Revised Statutes can be invoked in the land department under these circumstances to defeat the judgment of the court. Nor is it believed that the land department should, in disregard of the decree of the court, have undertaken to re-examine the claimed fraudulent character of the relocation by Curtis and protestants' claimed knowledge thereof at the time of their purchase, for the purpose of making an independent decision of its own thereon. All of this went to the right of possession, a matter intended to be committed to the courts for settlement and decision. For the land department to assert authority to retry and redecide such matters is to assert authority to give a patent to one claimant when by the judgment of a court of competent jurisdiction the right of possession to the ground in conflict has been adjudged to be in another. This was not intended or contemplated.

The difficulty here arises from the fact that the Addenda company filed its application for patent in the local land office in 1879, made due posting and publication thereof and upon the termination of certain adverse proceedings in 1882 became entitled, upon paying the purchase price, to make entry of all the ground embraced in its application and notices which had not been awarded to others in such adverse proceedings. Instead of exercising this right the company took no further proceedings under its said application until in 1894 after the lapse of twelve years and after the institution of the suit by the protestants to quiet title in themselves to the portion of the ground here in controversy. The mining laws contemplate that proceedings under an application for patent should be prosecuted to completion within a reasonable time after the required publication, or after the termination of proceedings on adverse claims, if any are filed; otherwise by making application for patent and giving notice thereof, but without making payment of the purchase price, one would become entitled to project indefinitely into the future the assumption of section 2325 "that no adverse claim exists" notwithstanding the requirement of section 2324

that an expenditure of one hundred dollars in labor or improvements shall be made upon a mining claim during each year until entry is allowed.

The Addenda company permitted its application to lie dormant so many years without making payment of the purchase price that it must be held to have waived the rights obtained by the earlier proceedings upon the application. Its entry in 1894, therefore, ought not to have been allowed, and for that reason must be canceled.

It appears that on October 7, 1897, while this matter was pending before the Department, said Kelly and Cain, and the Fulton Foundry, a corporation, which, in the meantime had acquired the interest of said McCone, were allowed to file in the local office applications for patent to the Black Rock Consolidated and the Contention claims, and on December 3, 1898, to make entry of the same as Nos. 257 and 258, surveys Nos. 3458 and 3459, respectively. The Contention claim as applied for and entered does not conflict with the Addenda claim, but the Black Rock Consolidated as applied for and entered does conflict with the Addenda throughout the entire length of the Black Rock Consolidated. No adverse claim appears to have been filed against the application for the Black Rock Consolidated, but the proceedings for patent therefor having been erroneously allowed while the Addenda entry was still intact of record, and during the pendency in the land department of the case arising on the protest of Cain and others against the Addenda entry, you are hereby directed to cancel the entry, No. 257, of the Black Rock Consolidated claim.

The question of what further effect should be given to the decree of the court obtained by the protestants in their suit against the company, must be determined by the courts in such adverse proceedings as may be had under sections 2325 and 2326, if either claimant makes further application for patent for the ground in controversy, and therefore need not be now considered by the land department. If this decree is not of such a character as to preclude an original adjudication between these parties of the right of possession to the ground in controversy, by a court of competent jurisdiction in proceedings fully conforming to sections 2325 and 2326, the matter of the running of the statute of limitations and the alleged fraudulent relocation by Curtis will be open to inquiry and determination by the court as though said decree had never been rendered; and if the decree is of such a character as to be conclusive upon the court in proceedings between these parties fully conforming to said sections and thus prevents a re-examination by a court of competent jurisdiction of such right of possession, then it is equally conclusive upon the land department and equally prevents a re-examination of that question by it.

The decision under review is therefore hereby recalled and vacated; and your office will take such further proceedings herein as may be in accordance with the views here expressed. Upon the cancellation of

the existing entries on the records of the local office either claimant will of course be at liberty to renew proceedings to obtain a patent for the land in controversy. In that way sections 2325 and 2326 will be given such operation and application with respect to these conflicting claims as is contemplated by law.

CONTEST—INDIAN ALLOTMENT—TRUST PATENT.

BRYANT ET AL. v. GILL ET AL.

The statute giving a preference right of entry to the successful contestant has never been extended, directly or by implication, to Indian allotments for which conditional or trust patents have issued.

*Secretary Hitchcock to the Commissioner of the General Land Office, July*  
(W. V. D.) 27, 1899. (L. L. B.)

February 14, 1896, James B. Melton entered under the homestead law the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 33, T. 10 N., R. 3 E., and lots 2 and 3, Sec. 4, T. 9 N., R. 3 E., in the Oklahoma land district, Oklahoma.

On the same day James H. Gill made like entry embracing the SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 32, T. 10 N., R. 3 E., and lot 4, of Sec. 4, and lot 1, and the SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  of Sec. 5, T. 9 N., R. 3 E., same land district.

February 19, 1896, Edwin N. Bryant brought contest against Melton's entry, alleging his right, by prior settlement, to that portion of land embraced therein described as the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 33, T. 10 N., R. 3 E.

February 25, 1896, L. E. Woodworth brought similar contest against both Melton and Gill, he claiming by priority of settlement the right to lots 3 and 4, Sec. 4, and the E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 5, T. 9, R. 3 E., the said lots 3 and 4 having been embraced in the entry of Melton and the said E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 5, in the entry of Gill.

September 21, 1896, W. S. Pendleton made homestead entry for the SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  of said Sec. 33, and the NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 32, T. 10 N., R. 3 E., in said land district.

October 2, 1896, Bryant amended his affidavit of contest, made Pendleton an additional party defendant, Bryant claiming in his settlement the entire SW.  $\frac{1}{4}$  of said Sec. 33, the S.  $\frac{1}{2}$  of which was covered by the entry of Melton and the N.  $\frac{1}{2}$  of the same by the entry of Pendleton.

The cases were consolidated and hearing duly had. The local office found in favor of the defendants, and on appeal, by your office decision of December 10, 1897, now here on the appeal of Bryant and Woodworth, the action of the local office was approved and the entries of Melton, Gill and Pendleton were held intact. These lands had formerly been embraced in certain Indian allotments for which conditional or trust patents had been issued under the allotment act of February 8, 1887 (24 Stat., 388), but these conditional or trust patents had been

relinquished and delivered to the Secretary of the Interior and by him canceled, some February 5, 1896, and the remaining portion September 14, 1896. (See letters of Secretary Smith, February 5, and September 14, 1896, Indian Division. In the letter of February 5, the description of the lands patented is omitted, but an examination of the records of your office shows that the lands here involved were included in the patents so surrendered and canceled.) Bryant and Woodworth allege settlement upon these lands in the summer of 1895, while they were covered by these allotments and claim that upon the cancellation of the allotments they were entitled to make entry of the lands by reason of such alleged settlement.

The evidence, which is quite voluminous, has been examined and it is found that the material facts are correctly stated in the decision appealed from. In order that a settlement claim on land not subject to settlement or entry may prevail over an application to enter, made after the restoration of the land to settlement and entry, such settlement must be accompanied by actual residence. (See *Hanson v. Rone-son*, 27 L. D., 382.) The record shows that the residence of contestants on the tracts claimed by them was colorable only.

The contestants further claim that they ought to be awarded the priority because they furnished the information that started the inquiry which resulted in the surrender of the conditional or trust patents and their cancellation by the Department.

The statute giving a preference right of entry to the successful contestant of a pre-emption, homestead, or other entry has never been extended, directly or by implication, to Indian allotments for which conditional or trust patents have been issued, and if it had, the record here does not show that the contestants ever contested or paid the land office fees to secure the cancellation of these allotments.

The decision appealed from is affirmed.

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#### STATE SELECTIONS—MINERAL LANDS.

##### STATE OF UTAH.

Coal and mineral lands are not subject to selection by the State under section 7, act of July 16, 1894; but lands containing building stone may be taken thereunder.

*Secretary Hitchcock to the Commissioner of the General Land Office, July*  
(W. V. D.) 27, 1899. (E. B., Jr.)

October 16, 1896, the State of Utah presented its application, per list No. 1, to select certain lands therein described, aggregating 1864.51 acres, under the grant made to it by section seven of the act of July 16, 1894 (28 Stat., 107, 109). The application was rejected by the local officers at Salt Lake City, Utah,

for the reason that the lands are represented in said selection list as mineral, and therefore not subject to such appropriation under the act of Congress, referred to.

Upon appeal by the State, your office by its decision of December 29, 1896, affirmed the decision of the local office as to all the said lands classified in the list as "mineral" and "coal" lands respectively, but reversed the decision of the local office as to the lands classified as "building stone" lands, amounting to two hundred and fifty acres, holding that lands chiefly valuable for building stone are not excepted from the said grant to the State. It was said, however, in your office decision:

It does not appear from the record before me how the fact that said lands are mineral was ascertained, but as it appears upon the face of the list you were by law obliged to reject the list. It is proper to state, however, that if said land applied for were designated as mineral in character upon the strength of the return of the surveyor, that neither said return nor this decision is final or conclusive as to the character of the land, nor so far as the record before me shows is the State on any account estopped from showing in accordance with paragraph 110 *et seq.* of the mining circular, and 19 L. D., page 23, that said lands, or any part thereof, are in fact non-mineral, and therefore subject to its application.

The State thereupon appealed to the Department from so much of the decision of your office as rejects its application as to lands classified in its list as "mineral" and "coal" lands, respectively, its contention being that these lands, which it designates generally in both its said appeals as "mineral lands," are, notwithstanding their mineral character, "subject to selection and appropriation under the act of Congress above referred to."

Upon careful consideration of the case, the Department finds no reason to dissent from the decision of your office relative to the lands designated therein as "mineral or coal lands," and the same is therefore hereby affirmed.

Your attention is called to what are evidently erroneous descriptions in the said list of certain of the tracts classified as "building stone" lands, in section 30, T. 11 S., R. 9 E. The description reading "the E.  $\frac{1}{2}$  and NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , the W.  $\frac{1}{2}$  and NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , and the W.  $\frac{1}{2}$  and SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ ," of said section 30, are clearly inaccurate and erroneous. The State should be called upon to file an amended list correcting these descriptions.

Relative to so much of your office decision as relates to lands classified in said list as "building stone" lands, it is deemed proper to say that while the Department approves of the conclusion therein reached, this decision is not intended to be taken as an approval of the reasons given for such conclusion.

## MINING CLAIM—EXCLUSION—JUDICIAL AWARD.

## FEDERAL GOLD MINING AND MILLING CO.

It is no objection to a mineral entry that it embraces certain ground specifically excluded from the application and notice, where in adverse judicial proceedings the ground so excluded has been awarded to the applicant.

The case of *The Greater Gold Belt-Mining Co.*, 28 L. D., 398, cited and followed.

*Secretary Hitchcock to the Commissioner of the General Land Office, July*  
(W. V. D.) 31, 1899. (E. B., Jr.)

This case involves Pueblo, Colorado, mineral entry No. 1657, made March 22, 1896, by The Federal Gold Mining and Milling Company, for the Washington group Nos. 1, 2, 3, 4 and 5 lode mining claims, survey No. 10940, on appeal by the company from the decision of your office dated September 20, 1898, holding the entry for cancellation as to the Washington group Nos. 1 and 2 claims.

It appears that the two claims last-above mentioned were in conflict to the extent of large portions of their surfaces, including the discovery shaft of each, with the Adams Express Nos. 2 and 3 lode mining claims, survey No. 10477, and that the Washington group No. 1 claim was also in conflict, to a small extent, with the Adams Express lode mining claim, likewise embraced in survey No. 10477; that the locations of the Adams Express and Adams Express Nos. 2 and 3 claims were made prior to the locations of the said claims in conflict therewith; that the ground thus in conflict was expressly excepted and excluded "without waiver of rights" both from the application filed November 16, 1895, for patent to the Washington group claims, and from all the notices thereof; and that by a judgment rendered February 12, 1898, by the district court of El Paso county, Colorado, in an adverse suit under section 2326 of the Revised Statutes, certain parts of the ground in conflict, including the said discovery shafts, were awarded to the adverse claimant, The Federal Gold Mining and Milling Company, and the remainder of the conflict to The Adams Express Gold Mining Company, the applicant for patent to the said Adams Express and Adams Express Nos. 2 and 3 claims, pursuant to a stipulation between the parties.

Under authority of its own decision, dated May 20, 1898, in the case of the Greater Gold Belt Mining Company, applicant for patent to the Happy Jack and other lode mining claims, your office held, in the case at bar, that because the judgment of the court was rendered in accordance with the stipulation between the parties it was not such a judgment as is contemplated by the said section of the Revised Statutes and should be disregarded, and so, assuming to determine for itself, from the evidence before it, the question of the right of possession, found that the said discovery shafts are within ground that belongs to the Adams Express Gold Mining Company as parts of the Adams

Express Nos. 2 and 3 claims, and therefore held the entry for cancellation to the extent above stated.

Appellant contends that the land department is bound by the judgment of the court, and that hence it was error on the part of your office to disregard such judgment and to hold the entry, in part, for cancellation.

The decision of your office in the case of The Greater Gold Belt Mining Company was, on appeal therefrom, reversed by the Department by its decision of May 15, 1899, therein (28 L. D., 398), it being held (syllabus):

A judgment rendered in adverse proceedings, whereby part of the ground in conflict is awarded to the senior locator and the remainder to the junior, is none the less binding upon the parties and the Department because it was made in pursuance of a stipulation between the parties.

The Federal Gold Mining and Milling Company having been duly awarded, in adverse proceedings under said section 2326, those parts of the ground in conflict embraced in its entry, it is no objection to such entry that such ground was specifically excluded from its application for patent and from the notices thereof (Stranger Lode, 28 L. D., 321).

The decision of your office is reversed accordingly.

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NOBLE ET AL. v. ROBERTS.

Motion for review of departmental decision of June 6, 1899, 28 L. D., 480, denied by Secretary Hitchcock, July 31, 1899.

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TERRITORIAL SCHOOL INDEMNITY SELECTIONS—FEES.

TERRITORY OF OKLAHOMA.

The payment of the fees specified in section 2238 R. S., should be required in all cases of school indemnity selections made by the Territory of Oklahoma before submitting the lists to the Department for approval.

Where a list of such selections has been approved without payment of the statutory fees the amount due remains a charge against the territory, but can not be enforced by vacating the approval.

*Secretary Hitchcock to the Commissioner of the General Land Office, July*  
(W. V. D.) 31, 1899. (E. F. B.)

By letter of February 18, 1899, the Department granted the petition of the Territory of Oklahoma for certiorari and you were directed to transmit its appeal from the decision of your office of July 1, 1898, holding that the payment of fees for indemnity school selections under section 2238 Revised Statutes, by the Territory is a necessary condition to the approval of such selections. Said appeal was not filed within the time required by the rule, but the petition was granted for the reason that it involved questions affecting the administration of a grant

to said Territory, and in view of the pending appeals by the Territory from the decision of your office as to school indemnity selections in the Guthrie and Oklahoma land districts, in which the same question was involved.

The record has been transmitted in compliance with the direction contained in said letter of February 18, 1899, and is now before the Department for consideration.

By letter of July 1, 1898, your office addressed the following letter to the local officers at the Woodward land office, Oklahoma:

SIRS: July 14, 1894, the governor of the Territory of Oklahoma filed indemnity school selection lists, Nos. 3 and 4, embracing, respectively, 18,560 and 5,320 acres of land, selected under act of May 2, 1890 (26 Stats., 81), and act of February 28, 1891 (26 Stat., 796).

By letter "K" of September 26, 1893, to the register and receiver at Beaver, Oklahoma, it was held that the payment of fees, under Sec. 2238 U. S. Revised Statutes, was not required in making school indemnity selections in Oklahoma, and the records of this office do not show any fees were ever paid upon said selections.

December 29, 1894, the Department approved selections, per said lists, aggregating 21,840 acres, per approved list No. 3, and January 21, 1895, approved selections aggregating 1837.47 acres per approved list No. 4.

April 19, 1898 (26 L. D., 536), the Department ruled that the payment of fees by the Territory of Oklahoma was a necessary condition precedent to the approval of a final location.

The selections approved aggregate 23,677.47 acres, upon which fees amounting to \$296.00 are payable.

You will accordingly notify the proper Territorial officer hereof and promptly report to this office any action taken in the premises.

It does not appear what action was contemplated by your office in the event of a failure to pay the fees on said approved selections, but the appeal from said decision was filed by the Territory, in which the following errors were assigned:

First. Said decision is contrary to law.

Second. Said Commissioner erred in holding, in effect, that said lands had been granted to the Territory of Oklahoma by acts of Congress.

Third. Said Commissioner erred in holding, in effect, that said selections were final locations of such land.

Fourth. Said Commissioner erred in not holding said matter *res adjudicata*, the Secretary of the Interior having formally and finally passed upon and decided the questions involved so far as they apply to the indemnity lands already selected.

Wherefore, it is prayed that said decision be in all things reversed.

The first, second and third assignments of error would seem to question the correctness of the ruling of the Department in its decision of April 19, 1898 (26 L. D., 536), upon which your action was taken. It was therein held that the reservation of school lands for the benefit of the State hereafter to be erected out of the Territory of Oklahoma, is equivalent to a grant in so far as it reserves the land from other disposition and segregates it from the general public domain, and as the Territory is now to have the benefit of the indemnity selections it is the duty of the government to require of it the payment of the fees

provided for by section 2238 Revised Statutes, as a condition that must be complied with before approving its school indemnity selections.

There is no reason why this ruling should in anywise be modified and the payment of such fees should be required in all cases of indemnity selection made by said Territory, before submitting the lists to the Department for approval. But if your office construed the decision of the Department, that the payment of fees by the Territory was a condition precedent to the approval of a final location, to mean that the inadvertent approval made by the Department December 29, 1894, of list 3, and January 21, 1895, of list 4, was a nullity, it is error.

It was only intended to hold by that decision that the lists of indemnity school selections made by the Territory of Oklahoma under the fourth section of the act of January 18, 1897 (29 Stat., 490), should not be approved until payment of the fees provided for in section 2238 Revised Statutes, but when the list of lands selected by the Territory, in lieu of the sections settled upon of the designated numbers reserved by the act for school purposes, was approved, the lands so selected were as much subject to reservation from all other disposition, except by Congress, as the designated sections.

With reference to the fourth assignment of error: While it is true that the approval of the list by the Secretary was an adjudication as to the validity of the selections, it does not follow that the question as to the liability of the Territory for the payment of the fees required by section 2238 Revised Statutes was determined by such approval. The amount due as fees for said selections is still a charge against the Territory and should be demanded of it, but it can not be enforced by vacating the approval of said selections.

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SPECULATIVE CONTEST—PREFERENCE RIGHT.

PRATHER *v.* CONNELLY.

On a charge against an entry that it was secured through a speculative contest, the entry must be held intact, where it appears that the entryman's status as a successful contestant did not operate to defeat the claim of any applicant for the land.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) July 31, 1899. (A. S. T.)

In the year 1893, J. M. Alexander made homestead entry for the SE.  $\frac{1}{4}$  of Sec. 32, T. 21 N., R. 3 E., I. M., Perry, Oklahoma, land district. On a contest brought by James W. Connely on a charge of abandonment, said entry of Alexander was canceled on September 24, 1896, and a preference right to enter said tract was awarded to said James W. Connely, who, on October 21, 1896, made homestead entry for the same.

On April 13, 1897, W. M. Prather filed affidavit of contest against said entry of Connely, charging that the preference right under which Connely had filed his application was obtained through fraud, because his contest against the entry of Alexander was made for speculative purposes; and also charging that prior to the cancellation of Alexander's entry Connely had executed and delivered to a second person a dismissal of said contest, which dismissal was outstanding at the time he (Connely) made his homestead entry; that a portion of the money to prosecute said contest was furnished by a second party with an agreement between himself and said Connely that the right to enter said land by Connely should be sold and the proceeds of sale divided between the parties; and further that said entry made by Connely was made in pursuance of said agreement, and was not made in good faith for the purpose and with the intention of making a home on said land.

The case was regularly heard before the register and receiver of the local land office, on May 28, 1897, and on June 1, 1897, they rendered a decision recommending that the contest be dismissed, from which decision contestant appealed to your office, where, on January 6, 1898, a decision was rendered affirming the said decision of the register and receiver and dismissing the contest, and from that decision contestant has appealed to this Department.

The charge of bad faith made by the contestant in his affidavit, seems to relate to the contest made by Connely against the entry of Alexander rather than to the entry made afterward by Connely, which is the subject of this contest. True, there is also a charge of abandonment, or failure to establish residence on the land within the prescribed time, but that charge was withdrawn on the hearing.

The proof shows that Connely moved his family and all his effects from Nebraska and established his residence on the land about the time of filing his homestead application, and that he has resided on it continuously and cultivated it in good faith ever since, and there is absolutely no evidence of fraud or bad faith in connection with his homestead entry.

The question presented by the appeal relates to the character of Connely's contest against the entry of Alexander. As to this it is sufficient to say that whatever may have been his motive in contesting Alexander's entry, after it had been in fact canceled he had at least an equal right with others to make an entry for the land, and was not disqualified from doing so, whatever may have been the character of his contest against Alexander.

If the present contestant had, during the pendency of the preferred right awarded to Connely, applied to enter the tract and had been denied the right to do so because of the preferred right awarded to Connely, then he would have been in a position to raise the question of the character of Connely's contest and to insist that the preferred right of entry had been unlawfully awarded him; but it does not appear that

contestant, or any one else applied to enter the land during the pendency of the preferred right awarded to Connely. If such had been the case the application would have been received and held subject to whatever rights Connely had (*Trusdle, R. H.*, 2 L. D., 275, 276; *Phillips, Alonzo*, 2 L. D., 321; *Stewart v. Peterson*, 28 L. D., 515, 519).

If it be conceded that Connely's contest was speculative as charged, he nevertheless stood on equal footing with the present contestant and all others who were eligible to enter public lands, and inasmuch as no one else applied to enter the lands in question, neither the contestant, the public, nor the government suffered by reason of the awarding of the preferred right to Connely, nor did Connely thereby receive any benefit or advantage over others, however erroneous that action may have been. So that whatever may have been the facts as to the contest with Alexander, Connely seems to have made the entry in question in the utmost good faith and no sufficient reason is shown why the same should be canceled. The decision of your office is therefore affirmed, the contest dismissed, and the entry of Connely held intact.

MINING CLAIM—DEPUTY MINERAL SURVEYOR.

FRANK A. MAXWELL.

A deputy mineral surveyor, while holding such office, is disqualified as a mineral entryman.

*Secretary Hitchcock to the Commissioner of the General Land Office, July*  
(W. V. D.) 31, 1899. (J. L. McC.)

Your office, by decision of May 10, 1898, held for cancellation mineral entry No. 343, made December 29, 1897, by Frank A. Maxwell, for the Buckeye and Blatter lode claims, Denver land district, Colorado.

It appears from the record that Maxwell purchased said claims from one H. J. Blatter, October 31, 1892, and that he was at that date, and also at the date of the entry in question, a deputy mineral surveyor. Your office held that, because of his official position, he was disqualified to make said entry—citing in support of said ruling the departmental decision in the case of *Floyd v. Montgomery* (26 L. D., 122).

From said decision of your office Maxwell has appealed.

The Department, in the case of *John S. M. Neill* (24 L. D., 393), held that a United States surveyor-general comes within the prohibition of section 452 of the Revised Statutes:

The officers, clerks, and employes in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land;

and of the circular of September 15, 1890 (11 L. D., 348), based upon the above section, which circular concludes as follows:

All officers, clerks, and employes in the offices of the surveyors-general, the local offices, and the General Land Office, or any persons, wherever located, employed

under the supervision of the Commissioner of the General Land Office, are, during such employment, prohibited from entering or becoming interested, directly or indirectly, in any of the public lands of the United States.

In the case of the Lock lode (6 L. D., 105), the Department held that the mineral entry of a deputy mineral surveyor was not in violation of any statute or departmental regulation. But the decision in the case of *Floyd v. Montgomery*, cited by your office, referring to section 452 R. S., to the circular of September 15, 1890, to the Neill case, *supra*, and to several cases bearing upon the right of employes in the surveyor general's office to make entry of public lands, said:

From an examination of these authorities, and a consideration of the language and manifest purpose of the section, it seems clear that its prohibitive provisions embrace a *deputy mineral surveyor*. In so far as the cases of *State of Nebraska v. Dorrington* (2 C. L. L., 647); *Dennison and Willits* (11 C. L. L., 261); and *Lock Lode* (6 L. D., 105), are in conflict with the views expressed in these later cases they are overruled.

The decision of your office in holding Maxwell's mineral entry for cancellation is correct, and is hereby affirmed.

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WATT ET AL. v. THOMAS ET AL.

Motion for rehearing denied, July 31, 1899, by Secretary Hitchcock. See departmental decision of April 10, 1899, 28 L. D., 261.

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NOTICE OF DECISION—REINSTATEMENT.

WISE ET AL. v. KURE.

In giving notice of a decision, in a matter between the entryman and the government, it is the duty of the local office to use all record means at its disposal to obtain service on the entryman.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) August 4, 1899. (W. A. E.)

George Y. Kure has appealed from your office decision of October 13, 1897, holding for cancellation his homestead entry made June 13, 1895, for the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$ , the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ , and the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 20, T. 23 N., R. 43 E., W. M., Spokane Falls, Washington, land district.

It appears from the record that David M. Wise filed preemption declaratory statement for said land on November 18, 1890, upon which he made cash entry January 4, 1893, when final certificate was issued to him.

On the same day that he received final certificate he mortgaged the land to the North American Loan and Trust Company, of Chicago, Illinois, for \$825 and the interest thereon.

April 8, 1893, he executed and delivered to George Y. Kure a warranty deed for said land, subject to said mortgage and the taxes for 1893 and subsequent, which the grantee assumed and agreed to pay.

May 29, 1894, your office, finding that no affidavit had been furnished with the proof showing that since August 30, 1890, Wise had not filed upon or entered a quantity of land which, with the tract applied for, would make more than three hundred and twenty acres, directed the local officers to notify Wise to furnish such affidavit within thirty days. It was not stated in your office letter, however, that the entry would be held for cancellation in the event that Wise failed to furnish the affidavit called for.

A copy of said letter was sent by the local officers to Wise at Spangle, Washington, his record address, but it was returned unclaimed. The local officers having heard that Wise had moved to Marshall, Washington, then sent the notice to him at the latter named place. Wise, it appears, had left Marshall before the notice was sent there, but at the request of his father-in-law the letter was forwarded to Eugene, Oregon, where it was received and receipted for by Wise on August 30, 1894, as is shown by the registry return receipt bearing the stamp of the Eugene post-office.

Wise having failed to furnish the required affidavit, your office, on October 24, 1894, held his entry for cancellation. Notice of this action was sent by the local officers to Wise, first at Spangle and afterwards at Marshall and both notices were returned unclaimed.

June 5, 1895, your office canceled Wise's entry and on June 13, 1895, Kure made homestead entry for said land.

November 30, 1895, the attorney for the North American Loan and Trust Company filed in your office the affidavit that Wise had been called upon to furnish, and asked for a reinstatement of Wise's entry.

This application for reinstatement was at first denied by your office, but on motion for review a hearing was ordered to determine the interest of the company and whether a fraud had been perpetrated upon the company by Kure and Wise. The hearing was duly had and on January 22, 1897, the local officers rendered their decision adverse to the application for reinstatement.

From this decision Wise and the company appealed and on May 28, 1897, your office affirmed the action of the local officers, but on motion for review your office, by letter of October 13, 1897, revoked its former decision and held Kure's entry for cancellation.

Kure's appeal brings the matter before the Department.

The question presented by this case is whether due service of notice was made upon Wise of your office decision holding his entry for cancellation.

Rule 17 of the rules of practice, provides that notice in such cases shall be served personally or by registered letter through the mail to the last known address of the party. The address given by Wise at

the time of making final proof was Spangle, Washington, and as above stated, notice of the decision holding his entry for cancellation was sent there and returned unclaimed. It appears, however, that he had received a former notice at Eugene, Oregon, and the registry return receipt showing this was on file in the local office at the time the notice of the decision holding his entry for cancellation was mailed. At that time it was merely a question between Wise and the government and it was the duty of the local officers to exhaust all the record means at their disposal to obtain service upon him. They ignored the registry return receipt, however, which showed him to be at Eugene, Oregon, and thus failed to reach him. It is urged by the attorney for Kure that Wise's failure to receive the notice was due to his own negligence, he having failed to notify the local officers of his change of address. It is to be observed, however, that Wise had made final proof and received final certificate, that there was no contest against his entry, that two years had elapsed since the date of his final proof, and that he had sold the land and thus (as he probably supposed) severed his connection with it. Under the circumstances he cannot be held guilty of negligence in not notifying the local officers of his change of address. It is further alleged that as he received the first notice calling upon him to furnish a certain affidavit he was in default in not furnishing said affidavit within the time allowed. To this it is to be said that he was not notified that his entry would be held for cancellation in the event he failed to furnish said affidavit and consequently he probably failed to realize the importance of furnishing it.

It thus appearing that Wise was not properly notified of your office decision holding his entry for cancellation and that the affidavit called for has now been supplied, your office decision granting the application for reinstatement is hereby affirmed.

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#### RAILROAD GRANT—ADJUSTMENT.

#### IOWA RAILROAD LAND COMPANY.

Directions given for the adjustment of the railroad grant to the Cedar Rapids and Missouri River R. R. Co., made by the acts of May 15, 1856, and June 2, 1864.

Departmental decisions of July 9, 1896, 23 L. D., 79, and January 30, 1897, 24 L. D., 125, recalled and vacated.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *August 4, 1899.*

The Department, upon the petition of the Iowa Railroad Land Company, the successor in interest of the Cedar Rapids and Missouri River Railroad Company, has again considered the various plans submitted by your office letter of November 17, 1888, for adjusting the grants made by the acts of May 15, 1856 (11 Stat., 9), and June 2, 1864 (13

Stat., 95), in aid of the construction of a railroad from Lyons, on the Mississippi river, across the State of Iowa to the Missouri river.

After an extended and careful examination of these statutes and of the opinion of the supreme court of the United States in *Cedar Rapids and Missouri River Railroad Company et al. v. Herring* (110 U. S., 27), it is now directed that the said adjustment shall be proceeded with and made upon the following lines:

First. For that portion of the road constructed by the Cedar Rapids and Missouri River Railroad Company prior to June 2, 1864, the grant should be adjusted as one "in place," according to the act of May 15, 1856, under which it was constructed.

Second. The length of that portion of the road constructed under the act of May 15, 1856, is to be determined by the length of the corresponding portion of the original line of said road, as shown upon the map of definite location filed under that act.

Third. The modified line authorized by, located and constructed under the act of June 2, 1864, is that portion of the road which extends westerly from the point to which the road had been completed in its westerly course on June 2, 1864, to a connection with the Iowa branch of the Union Pacific Railroad at or near Council Bluffs.

Fourth. The grant made by the act of June 2, 1864, in aid of the construction of said modified line is one of quantity, amounting to six sections per mile.

Fifth. The length of the modified line constructed under the act of June 2, 1864, is to be determined by the line thereof shown upon the maps of definite location filed under that act.

Sixth. The grant in aid of the construction of said modified line is to be satisfied according to the act of June 2, 1864, out of any public lands of the description named in section four of that act, within fifteen miles of the original main line of said road as definitely located under the act of May 15, 1856; and if an amount of lands sufficient to satisfy the grant made in aid of the construction of such modified line shall not be found within the limits so described, the deficiency may be satisfied from any public lands of the description named along said modified line and within twenty miles thereof.

Seventh. Any lands belonging to what is known as the Des Moines River grant, which were erroneously certified on account of the grants here under consideration, under either the act of May 15, 1856, or that of June 2, 1864, can not be charged to these grants in their adjustment.

Eighth. The decree whereby the title to certain claimed swamp lands in Carroll county was quieted in the American Emigrant Company, as against claimants under the grants made in aid of the construction of this railroad, having been rendered in a suit in which the United States was not a party, is not conclusive upon the land department, does not relieve it from the duty of determining the character of those lands, and does not necessarily avoid any prior determination of their

character by the land department. It has been suggested that this decree was rendered in pursuance of an agreement between the parties to the suit and not as the result of any actual inquiry or contest respecting the character of the lands. If this suggestion proves to be true the decree would not be entitled to any consideration in the determination of this matter, however much it may be binding upon the parties and their privies. The matter will be carefully inquired into and considered by your office, and if it be found that the land department has heretofore determined that these lands were not swamp lands, and if it be further found that no fraud or mistake intervened sufficient to obviate this determination, they will be charged to the railroad company as a part of the lands properly certified on account of these grants.

Ninth. If any lands previously disposed of by the United States have been erroneously certified on account of the grants in aid of the construction of this road, the company, upon relinquishing the same, will be entitled to have any charges made against these grants, on account of such certification, canceled.

Tenth. The lands certified on account of the grant in aid of the construction of this road, made by the act of May 15, 1856, and which were sold by the Iowa Central Air Line Railroad Company prior to the resumption of the grant by the State of Iowa, are properly chargeable against the grant made under that act, and in the adjustment should be treated as partial compensation for the completion of that part of the road which was constructed under that act.

It is believed that this fully covers the matters submitted in your said office letter of November 17, 1888, and also the matters submitted in relation thereto by the Iowa Railroad Land Company.

The former departmental decisions herein of July 9, 1896 (23 L. D., 79), and January 30, 1897 (24 L. D., 125), are hereby recalled and vacated, and the directions herein given for the adjustment of the grants made in aid of the construction of said railroad are substituted in place thereof. Your office will prepare and submit a statement of the matters pertaining to the grants made in aid of the construction of this railroad, with a view to an early adjustment of the same, according to the views herein expressed.

## WAGON ROAD GRANT—BONA FIDE PURCHASER—CONFIRMATION.

JACOB C. MULLIGAN.

Confirmation of title in a bona fide purchaser, of lands previously certified under a wagon road grant, is not defeated by an application to enter tendered long after such certification, nor by the erroneous action of the local office in allowing such application to go of record.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(S. V. P.) August 7, 1899. (H. G.)

Jacob C. Mulligan appeals from the decision of your office of December 10, 1897, holding for cancellation his homestead entry, made October 8, 1894, for the SE.  $\frac{1}{4}$  of Sec. 9, T. 18 S., R. 3 W., in the Roseburg, Oregon, land district.

The matter in issue in this case was passed upon in the departmental decision of November 19, 1897 (unreported), referred to in the decision of your office, and the ruling therein was to the same effect as that in kindred cases disposed of at the same time. It was that the title of the California and Oregon Land Company, the purchaser in good faith from the Oregon Central Military Road Company, of lands previously certified thereto, is confirmed in the absence of adverse claims, although by the construction of the grant to said company said lands were excepted therefrom. (See California and Oregon Land Company, 25 L. D., 390.)

In the brief of counsel for appellant herein it is asserted, *inter alia*, that the selection list of the Oregon Central Military Road Company, the grantors of the California and Oregon Land Company, was never approved. The records of your office show that the tract was selected by the first mentioned company March 22, 1871, and that such selection was approved December 8, 1871. Mulligan, the appellant, made his homestead entry October 8, 1894, and the only standing that he can assert arises from the fact that one William P. Gardner filed a donation notification for the tract prior to the grant to the Oregon Central Military Road Company. This donation notification was relinquished by Gardner October 2, 1894.

Whatever rights Gardner might be held to have in the premises, were he still claimant to the land under his donation notification, as against the California and Oregon Land Company, the purchaser from the Oregon Central Military Road Company, Mulligan, whose claim to this land was initiated by the tender of a homestead application long subsequently to the certification of the land on account of the wagon road grant, gained no such right by the tender of his application as would bar confirmation of the title of the purchasers through the military road company, nor was his (Mulligan's) claim benefited by the erroneous action of the local officers in permitting his application to go of record.

The decision of your office is affirmed.

## MINING CLAIM—PROTEST—PROOF OF EXPENDITURE.

GILLIS *v.* DOWNEY.

An uncorroborated protest against a mineral application, involving matters subsequently made the basis of judicial proceedings by the protestant, is not entitled to further consideration by the Department, as to matters in issue before the court, where by stipulation of the parties the judicial proceedings are dismissed. Under amended rule 53 of the mining regulations proof of an expenditure of five hundred dollars on a group of mining locations held in common and embraced within a single application is sufficient, where the application is prevented by protests from passing to entry prior to July 1, 1898.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(S. V. P.) *August 8, 1899.* (E. B., Jr.)

This is an appeal by James E. Gillis from the decision of your office, dated February 16, 1897, dismissing his protest against the application, filed March 21, 1891, of Stephen W. Downey for patent to the Columbia placer mining claims.

The lands covered by the said application are embraced in twenty-two placer locations, aggregating, after deducting the exclusions stated in the application and notices, 2,813.603 acres, forming parts of sections 2, 3, 9, 10, 14, 15, 16, 21, 22, 23, 27, and 34, in township 14, north of range 79 west, Cheyenne, Wyoming, land district. The claims extend nearly through the said township from north to south along Douglas and Beaver creeks, the latter a tributary of the former. The said locations were made during the years 1887, 1889, and 1890, and, with one exception, were for one hundred and sixty acres, and were made by said Downey for himself and as attorney in fact for seven others, the exception being in the case of the Minnehaha location, which was made by one Thomas Hale and five others for one hundred acres. The locations were all on surveyed lands and conformed to the legal subdivisions thereof. In his application Downey claims to have acquired the sole possessory title to the lands covered thereby under the said locations and by mesne conveyances. No adverse claim was filed during the period of publication of notice of the application, which commenced March 28, 1891. Protests, filed by Peter Pfandler and others and M. N. Grant, May 25, 1891, and March 4, 1894, respectively, were pending against the application until December 12, 1896, when they were dismissed by your office.

The protest of Gillis was filed February 8, 1897, and is an affidavit made by Avery T. Holmes, as agent of Gillis. Protestant objects to the application of Downey and to the issuance of patent to him thereunder for such parts of the lands covered by his application—

as are particularly described as follows: the east half of section 22; the northwest quarter of section 23; the south half and the northeast quarter of section 14; and the south half of the south half of the northeast quarter of section 27; and the southeast quarter of section 15, a plat of said claims being hereto attached and made a part hereof and marked exhibit "B."

The grounds of protest, briefly stated, are:

1. That protestant is the owner and in possession of the Maud S., the Nancy Hanks, the J. I. C., and the Fake placer claims, which were located October 6, 1896, and lie within the lands claimed by said Downey and above particularly described and shown by the said plat marked exhibit "B."
2. That the lands so described and shown by said plat, except the portions thereof embraced in protestants' locations, contain no auriferous gravel, being mostly precipitous and rocky cliffs and mountains covered with a dense growth of pine forest, and more valuable for timber than for mining purposes, except that in certain portions thereof there are a number of lodes of gold and other mineral bearing quartz.
3. That Downey nor his grantors have never discovered gold or other precious metals on each twenty acres thereof.
4. That Downey nor his grantors never erected monuments or in any wise marked the boundaries of their claims until after affiant had entered and taken possession thereof.
5. That Downey nor his grantors have never done the annual assessment work upon each claim as required by law.
6. That Downey nor his grantors have not expended \$500 in labor or improvements on each location or claim.

March 9, 1897, the protestant, said Gillis, commenced a suit against said Downey in the circuit court of the United States for the district of Wyoming to quiet title and determine the right of possession to the lands embraced in the said Maud S., Nancy Hanks, J. I. C., and Fake placer claims in conflict with the said Columbia placer claims. This suit was heard and successively decided upon demurrer to the bill, by the said court and the United States circuit court of appeals, eighth circuit, and was by the latter, on February 28, 1898 (85 Fed. Rep., 483, 489), remanded to the circuit court with leave to the defendant to make answer to the bill and for further proceedings thereunder. It does not appear what further proceedings, if any, were had in the meantime in the circuit court, but it does appear that the said suit was dismissed there, November 12, 1898, upon stipulation of the parties.

It is not deemed necessary to consider and pass, severally, upon the grounds of Gillis's protest, nor upon the reasons given by your office for dismissing it. The protest is wholly uncorroborated, and although this defect was pointed out in your office decision, no corroborative evidence has been filed. Furthermore, as to all charges therein of failure upon the part of said Downey or his grantors to comply with the mining laws, the protest is made solely upon the information and belief of the affiant, the said Holmes. These are in themselves serious objections to the protest, and especially to any favorable consideration thereof by the Department after the adverse action thereon by your office. See in connection *Mitchell v. Brovo*, 27 L. D., 40. Again, with but one exception—the charge of failure to expend \$500 on each location involved—all the material allegations of the protest relate to and are in support of the adverse interest and right of possession claimed by Gillis in part of the lands covered by Downey's application. Instead of relying upon his protest before the land department Gillis

very properly commenced his suit in court, the forum clearly intended by the mining laws in which questions relating to the right of possession, arising between adverse claimants of public mineral lands, are to be heard and determined. (*Cain et al. v. Addenda Mining Company*, on review, 29 L. D., 62.)

In that suit all the material allegations made in the protest, with the single exception pointed out above, were made in the bill of complaint and would have been there put in issue and determined but for the dismissal of the suit. No copy of the stipulation upon which the suit was dismissed is among the papers here, but it is certain that such dismissal, if not upon his own motion, was with the consent of the plaintiff, the protestant here. In view of the objections hereinbefore noted to the protest itself and of the dismissal of protestant's suit in the court, either upon his own motion or with his express consent, it is not believed that any sufficient ground is shown for the further consideration of the protest or interference by the Department with the action of your office thereon as to any allegation which was in issue in the said suit.

As to the allegation of failure by Downey or his grantors to expend \$500 on each location or claim involved in this controversy, it is shown by the affidavit of Charles Bellamy and Robert W. Burkhardt, filed March 21, 1891, that the improvements made by the applicant and his grantors upon the several locations embraced in the Columbia claims,—in addition to a bed rock flume on the Nevada location, four feet wide, two feet deep and five hundred and sixty feet long, the foundations of which are in some places cut into the solid rock to the depth of over fifteen feet, and the value of which is not stated,—consist of an open cut, two ditches, a dam, reservoir, flume and other workings of the total value of nearly three thousand dollars. In his sworn report dated February 12, 1891, of the examination of the Columbia claim, Deputy Surveyor Charles Bellamy refers to and makes part of his report the said affidavit of himself and Burkhardt as to the character and extent of the improvements on the claims.

By an amendment, made March 14, 1898, to paragraph 53 of the mining regulations (26 L. D., 378), it was provided, among other things—

That as to all applications for patent made and passed to entry before July 1, 1898, or which are by protests or adverse claims prevented from being passed to entry before that time, where the application embraces several locations held in common, proof of an expenditure of five hundred dollars upon the group will be sufficient and an expenditure of that amount need not be shown to have been made upon, or for the benefit of, each location embraced in the application.

The application for patent to the Columbia claims comes within the purview of the foregoing provision of the mining regulations. It was prevented from being passed to entry before July 1, 1898, by the several protests of Pfandler and others, Grant and Gillis. It is not necessary, therefore, under the said application to show an expenditure of

\$500 by the applicant or his grantors upon each location embraced therein, and the charge contained in the protest upon that point is not well taken. It is not questioned that the proof of the expenditure of five hundred dollars upon the group of locations embraced in the Columbia application is sufficient.

No sufficient reason appearing upon careful consideration of the premises why the Department should disturb the action of your office dismissing the protest of Gillis, such action is, in accordance with the views herein expressed, hereby affirmed.

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MCINTOSH *v.* GREEN.

Motion for review of departmental decision of June 9, 1899, 28 L. D., 490, denied by Acting Secretary Ryan, August 10, 1899.

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RAILROAD GRANT—LANDS EXCEPTED.

UNION PACIFIC RY. CO. *v.* LANDRUM (ON REVIEW).

Land embraced within an unexpired pre-emption filing at the date of the grant made by the act of July 1, 1862, is excepted from the operation of said grant.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
S. V. P.) August 11, 1899. (F. W. C.)

With your office letter of August 4, 1899, was transmitted the motion filed on behalf of the Union Pacific Railway Company for review of departmental decision of June-29, last (28 L. D., 575), involving lots 2 and 3 of Sec. 19, T. 12 S., R. 23 E., Topeka land district, Kansas, in which it was held that said tract was excepted from the grant made by the act of July 1, 1862 (12 Stat., 489), to aid in the construction of the Union Pacific Railroad, because, at the date of the passage of the act making said grant said lots were included in the subsisting pre-emption filing of one William H. Sparawk, filed September 2, 1859, alleging settlement August 1, 1859. Proof and payment were never made under said filing, as required by law, but as the tract was not offered until August 3, 1863, said filing had not, at the date of the passage of the act making the grant for said company, expired, and the tract was therefore not public land within the meaning of the granting act and was therefore not included in such grant. In support of said departmental decision the decision in the case of Northern Pacific R. R. Co. *v.* Smalley (15 L. D., 36), was referred to, which decision was based upon the decision of the supreme court in the case of *Bardon v. Northern Pacific R. R. Co.* (145 U. S., 535).

In the motion under consideration, referring to the decision of the court above cited, it is said:

3. The decision in the *Bardon* case, *supra*, was based upon the Northern Pacific grant of July 2, 1864, and is only properly applicable to that grant, there being a

very material difference in the language used in the grants to the Union Pacific and Northern Pacific, respectively.

4. Section 3 of the Northern Pacific grant, July 2, 1864 (13 Stat., 365) specifically provides that—

‘Whenever, prior to said time,—(of definite location)—‘any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.’

It was upon this language and construing that grant alone that the court made its finding in the *Bardon* case.

5. There is no such provision in the Union Pacific grant, section 3 of the act of July 1, 1862, clearly establishing and fixing the time of the *definite location* of the road as being the time in relation to which the condition of the land shall be ascertained. The language of that section containing the excepting clause is:

‘. . . not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is *definitely fixed*.’

6. In other words, if a tract of land within the limits of the Union Pacific grant was vacant public land of the United States at the time of the *definite location* of the road it must necessarily pass under the grant by the express words thereof regardless of what its condition, in respect of entries under the public land laws, may have been before that time, or might become after that time.

7. The Union Pacific grant passed lands free from adverse claim at the time of *definite location*, irrespective of the condition thereof at the date of the grant.

An analysis of the decision of the court in the *Bardon* case will not support the contention of counsel. In said opinion it was stated:

It is thus seen that when the grant to the Northern Pacific Railroad Company was made, on the 2d of July, 1864, the premises in controversy had been taken up on the pre-emption claim of Robinson, and that the pre-emption entry made was uncanceled; that by such pre-emption entry the land was not at the time a part of the public lands; and that no interest therein passed to the company. The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws. All land, to which any claims or rights of others have attached, do not fall within the designation of public land. The statute also says that whenever, prior to the definite location of the route of the road, and of course prior to the grant made, any of the lands which would otherwise fall within it have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands are to be selected in lieu thereof under the direction of the Secretary of the Interior. There would therefore be no question that the pre-emption entry by the heirs of Robinson, the payment of the sums due to the government having been made, as the law allowed, by them after his death, took the land from the operation of the subsequent grant to the Northern Pacific Railroad Company, if the pre-emption entry had not been subsequently canceled. But such cancellation had not been made when the act of Congress granting land to the Northern Pacific Railroad Company was passed; it was made more than a year afterward. As the land pre-empted then stood on the records of the Land Department, it was severed from the mass of the public lands, and the subsequent cancellation of the pre-emption entry did not restore it the public domain so as to bring it under the operation of previous legislation, which applied at the time to land then public. The cancellation only brought it within the category of public land in reference to future legislation. This, as we think, has long been the settled doctrine of this court.

It will thus be seen that no particular stress was laid upon the clause in the Northern Pacific grant providing for indemnity for disposals prior to definite location and, of course, prior to the date of the act, but that the decision of the court rested upon the ground that the grant was only of public lands, and that within the meaning of the granting act "public lands" was construed to include only those lands open to sale or other disposition under the general land laws and to which no claims or rights of others had attached.

The third section of the act of July 2, 1864 (13 Stat., 365), being the granting section in the act making the grant to the Northern Pacific Railroad Company, grants—

every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office;

The third section of the act of July 1, 1862, *supra*, being the granting section in the act making the grant for the Union Pacific Railroad, grants—

every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed.

It will thus be seen that the granting clauses are practically the same. These grants have been uniformly construed to be present grants passing the title by relation as of the date of the act. *Deseret Salt Co. v. Tarpey* (142 U. S., 241).

In the case of *St. Paul and Pacific v. Northern Pacific Railroad Co.* (139 U. S., 1), in referring to the grant to the Northern Pacific Railroad Company, it was said:

As seen by the terms of the third section of the act, the grant is one *in praesenti*; that is, it purports to pass a present title to the lands designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, pre-emption or other disposition previous to the time the definite route of the road is fixed. The language of the statute is 'that there be, and hereby is, granted' to the company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future.

The previous decision of the Department holding the tract under consideration to have been excepted from the railroad grant is therefore adhered to, and the motion is accordingly denied.

## MINING CLAIM—ADVERSE—TOWNSITE—EXPENDITURE.

## BRADY'S MORTGAGEE v. HARRIS ET AL.

The withdrawal of an adverse claim is a waiver of whatever right the claimant had under the mining laws to the ground in conflict, and leaves the possessory right thereto in the applicant for patent.

The title to land of known mineral character at the date of a townsite entry does not pass by the patent issued thereon.

In the case of a mineral entry made prior to July 1, 1898, it is not necessary that an expenditure of five hundred dollars be shown to have been made upon, or for the benefit of, each location embraced therein, it being sufficient if proof of such expenditure is shown upon the locations taken together.

A deed in escrow to land embraced within a mineral application, not delivered until after entry, does not defeat the right of the applicant to make entry of such land.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *August 12, 1899.* (E. B., Jr.)

It appearing in the matter of mineral entry No. 3624, made December 12, 1889, by William Brady, for the Parole and Morning Star lode mining claims, survey No. 4849, then Central City, now Denver, Colorado, land district, that said claims were "wholly in conflict" with the townsites of Black Hawk and Central City, Colorado, entered April 11, 1873, and May 16, 1873, respectively, and subsequently patented, the local office was directed by your office, February 12, 1897, to order a hearing to determine whether valuable mineral bearing veins or lodes were known to exist within the ground embraced in said claims prior to the townsite entries. The hearing was duly held at the local office May 27, 1897. Thomas Tinsley, claiming an interest as mortgagee of the entryman (then deceased), appeared by attorney, but the authorities of the cities of Black Hawk and Central City, though duly notified, made default.

On May 25, 1897, two days prior to the hearing, there was filed in the local office an application by Emma J. Harris, as executrix of the estate of Emma J. Harris, deceased, for the Puzzle lode claim, survey No. 11,510. This application was rejected by the local office, May 27, 1897, for the reason that the Puzzle claim was included in the patented townsite of Black Hawk and also conflicted with the entered Parole and Morning Star claims. From this rejection Harris appealed, June 24, 1897. An attorney named Leiper filed an affidavit of Harris the day of the hearing, protesting against the issue of patent to the Morning Star and Parole mining claims, and attempted in her behalf to cross-examine claimant Tinsley's first witness. Objection being made by Tinsley to this cross-examination and sustained by the local officers, an exception was noted by Harris' attorney, who does not appear to have made any further attempt to cross-examine the witnesses, nor to

have offered any testimony. The local officers rendered their decision in the premises, June 25, 1897, holding therein as follows:

The testimony shows that the ground embraced in mineral entry No. 3624 was known to be mineral bearing before the patenting of the townsites of Central City and Black Hawk, and that the veins in the Parole and Morning Star lodes in said mineral entry 3624 were worked profitably before and since the patenting of said townsites.

We dismiss the protest filed by Emma J. Harris, executrix, for the want of jurisdiction. The hearing was ordered for a specific purpose, hence no extraneous matters could be entertained.

From that decision Harris also appealed. The municipal authorities of Central City and Black Hawk were duly notified of the decision, but took no appeal therefrom.

June 7, 1897, there were filed in your office an affidavit of one John D. Peregrine, and certain abstracts of title and location certificates in support of Harris' protest, accompanied by an affidavit by Harris calling attention to her protest and rejected application. In its decision of October 19, 1897, your office, considering the entire record upon the appeal of Harris, found and held as follows:

I find by examining the record in mineral entry No. 3624, that during the period of publication therein, the General Tom Thumb claimants filed an adverse claim which was subsequently withdrawn. From an abstract filed by the protestants herein it appears that prior to entry the Morning Star and Parole claimant deeded to the General Tom Thumb claimant the ground in conflict.

The entry includes this conflict which should have been excluded therefrom. It is established by the testimony taken at the hearing and admitted in the affidavits of protest that a vein carrying mineral exists in the General Tom Thumb claim.

It is however alleged that no discovery has been made on those portions of the Parole and Morning Star claims outside of the General Tom Thumb. This is an allegation which if proven would be sufficient to require the cancellation of mineral entry No. 3624 in its entirety. The testimony taken at the hearing held is to the effect that upon the Parole and Morning Star claims, there were at date of the townsite entries, known mines, which were then and have since been profitably worked for their product. One witness states that the claim was then known as the Yellow Jacket or Red Jacket. The testimony of the other witness is not specific. This testimony is sufficient on which to base a decision that the land covered by the Yellow Jacket or General Tom Thumb claim was under the law excepted from the townsite patents.

It is not established, however, that the Parole and Morning Star claims were so excepted. I am accordingly of the opinion that the protestants should have been allowed to intervene and submit testimony on the issue as to whether the claims last mentioned were at date of the townsite entries, or at any time, known mines or valid mining claims capable of being profitably worked. The question as to whether the Puzzle lode was a known mine at date of the townsite entries will have to be considered, if at all, upon the conclusion of the proceedings relative to mineral entry No. 3624.

Your decision rejecting the mineral application for the Puzzle lode is affirmed, mineral entry No. 3624 is held for cancellation to the extent of that portion of the ground deeded to the General Tom Thumb claimants, and you will, should this decision become final, order a hearing to determine whether veins or lodes bearing valuable mineral have been discovered within the Parole and Morning Star claims, and, if so, when such veins were discovered.

An appeal by Tinsley brings the case to the Department.

In her affidavit of protest, which, as to all material allegations, is made upon information and belief, said Harris alleges that she is the owner of the Puzzle lode claim; that the original discovery of the Puzzle lode was made August 10, 1870; that the shaft, machinery and improvements of the Puzzle lode are "upon the Parole lode;" that in addition to the right she acquired under the original discovery of the Puzzle lode, the city of Black Hawk, on January 4, 1894, conveyed all the surface rights and interests it had in the Puzzle claim to her, the said Harris, which conveyance was more than two years prior to a certain deed by the city of Black Hawk to Tinsley for the surface of the Parole and Morning Star claims; that the pretended discovery shaft of the Parole lode is not ten feet deep and has no vein; that there has not been \$250 worth of work done upon the Parole claim; and that there has been no discovery of a vein or lode from or within the cross cut entering the Morning Star and Parole claims. This protest was without corroboration until the filing of the affidavit of said Peregrine, wherein it is stated that from personal examination affiant knows there is no "mining or mineralized vein" in the discovery shafts of the Parole and Morning Star claims, "nor in the cross cut tunnel upon the Morning Star lode," nor in two other shafts on the Parole. Affiant further states, however, that there is a rich vein of mineral in the General Tom Thumb or Yellow Jacket claim, and that from such vein rich ore has been taken.

The Parole and Morning Star claims were located January 1, 1883, and are situated in one of the oldest and best known mining regions of Colorado, partly in the SW.  $\frac{1}{4}$  of Sec. 7, T. 3 S., R. 72 W., but chiefly in what would be, as shown by protraction of the lines of the public survey, the SE.  $\frac{1}{4}$  of section 12 of township 3 south; range 73 west, if such survey were extended over the land adjoining said section 7 on the west. All of section 7, in which the townsite of Black Hawk is situated, as well as several other sections in the same township, were returned as mineral land in 1867. The public survey was not then and has not since been extended over any portion of what would be, if surveyed, township 3 south, range 73 west, for the reason, as disclosed by informal inquiry of your office, that the rough and mountainous character of the country, the absence of any body of agricultural land of appreciable size, and the presence of a very large number of mining claims therein seemed to render such survey unnecessary. The records of your office show that several lode mining claims in the immediate vicinity of the ground involved in this controversy were entered in 1871 and 1873 prior to the entries of the said townsites and have since been patented; and that the Mammoth lode claim, survey No. 287 and the Pederson lode claim survey No. 843, each of which embraces ground within the lines of the Parole and Morning Star locations, but is excluded from the said entry No. 3624, were entered in 1874 and 1883,

respectively, and have since been patented. They also show that other entered and patented lode claims, too numerous to mention, are situated in close proximity to the Parole and Morning Star, and that at least five-sixths of the entire said southeast quarter are covered by surveyed mining claims.

The townsite authorities having, as already stated, made default at the hearing, and no opposing testimony being offered, but two witnesses were examined in behalf of the claimant of the Parole and Morning Star. The testimony of these witnesses is to the effect that the ground embraced in these claims was known to be valuable for minerals and was covered by mining claims which were held and profitably worked, at and prior to the dates of the said townsite entries. One of these witnesses refers especially to a claim known as the Yellow Jacket or Red Jacket, also referred to herein as the General Tom Thumb, and as lying wholly within the Parole and Morning Star locations, from which, in 1872 and again in 1878, he took ore yielding from \$40 to \$60 per ton. The affidavits of several witnesses, filed since the hearing, in support of the entry in question, strongly corroborate the testimony taken at the hearing, and also show discoveries of mineral bearing veins within the Parole and Morning Star claims outside the General Tom Thumb claim.

The municipal authorities by their silence acquiesce in the claim that the ground in question was known to be valuable for its mineral deposits at the dates of the townsite entries. They have never, at any time, so far as appears, opposed the application for patent thereto. Protestant alleges, as already stated, that the city of Black Hawk has conveyed to her whatever surface rights it had in the ground located as the Puzzle claim. The claimant of the Parole and Morning Star has filed a duly certified copy of a quitclaim deed, dated January 6, 1896, to said Tinsley from the city of Black Hawk by its mayor and clerk, to the ground covered by the said entry lying within the limits of that townsite. If, as would appear to be the case, the ground embraced within the Parole and Morning Star locations was known to be valuable for its mineral contents at the date of the townsite entry, no title to such ground was conveyed by the townsite patent, and as it does not appear that the city of Black Hawk acquired title otherwise, the alleged conveyance to Harris and the deed to Tinsley could not pass any title thereto. If such conveyance and deed, assuming that there was a conveyance to Harris as alleged, are of any value whatever as evidence in the case it is only to show that the city of Black Hawk does not object to the issue of patent upon the said entry, and as tending, possibly, to show that the municipal authorities thereof recognize and assent to the claim that the land is mineral and was known to be such at the time of that townsite entry.

Upon very careful consideration of the evidence the Department is well convinced that the ground embraced in the said mineral entry

was known to be valuable mineral land at the date of the said townsite entries and was therefore excepted from the townsite patent.

Relative to the protest of Harris, it appears that although due notice of the application for patent to the Parole and Morning Star was given in 1887, no adverse claim was filed in behalf of the alleged Puzzle location; that the Puzzle claimant not only thereby waived all claim to the ground in conflict, but impliedly admitted the validity of the Parole and Morning Star locations including, of course, the discovery of mineral; that she is herself directly asserting the mineral character of so much of the land involved as is included in the conflict between the Puzzle location and the ground embraced in mineral entry No. 3624; and that she admits, by the affidavit of her only corroborating affiant, that a valuable vein of mineral exists in that ground outside of such conflict. It is true that affiant states that such vein is within the General Tom Thumb claim, but that fact is immaterial. By the withdrawal of their adverse claim the General Tom Thumb claimants waived whatever right they had under the mining laws to the ground embraced in their location, and left the possessory right thereto in the applicant for the Parole and Morning Star, who was thus entitled beyond question to the benefit of all discoveries made therein by himself or his grantors.

The entry in question having been made prior to July 1, 1898, it is not necessary that an expenditure of \$500 be shown to have been made upon or for the benefit of each location embraced therein, it being sufficient if proof of such expenditure is shown upon the locations taken together (R. S. Hale, 28 L. D., 524; and Mayflower Gold Mining Co., 29 L. D., 7). The allegation of the protest that \$250 worth of labor has not been expended upon the Parole claim is therefore not material, it appearing that \$500 had been duly expended upon the Parole and Morning Star claims by the applicant for patent or his grantors.

In view of these facts and of the conclusion already reached as to the known character of the land involved prior to the townsite entries, and of the evidence of discoveries of mineral within the limits of the Parole and Morning Star claims, both within and without the General Tom Thumb claim, since the townsite entries, the Department is constrained to hold that no sufficient reason is shown for the proposed hearing upon the protest of Harris, and the protest is accordingly hereby dismissed.

It appears that as consideration for the withdrawal of the General Tom Thumb adverse claim, the applicant, the said Brady, promised to convey to the claimants of the General Tom Thumb claim the ground embraced thereby after the allowance of the entry for the Parole and Morning Star, and that in pursuance of the agreement between the parties Brady executed and placed in escrow, prior to the entry, a deed to such ground, which was not to be delivered until after entry. It is too well settled to need any citation of authority that such deed until

delivered pursuant to the agreement, or with the consent of the maker thereof, passed no title. The deed was not delivered or recorded until in January 1890. Until that time then the right to the ground covered thereby was in Brady, and such ground was properly embraced in the entry, and it was error on the part of your office to hold the entry for cancellation to that extent.

The decision of your office is modified in accordance with the views expressed and action taken herein.

It is not deemed necessary to pass upon any other question raised by the appeal, nor upon the motion by the resident attorney of Tinsley to strike from the files a certain paper and exhibits filed May 22, 1899, by counsel for Harris.

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BRANDON *v.* TULLER.

Motion for review of departmental decision of June 6, 1899, 28 L. D., 485, denied by Acting Secretary Ryan, August 12, 1899.

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RAILROAD GRANT—PATENTEE—SUCCESSOR IN INTEREST.

UNION PACIFIC LAND COMPANY.

Directions given that hereafter patents shall issue to the Union Pacific Land Company, as the successor in interest of the Kansas Pacific Railway Company, for any lands which the latter company is entitled to under congressional grants to aid in the construction of the Kansas Pacific Railway.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *August 14, 1899.* (V. B.)

On July 17, 1899, two petitions of the Union Pacific Land Company were filed, with exhibits, in this Department, requesting that directions be given for the issuance of patents to said Land Company for the lands included in the land grant to the Kansas Pacific Railway Company. One of said petitions embraces the lands included in said grant east of the three hundred and ninety-fourth mile post, and the other, the lands included in said grant west of the three hundred and ninety-fourth mile post.

The exhibits accompanying the petitions include a duly certified copy of the foreclosure proceedings in certain causes, instituted by lien creditors, pending in the United States circuit court for the district of Kansas, to which causes the United States of America were parties. Decrees were entered directing the selling of all the lands theretofore granted by Congress to the Leavenworth, Pawnee Western Railroad Company, or the Union Pacific Railway Company, eastern division, or the Kansas Pacific Railway Company, not theretofore sold or conveyed by either of said companies, or by the Union Pacific Rail-

way Company, successor by consolidation with the Kansas Pacific Railway Company.

In pursuance of these decrees all of said lands described therein were, after due notice, sold to the Union Pacific Land Company, a duly incorporated company under the laws of the State of Utah, to which company, with the approval of the respective courts, deeds were executed by a special master authorized thereunto, conveying title to all of said lands. A copy of the articles of incorporation of said Land Company also accompanies said exhibits, from which it appears that said company is competent to purchase and hold said property.

In view of the foregoing, you will hereafter issue patents to said Union Pacific Land Company, the successor in interest of said companies, as heretofore recited, for any lands which the former companies are entitled to under congressional grants made to aid in the construction of what is known as the Kansas Pacific Railway.

Herewith are sent to you said petitions and papers accompanying the same, to be placed in the files of your office. You will notify resident counsel of petitioners of the decision herein reached.

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ALASKAN LANDS—WATER FRONT—ACT OF MAY 14, 1898.

INSTRUCTIONS.

In determining the extent of the water front of claims under sections 1 and 10, act of May 14, 1898, abutting on navigable waters, the measurement should be made along the meanders of the bank or shore.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *August 15, 1899.* (F. W. C.)

In your office letter of April 24, 1899, is submitted for the consideration of this Department the question as to whether, in the survey of claims in the district of Alaska, abutting on navigable water, provision for the entry of which is contained in sections one and ten of the act of May 14, 1898 (30 Stat., 409), the extent of the claim along the shore is to be measured along the meanders thereof.

Section one of the act, in extending the homestead laws to the district of Alaska, provides "that no entry shall be allowed extending more than eighty rods along the shore of any navigable water," and section ten, in providing for the acquisition of lands occupied for the purposes of trade, manufacture or other productive industry, declares:

That no entry shall be allowed under this act on lands abutting on navigable water of more than eighty rods: *Provided further,* That there shall be reserved by the United States a space of eighty rods in width between tracts sold or entered under the provisions of this act on lands abutting on any navigable stream, inlet, gulf, bay, or seashore, and that the Secretary of the Interior may grant the use of such reserved lands abutting on the water front to any citizen or association of citizens, or to any corporation incorporated under the laws of the United States or

under the laws of any State or Territory, for landings, and wharves, with the provision that the public shall have access to and proper use of such wharves, and landings, at reasonable rates of toll to be prescribed by said Secretary, and a roadway sixty feet in width, parallel to the shore line as near as may be practicable, shall be reserved for use of the public as a highway . . . . *Provided further*, That all claims substantially square in form and lawfully initiated, prior to January twenty-first, eighteen hundred and ninety-eight, by survey or otherwise, under sections twelve and thirteen of the act approved March third, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, chapter five hundred and sixty-one), may be perfected and patented upon compliance with the provisions of said act, but subject to the requirements and provisions of this act, except as to area, but in no case shall such entry extend along the water front for more than one hundred and sixty rods.

The several expressions, viz: "along the shore of any navigable water," "abutting on navigable water," "abutting on any navigable stream, inlet, gulf, bay or seashore," and "along the water front," are manifestly intended to mean one and the same thing, and to describe one of the boundaries of claims which abut on navigable water.

The rule is well established that where the bank of a stream or shore line is made a boundary for a specified distance, the measurement is to be with the meanders of the bank or shore and not in a direct line, and this rule controls in ascertaining the extent of the water front of all claims under sections one and ten of this act abutting upon navigable water. The limitations contained in the statute apply to navigable water only, and where in measuring the shore line a non-navigable stream, inlet, gulf or bay is encountered the sinuosities of such non-navigable water will not be reckoned in ascertaining the extent of the water front.

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HOMESTEAD CONTEST—SINGLE WOMAN—DIVORCE.

CLINE *v.* URBAN.

The good faith of an entrywoman in securing a decree of divorce, as affecting her qualifications under the homestead law, is not a matter for investigation through a contest under the act of May 14, 1880.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *August 15, 1899.* (J. R. W.)

September 19, 1893, Amy Urban made homestead entry 155, for the SW.  $\frac{1}{4}$  of Sec. 10, T. 22 N., R. 6 W., Enid land district, Oklahoma.

July 5, 1898, Henry Cline applied to contest said entry, his affidavit alleging, as amended July 18, 1898:

He has been informed and believes said entry was made by fraud against the United States; said Amy Urban was not at time of making said entry a qualified entryman in that she was at said date of entry living with Joseph Urban as his wife and has continued to live with him as his wife to the present time; prior to said entry her husband had exhausted his homestead right. Amy and Joseph Urban pretended to obtain a divorce before a probate court in Oklahoma county, Oklahoma Territory, prior to said entry, but said pretended divorce proceedings were fraudulent and collusive between said Ana and Joseph Urban; the sole object and purpose

of said divorce proceeding was to permit said Amy Urban to enter land in the Cherokee Outlet because said Joseph Urban had exhausted his rights under the homestead law, and said Amy and Joseph Urban have repudiated said divorce proceedings by acts and statements and have resumed the marriage relation since said proceeding was had and prior to date of said entry; at date of said entry said Amy Urban was neither *bona fide* a single person, head of a family, widow, or deserted wife.

Hearing was set for August 23, 1898, and notice was served personally, July 18, 1898, at which time her attorney filed motion to dismiss, because—

1. The question raised by affidavit in this case has been *res adjudicata*.
2. The register and receiver, nor other officer or tribunal of the Interior Department has jurisdiction to determine as to the legality or illegality of a decree of a court of record.

The register and receiver sustained the motion and plaintiff appealed to your office, which, by decision of May 23, 1899, sustained the local officers and dismissed the contest, and plaintiff further appealed to the Department.

It appears from your decision that Thomas J. Offield filed contest against this same entry on April 24, 1894, on the ground of the fraudulent and collusive character of the divorce proceeding between Amy and Joseph Urban, which case was tried upon its merits, the local officers finding in favor of Offield. Mrs. Urban appealed to your office, which, September 8, 1896, reversed the action below. The contest was dismissed March 6, 1897, and the entry left intact.

The only question raised by the appeal is whether your office erred in refusing to order a hearing upon this affidavit of contest. It is believed that it did not. The charges contained therein are so indefinite in character that it is difficult to determine exactly the nature of the cause of action; but it is gathered therefrom that it is meant to be charged that Amy Urban is in fact a married woman, because a certain divorce obtained by her prior to making said entry was procured through collusion and fraud between herself and her former husband.

There is no allegation that the decree of divorce has been annulled or that for any reason save collusion of the parties it was irregular or voidable. It must be assumed that if such a decree was rendered it was regular in form, pronounced by a court of competent jurisdiction, with full jurisdiction of the parties. The intent of the parties in the procurement of such divorce is not a matter for investigation by the Department under contest proceedings initiated under the act of May 14, 1880. It is true that in the case of *Leonard v. Goodwin* (14 L. D., 570) the Department did consider the good faith of certain divorce proceedings in determining adverse rights said to have been secured prior to the decree of divorce; but without discussing the soundness of that decision, it is enough to say that this case presents no such question as was involved in the case referred to.

The decision is affirmed.

## RAILROAD GRANT—SECTION 1, ACT OF APRIL 21, 1876.

CENTRAL PACIFIC R. R. CO. *v.* DOFF ET AL.

Under the grant made by the acts of July 1, 1862, and July 2, 1864, the title of the company to the designated sections vests immediately upon the definite location of the road, irrespective of any order of withdrawal by the Land Department, or notice of such order, and thereafter such lands are beyond control or disposition by Congress, in the absence of a breach of condition subsequent; the confirmatory provisions of section 1, act of April 21, 1876, are therefore not applicable, where, prior to the passage of the act, title has passed by definite location, and been earned by the construction of the road.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) August 15, 1899. (F. W. C.)

Appeal has been filed on behalf of the Central Pacific Railroad Company from your office decision of April 23, 1898, in which it was held that certain entries, made by Genettie B. Doff *et al.*, covering lands in the Blackfoot land district, Idaho, were confirmed by section one of the act of April 21, 1876 (19 Stat., 35).

There seems to be no dispute about the facts. All the lands involved are portions of odd numbered sections and within the limits of the grant made by the acts of July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 356), to aid in the construction of the Central Pacific railroad.

The line of the road was definitely located by the filing and acceptance of the map thereof October 20, 1868. The lands in question were then free from claims of every character. The entries in question were allowed between July 30, 1890, and April 28, 1894, long subsequent to both the definite location and the construction of the road, their allowance being due to the fact that upon the diagram first transmitted by your office to the Boise City land office, showing the limits of the grant within that district, the northern limit of the grant was incorrectly described, and the mistake was not corrected until, by your office letter of February 4, 1896, a correct diagram was forwarded to the local office.

The decision under review holds that these entries were allowed prior to the receipt at the local office on February 10, 1896, of the corrected diagram, and that they are therefore confirmed by section one of the act of April 21, 1876, *supra*.

By section three of the act of July 1, 1862, the grant of lands is made in these words:

SEC. 3. *And be it further enacted,* That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed.

By section four of the act of July 2, 1864, the grant was increased from five alternate sections per mile on each side, and within ten miles, of the line of railroad, to ten alternate sections per mile on each side within the limits of twenty miles.

In determining when, under a similar grant, the line of road became definitely fixed and when the right of the railroad company to the alternate sections granted became vested, the supreme court said, in *Van Wyck v. Knevals* (106 U. S., 360, 366):

The inquiry then arises, When is the route of the road to be considered as "definitely fixed" so that the grant attaches to the adjoining sections? The complainant in the court below, who derives his title from the company, contends that the route is definitely fixed, within the meaning of the act of Congress, when the company files with the Secretary of the Interior a map of its lines, approved by its directors, designating the route of the proposed road. On the other hand, the defendant,—the appellant here,—who acquired his interest by a subsequent entry of the lands and a patent therefor, contends that the route cannot be deemed definitely fixed, so that the grant attaches to any particular sections and cuts off the right of entry thereof until the lands are withdrawn from market by order of the Secretary of the Interior, and notice of the order of withdrawal is communicated to the local land-officers in the districts in which the lands are situated.

We are of opinion that the position of the complainant is the correct one. The route must be considered as "definitely fixed" when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the Secretary of the Interior the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior and accepted by that officer, the route is established; it is, in the language of the act, "definitely fixed," and cannot be the subject of future change, so as to affect the grant, except upon legislative consent. No further action is required of the company to establish the route. It then becomes the duty of the Secretary to withdraw the lands granted from market. But if he should neglect this duty, the neglect would not impair the rights of the company, however prejudicial it might prove to others. Its rights are not made dependent upon the issue of the Secretary's order, or upon notice of the withdrawal being given to the local land-officers. Congress, which possesses the absolute power of alienation of the public lands, has prescribed the period at which other parties than the grantee named shall have the privilege of acquiring a right to portions of the lands specified, and neither the Secretary nor any other officer of the Land Department can extend the period by requiring something to be done subsequently, and until done, continuing the right of parties to settle on the lands as previously. Otherwise, it would be in their power, by vexatious or dilatory proceedings, to defeat the act of Congress, or at least seriously impair its benefit. Parties learning of the route established—and they would not fail to know it—might, between the filing of the map and the notice to the local land-officers, take up the most valuable portions of the lands. Nearness to the proposed road would add to the value of the sections and lead to a general settlement upon them.

In *Kansas Pacific Railway Co. v. Dunnmeyer* (113 U. S., 629, 634, 640), this ruling was applied to a grant made by the said acts of July 1, 1862 and July 2, 1864, the court saying:

We are of opinion, that under this grant, as under many other grants containing the same words, or words to the same purport, the act which fixes the time of definite location is the act of filing the map or plat of this line in the office of the Commissioner of the General Land Office.

The necessity of having certainty in the act fixing this time is obvious. Up to that time the right of the company to no definite section, or part of section, is fixed. Until then many rights to the land along which the road finally runs may attach, which will be paramount to that of the company building the road. After this no such rights can attach, because the right of the company becomes by that act vested. It is important, therefore, that this act fixing these rights shall be one which is open to inspection. At the same time it is an act to be done by the company. The company makes its own preliminary and final surveys by its own officers. It selects for itself the precise line on which the road is to be built, and it is by law bound to report its action by filing its map with the Commissioner, or rather, in his office. The line is then fixed. The company cannot alter it so as to affect the rights of any other party. Of course, as soon as possible, the Commissioner ought to send copies of this map to the registers and receivers through whose territory the line runs. But he may delay this, or neglect it for a long time, and parties may assert claims to some of these lands, originating after the company has done its duty—all it can do—by placing in an appropriate place, and among the public records, where the statute says it must place it, this map of definite location, by which the time of the vestiture of their rights is to be determined. We concede, then, that the filing of the map in the office of the Commissioner is the act by which “the line of the road is definitely fixed” under the statute. *Van Wyck v. Knevals*, 106 U. S., 360.

\* \* \* \* \*

The land granted by Congress was from its very character and surroundings uncertain in many respects, until the thing was done which should remove that uncertainty, and give precision to the grant. Wherever the road might go, the grant was limited originally to five sections, and, by the amendment of 1864, to ten sections on each side of it within the limit of twenty miles. These were to be odd-numbered sections, so that the even-numbered sections did not pass by the grant. And these odd-numbered sections were to be those “not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead right had not attached at the time the line of said road is definitely fixed.” When the line was fixed, which we have already said was by the act of filing this map of definite location in the General Land Office, then the criterion was established by which the lands to which the road had a right were to be determined. Topographically this determined which were the ten odd sections on each side of that line where the surveys had then been made. Where they had not been made, this determination was only postponed until the survey should have been made. This filing of the map of definite location furnished also the means of determining what lands had previously to that moment been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had attached; for, by examining the plats of this land in the office of the register and receiver, or in the General Land Office, it could readily have been seen if any of the odd sections within ten miles of the line had been sold, or disposed of, or reserved, or a homestead or pre-emption claim had attached to any of them.

The lands in controversy being entirely free at the time of the definite location of the line of road, October 20, 1868, it is clear under these decisions that the right of the railroad company then attached and became vested. The lands then ceased to be public lands and the public land laws were no longer applicable to them.

In the recent decision of this Department in the case of *William E. Inman v. Northern Pacific Railroad Co.* (28 L. D., 95), in construing the confirmatory act invoked by your office decision, it was said:

Where before the act of April 21, 1876, the legal title to lands had thus passed to a railroad company beyond the power of revocation by Congress, excepting for non-

performance of conditions subsequent, such lands are not subject to disposition under that act in the absence of a forfeiture for breach of a condition subsequent. A construction must be given to the act which does not impute to Congress an intent to divest legal titles which had theretofore vested and respecting which no breach of a condition subsequent was asserted. Examining its provisions in the light of this rule it is clear that the word "withdrawal" there employed refers to withdrawals of lands remaining subject to control and disposition by Congress and not to prior withdrawals made contemporaneously with the vesting of title in the grantee company.

Applying this ruling to the facts in the case under consideration it is seen that the title to these lands passed to the railroad company October 20, 1868, upon the definite location of the line of road, and was not thereafter subject to control or disposition by Congress, except in the event of a breach of a condition subsequent, which did not occur. The railroad was constructed, and the portion opposite these lands was accepted by the President, under the terms of the grant, in 1869. Thus long before the act of April 21, 1876, the title to the lands in controversy had passed to and been fully earned by the railroad company. These entries are therefore not within the operation of that act and can not take precedence over the railroad grant. Your office decision is accordingly reversed and the papers in the case are herewith returned.

In view of the hardships of these entrymen, resulting from inadvertence on the part of your office, it is suggested that the attention of the railroad company be invited thereto and that it be requested to relinquish its claim to these lands under the provisions of the act of June 22, 1874 (18 Stat., 194), to the end that the entrymen may be secured in their possession of the lands in question, and the company be entitled to select other lands in lieu thereof, as provided for in said act.

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UNION PACIFIC RY. CO. *v.* GRANT.

Motion for review of departmental decision of January 13, 1899, 28 L. D., 18, denied by Acting Secretary Ryan, August 17, 1899.

## CLASSIFICATION OF LANDS—ACT OF FEBRUARY 26, 1895.

LAMB ET AL. *v.* NORTHERN PACIFIC R. R. CO.

To justify a hearing as to the character of land classified under the act of February 26, 1895, where the protest is not filed until after the prescribed time, and after the approval of the classification by the Secretary of the Interior, such a showing of fraud in the classification must be made as would condemn and avoid it, if sustained by proof produced at the hearing.

A protest so filed, justifies a hearing as to the alleged mineral character of land, reported as agricultural, where it is shown thereby that the report of the commission, on which the Secretary of the Interior approved the classification, was false, and a clear misrepresentation of the character of the land.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *August 17, 1899.* (L. L. B.)

The commissioners appointed under the act of February 26, 1895 (28 Stat., 684), to classify, as mineral or non-mineral, the lands, in certain land districts, within the primary and indemnity limits of the grant to the Northern Pacific Railroad Company, in a report made September 1, 1895, returned as non-mineral all of Sec. 3, in T. 2 N., R. 2 E., Bozeman, Montana, land district. Notice of this classification was duly published as required by the act and no protest against the same being filed and no objection thereto otherwise appearing, it was approved by the Secretary of the Interior January 13, 1896.

January 12, 1897, E. M. Lamb and others filed in the Bozeman land office their protest against the classification of lots 4, 5 and 6 in said section. The protest not being filed within sixty days after the first publication of notice of the classification, as required by the act, the local officers forwarded the same to your office without action thereon.

March 20, 1897, your office held that the protestants were entitled to a hearing on their protest, notwithstanding the same was not filed in time.

The Northern Pacific Railroad Company has appealed to this Department, and urges that as no protest was filed during the time prescribed, the classification became final upon its approval by the Secretary of the Interior, and your office was without authority to consider the protest or order a hearing thereon.

Said lands are part of an odd numbered section within the primary limits of the grant to the railroad company, but patent has not issued therefor.

The protest, which is corroborated, alleges that upon the land in controversy, at the date of its classification as non-mineral, there was a placer mine, notice of the location of which had previously been duly recorded in the office of the county clerk and recorder of Jefferson county, Montana; that all the requirements of the law had been faithfully fulfilled and the required work done; that the work consisted of six shafts sunk to bed-rock, two fifteen feet in depth, one eighteen feet

in depth with a drift of eight feet on bed-rock, one twenty-two feet in depth, one twenty-five feet in depth, well timbered, and about twenty-four feet of drift on bed rock, also well timbered; that in addition to these shafts and drifts there were two open cuts run in from the east side about twenty-four feet, and several pits worked off along the claim next the river; that gold had been taken in paying quantities from this mine, some of which can be produced in evidence; that the protestants being distant from a central location did not take the papers and were ignorant of the action of the commission and its effect and only learned of their action after the time for protest had expired; and that one of said commissioners had personal knowledge of the mineral character of this land, he having, prior to his appointment on the commission, attempted to bond and lease said mine.

The following letter from the chairman of the commission was filed in support of the protest:

DEPARTMENT OF THE INTERIOR,  
MINERAL LAND COMMISSION,  
Bozeman, Montana, February 3, 1897.

E. M. LAMB, Esq.,

*Radersburg, Mon.*

DEAR SIR: In regard to your letter about the placer claims on section 3 of Tp. 2 N., R. 2 E., I am only able to give you the information that the N. P. R. R. has not yet secured a patent for it, although they secured a patent on all the rest of the section.

I understand that someone has sent a protest to Washington against their obtaining a patent and therefore am unable to say just who has a title to the land.

The R. R. will sell it to you at the government price of \$2.50 an acre. If you desire to buy it write to F. J. Davies, N. P. land agent at Bozeman.

Of course if the Secretary of the Interior reverses the decision of this board on account of the protest now filed, the land will be open for occupation and exploration under the mining laws.

If you want to buy the land I would advise you to buy of the R. R., as you will avoid heavy surveyor's fees and other government charges, in addition to the price of the land. I believe the R. R. will guarantee title.

Am very sorry that the board should put you to any embarrassment in the matter, but no one ever informed us that that country was anything except non-mineral until Mr. Osborn saw us last fall.

Very respectfully,

ANDREW O. CAMPBELL, *Chairman.*

The decision of your office says: "There is no charge of fraud and the protestants admit that no protest was filed within the time allowed under the rules." The time, however, for filing protest is not fixed by any rule, but by the act of Congress.

Section six of the act provides:

That as to the lands against the classification whereof no protest has been filed as hereinbefore provided, the classification, when approved by the Secretary of the Interior, shall be considered final except in case of fraud, and all plats and records of the local and general land offices shall be made to conform to such classification. All lands so classified as above without protest, and the classification whereof is *disapproved* by the Secretary of the Interior, and all lands whereof the classification has been invalidated for fraud, shall be subject to hearing and determination in such manner as the Secretary of the Interior may prescribe.

From this two things are apparent:

1st. The Secretary of the Interior may disapprove the classification by the commission even where no protest is filed.

2nd. In the absence of a protest timely filed, the Secretary's approval of the classification makes it final except in case of fraud.

Here no protest was filed until after the expiration of the prescribed time and after the classification was approved by the Secretary of the Interior. To justify the order for a hearing, therefore, the protest must make such a showing of fraud in the classification as would condemn and avoid it if sustained by proof produced at the hearing.

In section three of the act it is directed that—

Where mining locations have heretofore been made or patents issued for mining ground in any section of land, this shall be taken as *prima facie* evidence that the forty acre subdivision within which it is located is mineral land.

Under the showing made in the protest the land in controversy should have been taken as *prima facie* mineral and should have been so classified by the commission, unless upon personal inspection or by satisfactory evidence this presumption was overcome.

The instructions issued by this Department April 13, 1895 (20 L. D., 350), for the direction of the commissioners in the performance of their duties directs, among other things, that—

b. The examination in the field shall be as to each forty acre subdivision, and you will note carefully as evidence any testimony offered or facts observed relative to each particular tract or tracts adjacent thereto.

c. That all said land shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation and purchase under the provisions of the United States mining laws, and the commissioners in making the classification hereinafter provided for shall take into consideration the mineral discovered or developed on or adjacent to said land.

d. Whenever you are in doubt as to the proper classification of any particular tracts of land you may avail yourselves of such evidence as may be accessible to you or summon and take the testimony of such witnesses as you may deem necessary.

The report made by the commissioners in which the land in controversy is embraced shows that no evidence was taken by them in relation to its character, and contains the statement that "The lands were personally examined by the board and no traces of mineral formation were found."

Does the showing made in the protest, considered in the light of the report of the commission, constitute a "case of fraud" within the meaning of the statute? In Bigelow on Fraud (Vol. 1, p. 8) it is said:

The term "legal" fraud, as used since the beginning of the present century, is an anomaly. Lord Kenyon appears to have been the author of it in the sense in which it is commonly used. That sense may be best shown by his own words in the case just cited. "The defendant," he says, "affirmed that to be true, within his own knowledge, which he did not know to be true. This is fraudulent; not perhaps in the sense which affixes the stain of moral turpitude on the mind of the party, but falling within the notion of legal fraud. . . . The fraud consists, not in the defendant's saying that he believed the matter to be true . . . but in asserting positively his knowledge of what he did not know."

In more recent times judges generally have agreed to call such a case fraud, without any disturbing adjective, and rightfully; though Lord Kenyon's associates, to whom the whole subject was still new, were not even willing to give it the name of legal fraud. But the truth is, as Lord Kenyon virtually said, and as others have pointed out, such a case is falsehood told *scienter*; for the person who makes such a statement declares by plain implication that he is possessed of knowledge of facts sufficient to justify it; and that, by the very terms of the case, he knows to be false. This for many years has been held enough.

Clothed by the statute with full authority, subject to approval by the Secretary of the Interior, to determine the character of these lands, and enjoined by departmental instructions to the greatest care and diligence in their examination, this commission reported that "The lands were personally examined by the board and no traces of mineral formation were found." Relying upon this report the Secretary approved this classification.

If the allegations of the protestants are true, this report was false. It was not a mistake in judgment, which would be waived by failure to make a timely protest, but it was a clear misrepresentation of the character of the land. If they did not make such personal examination their report is equally fraudulent, inasmuch as it asserted that they did so examine them; it was an assertion of "positive knowledge of what they did not know," and comes within Lord Kenyon's definition, *supra*, of a "legal fraud," and is what in more recent times judges and commentators have classified as a case of fraud without any "disturbing adjective." No reason is perceived for giving to the words "case of fraud" used in the statute a different or more restricted meaning than is ordinarily given to them.

As the classification of the commissioners was approved by the Secretary of the Interior, the proper action by your office would have been to forward the protest for the action of this Department, but as it is here, this irregularity will be waived, and the order for a hearing sustained. The question to be determined at the hearing will be whether the land was known at the time of the classification to be mineral in character, as alleged, and if so whether the classification to the contrary was fraudulently made, on the part of the commission, as alleged.

## ALASKAN LANDS—RIGHT OF WAY—STATION GROUNDS.

## PACIFIC AND ARCTIC RAILWAY AND NAVIGATION CO.

The right to station grounds under the act of May 14, 1898, is limited to one station for each ten miles of road, not to exceed in amount twenty acres for each station, with the exception to this limitation that the grant may, at such stations as are also junctions or terminals, include forty acres additional, if necessary for legitimate terminal or junction purposes.

Lands selected for terminal purposes should be taken in one compact body, where a sufficient quantity in such form can be found for the necessary uses of the railroad at or near its terminus; but the selection of separate tracts may be permitted, where the necessity therefor is made to appear.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) August 18, 1899. (F. W. C.)

With your office letter of July 18, 1899, were transmitted four separate maps showing lands selected for terminal and depot grounds; said maps being filled by the Pacific and Arctic Railway and Navigation Company for approval under the provisions of the act of Congress approved May 14, 1898 (30 Stat., 409). Maps numbered one and two, embracing 17,372 acres and 5,836 acres, respectively, are claimed for terminal purposes, as is also map No. 4, containing 8.39 acres.

Referring to these plats your office letter states as follows:

I am of the opinion that the company is entitled to but two tracts for station grounds for this section of 19.607 miles of its road. The plats are accordingly submitted with the recommendation that the company be allowed to elect from these plats the two which it prefers to have approved, or it may be allowed to withdraw the plats and submit, instead, two plats at the same or other locations covering larger areas.

Attention is called to the fact that the tracts selected for station grounds are two or more miles from the terminus of the road; but as there may not be suitable public land nearer to the end, I do not consider that objection should be made on this account. It is to be further noted that the company shows, on the map of its line of route in the third mile, a tract of 11.69 acres, for which no station plat is filed. If this tract is located on public land, its occupation by the company is unauthorized and cannot be permitted.

Since the receipt of your office letter transmitting these plats, to wit, on July 26, 1899, there was received at this Department a letter from S. H. Graves, president of said Pacific and Arctic Railway and Navigation Company, in which he states that he has received a copy of your letter of the 18th instant, regarding these plats, and further states:

I am leaving shortly for Alaska and will take up the matter of our terminals and depot grounds with our people there, after which new plats will be prepared for filing. Meanwhile, I would be obliged if you would kindly advise me whether, in view of the above facts, it will be satisfactory if we file the plats for our Skaguay terminals as near the end of our track, and as nearly in one body as possible.

In view of this statement, to the effect that new plats will in all probability be filed, final action upon the plats submitted will not at

this time be taken, but, in view of the importance of the questions presented, not covered by the regulations heretofore issued under this act, and of the request for a ruling thereon, so that proper maps may be filed for the protection of those interested in the building of railroads in Alaska, and the further fact that considerable time is necessary in the preparation and filing, after due survey of the lands, of plats showing lands selected under the right of way act within the district of Alaska, it is deemed advisable, in returning these maps, to consider the questions necessarily raised in determining whether they can properly be approved under that act.

The second section of the said act of May 14, 1898, provides:

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

It will be observed that the grant, in addition to the right of way for "station buildings, depots, machine shops, side tracks, turn-outs, water stations, and terminals, and other legitimate railroad purposes," has the limitation that it shall not "exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road." Then follows an exception from this limitation as to terminals and junction points, which, it is said, "may include additional forty acres."

In the opinion of the Department this is purely an exception from the limitation, and means only that at such stations as are also terminals or junction points (not to exceed one for each ten miles of road), the grant may include additional forty acres—that is, additional to the twenty acres—if necessary for the legitimate terminal or junction purposes of the road. The exception applies only to the quantity of lands that may be taken at a station which is also a terminal or junction point, and does not affect the stated limitation in any other way.

But one further question is suggested by these plats, namely, Can the company select for terminal purposes separate tracts, near a terminus of the road, in the aggregate not exceeding the amount granted—sixty acres?

While the act does not specifically require that the lands selected at

a terminal shall be in one compact body, yet, as a general rule, it would seem that, where a sufficient quantity can be found in a compact body for the necessary uses of the railroad, at or near its terminus, the same should be taken in that form; but the selection of separate bodies, in the aggregate not exceeding the limits of the grant, will be permitted where the necessity therefor is made to appear, the approval resting largely in the discretion of the Secretary of the Interior.

The maps forwarded with your office letter of July 18, 1899, and the papers subsequently transmitted in relation thereto, are herewith returned to await the further action of the company in the matter of making new selections, as indicated in the letter from the president of the company. You will advise him fully of the views herein expressed.

OKLAHOMA LANDS—SECOND ENTRY—SECTION 13, ACT OF MARCH 2, 1889.

WALTON ET AL. *v.* MONAHAN (ON REVIEW).

One who has abandoned all claim under a former entry is not disqualified as a settler, claiming the right of second entry under section 13, act of March 2, 1889, 25 Stat., 980, by the fact that the first entry had not been canceled of record at the date of his settlement.

Section 10, act of March 3, 1893, makes the provisions of said section 13 applicable to the lands in the Cherokee Outlet, not only as to the manner of opening said lands, but also as to the qualifications of claimants therefor.

The case of *Newbanks v. Thompson*, 22 L. D., 490, overruled.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) August 18, 1899. (C. J. G.)

Motions have been filed by Simeon L. McQuiston and Michael J. Monahan, parties to the above entitled case, for review of departmental decision of June 1, 1899 (28 L. D., 449), involving lots 1, 2, 3 and 4 and N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 32, T. 26 N., R. 3 E., Perry, Oklahoma, land district.

In said decision the Department affirmed the action of your office in holding Monahan's homestead entry for the land described, made October 23, 1893, subject to the superior rights of Burned Helda and Benjamin F. Walton. The last named persons made the race into the Cherokee Outlet, September 16, 1893, from the Chilocco Indian school reservation, which fact the Department subsequently held did not of itself disqualify them from making settlement and entry. McQuiston did not settle on the land until September 23, 1893, and in addition to this testified that he made such settlement with the understanding that if those who made the race from the Chilocco reservation did so "legally" he would vacate the land. It was therefore held that his claim also was defeated by the prior settlements of Helda and Walton.

As to the facts of this case, as above set forth, there was very little controversy, the concurring decisions below finding that Helda and Walton were prior settlers and had since complied with the law. It

was alleged, however, that these parties were disqualified from making entry, the former by premature entry into the Territory and the latter by reason of a prior entry of record. Both motions for review, which will be considered together, are practically confined to a reiteration of Walton's disqualification. McQuiston again alleges Helda's disqualification for the reason above stated, but the Department finds no sufficient reason to give further consideration to that feature of the case. Monahan stands on his entry alone and as that was made subsequently to the settlement of Helda and Walton he can have no rights unless the contention as to the disqualification of Helda and Walton be sustained.

In their appeals Monahan and McQuiston alleged that Walton was disqualified under the circumstances from making "entry," thereby following the language of the special act of March 2, 1889, and the decision complained of was made responsive to such allegation. In their motions for review the word "settlement" is employed instead. The distinction, if any, however, is not regarded as important. There being two modes whereby claims may be initiated under the homestead law, that is, by settlement or by entry, and Walton having made settlement, is also entitled to make entry if he was qualified to make such settlement.

The record shows that Walton made an entry April 21, 1887, at Lamar land office, Colorado. This entry was of record at the time he settled upon the land in controversy and remained so until May 14, 1897. The Department held in the decision complained of that Walton was not disqualified by this circumstance from making a second entry under section 13 of the act of March 2, 1889 (25 Stat., 980, 1005), as it was shown that he had, for satisfactory reasons stated by him, wholly abandoned the Colorado land in August, 1887.

Section 13 of the act of March 2, 1889, *supra*, is special legislation relating to the opening to settlement and entry of the Seminole lands in Oklahoma. The first proviso of said section is as follows:

That any person who having attempted to, but for any cause, failed to secure a title in fee to a homestead under existing law, or who made entry under what is known as the commuted provision of the homestead law, shall be qualified to make a homestead entry upon said lands.

Said act authorizes the two classes of persons therein described to make second entry, and, in the absence of anything to the contrary, the reasonable implication is that such persons may also make settlement with a view to such entry. The only distinction in Walton's case from certain others where second entries have been allowed, is that his original entry was not actually canceled at the date of his settlement on the land in question. It is not believed, under the circumstances of the case, that the distinction is of sufficient force to materially affect the rights of Walton.

In the case of *Smith et al. v. Taylor* (23 L. D., 440), it was held (syllabus):

A homestead settlement, made by one who has at such time an existing homestead entry for another tract, must be held valid where the settler is entitled to make a second entry; and a second entry based on such settlement, and allowed prior to the actual cancellation of the first, though irregular, may stand.

The land involved was in the Cherokee Outlet as in this case. It appears that Taylor made entry for said land on the day of opening. He was contested by Smith and one Maupin on the ground of prior settlement, the latter subsequently filing a supplementary affidavit alleging that Taylor had an entry of record, for another tract, at Guthrie, Oklahoma, land office, at the time he made entry of the said involved land. After finding that Taylor was first to arrive on the land the Department concluded as follows:

Unless the first entry made by Taylor disqualified him for making settlement on said tract his settlement was prior to that of either Smith or Maupin. He was first on the land and first laid claim thereto in the manner recognized and approved by the custom in Oklahoma Territory, and warranted by the law, and has shown full compliance with the law in the matters of residence and cultivation since. It must be conceded that his second entry, while the first was yet unanceled—and perhaps his settlement also for the same reason—was irregular. But were both settlement and entry, or either of them nullities—absolutely void—on that account? The Department does not so hold in view of all the circumstances of the case. Judgment of cancellation on the ground already indicated had been entered by the Department against his first entry February 24, 1893 (262 L. and R., 359). This judgment would have been executed by the cancellation of the entry upon the records, but for Taylor's motion for review which only suspended its operation. The testimony shows that subsequent to the filing of such motion, Taylor manifested an intention to accept and acquiesce in said judgment. In his homestead affidavit filed September 16, 1893, he swears that his application for the tract in contest "is honestly and in good faith made for the purpose of actual settlement and cultivation . . . and in good faith to obtain a home for myself." This is only consistent with the view that he regarded his former entry as lost to him and to all intents and purposes the same as if then already canceled.

His first entry was defeated through no fault of his, but by reason of a superior right in another to the land covered thereby. It is well settled doctrine that he did not therefore lose his homestead right. The Department has frequently upheld the right to make a second entry in cases where the equities were, to say the least, no stronger than in this case (*James M. Frost et al.*; and cases cited therein, 18 L. D., 145). If the right to make a second entry were not lost to Taylor he certainly was not disqualified to make settlement on the tract. His settlement being valid and prior to the alleged settlements of Smith and Maupin, his right to the tract in controversy must be held superior to their claims. So far as they are concerned, standing upon his settlement alone, he must prevail. The irregularity of his second entry would not defeat his superior right as a settler. If that entry should be canceled for such irregularity it would be without prejudice to his right to make again entry for the same tract. Cancellation under these conditions would be a vain act.

A distinction between that case and the one being considered is that there had been a judgment of cancellation entered against Taylor's first entry, but the same had not been executed at the date of his settlement

or when his second entry was allowed. This is the only distinction worth considering. Otherwise there is a marked similarity in the facts in the two cases. Walton had not made second entry, and therefore no irregularity in that respect had been committed in his case. The only other mode of initiating a claim under the act was by settlement which he made, and this may in a measure be accepted as evidence that "he regarded his former entry as lost to him and to all intents and purposes the same as if then already canceled." He not only alleges that he abandoned the land embraced in his entry but said entry has for years been subject to cancellation on the ground of such abandonment, and would have been defeated upon contest based upon such charge. The distinction referred to is not regarded as sufficiently material to prevent the Smith-Taylor case from controlling the one under consideration.

One of the contentions in the motions for review is that it was "error to hold that Walton had not, in any bone fide manner, 'attempted to secure title to a homestead under existing law,' as to his entry in the Lamar, Colo., district, and, for this reason, was not within the terms of section 13 of the act of March 2, 1889."

In the case of *Miller v. Craig* (15 L. D., 154), it is held (syllabus):

Failure to secure title under the first homestead entry on account of bad faith or non-compliance with law does not defeat the right to a second entry under the act of March 3, 1889.

That case is one coming under the general act relative to second entries (25 Stat., 854), but the principle announced therein is believed to be applicable to cases coming under the special act under consideration, and this reference to said case is therefore a sufficient answer to the contention made.

It is likewise contended that the holding of the Department in the decision complained of is in conflict with the decision in the case of *Newbanks v. Thompson* (22 L. D., 490), wherein it was held (syllabus):

The right to make a second homestead entry under section 2, act of March 2, 1889, can not be invoked for the protection of a settler who at the time of his settlement has an entry of record for another tract.

That case is also one that came under the general act, but in so far as the principles announced therein are in conflict with the principles announced in this case, the same will not, for the reasons stated herein, be followed.

Error is also alleged in applying section 13 of the act of March 2, 1889, to lands in the Cherokee Outlet, so far as the qualification of claimants are concerned, Sec. 10 of the act of March 3, 1893 (27 Stat., 642), making said act of March 2, 1889, applicable to said Outlet only as to the *manner of opening* the lands to settlement and entry etc.

Said section 10 makes section 13 of the act of March 2, 1889, applicable to the Cherokee Outlet, in the following language:

The President of the United States is hereby authorized, at any time within six months after the approval of this act and the acceptance of the same by the Chero-

kee nation as herein provided, by proclamation, 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.'

A fair construction of the language quoted is, that it was intended thereby to make applicable the provisions of said section 13, in the disposal of lands in the Cherokee Outlet, not only as to the manner of opening said lands to settlement and entry, but also as to the qualifications of claimants. This is the interpretation put upon said section 10 in the proclamation of the President issued in pursuance thereof, as well as in the rules and regulations prescribed by the Secretary of the Interior and incorporated in said proclamation. 17 L. D., 230, 234 and 242.

The motions for review are hereby denied.

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MCDONALD ET AL. v. HARTMAN ET AL.

Motion for re-review of departmental decision of August 2, 1898, 27 L. D., 290, denied August 21, 1899, by Acting Secretary Ryan. See also 27 L. D., 580.

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RIGHT OF WAY—RESERVOIR SITES—MAP OF LOCATION.

BATTLEMENT RESERVOIR COMPANY.

The provision contained in the act of March 3, 1891, requiring a map of location to be filed within twelve months after the location of a canal, ditch or reservoir, if upon surveyed lands, or within twelve months after survey, if upon unsurveyed lands, is directory, with respect to the time so fixed, and not mandatory. The case of Milwaukee, Lake Shore and Western Ry. Co., 12 L. D., 79, overruled.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *August 21, 1899.* (E. F. B.)

By your office decision of June 25, 1897, the application of the Battlement Reservoir Company for right of way or sites for five reservoirs in township 8 south, ranges 94 and 95 west, Glenwood Springs, Colorado, land district, presented under sections 18 and 21, inclusive, of the act of March 3, 1891 (26 Stat., 1095), was rejected for the reason that the map of such right of way or sites was not filed in the local land office within the period of twelve months after the location thereof, as prescribed in section 19 of said act. The sites for the reservoirs were located September 9, 1895, but the map of location was not filed in the local office until March 30, 1897.

The provision of the statute requiring the map to be filed within twelve months after the location of the canal, ditch or reservoir, if

upon surveyed lands, and within twelve months after the survey by the United States if upon unsurveyed lands, is not mandatory or imperative, as held by your office. No penalty is fixed for not filing it within that time; there is no prohibition against filing it at a later time; and it is upon its approval by the Secretary of the Interior and not before, that "the same shall be noted upon the plats in said office (local land office), and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way." Under these circumstances no possible injury can result to rights intervening between the expiration of the prescribed period of twelve months and the time of actually filing the map.

Considering the act in its entirety, the Department is of the opinion that the provision fixing the time for the filing of the map is directory and not mandatory.

The general act of March 3, 1875 (18 Stat., 482) granting rights of way through the public lands to railroad companies contains the same provision respecting the filing of a map of location, and in the case of Milwaukee, Lake Shore and Western R'y Co. (12 L. D., 79), it was held that a map filed after the expiration of the prescribed period of twelve months can not be approved by the Secretary of the Interior. The decision does not contain any discussion of the question or disclose the reason for its adoption. It does not seem to be well grounded and is overruled.

Five years have not elapsed since the location of the Battlement company's reservoirs and hence no question is presented respecting that provision in section 20, of said act of 1891, which provides for a forfeiture of the rights granted if the canal, ditch or reservoir be not completed within five years after location.

The decision of your office is reversed.

The application, map and accompanying papers, are herewith returned to your office for appropriate action.

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HERWIG *v.* COOPER.

Motion for review of departmental decision of June 6, 1899, 28 L. D., 28 L. D., 482, denied by Acting Secretary Ryan, August 21, 1899.

## MINING CLAIM—ENTRY—APPLICATION—ADVERSE PROCEEDINGS.

## MORGAN ET AL. v. ANTLERS-PARK-REGENT CONSOLIDATED MINING Co.

An application for patent under the mining laws for land embraced in an existing mineral entry should not be accepted or entertained.

Proceedings in the form of an adverse suit, instituted by one holding under an existing mineral entry, as against a subsequent mineral application erroneously accepted and entertained by the local office, do not constitute a recognition of the validity or regularity of such application, or have the effect of divesting, waiving or suspending rights acquired under the entry.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *August 21, 1899.*

John G. Morgan and P. T. Moran have appealed from the decision of your office of April 23, 1898, dismissing their protest against the issuance of patent upon mineral entry No. 329, Del Norte Colorado, land district, made March 21, 1894, by the Park-Regent Consolidated Mining Company and embracing the True Friend, Best Friend, Extension No. 1 and Extension No. 2 lode mining claims, survey No. 8046.

It appears that the Park-Regent company filed its application for patent for said claims in the local office February 18, 1893, and that notice thereof was duly given. In response to this notice Morgan and Moran, the appellants, filed in the local office an adverse claim asserting that they had a prior and superior right of possession to a portion of the ground embraced in the Park-Regent claims alleged to be in conflict with the Treasure Vault lode mining claim owned by Morgan and Moran. A suit brought in a court of competent jurisdiction in support of this adverse claim was dismissed upon stipulation of the parties, and the Park-Regent company then (March 21, 1894) made entry of its said claims and the usual receiver's receipt was issued to it. The Antlers-Park-Regent Consolidated Mining Company, the appellee, claims under a conveyance from the Park-Regent company.

October 28, 1897, Morgan and Moran filed in the local office an application for patent for the Treasure Vault lode mining claim, including the conflict with the Park-Regent claims embraced in the Park-Regent entry. During the period of publication of notice of this application the Antlers Park-Regent Company filed in the local office a so-called adverse claim, setting forth the claim of that company to the area in conflict, and the entry and final receipt theretofore obtained by the Park-Regent company upon its application for patent. The Antlers-Park-Regent Company then commenced suit in a local court in support of its so-called adverse claim, but what, if any, proceedings have been had in that suit does not appear.

March 4, 1898, Morgan and Moran filed in the local office a protest against the issuance of patent upon the Park-Regent entry, and your office ascertaining, in the course of the consideration of this protest,

that Morgan and Moran's application for patent for the Treasure Vault lode mining claim included the area in conflict with the Park-Regent claims embraced in the subsisting entry of the Park-Regent company, held, in the decision under review, that an application for patent under the mining laws for land embraced in an existing mineral entry should not be accepted or entertained; that the local officers should not have accepted or entertained the application of Morgan and Moran, covering the conflict included in the Park-Regent entry; that this application should be canceled as to that conflict; that the Antlers-Park-Regent company was fully protected by the proceedings had upon the prior application of the Park-Regent company and the entry and receiver's receipt obtained by it; and that the precautionary measures taken by the Antlers-Park-Regent company in filing, and bringing suit in support of, its so-called adverse claim against the application of Morgan and Moran, so erroneously accepted and entertained by the local officers, do not constitute a recognition of the validity or regularity of that application and do not have the effect of divesting, waiving or suspending the company's rights under the Park-Regent entry.

It was also held by your office in its said decision that the grounds of said protest, none of which were based upon the application of Morgan and Moran, or the pendency of the so-called adverse suit of the Antlers-Park-Regent company, were without merit and vexatious and that the protest should be dismissed.

In the assignments of error upon their appeal Morgan and Moran questioned each of these rulings, but they have not filed any brief or submitted any argument in support of their contention.

A consideration of sections 2325 and 2326 of the Revised Statutes, and an examination of the protest filed by Morgan and Moran, show that the decision of your office is correct, and it is accordingly affirmed.

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RAILROAD GRANTS—CONFLICTING LIMITS—SETTLEMENT CLAIM.

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

Lands within the indemnity limits of the Northern Pacific, and the primary limits of the grant of March 3, 1871, for the St. Vincent extension of the St. Paul, Minneapolis and Manitoba railway, and not included within the withdrawal on the general route of the Northern Pacific, passed under said grant of 1871.

The cultivation of a tract by one not entitled at such time to initiate a claim thereto does not constitute such person an "actual settler," within the meaning of the act of June 22, 1874.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) August 22, 1899. (F. W. C.)

With your office letter of November 10, 1897, were transmitted appeals by Louis Lamettery and seventeen others from the action taken

in your office decision of January 27, 1897, rejecting their several applications to make entry of portions of odd-numbered sections within the limits of the grant to aid in the construction of the St. Vincent Extension of the St. Paul, Minneapolis and Manitoba railway, for conflict with said grant.

The grant to aid in the construction of said road was made by the act of March 3, 1871 (16 Stat., 588), and the road was definitely located December 19, 1871.

The tracts applied for are also within the thirty-mile or first indemnity belt of the grant made by the act of July 2, 1864 (13 Stat., 365), to aid in the construction of the Northern Pacific railroad. They were not included, however, in the withdrawals made upon the maps of general route filed by said Northern Pacific Railroad Company in 1870.

Applications to select these lands as indemnity on account of the Northern Pacific grant were filed in the local office April 27, 1892, but were rejected for conflict with the grant to aid in the construction of the St. Vincent Extension of the Manitoba railway; from which action the Northern Pacific Railroad Company appealed.

The several applicants under the settlement laws tendered their applications during the years 1894 and 1895, but they were all, excepting the application of John Turczin, tendered June 14, 1894, to make homestead entry of the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 33, T. 131 N., R. 39 W., St. Cloud land district, Minnesota, rejected for conflict with the St. Vincent grant; and each of the several applicants appealed from the rejection of his application the conflict with the railroad grant. In the case of Turczin the local officers recommended that his application be accepted, holding that the land applied for was excepted from the grant to the Manitoba company under the provisions of the act of June 22, 1874, by reason of the settlement of one John Mouch, and that there was no selection, so far as their record shows, on account of the Northern Pacific grant. From said decision appeal was filed on behalf of the Northern Pacific Railroad Company.

The appeals on behalf of the Northern Pacific Railroad Company and the several applicants under the settlement laws were together considered in your office decision of January 27, 1897, in which the rejection of the tendered application to select the lands on account of the Northern Pacific grant was affirmed; the rejection of the several applications under the settlement laws was also affirmed, and it was held that all of the lands involved, being free from claim at the date of the definite location of the St. Vincent Extension of the Manitoba railway, passed to that company under the grant made by the act of March 3, 1871, *supra*.

From said decision the Northern Pacific Railroad Company failed to appeal.

In the several appeals filed by the applicants under the settlement laws, however, it is urged that the right of selection under the North-

ern Pacific grant, to supply deficiencies in that grant, is superior to the grant made by the act of March 3, 1871, *supra*, to aid in the construction of the St. Vincent Extension of the Manitoba railway, and served to except the lands from the operation of the last-mentioned grant; that the matter is therefore one solely between the applicants and the Northern Pacific Railroad Company, and as the several settlement claims antedate the tender of an application to select on account of the Northern Pacific grant, that their settlement rights are superior to any claim made under that grant, and as a consequence their applications were improperly rejected.

These lands were not withdrawn on account of the Northern Pacific grant prior to the definite location of the St. Vincent Extension, and the Northern Pacific Railroad is not here asserting any right to them. Further, this Department has repeatedly ruled that the lands falling outside of the limits of the withdrawal on the general route of the Northern Pacific, and within the primary limits of the grant of 1871, to aid in the construction of the St. Vincent Extension of the St. Paul, Minneapolis and Manitoba railway, passed under the last-mentioned grant. (*Grunewald et al. v. Northern Pacific R. R. Co. et al.*, 24 L. D., 195; *Northern Pacific R. R. Co. v. St. P., M. & M. Ry. Co.*, 27 L. D., 674.)

In several of the appeals it is alleged that the records of the General Land Office show that the Manitoba Railway Company has already received patents for more lands than it is entitled to under the grant in question. No decision or report from your office is referred to as evidencing this condition. Further, as these lands are within the primary limits of the grant, if of the character granted they passed to the company upon the definite location of its line of road, and if there is an excess it must be on account of the patenting of lands within the indemnity limits in excess of those lost to the grant within its primary limits. This could not affect the correctness of the action of your office in rejecting the applications under considerations; which action is hereby affirmed.

This disposes of all of the appeals except the appeal filed on behalf of John Turczin. As before stated, his application was filed June 14, 1894. In support thereof affidavits were filed to the effect that one John Mouch settled upon the tract applied for in 1872; that he continued to occupy and improve the tract until 1886, when he sold his improvements to one August Johnson, who occupied and improved the tract until 1892, when he in turn sold to Turczin for \$550; that Turczin has since continuously resided upon the land and has increased the improvements thereon to the value of about \$1000.

Upon said allegations a hearing was ordered, after due notice to the Manitoba and the Northern Pacific railroad companies, and upon the testimony adduced the local officers found in favor of Turczin, as before stated; from which the Manitoba railroad company failed to appeal.

In your office decision of January 27, 1897, the decision of the local

officers was reversed, without special consideration of the application by Turczin, it being treated collectively with the other seventeen applications before referred to.

The local officers found that this tract, namely, the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 33, T. 131 N., R. 39 W., came within the provisions of the act of June 22, 1874 (18 Stat., 203), and was therefore excepted from the Manitoba grant.

The first section of said act of June 22, 1874, extends the time for building the railroad upon the following conditions:

That all rights of actual settlers and their grantees who have heretofore in good faith entered upon and actually resided on any of said lands prior to the passage of this act, or who otherwise have legal rights in any of such lands shall be saved and secured to such settlers or such other persons in all respects the same as if said lands had never been granted to aid in the construction of the said lines of railroad.

It is claimed that John Mouch was an actual settler upon this land June 22, 1874, and as the present applicant is one of his grantees, he is entitled to complete entry of this land as though it had never been granted.

An examination of the record made on Turczin's homestead application shows that John Mouch, in the year 1872, settled upon the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 32, same township and range, being an adjoining tract to that here in question. For the said tract in section 32 Mouch made homestead entry April 24, 1873, upon which he made final proof and certificate issued January 27, 1880. At the time of making said entry the limit of a claim under the homestead law was eighty acres, within railroad limits, and it was not until 1879 that Mouch would have become entitled to an additional homestead right. As shown, he lived upon the even-numbered section, and his claim to the tract here under consideration consisted in the extension of his cultivation across the section line and including part of this tract. This evidence falls short of showing Mouch to have been an actual settler upon the land in question within the meaning of the act of June 22, 1874. He did not have at that date, and could not have initiated, a claim to the land in question while holding his homestead entry upon the even-numbered section.

Your office decision, in so far as it rejects Turczin's application, is therefore affirmed.

This disposes of all the appeals filed, and the papers in the case are herewith returned.

## INDIAN LANDS—CHIPPEWA PINE LANDS—ALLOTMENT.

## NELLIE LYDICK ET AL.

The provisions of the act of January 14, 1889, with respect to the disposition of the ceded Chippewa lands, do not contemplate the allotment of lands that have been duly classified as "pine lands" in accordance with the terms of said act.

*Acting Secretary Ryan to the Commissioner of Indian Affairs, August*  
(W. V. D.) 22, 1899. (W. C. P.)

Mrs. Nellie Lydick, claiming to be a member of Chippewa nation of Indians, applied to the Chippewa commissioner for allotments of land for herself and four minor children on the Chippewa reservation in Minnesota, under the provisions of the act of January 14, 1889 (25 Stat., 642). This application was rejected by the said commissioner for the reason that there is nothing in the application, or with it to show that the applicant Lydick or her children have ever resided upon the Chippewa reservation where their application is made to secure allotment of land.

From this action the plaintiff filed an appeal to your office, and by your office letter of May 20, 1899, you transmitted all the papers in the case "for an official decision of the Department upon the appeal of Mrs. Lydick from said rulings of the Chippewa commission," but you do not express any opinion as to the merits of the case.

Under date of September 10, 1898, Mrs. Lydick presented to the Chippewa commissioner an application for allotments for herself and children, as follows:

As a member of the White Oak Point band of Chippewas of the Mississippi I have the honor to make application for allotments of land on the Mississippi ceded lands as follows: For myself, Nellie Lydick, the east  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  Sec. 16, T. 145, R. 31.

For my children as follows:

Charles Lydick, the W.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  Sec. 15, T. 145, R. 31.

Henry Lydick, The W.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  Sec. 16, T. 145, R. 31.

Ruth Lydick, The E.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  Sec. 16, T. 145, R. 31.

James Lydick, The E.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  Sec. 15, T. 145, R. 31.

This application was rejected September 10, 1898, as follows:

The within application is refused on the grounds that the applicant as a member of the White Oak Point band of Chippewas did not make settlement on said land in time—i. e., prior to January 14, 1889, and for the further reason that schedules of allotments on the Chippewa reservation are made up and members of said White Oak band may now get land for their allotments on White Earth reservation.

Afterwards Mrs. Lydick presented another or supplemental application dated October 12, 1898, for the same lands and filed with it her sworn statement dated November 7, 1898, in which she sets forth that she is a member of the White Oak Point or Mississippi river band of Indians; that she was born "at White Oak Point on said reservation" (the name of the reservation is not given, but it is reasonably certain that the Chippewa reservation, and not the White Oak Point reservation, was the one intended, although the Chippewa commissioner

seems to have understood it otherwise), twenty-eight years before, and has always claimed said reservation as her place of residence; that she was an actual resident of said reservation January 14, 1889, and was enrolled at the census taken at that time; that she was married in the spring of 1888 and her children have received payments as members of "said band residing on the Mississippi river in Minnesota," and that she has always been regarded as a member of said band.

With this application is also the affidavit of Ni-ga-no-de-qua, or Betsey Smith, who says she is a member of the Mississippi river band of Chippewa Indians; that she knows Nellie Lydick and has known her all her life; that she belongs to the same band as affiant and has always lived on the reservation; that White Oak Point is a point of land on the Mississippi river made by the river and White Oak lake, and that at the time of Nellie Lydick's birth a large number of Indians lived there.

This application was rejected by the Chippewa commissioner November 17, 1898,

for the reason that there is nothing in the application, or with it to show that the applicant Lydick or her children have ever resided upon the Chippewa reservation where their application is made to secure allotment of lands.

In this decision it is said that if the applicant were born on White Oak Point reservation and her claimed residence were established it might warrant the commission in granting allotments on White Oak Point reservation "instead of on White Earth reservation as was supposed to be the desire of applicant last winter when allotments were made to the White Oak Point band," but would seem to bar the allotment on the Chippewa reservation as now asked for.

Afterwards the applicant filed another verified statement and other affidavits in support of her application. In this statement she asserts that her former statement was misunderstood; that she was mistaken as to the place where she was born, being at that time on the Chippewa reservation; that she supposed the commissioner upon her application being made would proceed to ascertain all the facts relative to her rights, and being mistaken in these things she asks to be allowed to submit a statement, as follows:

1st. I stated in my said application that I was born at White Oak Point *on said reservation* about twenty-eight years ago.

At the time I made said statement I supposed that White Oak Point was on the general Chippewa reservation twenty-eight years ago but I have been informed since I made that statement that White Oak Point was not on any reservation twenty-eight years ago. I have been informed that at that time White Oak Point was U. S. public lands and not within the limits of the reservation. That afterward and in 1873 the President of the U. S. by an order made White Oak Point a reservation calling it "White Oak Point Indian reservation."

2nd. At the time I made my statement I did not know of the fact that White Oak Point was a separate Indian reservation; I supposed it was a part of the general Chippewa reservation in Minnesota. Upon investigation I find that at White Oak

Point, and including it, there is a small reservation, about two or three miles square or nearly so, which is a part of the Chippewa Indian reservations of Minn.

3rd. I also find that at the census of 1889 the Indians who were then living at said White Oak Point, or who belonged to the band then living there were designated as "The White Oak Point or Mississippi band of Indians of the Chippewas in Minnesota." At the time of the census many of these Indians were not actually at White Oak Point; some of them were miles away along the Mississippi river. But they were enumerated and designated as members of that band, no matter at what particular place they then were.

At the time of the census I was married and was then with my husband below White Oak Point perhaps twenty-five miles by the river. My husband was working there during the winter of 1889 and 1890 and I was there just for the winter with him. Within a few miles of where I was, and also where I was at that time, there were a great number of the same band of Indians all of whom were enumerated at that census and designated as members of the White Oak Point of Mississippi river band. Some of this band of Indians were then living at Pokegema lake in Itasca county, Minn., but they were all called members of the band of Indians.

4th. Upon reading the decision of the Hon. U. S. Chippewa commission upon my said application I find that said commission interprets, or understands, my said statement accompanying my application to say that I have always resided upon the "White Oak Point Indian reservation." That my said children were born and have always resided upon said White Oak Point Indian reservation.

As I have stated I did not then know that there was a White Oak Point reservation, I supposed White Oak Point to be upon the general Chippewa reservation. In each and all reference I made in my said statement to the Indian reservation I referred to and meant the general Chippewa Indian reservation in Minnesota. I never once mentioned or spoke of the White Oak Point reservation. I did not say or intend to be understood as saying that I have always resided at White Oak Point. I did not say and I did not intend to be understood as saying that my children were born and always resided at White Oak Point. Such statements would not be true. I was born at White Oak Point and have always claimed the general Chippewa reservation as my place of residence. I am a member of the White Oak Point or Mississippi river Band of the Chippewa Indians. I never considered that my place of residence on said general reservation was confined to White Oak Point. There is not land enough on the reservation designated "White Oak Point reservation" to give each Indian of the White Oak Point band *eight acres* of land. Not one of that band ever supposed that he was limited to White Oak Point in the selection of his allotment. Members of this band have been selecting and receiving allotments of land along the Mississippi river at places quite distant from White Oak Point.

The Hon. Commissioner states in his decision that he decides against me on the ground, among other things, that my application does not show that I am a resident of the particular land sought to be allotted. This is true; my application did not state that I was an actual resident upon the particular descriptions of land I then sought, and now seek, to have allotted to me. All I attempted to state in my said application was that I have always been a resident of the Chippewa reservation in Minnesota, on the Mississippi river.

At the time I made my statement I supposed that the Hon. U. S. Chippewa Commission would investigate and find just where I had resided on said reservation and where I was then residing on said reservation. I did not think the Hon. Commission would confine itself to my statement. I still think the Hon. Commission should look into the facts, rights and equities of my case and my application regardless of any omission or blunder I may have made in the same. I am a ward of the U. S. government and the Hon. Chippewa Commission is an office and instrumentality of said government having for its immediate purpose and object the charge of said ward. That being true the commission should not pit itself against me any more than for me but should examine and act upon my rights fairly and impartially.

With this she submitted affidavits of persons who claim to know the land and to have examined each subdivision and to be able to estimate the quantity and value of the timber thereon. These affidavits describe the improvements of Mrs. Lydick and the tracts upon which affiants found pine timber, and give affiants' opinion as to the amount and value of the pine upon each tract.

The Chippewa commissioner again denied the application, saying:

Nellie Lydick the applicant was not found residing on either the Chippewa or White Oak Point reservations, and was understood to desire to take her allotments on the White Earth reservation, the allotment on the Chippewa and White Oak Point reservations was completed, the schedules made up August 1st, 1898, and duly forwarded to the Hon. Commissioner of Indian Affairs.

The applicant from her statement, first made settlement upon the land applied for September 1st, 1898. This was after the allotment on the before mentioned reservations had been completed and the schedules made up, removals provided for by the act of 1889 having long before been effected, and instructions from the Hon. Commissioner of Indian Affairs to that effect were sent to this office as long ago as December 11, 1896 (Land 45590). There is nothing to show that Nellie Lydick the applicant ever resided upon the Chippewa reservation prior to September 1st, 1898, only her claim that she was born at White Oak Point, which is not on the Chippewa reservation, and had always *claimed* the general reservation as her residence. This would hardly seem to meet the requirements of the act which says in effect, one may take allotment on the reservation where he lives, *at the time of the removal herein provided for is effected.*

The applicant appealed to your office alleging that the Chippewa commissioner erred in not of his own motion ascertaining all the facts as to her rights, asserting that upon the proofs submitted she is entitled to the allotments asked, urging that she being a ward of the United States it was the duty of said commissioner to investigate her claim and after ascertaining all the facts to render a decision, and requesting that if she has omitted to state any matter or make any showing necessary for an accurate and reliable understanding of her rights that a full and complete investigation be made.

With the papers is a report of Special Agents Schwartz and Parke, dated November 26, 1898, giving their opinion as to the character and value of the land and stating that the Great Northern Railway runs east and west through the land and since September 10, 1898, various people had squatted along the right of way and on adjacent land, making the town of Cass Lake, with about five hundred residents at that time; that the right of way was cleared before the Lydicks made settlement; that they moved on the land September 1, 1898, and had lived there continuously since; that at the date of settlement there was the prospect of a town building but there was no person living there and no house. With this report the special agents submit the affidavits of two parties as to the character of the land, the settlement of the Lydicks thereon and the improvements made by them and an affidavit of Mrs. Lydick, dated November 3, 1898, in which she states that she is a member of "the White Oak Point Mississippi band of

Chippewa Indians," and has been recognized as a member ever since her birth; that in August, 1898, she with her husband and children made settlement upon the tract or block of land described in her application for allotments and has continued to reside there; that her improvements, consisting of dwelling-house, stable, root house and other out-houses and well, cost over one thousand dollars and were paid for with her personal money; that all of said land is good farming land and at the date of her settlement and application fitted only for farming purposes, and was uninhabited, unoccupied and free from any claim excepting only the right of way for the Great Northern Railway, and that there is no pine timber on said lands, except a small bunch of "Norway" on the east side of the SE $\frac{1}{4}$  of the NW $\frac{1}{4}$  of Sec. 15.

In submitting the matter you state that the annuity rolls show that Mrs. Nellie Lydick has drawn pay with the White Oak Point band of Chippewa Indians since 1889, that her children have also drawn pay since the date of their respective births, and that all allotments to the White Oak Point and Sandy Lake bands of Chippewa Indians, both on the White Oak Point and Chippewa reservations were completed prior to August 1, 1898, which was prior to Mrs. Lydick's first application for these lands.

The act of January 14, 1889 (25 L. D., 642), directed the appointment of a commission to negotiate with the different bands or tribes of Chippewa Indians in Minnesota for the cession of all their reservations in Minnesota except the White Earth and Red Lake reservations. It was provided that a census should be taken of each tribe or band and after that had been taken and the cession provided for had been obtained, all the Chippewa Indians except those on Red Lake reservation should be removed to White Earth and allotted lands in severalty in conformity with the act of February 8, 1887 (24 Stat., 388), with the following proviso:

That any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives at the time of the removal herein provided for is effected, instead of being removed to and taking such allotment on White Earth reservation.

The cessions were obtained and approved and the commission entered upon the task of persuading the Indians to remove to White Earth reservation. This was prosecuted with varying success until January, 1895. The results were, however, unsatisfactory, and under date of January 19, 1895, your office, by direction of this Department, instructed the commission to suspend the work of removals, but if in the course of their work they should find an Indian willing to remove to report the facts for the determination of your office. After that the commission's work was in the direction of making allotments to the individuals of the various bands or tribes who had not been removed to White Earth. This work was completed as to the White Oak Point band in

1898, the certificates of the commission to the schedules prepared after the completion of the work being dated August 1, 1898.

The act of January 14, 1889, further provided "that as soon as the cession and relinquishment of said Indian title has been obtained and approved," the ceded lands should be surveyed and an examination be made to ascertain on which lots or tracts pine timber was standing or growing. The tracts upon which such timber was found were to be termed "pine lands" and were to be appraised at their actual cash value, not less than three dollars per thousand feet board measure, to be approved by the Secretary of the Interior. All other lands on said reservations were to be termed "agricultural lands."

By section five of said act it was provided:

That after the survey, examination, and appraisals of said pine lands has been fully completed they shall be proclaimed as in market and offered for sale.

They were to be sold in forty-acre parcels at not less than the appraised value.

Section six provided:

That when any agricultural lands on said reservation not allotted under this act nor reserved for the future use of said Indians have been surveyed, the Secretary of the Interior shall give thirty days' notice through at least one newspaper published at Saint Paul and Crookston in the State of Minnesota, and at the expiration of thirty days, the said agricultural lands so surveyed shall be disposed of by the United States to actual settlers only under the provisions of the homestead law.

The difference in the wording of the provisions in respect to the different classes of lands is significant. As to the "agricultural lands" only such as were not allotted or reserved were to be disposed of, while the "pine lands" were to be sold after the completion of their survey, examination and appraisal, which was to be accomplished "as soon as the cession and relinquishment of said Indian title has been obtained and approved," nothing being said as to allotments. This clearly indicates that the allotments were not to be made of pine lands.

In 1892 the question as to the right of the Indians on White Earth reservation to take "pine lands" in their allotments was raised, and on October 4th of that year this Department held that such lands should not be allotted.

This was also the view taken when the act in question was explained to the Indians during the negotiations for the cession therein provided for, and it was stated to them that the allotments would be made of agricultural lands, as is shown by the report of the commission found in executive document No. 247, House of Representatives, Fifty-fifth Congress, First Session.

The lands classed as "pine lands" are not subject to selection for allotments.

The tracts in section fifteen included in Mrs. Lydick's application, being the E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$ , selected for James Lydick, and the W.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$ , selected for Charles Lydick, have been examined, pine

timber has been found standing and growing thereon, this timber has been estimated and appraised as to each forty-acre tract, and this appraisal has been approved by the Secretary of the Interior. Thus these tracts have been classified as "pine lands" by the agency and in the manner provided for in said act of Congress. The reports of special agents and the affidavits submitted by the applicant respecting the character of the land do not overcome this classification.

The action of the Chippewa commissioner as to the selections for James Lydick of the E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 15, and for Charles Lydick of the W.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of said Sec. 15, is approved, and those selections are hereby rejected.

The other tracts covered by Mrs. Lydick's application seem to have been returned as "agricultural lands" and to have been subject to selection for allotments. The facts have not, however, been sufficiently developed to justify a decision as to the right of Mrs. Lydick and her children thereto. The facts as to her actual residence at and preceding the time allotments were made to the White Oak Point band, ought to be easily ascertained.

The matter is returned that a further investigation may be made to ascertain all the facts, after which you will again submit the matter with your opinion as to her rights in the premises.

APPLICATION TO ENTER—INDEMNITY SELECTION—SETTLEMENT  
CLAIM.

OLSON ET AL. *v.* HAGEMANN.

No rights are gained by the tender of an application to enter lands embraced within a pending railroad indemnity selection, made under the rulings in force, nor by an appeal from the rejection of such application.

Where an order of the General Land Office cancelling a list of railroad indemnity selections provides that no disposal of the lands shall be made until pending applications therefor have been adjudicated, and a hearing is subsequently directed as between said applicants, at which they appear, they will not be held in default, as to the timely assertion of their settlement claims, on account of failure to make application to enter within three months after said cancellation.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) August 24, 1899. (F. W. C.)

Sophia Hagemann and Rheinhard H. Schindeldecker have appealed from your office decision of August 6, 1898, awarding to Stina Olson the right to make entry of the NW.  $\frac{1}{4}$ , Sec. 25, T. 128 N., R. 47 W., St. Cloud land district, Minnesota.

This tract is within the indemnity limits opposite the main line of the St. Paul, Minneapolis and Manitoba Railway and was selected August 12, 1890, in lieu of lands lost along the St. Vincent Extension of said railway.

By your office decision of July 18, 1896, said selection was held for cancellation, the basis assigned not being a sufficient one, and as no appeal was taken therefrom by the railway company, the selection was ordered canceled, together with other selections having a like status, by your office decision of October 23, 1896. In cancelling the selections it was stated that—

A large portion of these lands have been applied for by parties claiming them under the settlement laws. . . . No disposal of these lands will be made until the above claims have been adjudicated by this office.

It appears that at the date of the cancellation of the selection covering the tract in question, there were pending, on appeal from the action of the local officers rejecting the same, applications by Hagemann, Schindeldecker and Olson tendered at the following dates: Hagemann, January 6, 1896; Schindeldecker, October 5, 1896; and Olson, October 10, 1896.

Following the cancellation of the railway selection, to wit, on November 28, 1896, your office directed the local officers to order a hearing in order to determine the priority of right between the several applicants. At the hearing ordered appearance was entered by all parties, but no testimony appears to have been offered on behalf of Hagemann. Upon the conclusion of the hearing the local officers recommended that the application by Sophia Hagemann be accepted, as it was prior in time to the applications of Schindeldecker and Olson, which recommendation was concurred in and the right of entry was awarded to Sophia Hagemann by your office decision of August 6, 1898, as before stated, from which appeals were filed by both Schindeldecker and Olson.

The question as to the effect of the presentation of an application to enter land included in a pending selection made by the Manitoba railway company along its main line on account of losses along its St. Vincent Extension branch, was fully considered in departmental decision of May 9, 1899, in the case of Falje v. Moe (28 L. D., 371). Applying the ruling therein made to the facts shown by the record under consideration, it must be held that neither Hagemann, Schindeldecker nor Olson gained any right by reason of the tender of their several applications prior to the cancellation of the railroad selection, nor by their appeals from the rejection thereof. The rejection of said applications should have been affirmed by your office, and any applicant still desiring to enter the land should have made application therefor at the local office after the land was freed from the railroad selection and subjected to homestead entry, and to fully protect the applicant in any claimed rights by reason of his settlement upon the land at the time of cancellation the application should have been made within three months after the cancellation, the time when the settlement became effective. In view, however, of the action taken by your office and of the fact that these parties appeared at and participated in the hearing held in accordance with the directions given by your office,

after the cancellation of the railroad selection, they will not be held in default for failing to apply to enter the land within the prescribed time after the cancellation.

From the record made it does not appear that Hagemann ever settled upon or made any improvements upon the land in question, her claim resting alone upon the tender of her application, as before stated, on January 6, 1896, long prior to the cancellation of the railroad selection. As she gained nothing by reason of said application, further consideration of her claim is unnecessary.

Schindeldecker and Olson each claim residence upon the land antedating the cancellation of the railroad selection. In the view entertained by your office, namely, that rights were acquired by the tender of the applications by the several parties prior to the cancellation of the railroad selection, it was not necessary to consider the record made at the hearing in so far as it relates to the claims of Schindeldecker and Olson, based upon settlement and residence on the land antedating the cancellation. That view being erroneous, the record is herewith returned for your further consideration and decision upon the relative rights of Schindeldecker and Olson upon the showing made at said hearing.

SCHOOL GRANT—ADJUSTMENT—INDEMNITY—CERTIFICATION.

BUTLER *v.* STATE OF CALIFORNIA.

It is the number of townships, or fractional townships, within a State that determines the extent or measure of the grant for school purposes; hence when it is found that the State has received for each township the designated sections, or an equal quantity in lieu thereof, or for the fractional quantity due, no mere irregularity in the matter of adjustment is material as between the State and the United States.

By the certification of a school indemnity selection title passes to the State, and an order thereafter made, by the General Land Office, cancelling such certification is without authority and void.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *August 24, 1899.* (E. F. B.)

This controversy involves the right to the NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  and E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 22, T. 10 N., R. 7 W., M. D. M., San Francisco, California, which is claimed by the State of California under its application, filed January 22, 1892, to select it as indemnity school land to compensate the deficiency in section 16, T. 2 S., R. 32 W., S. B. M., being part of Santa Rosa Island, a confirmed Mexican grant. It is also claimed by John J. Butler under his application filed March 20, 1897, to enter said land as a homestead, which was rejected because of the pending State selection, from which action he appealed.

In passing upon the claims of said parties to the tracts in controversy, your office, by decision of October 19, 1897, held the State's

selection for cancellation upon the ground that it had theretofore received by approved selections on account of said township, more land than was necessary to compensate the deficiency, and the application of Butler to make homestead entry was allowed.

The State filed a motion for review, alleging error in said decision and also upon the ground of newly discovered evidence, in this, that upon a recent calculation by the surveyor general of California, based on information obtained from the files of his office, it is shown that sections 16 and 36, are entire sections of 640 acres each, existing in place within the limits of the Mexican grant of Santa Rosa Island.

Your office, by decision of January 24, 1898, denied the motion and the State has filed an appeal from said decisions of October 19, 1897, and January 24, 1898, and the question presented is whether the State is entitled to any indemnity on account of its school grant for losses in said township 2 S., 32 W., either to compensate for deficiency in said township or in lieu of lands lost in place.

This township is within the limits of the Mexican grant of the island of Santa Rosa, which was confirmed to M. C. de Jones, and the exterior boundaries of which were thereafter surveyed and the survey approved by the surveyor-general June 19, 1862. It was also approved by your office October 3, 1871, in accordance with the act of July 1, 1864 (13 Stat., 332).

The grant to the State of California of the sixteenth and thirty-sixth sections for school purposes, was made by the act of March 3, 1853 (10 Stat., 244), which authorized the selection of other lands agreeable to the provisions of the act of May 20, 1826 (4 Stat., 179), where said sections were settled upon prior to survey, reserved for public uses or taken by private claims. The right of the State to select lands for school purposes in lieu of the sixteenth and thirty-sixth sections conferred by the act of March 3, 1853, was construed by the sixth section of the act of July 23, 1866 (14 Stat., 218), to extend to such sections—

as were settled upon prior to survey, reserved for public uses, covered by grants made under Spanish or Mexican authority, or by other private claims, or where such sections would be so covered if the lines of the public surveys were extended over such lands, which shall be determined whenever township lines shall have been extended over such land, and in case of Spanish or Mexican grants, when the final survey of such grants shall have been made. The surveyor-general for the State of California shall furnish the State authorities with lists of all such sections so covered, as a basis of selection, such selections to be made from surveyed lands, and within the same land district as the section for which the selection is made.

The territory covered by the survey of the Santa Rosa private land claim, as shown by the protraction of the township lines on the official plat of survey, embraces eight fractional townships. May 22, 1872, the surveyor-general of California, as required by the act of July 23, 1866, certified to the State of California, the condition of sections 16 and 36 embraced within the limits of said private claim, and the amount of indemnity it was entitled to by reason thereof.

In township 2 S., R. 32 W., which contains the alleged basis for the selections in controversy, section 36 is shown to be in place, and section 16 is fractional to the extent of 180 acres. The surveyor-general therefore certified that the State was entitled to 640 acres for section 36 and 460 acres for section 16, a total of 1,100 acres for said township. This township, as shown by the protraction of the township lines on the official plat of survey, contains less than one-half but more than one-quarter, the area of an entire township, and, under the rule of adjustment (section 2276, R. S.), the State would be entitled to 640 acres if sections 16 and 36 were both wanting, or to an equal acreage to compensate the deficiency if sections 16 and 36 were fractional to a greater extent than 640 acres. But as section 36 is in place, containing the full quantity of 640 acres, and section 16 is only fractional to the extent of 180 acres, there are no deficiencies in the township by reason of its fractional condition and therefore the right of selection is not to compensate a deficiency but to select in lieu of lands lost in place by reason of being covered by a Mexican grant.

The records of your office show that the State has received 1,126 acres of land in lieu of sections 16 and 36 in this township, which have been certified to it upon approved selections as follows:

*List 1: San Francisco District, approved January 6, 1868.*

Sec. 16.—S. $\frac{1}{2}$ SW. $\frac{1}{2}$ , 8, 15 N., 16 W., R. & R. 858 .....	80
“ “ —N. $\frac{1}{2}$ NE. $\frac{1}{2}$ , 17, “ “ “ “ “ “ .....	80
	160
Sec. 36.—E. $\frac{1}{2}$ SW. $\frac{1}{2}$ , 7, 15 N., 16 W., R. & R. 857 .....	80
“ “ Lots 3 and 4, 7, 15 N., 16 W., R. & R., 857 .....	70
“ “ SE. $\frac{1}{2}$ , 7, “ “ “ “ “ “ .....	160
“ “ N. $\frac{1}{2}$ , 34, 17 “ 17 “ “ “ 796 .....	320
	630

*List 26, approved April 18, 1873.*

Sec. 16.—NW. $\frac{1}{4}$ , 17, 15 N., 16 W., R. & R. 858 .....	160
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*List 4, Los Angeles District, approved September 1, 1874.*

Sec. 36.—N. $\frac{1}{2}$ NE. $\frac{1}{2}$ SW. $\frac{1}{2}$ NE. $\frac{1}{2}$ and NW. $\frac{1}{2}$ SE. $\frac{1}{2}$ , 20, 10 S., 3 W., R. & R. 240 .....	160
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The State has also selected the N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 30, T. 17, R. 10, per list R. and R. 1070, Los Angeles, which was approved to it upon a basis made up of small deficiencies including 16 acres of said section 16. It has therefore received upon approved lists 790 acres for said section 36, and 336 acres for said section 16, making a total of 1,126 acres to compensate for a loss of 1,100.

The contention of the State is that as the records of your office show that it is entitled to 124 acres to compensate for the loss in section 16, even according to the amount certified by the surveyor-general, it is a valid basis for the selection in controversy. This contention is based

upon the following grounds which cover substantially the several alleged grounds of error:

1. That there is no authority to charge section 16 with the overplus of lands certified on account of section 36.

2. That there is no authority to select school indemnity and approve such selections upon the basis of losses in a township as a whole, but that each section must be adjusted according to its own loss.

3. That State selection R. and R. 796 appears from the tract book of your office to have been canceled for invalidity and was not certified to the State on the basis of sections 16 and 36 of T. 2 S., R. 32 W.

The first and second grounds above set forth present the controlling question in the case, and that is, whether the Department has authority to adjust the school grant with reference to the losses in a township, as a whole, and to make up from the State selections a clear list and upon it certify to the State the indemnity due in satisfaction of the loss in such township.

The grant of lands to the States for school purposes is for each township. It is the number of townships or fractional townships within the boundaries of the State that determines the extent or measure of the grant, and, hence, in adjusting the grant the main object is to determine whether the State has received for each township the designated sections or an equal quantity of lands in lieu thereof, or for the fractional quantity due, where such sections are wanting or are fractional in quantity. When this is accomplished the State is fully indemnified, and as between the State and the United States no mere irregularity in the adjustment of the grant will be allowed to control.

It is contended by the State that the lands were not certified upon the list of lands as selected by the State. That is true, but from the State lists of selections the Department made up a clear list omitting some of the selections from list No. 1, which were afterwards certified in another list. It is also true that the Department substituted section 36 for section 16, the basis designated by the State in its list No. 796, but there was no adverse claim to any of the lands selected and the State in 1868 received by the certification and approval of the Department, the absolute title to all the lands embraced in list 1, without complaint. While the certificate to the State, September 1, 1874, of the 160 acres selected in the Los Angeles district was improperly credited to loss in section 36, inasmuch as the Department had already certified to the State 630 acres upon the basis of loss in that section, it was a mere irregularity that no one could take advantage of but an adverse claimant to the selected tract, since the records showed that the State was entitled to that amount on account of losses in the township. It acquired the absolute title to this indemnity by the certificate of the Department and no rights were prejudiced by the erroneous designation of the bases. *Melvin v. California* (6 L. D., 702); *James Lynch* (7 L. D., 580); *State of California* (8 L. D., 307).

As to the allegation that the selection of 320 acres (NW.  $\frac{1}{4}$ , 34, 17-17), embraced in State selection 796 and certified to the State January 6, 1868, in list No. 1, was canceled, the following entry appears on the tract books:

N.  $\frac{1}{2}$  of Sec. 34, 17 N., 17 W., 320.00 (acres), selected by State February 21, 1867, in lieu of S.  $\frac{1}{4}$  of 16, 2 S., 32 W. (S. B.), R. & R. 796. 'B,' Canceled March 9, 1885.

The record also shows that your office addressed a letter to the register and receiver at San Francisco, California, March 9, 1885, notifying them of said cancellation and directing them to note it on the records of their office and advise the State of such action. The letter states that this selection was canceled because it was based upon deficiencies in school sections which had been satisfied by prior selections, but it does not appear that the State ever took any action looking to the relinquishment or surrender of the title to this tract and it still holds the title to the same. The action of your office in attempting to cancel said certification was without authority and void. *California v. Boddy* (9 L. D., 636); *Tonner v. O'Neill* (14 L. D., 317); *State of Montana* (27 L. D., 474).

The State also claims that sections 16 and 36 of T. 2 S., R. 32 W., are full sections in place containing 640 acres, as will be seen from the certificate of W. S. Green, then surveyor-general of California, who, while in office, made a calculation based on accurate information on file in that office. He certifies that the red lines shown on the official plat of Santa Rosa Island to represent the township lines, were never surveyed but were merely protracted to show their approximate position and were not located upon any definite data to be found in that office; that the east and west lines are about 20 chains too far south, and the north and south lines about 115 chains too far west; and that a protraction of section lines in said township, upon the correct calculation recently made, shown upon a diagram annexed to the official plat, shows that sections 16 and 36 are entire sections of 640 acres each, in place within said Mexican grant.

It was known to the Department when the grant was adjusted that the township lines were extended over this survey by protraction, and that is the manner contemplated by the act of July 23, 1866, by which it is to be determined whether such sections would be covered by private grants over which the public surveys were not to be extended. The exterior boundaries of this grant were surveyed in 1862. In 1872 the surveyor-general, under authority of the act of July 23, 1866, determined what quantity of school land was covered by such grant by protracting the township lines upon the official plat of survey. The effect of the change in the protraction of the township lines contended for by the State would be to remove the north and south lines one mile east, which would show all of section 16, T. 2 S., R. 32 W., to be in place, but the aggregate quantity of indemnity would be considerably diminished. The protraction of the township lines upon the plat

submitted with the certificate of the ex-surveyor-general, shows no part of section 16, T. 2 S., 30 W., to be in place and only a small fraction of Sec. 36. As the lines are protracted upon the official plat, all of section 36 of this township and about one-half of section 16, is in place. For this township the surveyor general certified that the State was entitled to 960 acres and this quantity of land has been received by the State for this township upon approved selections.

The adjustment of the grant to the State to compensate for losses within said private claim was made under the laws in force prior to the act of February 28, 1891, amending sections 2275 and 2276 Revised Statutes; but said amendatory act does not affect the questions presented herein, inasmuch as the State has received all the land it would be entitled to even if provisions similar to section 2275 had been in force at the time of said adjustment.

Your decision is affirmed.

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CEDED CHIPPEWA LANDS—ALLOTMENT.

HAROLD BORUP.

The special provisions of the act of January 14, 1889, for the disposition of the ceded Chippewa lands, take them out of the class of lands subject to allotment under section 4, act of February 8, 1887.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *August 25, 1899.* (W. C. P.)

July 2, 1898, Harold Borup made Indian allotment application for the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 16, and the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 15, T. 145 N., R. 31 W., St. Cloud, Minnesota, land district. This application was made under the fourth section of the act of February 8, 1887 (24 Stat., 388), by Borup, as a Chippewa Indian not residing upon any reservation.

By your office decision of October 22, 1898, the application was held for cancellation because Borup had formerly applied for other lands, which it is said would have exhausted any rights he may have had under said act, and for the further reason that this Department had held, in a decision of June 6, 1898, that Borup was not entitled to any benefit under the fourth section of said act. Borup was advised that he would be allowed sixty days to apply for a hearing to show cause why his application should be sustained. He asked for a hearing, supporting the request by his own and other affidavits; but this was denied on the ground that his statement that he is the son of a marriage between a white man and an Indian woman fixes his status as a white and shows that he is not entitled to an allotment. Borup appealed to this Department.

This applicant, in 1888, asked for an allotment of certain unsurveyed lands in sections 22, 23, and 26, T. 29 N., R. 23 W., Minnesota. That application, with others, was submitted to this Department in 1890, with request for an opinion as to the rights of these parties to receive allotments, it being stated that the land applied for was not subject to selection. This decision was not made until June 6, 1898, when it was held, in a letter to the Commissioner of Indian Affairs, that Harold Borup, among others, was not entitled to an allotment. The application now under consideration was filed after that.

The former application was for lands not subject thereto, and hence would not exhaust any right he may have had under said act or constitute a bar to the selection of other lands, and your office decision holding it did exhaust his right was to that extent in error.

It is found that the land now applied for is within the Chippewa Indian reservation and was a part of the lands ceded by the Chippewa Indians under the act of January 14, 1889 (25 Stat., 642), and that part of it in section 15 has been examined, appraised and ordered sold as "pine lands" under the provisions of said act. It is held that the lands thus ceded, which were to be disposed of for the benefit of the Indians, are not of the class of lands subject to selection as allotments under the fourth section of the act of 1887. (Onab Ogamaybeck, 26 L. D., 275.) The application under consideration must be rejected without regard to the applicant's qualifications, and hence the hearing asked for could avail him nothing in connection with this application. Inasmuch as a part of the lands involved have been ordered sold at public sale, it is important that all claims thereto now pending should be disposed of without delay.

For the reasons herein given your action holding said application for cancellation and refusing to order a hearing is affirmed.

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#### DESERT LAND ENTRY--WATER RIGHT.

##### INSTRUCTIONS.

The act of March 3, 1877, provides that the water right of a desert land entryman shall depend upon prior appropriation, and evidence which satisfactorily establishes the fact that the entryman has thus acquired and possesses an undoubted right to the requisite supply of water, is sufficient.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *August 25, 1899.* (W. C. P.)

In your office letter of July 25, 1899, it is said that it has been the practice to require desert land entrymen to show by a certificate from the proper officer, or by other competent testimony, that the water used by them for irrigation was properly appropriated under the laws

of the State or Territory where the land is situated, and a recent decision of this Department (A. W. Lindsey, 28 L. D., 512) is referred to as opposed to this view, and quoted from as follows:

Inasmuch as a desert entryman is protected in a water right acquired by appropriation under the desert land act, it is unnecessary to determine whether such entryman would be protected under section 2339 Revised Statutes and the laws and the decisions of the supreme court of the State of Oregon.

Following and in reference to this quotation it is said:

This language would seem to imply that the right to appropriate water is primarily given by said act of Congress independent of State laws, and that when it has been so appropriated it is "unnecessary to determine" whether it has been appropriated under the State laws or not.

If this literal interpretation is to be taken as a departmental ultimatum on this subject it necessitates an alteration in the practice of this office, as it has heretofore held that evidence of a compliance with the requirements of the State or Territorial laws relative to the appropriation of water for irrigation purposes was all that was necessary.

The decision to which attention is called is subject to criticism. Notwithstanding the language there employed, it was not intended to say that the act of March 3, 1877 (19 Stat., 377), gives a right to appropriate water independently of State or Territorial laws, customs and decisions, or that a certificate from the proper officer of a State or Territory that the water had been properly appropriated would not be accepted as evidence of a prior appropriation, or to lay down any absolute rule upon the subject. The decision of your office in that case requiring the entryman to produce a certificate from an officer of the State that the water had been properly appropriated was clearly wrong, since no officer of that State was authorized to give such a certificate. By the decisions of the supreme court of that State the right to divert water from a natural stream and to appropriate it to beneficial uses had been fully recognized and acknowledged (*Kaylor v. Campbell*, 13 Ore., 596; *Low v. Rizer*, 37 Pac. Rep., 82; *Nevada Ditch Co. v. Bennett et al.*, 45 Pac. Rep., 472; *Smyth v. Neal*, 49 Pac. Rep., 850), and hence it was not necessary to consider whether the right to appropriate the water could be rested solely upon the act of Congress of March 3, 1877. That case demonstrates the infeasibility of adopting or attempting to adhere to any absolute rule upon the subject.

The act declares that the right to the water to irrigate the land intended to be reclaimed shall depend upon prior appropriation, and evidence which satisfactorily establishes the fact that an entryman has, through prior appropriation by himself or others through whom he claims, acquired and possesses an undoubted right to title to a sufficient supply of water to irrigate the land claimed by him, should be accepted.

## RAILROAD GRANT—INDEMNITY SELECTION—FORFEITURE.

SMEAD *v.* SOUTHERN PACIFIC R. R. CO.

The Southern Pacific R. R. Co. is not entitled to make indemnity selections, on account of its branch line, within the forfeited indemnity-limits of the grant to the Atlantic and Pacific.

The departmental decision herein of November 22, 1895, 21 L. D., 432, vacated.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) August 25, 1899. (J. L. McC.)

The land in controversy in this case is the NE.  $\frac{1}{4}$  of Sec. 15, T. 18 N., R. 17 W., Los Angeles land district, California.

It lies within the common indemnity limits of the grant made by the act of July 27, 1866 (14 Stat., 292), to the Atlantic and Pacific Railroad Company, and that of March 3, 1871 (16 Stat., 573), to the Southern Pacific Railroad Company branch line.

The latter company selected the tract on account of its branch line, on January 16, 1885, but at that time failed to specify the loss for which said selection was made; on October 14, 1887, it designated the S.  $\frac{1}{2}$  of Sec. 29, T. 4 N., R. 18 W., as the basis for its selection of the N.  $\frac{1}{2}$  of said Sec. 15; and on November 28, 1888, it substituted for this the S.  $\frac{1}{2}$  of Sec. 29, T. 1 N., R. 14 W., as the basis.

On December 10, 1889, Elihu Smead applied to make homestead entry of the tract in controversy. His application was rejected because of the prior selection thereof by the company. He appealed to your office; and upon its decision of August 1, 1894, adverse to him, he appealed to the Department. He directed attention to the fact that the basis of the indemnity claimed—the S.  $\frac{1}{2}$  of Sec. 29, T. 1 N., R. 14 W.—is embraced in a Mexican grant (Mission de San Fernando, lot 373), and was patented January 8, 1873; and contended that said land never was government land belonging to the United States, and therefore the company is not entitled to indemnity therefor.

The Department, by decision of November 22, 1895, held that the company was entitled to indemnity for the loss of said tract, and affirmed the decision of your office rejecting Smead's application to make homestead entry of the same. (Smead *v.* Southern Pacific R. R. Co. (21 L. D., 432).

Subsequently to the rendition of said decision, but prior to its promulgation, the attention of the Department was called to the fact that a suit was pending in the United States circuit court for California to determine the rights of the Southern Pacific Railroad Company to lands claimed by it under the grant for its branch line, but within the place and indemnity limits of the forfeited grant of the Atlantic and Pacific Railroad Company; and thereupon said decision was recalled for further consideration and the papers in the case informally returned to the Department.

Said suit pending before the United States circuit court for California, having been decided adversely to the Southern Pacific Railroad Company, was appealed to the United States Supreme Court, which rendered decision therein October 18, 1897 (Southern Pacific Railroad Co. v. The United States, 168 U. S., 1), holding that upon the passage of the act of July 6, 1886 (24 Stat., 123), forfeiting the grant of lands to the Atlantic and Pacific Railroad Company, such lands became the property of the United States, without the Southern Pacific Railroad Company having acquired any interest therein that affected the ownership of the United States, or that would prevent Congress from restoring such lands to the public domain to be disposed of by the United States as it might see proper.

Thereupon the Department, by letters of January 18 and 28, 1898 (26 L. D., 48 and 97), directed that the restoration to entry of the lands which it had ordered to be restored by departmental letter of July 15, 1893 (but which had been suspended by departmental letter of November 8, 1893, because of the pendency of the suit above mentioned), should be proceeded with. On April 15, 1898 (26 L. D., 697), instructions were issued to the local officers at Los Angeles, California, relative to the proper manner of carrying into effect said order of restoration. With said instructions was transmitted a diagram showing the limits of the said grants as they overlap the lands to be restored, and in explanation thereof it was said that—

under the decision of the court the restoration will embrace all the public lands within the thirty (30) mile limits of the forfeited Atlantic and Pacific grant to the extent it is overlapped by the Southern Pacific branch line grant (both twenty and thirty mile limits) outside the twenty mile primary limits of the Southern Pacific main line grant, and also the tracts above described within the latter limits as being involved in the suit recently decided, with the exceptions noted.

The lands outside the primary limits of the Southern Pacific main line grant, and within the limits of its branch line grant, are of four classes, as follows: Lands within the common granted limits of the Atlantic and Pacific grant and the Southern Pacific grant of 1871; lands within the granted limits of said Southern Pacific grant and the indemnity limits of the Atlantic and Pacific grant; lands within the granted limits of the Atlantic and Pacific grant and within the indemnity limits of the Southern Pacific; and lands within the common indemnity limits of both grants. The San Gabriel reservation is noted on the diagram and colored pink.

All applications to select, and all selections, by the Southern Pacific Railroad Company on account of its branch line, of the lands to be restored, are rejected and canceled, respectively; and you will so note upon your records.

The lands referred to as being excepted from restoration are the lands involved in the suit decided by the United States supreme court (168 U. S., 1, *supra*), which were claimed by defendants in that suit other than the Southern Pacific Railroad Company, and the trustees of a certain mortgage executed by that company, and the lands lying within the San Gabriel timber-land reserve, all of which are specifically noted in said instructions.

The land here in controversy, being situated within the common

indemnity-limits of the grant to the Atlantic and Pacific Company and that to the Southern Pacific Company branch line, and not within the exceptions referred to, are within the said instructions as a part of the restored lands. The departmental decision of November 22, 1895, holding intact the company's selection of the same, was therefore erroneous, and is hereby set aside and vacated; your office decision of August 1, 1894, is reversed; and appropriate action will be taken upon Smead's application in accordance with this decision.

MINING CLAIM—PLACER ADVERSE—JUDICIAL AWARD.

CLIPPER MINING CO. *v.* SEARL ET AL.

A judgment of a court in adverse proceedings instituted by a placer claimant, as against a lode applicant, wherein the adverse claimant is awarded the possession of the land in controversy, forms no basis for a lode entry by such adverse claimant, where, in the adverse claim filed in the local office and set forth in the pleadings of the adverse suit, said claimant rests his right to the land in controversy solely on his alleged placer claim, and asserts that there are no known lodes or veins therein.

The adverse claim in such case, and the judgment thereon, will not be disregarded on the ground that the land in controversy, by previous decision of the Department has been held to contain no placer deposits, where said adverse claim has been recognized by departmental decision, and sustained by the trial court, and the matter is pending on proceedings in error in which a supersedeas has been allowed.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *August 25, 1899.* (G. B. G.)

This case involves that portion of the so-called Searl placer mining claim in the Leadville, Colorado, land district, which is embraced in the so-called Capital, Congress, Clipper and Castle lode mining claims. The land covered by this placer claim has been the subject of departmental consideration on several occasions: (7 Copp's L. O., 36; 11 L. D., 441; 22 L. D., 527). So far as is material to the present inquiry, the facts are briefly as follows:

September 1, 1893, the Clipper Mining Company made application for patent for the Capital, Congress, Clipper and Castle claims, at the Leadville, Colorado, land office, the claims being described in the application as containing veins or lodes bearing silver.

October 28, 1893, and within the period of publication of notice of said application, A. D. Searl and others filed in the local office an adverse claim against the Clipper Company's application, alleging that the adverse claimants were the owners of the Searl placer mining claim; that said placer claim was the prior claim in the point of time of location and embraced a portion of the area included in said lode claims; that the adverse claimants and their grantors had been continuously in the possession of the placer claim since the location

thereof; that they had complied with all requirements of the mining laws, customs and rules; that neither the Clipper Company nor those under whom it claims had discovered any vein or lode bearing mineral within the placer claim; and that the adverse claimants were entitled to the area in controversy. The adverse claim contained no statement that there were any veins or lodes within the limits of the placer claim or that the adverse claimants were claiming any known veins or lodes therein.

Within the time prescribed therefor the adverse claimants brought suit in the district court of Lake County, Colorado, against the Clipper Company to establish their adverse claim. In their pleadings in that suit the adverse claimants rested their right to the land in controversy upon the location and continued maintenance of said placer mining claim, asserted that the Clipper Company had wrongfully withheld from them the possession of the area in conflict since November 25, 1890, and denied the existence of any known veins or lodes within that area at the time of the bringing of the suit. April 28, 1898, a judgment was rendered in the suit, finding and adjudging that the adverse claimants were entitled to the possession of the land in controversy. This land was described in the judgment as follows:

That portion of the placer claim called The Searl placer claim, situate in the California mining district, county of Lake and State of Colorado, bounded and described as follows: Beginning at corner No. 2, U. S. survey No. 6965, thence "A" S. 81° 36' W. 490.9 feet; thence "B" S. 8° 30' E. 100 feet; thence "C" S. 71° 26' 27" E. 61 feet; thence "D" S. 81° 36' W. 13.58 feet; thence "E" N. 69° 51' W. 178.12 feet; thence "F" S. 75° 35' W. 144.2 feet; thence "G" S. 81° 36' W. 23.7 feet; thence "H" N. 77° W. 135.6 feet; thence "I" N. 8° 24' W. 58.8 feet; thence "J" S. 81° 36' W. 150 feet; thence "K" N. 77° W. 161 feet; thence "L" N. 8° 24' W. 144.2 feet; thence "M" N. 81° 36' E. 300 feet; thence "N" S. 8° 24' E. 108.3 feet; thence "O" N. 81° 36' E. 300 feet; thence "P" S. 8° 24' E. 70.1 feet; thence "Q" N. 81° 36' E. 264.4 feet; thence "R" S. 50° 30' E. 52.3 feet; thence "S" S. 8° 24' E. 142.3 feet; thence "T" S. 81° 30' W. 132 feet; thence "U" S. 50° E. 199 feet; thence "V" S. 8° 24' E. 168.63 feet; thence "W" N. 81° 36' E. 150 feet; thence "X" S. 50° E. 225.9 feet; thence "Y" S. 8° 24' E. 703.87 feet to place of beginning; comprising 35.59 acres more or less.

August 4, 1898, this judgment being in full force and not having been superseded or vacated by any appellate or other proceeding, the adverse claimants filed in the local office a certified copy thereof, accompanied by the following application in writing, subscribed by them or in their behalf:

#### APPLICATION TO PURCHASE.

*To the Register and Receiver, United States Land Office at Leadville, Colorado.*

The undersigned, claimants under the provisions of the Revised Statutes, Chapter Six, Title Thirty-two, and legislation supplemental thereto, hereby apply to purchase that *mining claim* known as the Capitol, Clipper, Congress and Castle lode mining claim, section 24, in township No. 9 south of range No. 80 west 6th principal meridian, designated as lot No. 6965, said lot No. 6965 extending 872.77 feet in length on the said Capitol lode; 1500 feet in length on the Clipper lode; 1500 feet in length on the Congress lode, and 1500 feet on the Castle lode. Said claim being the amounts

recovered by the said claimants as a part of the Searl placer in an adverse suit filed by said claimants against The Clipper Mining Company, as suit No. 4580, in the district court of Lake county, Colorado on November 23rd, 1893; judgment for said tract being recovered on the 28th day of April, 1898; said claim being described by metes and bounds as follows, as shown by the adverse plat on file in this proceeding:

Beginning at corner No. 2, U. S. survey No. 6965, thence course "A" S. 81° 36' W. 409.9 feet; thence course "B" S. 8° 30' E. 100 feet; thence course "C" S. 71° 26' 27" E. 61 feet; thence course "D" S. 81° 36' W. 13.58 feet; thence course "E" N. 69° 51' W. 178.12 feet; thence course "F" S. 75° 35' W. 144.2 feet; thence course "G" S. 81° 36' W. 23.7 feet; thence course "H" N. 77° W. 135.6 feet; thence course "I" N. 8° 24' W. 58.8 feet; thence course "J" S. 81° 36' W. 150 feet; thence "K" N. 71° W. 161 feet; thence course "L" N. 8° 24' W. 1441.2 feet; thence course "M" S. 81° 36' E. 300 feet; thence course "N" S. 8° 24' E. 108.3 feet; thence course "O" S. 81° 36' E. 300 feet; thence course "P" S. 8° 24' E. 70.1 ft; thence course "Q" S. 81° 36' E. 264.4 feet; thence course "R" S. 50° 30' E. 52.3 feet; thence course "S" S. 8° 24' E. 142.3 feet; thence course "T" S. 81° 30' W. 132 feet; thence course "U" S. 50° E. 149 feet; thence course "V" S. 8° 24' E. 168.63 feet; thence course "W" N. 81° 36' E. 150 feet; thence course "X" S. 50° E. 225.9 feet; thence course "Y" S. 8° 24' E. 703.87 feet to the place of beginning.

The area herein applied for constitutes the entire area applied for by the said Clipper Mining Company, as the Capitol, Clipper, Congress and Castle lodes, all of which was recovered by these the claimants in the said suit 4580, as shown by the certified transcript of the said judgment therein filed herewith.

This application is made without prejudice to the rights of these claimants to apply for and enter the remainder of their said Searl Placer Mining Claim not covered by the said Capitol, Clipper and Castle lodes. Said lode mining claim embracing 35.59 acres in the California mining district, in the county of Lake and State of Colorado, as shown by the survey thereof, and hereby agree to pay therefor one hundred and eighty (\$180.00) dollars, being the legal price thereof.

Dated August 4th, 1898.

The adverse claimants then paid for the land in controversy the price fixed by law for lode claims, receiving the receiver's receipt therefor, and made entry of said land as lode mining claims, under the names designated in the Clipper company's application, receiving a certificate of final entry from the register. The whole proceedings with the certified copy of said judgment were then certified or transmitted to your office as required by section 2326 of the Revised Statutes, where they were met by a protest filed by the Clipper company against said entry and against the issuance of patent thereon.

Your office decision of December 20, 1898, considered these entry proceedings and held that in the adverse claim filed in the local office and in their pleadings in the adverse suit the adverse claimants rested their right to the land in controversy solely upon their alleged placer claim and asserted that there were no known veins or lodes therein; that the judgment in the adverse suit awarded said land to them as a part of said placer claim and not otherwise; that such judgment did not establish in them any right to make a lode entry or receive a lode patent and that the lode entry should be canceled as wholly unauthorized. From this decision Searl and his associates, the adverse claimants, have appealed to the Department.

The decision of your office was clearly correct and is therefore affirmed.

The Clipper company contends that the land in controversy does not contain any placer mineral deposits and was so held by this Department in its decision of November 13, 1890 (11 L. D., 441), and that therefore no placer patent can be issued to Searl and his associates under their judgment. It is a sufficient answer to this to say that no request for the issuance of a placer patent under said judgment has been made, and until that is done there will be no occasion to determine the rights of Searl and his associates to such a patent.

The Clipper company also asks, because of the departmental decision of November 13, 1890, holding that the land in controversy contains no placer mineral deposits, that the adverse claim of Searl and his associates and the judgment sustaining the same be disregarded and the land be patented to the company as lode mining claims under its application first above recited. Recognition having been given to said adverse claim by departmental decision of May 13, 1896 (22 L. D., 527), the correctness of which is not now considered, and the adverse claim having been sustained by the judgment rendered in the adverse suit, and the matter having been taken to, and being now pending in, the supreme court of Colorado upon proceedings in error in which a supersedeas was allowed March 7, 1899, the Department will not give further consideration to any claimed rights of the Clipper company until the matter is finally determined by the courts.

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JULIA E. MYERS.

Motion for review of departmental decision of May 22, 1899, 28 L. D. 399, denied by Secretary Hitchcock, August 28, 1899.

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VACA *v.* PETERSEN.

Motion for review of departmental decision of June 14, 1899, 28 L. D., 510, denied by Secretary Hitchcock, August 28, 1899.

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PRACTICE—APPEAL—MODIFICATION OF RULES.

WHITING ET AL. *v.* JEFF DAVIS MINING CO.

The General Land Office, after an appeal from its decision in a case, is without authority therein to grant an extension of time for filing argument, or otherwise modify the Rules of Practice with respect to the proceedings on appeal.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *August 28, 1899.* (E. B., Jr.)

It appears that on July 11, 1899, while the above entitled case was pending before the Department on appeal from your decision of March

20, 1899, dismissing the protest of C. K. Whiting *et al.* against the application of the Jeff Davis Mining Company, as to the Bull Domingo and Annie May Wells lode mining claims, embraced with other lode mining claims in the said application, a letter was written by your office, addressed to the attorneys for the protestants, purporting, upon their request, to allow an extension of sixty days' additional time within which to file a brief in support of their appeal to the Department.

After an appeal has been taken from a decision of your office in a case further proceedings therein are controlled generally, as to the time for the filing of appeal and argument, by the Rules of Practice. In such case no authority exists in your office to grant any extension of time or to modify in any way the Rules of Practice pertaining to such matters, and the attempted grant of an extension of time within which to file a brief was therefore irregular and is disapproved by the Department.

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#### INSTRUCTIONS.

##### MANNER OF PROCEEDING UPON SPECIAL AGENTS' REPORTS.

##### DEPARTMENT OF THE INTERIOR,

##### GENERAL LAND OFFICE,

Washington, D. C., August 18, 1899.

*To Registers and Receivers of United States District Land Offices.*

GENTLEMEN: The following rules are prescribed for the government of all parties concerned in proceedings arising on reports of special agents affecting the validity of claims to public lands, viz:

1. Hereafter, when there is filed in this office a report of a special agent alleging that a certain entry, filing, location, or claim for a specified tract of public lands, is fraudulent, or illegal, or that the claimant has failed to comply with the requirements of law, and the facts presented are sufficient, if true, to warrant the cancellation of the entry or claim, the proper local officers will be promptly advised thereof, and will be directed to serve notice upon the entryman or claimant in the following manner:

2. The notice must specifically define the charges contained in the special agent's report adverse to the entry, filing, location, or claim; and the entryman or claimant shall be advised that he will be allowed thirty days within which to apply for a hearing, and that a failure to apply for such hearing within the prescribed time will be taken as an admission of the truth of the charges.

3. Said notice must be served personally, or, in cases where evidence is submitted to this office showing that due diligence has been used by the local officers and the special agent, and the party or parties can not be found, notice by publication in accordance with Rules 13 and 14 of Practice may be specially authorized and directed by this office.

4. If the entryman or claimant applies for a hearing, the local officers will promptly forward the application to this office when, at as early a day thereafter as practicable, a special agent will be assigned to represent the government at the trial, and the local officers will be directed to confer with him and agree upon a day therefor, of which they will duly notify all parties in interest, and otherwise proceed as provided by the rules of practice governing contest cases.

5. Upon the termination of the hearing (at which the burden of proof will be assumed by the government) the local officers will, without delay, make their finding and recommendation in the case, duly notify the defendant thereof as in other cases (Rule 44 Practice), and, upon the expiration of the time allowed for appeal, transmit the record to this office.

6. In cases where the entryman or claimant, after due notice, fails to apply for a hearing within the time allowed, the local officers shall, at the expiration of the prescribed time, render decision as in other *ex parte* cases. The failure of the entryman or claimant to answer to the charges shall be taken as an admission of their truth, obviating the necessity of submitting evidence in support thereof.

7. Notice of such decision shall be given the entryman or claimant by the local officers, as in other cases (Rule 44 of Practice) allowing the usual time for appeal. If, at the expiration of the time allowed, no appeal has been filed, the case shall be transmitted to this office to be disposed of in the same manner as other *ex parte* cases.

8. Hereafter, no entry, filing, location, or other public land claim will be canceled upon allegations contained in a special agent's report, except upon proper evidence that the entryman or claimant had notice of the charges against the same, either by personal service of notice, or after due and proper notice has been given by publication under Rules 13 and 14 of Practice.

9. Instructions of November 4, 1895 (21 L. D., 367), relative to hearings ordered upon special agents' reports will remain in full force and effect where not in conflict herewith, but all instructions relative to any proceedings upon special agents' reports inconsistent herewith, are hereby rescinded.

10. All notices to be served on entrymen or claimants under these instructions, must likewise be served on transferees or mortgagees, where such transferees or mortgagees are of record as parties in interest in the local land office or in the General Land Office.

Very respectfully,

W. A. RICHARDS,  
*Acting Commissioner.*

Approved:

THOS. RYAN,  
*Acting Secretary.*

COPE *v.* BRADEN.

Petition for rehearing denied August 29, 1899, by Secretary Hitchcock. See departmental decision of October 21, 1897, 25 L. D., 341, and April 19, 1898, 26 L. D., 536.

MCFARLAND *v.* MCALISTER.

Motion for review of departmental decision of April 28, 1899, 28 L. D., 337, denied by Secretary Hitchcock; August 31, 1899.

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

## BRODIE GOLD REDUCTION CO.

The right to a patent for a mill site, under the second clause of section 2337, R. S., depends upon the presence on the land applied for of a quartz mill or reduction works.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *August 31, 1899.* (C. J. W.)

It appears that the Cripple Creek Gold Extraction and Power Company filed mineral application No. 370 for the Mound City millsite, located May 12, 1892, embracing five acres of Sec. 5, T. 15 S., R. 70 W., Pueblo land district, Colorado, which was surveyed for patent on December 7, 1892, as survey No. 7726, and the field notes duly filed in the land office at Pueblo, Colorado. It also appears that the greater part of the five acres so located and claimed by the Cripple Creek Gold Extraction and Power Company was found to be within the boundaries of a claim known as the Tiva placer claim. In order to avoid litigation an amicable agreement was reached between the Cripple Creek Gold Extraction and Power Company and the owners of the Tiva placer claim, under which the said company agreed to exclude from its application that portion of the millsite applied for which was within the exterior lines of the Tiva placer claim, and the owners of said Tiva placer claim agreed to obtain patent to the ground so excluded from the application of the Cripple Creek Gold Extraction and Power Company, from the United States, and thereafter convey title to said ground to said Cripple Creek Gold Extraction and Power Company. This agreement appears to have been fully carried out, and the land obtained under said agreement with the owners of the Tiva placer claim is the land upon which the mill and reduction works of the Brodie Gold Reduction Company are located, the Brodie Gold Reduction Company having succeeded to the rights of the Cripple Creek Gold Extraction and Power Company.

The Brodie Gold Reduction Company, as successor to the rights of the Cripple Creek Gold Extraction and Power Company, filed its appli-

cation to purchase certain parcels of land, which it is alleged form a part of the Mound City millsite, as shown by mineral survey No. 7726 as amended May 26, 1897, and on September 20, 1897, said company was permitted to make mineral entry No. 1348, on which final certificate issued in due course. The amended mineral survey No. 7726 appears to have been made in compliance with instructions from your office bearing date April 16, 1896.

On December 10, 1897, your office held mineral entry No. 1348 for cancellation, and on March 10, 1898, denied a motion for review of said decision of December 10, 1897. The Brodie Gold Reduction Company has appealed to the Department, alleging error in said decision.

It is not denied that the mill and principal improvements of the applicant company are located on the land excluded from the original application of the Cripple Creek Gold Extraction and Power Company, and it is apparent that the amended survey No. 7726 of May 26, 1897, was for the purpose of excluding the ground which was the subject-matter of the agreement between the Cripple Creek Gold Extraction Company and the owners of the Tiva placer claim, hereinbefore referred to, from the application. It is insisted, however, that the two small parcels now in question, aggregating nine hundred and eighty one-thousandths of an acre, form part of the five acres originally applied for and located as the Mound City millsite, and continually possessed as a part thereof.

In view of the facts you were of opinion that sections 2337 Revised Statutes conferred no authority upon the Department to patent the tracts applied for as a millsite. Said section is as follows:

Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface-ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction-works, not owning a mine in connection therewith, may also receive a patent for his millsite, as provided in this section.

The applicant is within the last clause of said section provided the tracts are shown to be improved as a millsite, but it is apparent that the company has no mill or reduction works upon them and that its mill and reduction works are upon the lands obtained from the Tiva placer. The fact that the applicant has a mill and reduction works upon other land adjoining the land applied for does not help the matter. Your office properly held that a right to a patent for a millsite, under the second clause of section 2337 Revised Statutes, depends upon the presence on the land applied for of a quartz mill or reduction works. (Le Neve Millsite, 9 L. D., 460.)

Your office decision is accordingly affirmed.

## REPAYMENT—DESERT LAND ENTRY—LASSEN COUNTY ACT.

## LAFAYETTE D. McDOW (ON REVIEW).

Where a desert land declaration is filed under the Lassen county act of 1875, and, prior to the expiration of such filing, a declaration for the same land is filed and accepted under the general act of 1877, the latter declaration is not "erroneously allowed" within the intent and meaning of the repayment act.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *August 31, 1899.* (F. W. C.)

A motion has been filed on behalf of Lafayette D. McDow for review of departmental decision of March 2, 1898 (26 L. D., 283), in which his application for repayment of the fees, commissions and purchase money paid on desert declaration No. 136, Susanville land district, California, covering the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$ , Sec. 28, the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  and the NW.  $\frac{1}{4}$  of Sec. 33, T. 30 N., R. 12 E., was denied.

The land in question is in Lassen county, California, and on January 13, 1877, McDow filed desert declaration therefor under the provisions of the act of March 3, 1875 (18 Stat., 497). Under said act he was allowed two years within which to reclaim the land and make proof of the fact. Prior to the expiration of this time, to wit, on January 7, 1879, he filed desert declaration for this land under the provisions of the act of March 3, 1877 (19 Stat., 377).

Under the later law he was required, at the time of filing his declaration, to make payment at the rate of twenty-five cents per acre, which he did, and was also required to make proof of reclamation within three years and payment of an additional one dollar per acre.

He failed to make proof of reclamation, and by your office letter of September 22, 1885, his declaration was canceled.

It was for the return of the money paid at the time of the filing of the declaration on January 7, 1879, that the application under consideration was made, it being urged that said declaration was "erroneously allowed" within the meaning of the act of June 16, 1880 (21 Stat., 287), McDow having exhausted his rights under the desert land laws by the filing made on January 13, 1877, under the act of March 3, 1875.

The second section of the act of June 16, 1880 (*supra*), provides—

In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office, and in all cases where parties have paid double-minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns.

It will be seen that this act authorizes repayment where a desert *entry* has been erroneously allowed and can not be confirmed.

The act of March 3, 1875, as well as the act of March 3, 1877, clearly distinguishes between the declaration filed as the initiation of the claim and the entry allowed only after proof of reclamation.

It would appear, however, that in the previous administration of the act of June 16, 1880, the declaration has been treated as an "entry" and repayment of the money paid thereon has been authorized.

In the decision of March 2, 1898, it was held that McDow's desert declaration of January 7, 1879, was not "erroneously allowed" within the meaning of said act of June 16, 1880, and for that reason repayment was refused.

In the recent case of Bernard Neuhaus (26 L. D., 673) it was held that a desert declaration made either under the Lassen county act or the general act of March 3, 1877, and abandoned, exhausts the claimant's rights under the desert land laws.

In said case it was found that the prior declaration was made by Benjamin Neuhaus and not Bernard Neuhaus.

In support of the first proposition, viz: as to the effect of a filing made under the Lassen county act, upon the right granted by the general act of March 3, 1877, the fact that the first filing was made prior to the passage of the act of March 3, 1877, while referred to in the decision under review in quoting from the decision of your office, appears to have been overlooked, for the decisions referred to in support of the reversal of the holding of your office, that such filing did not exhaust the right under the act of March 3, 1877, viz: Fannie D. Lake, 18 L. D., 580, and Simeon D. Wyatt, id., 99, do not involve that question. In these cases the parties claimed that the rights were cumulative, and after the passage of the act of March 3, 1877, made each two declarations for different tracts, claiming the right to one under the act of March 3, 1875, and the other under the act of March 3, 1877.

The effect of the ruling in the decision under review is that after the passage of the act of March 3, 1877, the limited right under the act of March 3, 1875, was merged in the general right given by the act of March 3, 1877; and that as the act of March 3, 1877, contained the provision "that no person shall be permitted to enter more than one tract of land, and not to exceed six hundred and forty acres, which shall be in compact form," the two laws should not be so construed as to permit, in one county of the United States, the making of two entries which might in the aggregate exceed six hundred and forty acres, and not in compact form.

In the case under consideration but one tract was sought and that was in compact form and covered less than six hundred and forty acres.

The original declaration, under which this tract was claimed, was not abandoned, nor had the same expired prior to the filing of the second declaration under the act of 1877. The party evidently sought to

take advantage of the increased period granted by the latter law, and the facts do not show that he transgressed its provisions. In this respect the facts are different from those in Simeon D. Wyatt (23 L. D., 61).

The previous decision, in which it was held that said second filing by McDow was not "erroneously allowed" within the meaning of the act of June 16, 1880, is adhered to, and the motion for review is denied and herewith returned for the files of your office.

RESERVOIR FOR WATERING LIVE STOCK—PUBLIC LAND STRIP.

FRANK LAUGHRIN.

The provision in the act of May 2, 1890, that the "public land strip" shall be opened to settlement under the "homestead laws," does not reserve said land from the operation of the act of January 13, 1897, authorizing the use of public lands for reservoir purposes.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *September 5, 1899.* (E. J. H.)

Under date of July 10, 1899, you transmitted to the Department the appeal of Frank Laughrin from your office decision of September 19, 1898, holding for cancellation his reservoir declaratory statement No. 182, dated April 19, 1898, covering the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 7 and the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  and the NE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 18, T. 3 N., R. 24 E., C. M., Woodward, Oklahoma, land district.

The lands involved are within the strip of land south of southwestern Kansas and southeastern Colorado which was ceded to the United States by Texas in 1850. It was for many years called "No man's land," and more recently the "Public land strip." It has always been a part of the public domain since it was obtained from Texas, and by the act of May 2, 1890 (26 Stat., 81), entitled "An Act to provide a temporary government for the territory of Oklahoma," etc., it was made a part of that territory and "opened to settlement under the provisions of the homestead laws."

The reservoir declaratory statement under consideration in this case was filed under the act of January 13, 1897 (29 Stat., 484), the first section of which provides—

That any person, live-stock company, or transportation corporation engaged in breeding, grazing, driving, or transporting live stock may construct reservoirs upon unoccupied public lands of the United States, not mineral or otherwise reserved, for the purpose of furnishing water to such live stock, and shall have control of such reservoir, under regulations prescribed by the Secretary of the Interior, and the lands upon which the same is constructed, not exceeding one hundred and sixty acres, so long as such reservoir is maintained and water kept therein for such purposes: *Provided*, That such reservoir shall not be fenced and shall be open to the free use of any person desiring to water animals of any kind.

The second section provides for filing declaratory statements by the parties entitled thereto under the first section of the act.

Your said office decision holds that the opening of this public land strip "to settlement under the provisions of the homestead laws," is such a reservation of the lands therein that the act of January 13, 1897, to provide reservoirs for watering stock, does not apply thereto.

In said act of May 2, 1890, by which the lands involved were opened to settlement, it is provided that sections sixteen and thirty-six in each township in said territory shall be "reserved" for the purpose of being applied to the use and support of the public schools, and that all actual and *bona fide* settlers upon and occupants of the lands in this "public land strip" at the time of the passage of said act shall be entitled to have preference right thereto. The balance of the lands therein were to be disposed of under the homestead laws only, but this, in the opinion of the Department, did not constitute them "reserved" lands, in the ordinary or proper meaning of the word.

It will be found that the words "otherwise reserved" or the words "heretofore reserved," when used in the excepting clause of an act of Congress making a grant of public lands, or providing for some disposition thereof, have generally been used for the purpose of excluding from the operation of such act those tracts or portions of the public domain that have been *withheld from settlement*, having been set apart for some particular purpose, and not to the whole body of large areas of public lands opened to settlement and entry in some particular manner.

As shown herein, Congress in said act of May 2, 1890, made certain reservations of land for general disposal in said strip, and in the different States and Territories there are school, military, forest, park and other reservations of the public lands, and to such the words "otherwise reserved," in the act in question, undoubtedly refer.

To give the words as used the construction placed upon them by your office letter to the local officers would be a forced and unusual construction, and one not intended by Congress, as it would tend to defeat the object Congress evidently had in view in passing said act, to wit: the providing of places in those sections of the country having no stream or facilities for watering stock, where the settlers and parties driving herds through the country could find water for their animals.

The conclusion of the Department is that the act of January 13, 1897, is applicable to the tracts in question and others similarly situated in said "public land strip." Taking this view of the matter, your decision holding Laughrin's said reservoir declaratory statement, No. 182, for cancellation, is reversed. Whether the declaratory statement should for other reasons be rejected has not been considered by the Department, and is left open for the consideration of your office.

## TIMBER LAND ENTRY—ALIENATION—FRAUDULENT ENTRY.

UNITED STATES *v.* BRYAN ET AL.

A power of attorney executed and delivered by a timber land applicant, prior to final proof and entry, authorizing the sale of the land, is an agreement in violation of the act of June 3, 1878.

A timber land entry secured on proof and payment made in the name of the applicant, but in fact by and for the sole benefit of another is an evasion of the law and fraudulent.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *September 5, 1899.* (W. M. W.)

Jacob H. Brush, as successor in interest of Louis Bryan, has appealed from your office decision of January 20, 1898, holding for cancellation said Bryan's timber land entry for the SE.  $\frac{1}{4}$  of Sec. 25, T. 21 N., R. 16 W., San Francisco, California, land district.

The record shows that Louis Bryan filed his sworn timber land application March 7, 1883, under which proof was made May 31, and on June 4, 1883, the entry was allowed and receiver's receipt issued for the purchase money. This entry was subsequently investigated by a special agent of your office, who reported, in effect, that it was made in the interest of another party than the entryman and that it was illegal and fraudulent; that, as shown by the county records of the county in which the land is situated, on the day the entry was made Bryan gave to M. D. Hyde a power of attorney to transfer the land, and that thereunder Hyde transferred the tract to J. P. Simpson on August 22, 1883.

December 21, 1889, your office held Bryan's entry for cancellation on said special agent's report.

December 15, 1889, M. D. Hyde, as the attorney for the grantees of Bryan, filed in the local office an application for a hearing, and on February 13, 1890, your office ordered the hearing and directed the local officers to confer with a special agent as to the date therefor.

The hearing was held October 5, 1897, at which the government was represented by a special agent of your office, and Jacob H. Brush, the present owner of the land under transfers from Bryan, was represented by M. D. Hyde as his attorney.

November 2, 1897, the register and receiver found from the evidence submitted that there was no wilful fraud committed by the entryman, and recommended that the entry be released from suspension.

January 20, 1898, your office considered the case and found the entry to be fraudulent and invalid and thereupon held it for cancellation.

The transferee, Jacob H. Brush, appeals.

It appears that on March 7, 1883, the entryman, Bryan, executed a power of attorney to M. D. Hyde, which was recorded on the records of the county in which the land lies August 27, 1883, under which said

Hyde, as Bryan's attorney in fact, conveyed the land to John P. Simpson August 27, 1883. Afterwards said Simpson died, and on January 25, 1892, his administrator, under the orders of the probate court, sold the land, with other land, to Jacob H. Brush for \$5,400.00.

At the time the case was called for trial before the register and receiver the special agent stated that he had made diligent search for witnesses to testify in the case, and that the only person who possessed any knowledge of the transactions regarding the entry and subsequent sale of the land was M. D. Hyde, who appeared as attorney for Brush, and requested him to be sworn as a witness, which he consented to, and was the only witness who testified in the case. The witness testified that he was the same person who, in August, 1883, as the attorney in fact for Louis Bryan, executed a deed conveying the land in question to John P. Simpson. He was then asked to state concisely the circumstances which led up to the sale, and answered as follows:

In the latter part of 1882, and during the year 1883, there was considerable excitement in California regarding the redwood timber land in Mendocino county.

At that time it was not required that the entryman make personal examination of the land, or that he submit his own evidence in support of his right of entry; the preliminary affidavit was all that was then required.

When the Bryan entry was made, I was employed by him to attend to his filing, advertising and proof. He paid to me \$15.00 for advertising, and agreed to pay about \$30.00 when proof should be made, as attorney's fees.

To secure myself in the payment of costs of witnesses and attorney's fees, I required of the entryman a power of attorney authorizing me to convey the land entered.

This power of attorney was not given with a view to the sale of the land, but as security only for the payment of fees and costs, and was required of all entrymen who did not pay in advance.

At this time the entryman was not required to make any proof in addition to his preliminary affidavit, nor to be present when his proof was submitted, nor to submit such proof within any given period.

In this case the proof of Bryan was made at my convenience, when I found two persons in the city who were sufficiently acquainted with the land to testify as witnesses.

June 4, 1883, I made the final entry, and I paid for the land and fees.

At the time of entry there was no contract or agreement on the part of Bryan to convey the land to any person.

I notified Bryan of the amount paid, and he promised to settle the account. A few days later he called at my office and informed me that he had gone into a mining scheme in New Mexico, and made me two propositions—First, to receive credit for \$600 as a member of the mining company and cancel his obligation to me, receiving stock in exchange therefor, or else to give him further time in which to pay me \$450 in full.

Neither of these propositions was accepted at the time.

In the latter part of July, 1883, Bryan informed me that he was about to depart for New Mexico, and I then informed him that I would sell the land at the first opportunity and would consider the power of attorney as irrevocable, to which he agreed.

I then entered into negotiations with John P. Simpson, which resulted in the sale of this land to him for \$450, and on August 22, 1883, I, as attorney in fact, executed a deed.

He further testified that Simpson knew nothing of the Bryan entry until July, 1883, when witness sought him as a customer to purchase the land; that he (Hyde) paid the receiver the purchase price for the land on Bryan's account with the full expectation that Bryan would return the money to witness; that he knew nothing of Bryan's whereabouts since July, 1883; that he (Hyde) had no pecuniary interest in the land beyond the fact that he was employed by Brush, the owner of the land by purchase from the heirs of Simpson, to look after his interest in the premises.

The act of June 3, 1878 (20 Stat., 89), under which Bryan's claim was initiated, requires the person applying for its benefits to file with the register of the proper district a written statement, under oath, stating, among other things—

that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title 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; . . . 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;

Sixty days' notice of such application is required to be given, and if no adverse claim is filed the person desiring to purchase is required to furnish satisfactory evidence showing certain things, and after doing so he is required to pay, to the proper officer, the purchase price of the land, together with the fees of the register and receiver, and then he may be permitted to enter the land applied for. The entry is not made until all of these requirements have been met, and it follows that all of the conditions respecting the good faith of the claimant required to be shown at the time he files his application, must continue and actually exist at the time the entry is made. (See *Shepherd v. Bird et al.*, 17 L. D., 82.)

The burden of proof rested on the government to show, by a clear preponderance of the evidence, that the entry was illegal or fraudulent, in order to warrant the cancellation thereof. (*Henry C. Putnam*, 5 L. D., 22; *Levesque v. Armstrong*, 15 L. D., 445.)

The witness Hyde was the only witness who testified at the hearing, and it is claimed that the government is bound by his statements.

The general rule is, that a party who offers a witness in proof of his cause thereby represents him as worthy of belief (1st Greenleaf on Evidence, Sec. 442), and in this case this rule will be applied to the evidence of the witness Hyde. At the same time, in considering his statements the government could not be bound by the arguments or conclusions of the witness, for the reason that they are not in any proper sense *evidence*. He was placed on the witness stand to testify to *facts*, and so far as his statements consist of facts within his knowledge his testi-

mony will be fully considered, and the Department will draw its own conclusions therefrom.

The exact contents of the power of attorney given by Bryan to Hyde are not known to the Department, as neither the original nor a copy thereof is among the papers, but as Hyde transferred the land to Simpson under it, it will be considered as authorizing such conveyance. The giving of this power of attorney before proof and entry was made constituted such an agreement as the statute clearly forbids. Under it Bryan placed the matter in such a shape that he might never be able to appropriate the land to his own use and benefit, and according to Mr. Hyde's evidence this contingency actually happened.

Witness Hyde swears that he made the final entry, paid his own money for the land and the local land office fees, and notified Bryan of the amount paid, who promised to settle the account but which promise he never performed. The real facts summed up in a few words are: Bryan applied for the land and thereafter abandoned his claim. Thereupon his attorney, who had a claim for fees, proceeded to make entry of the land applied for by Bryan, by submitting proof and paying for the land and the land office fees, and by so doing it is clear that the entry as made was solely for the benefit of Hyde. Such an entry is clearly in evasion of the law and fraudulent. (See Instructions, 3 L. D., 84.)

If it were conceded that the entry was made by Bryan, then the only reasonable conclusion that can be deduced from the evidence when considered as a whole is that the power of attorney was a collusive arrangement by which the entryman was induced to make the entry with the view of selling the land embraced therein on speculation, and for that reason the entry would be in violation of the statute and should be canceled. (See *United States v. Bailey et al.*, 17 L. D., 468; *United States v. Searles et al.*, 19 L. D., 258, 265.)

It follows that there was no error in the conclusion reached by your office in the decision appealed from, and the judgment of your office is accordingly affirmed.

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WITHERS *v.* PAGE.

Motion for review of departmental decision of June 23, 1899, 28 L. D., 547, denied by Secretary Hitchcock, September 5, 1899.

## WATER RESERVE LANDS—ACT OF JUNE 20, 1890.

W. D. HARRIGAN.

The water reserve lands restored to the public domain by the act of June 20, 1890, were, by the express terms of said act, made subject to "homestead entry only," and hence are not open to sale under the timber and stone act, or under the statutes providing for the sale of isolated tracts.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *September 5, 1899.* (C. J. G.)

The land involved in this case is the NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 4, T. 42 N., R. 5 E., Wausau, Wisconsin, land district.

By letter of June 25, 1898, your office transmitted to the Department an appeal by W. D. Harrigan from your office decision of May 16, 1898, rejecting his application dated January 24, 1898, to have the land described ordered into market and sold under section 2455 of the Revised Statutes, as amended by act of Congress approved February 26, 1895 (28 Stat., 687).

It appears that Harrigan furnished the corroborated affidavit required of applicants under said section as amended, in which he alleges that the land in question is chiefly valuable for its timber, and that it is for said timber he desires the land ordered into market.

The conclusion reached in your said office decision is as follows:

The records of this office show that said tract was withdrawn by the President's proclamation No. 859 for reservoir purposes, March 22, 1880, and restored by act of June 20, 1890 (26 Stat., 169), to the public domain subject to entry under the homestead law, and is, therefore, unoffered and subject to entry under the timber and stone act of June 3, 1878 (20 Stat., 89), and August 4, 1892 (27 Stat., 348), which provides for the sale of timber land.

In his appeal Harrigan contends that it was error to hold that this tract is unoffered land as the same has once been offered, although subsequently withdrawn and afterwards restored to homestead entry.

By letter of August 11, 1899, your office transmitted certain papers to be considered in connection with Harrigan's appeal, from which it appears that on January 13, 1899, he made timber and stone cash entry No. 22241 for the land in question; and that on April 28, 1899, your office, after stating that the act of June 20, 1890, *supra*, restoring said land to the public domain, provides that the same shall be subject to "homestead entry only," directed the local officers to advise Harrigan that he would be allowed thirty days from notice in which to show cause why his timber and stone entry should not be canceled for illegality. Harrigan filed a brief in reply to this requirement, but no further action has been taken by your office.

The first section of the act of June 20, 1890, *supra*, provides:

That there is hereby restored to the public domain all the lands described in certain proclamations of the President of the United States . . . . in the State of Wisconsin; and that these lands, when so restored, shall be subject to homestead entry only.

This language is entirely free from ambiguity, leaving no room for construction, and clearly indicating that it was the intention of Congress in restoring these lands to the public domain to make them subject to entry under the homestead law only. No sufficient reasons are advanced for a different construction even if the said act were susceptible of any other. Harrigan's application for the sale of this land as an isolated tract should have been denied because the land is subject to homestead entry only, and not because the same was unoffered. The timber and stone entry will have to be canceled for the same reason.

Entertaining this view it is unnecessary to answer the contention made in Harrigan's appeal as to whether the land is offered or unoffered.

Your office decision of May 16, 1898, is modified as herein indicated, and as Harrigan has made no sufficient showing in response to the rule laid upon him by your letter of April 28, 1899, requiring him to show cause why his entry should not be canceled, his said timber and stone entry will be canceled, and the land involved held subject to entry under the homestead law only.

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MINING CLAIM—INACCURATE DESCRIPTION OF LAND.

WRIGHT ET AL. *v.* SIOUX CONSOLIDATED MINING CO.

A mining claim will not be permitted to pass to patent, where in the description thereof, as appearing in the surveyor's certificate and the notice of application, the name of the county, in which the claim is situated, is incorrectly given.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(F. L. C.) *September 8, 1899.* (A. S. T.)

On August 27, 1890, the Salvator lode claim was located by Fred H. Schmidt *et al.*, the claim being described in the location notice as situate in the Tintic mining district, county of Juab, State of Utah. After procuring the survey, No. 3219, of the claim, the Sioux Consolidated Mining Company filed application for patent No. 2462 therefor on November 19, 1896, the claim being described in said application as being in the mining district, county and State above given, which description is in accordance with the official survey.

Notice of said application for patent was given by publication and posting as required by law.

Joseph Wright *et al.* filed adverse claim No. 1030, against said application for patent, alleging ownership of a conflicting claim, and within the time allowed suit was commenced by them in the district court of Juab county, Utah. The defendant filed its answer in said suit, and subsequently entered a motion to dismiss the suit upon the ground that the claim, which was the subject of the suit, was located in Utah.

county and not in Juab county. Several affidavits were filed in support of said motion, all showing the claim to be located in Utah county. The motion came on to be heard on said affidavits, and thereupon said court dismissed said action on the ground and for the reason stated in said motion.

On April 7, 1898, said adverse claimants filed a formal protest against the issuance of patent for said claim, alleging that the claim in controversy had been described in various records and conveyances, as well as in said publication, as being located in Juab county, and that as a matter of fact it was near the line between Juab and Utah counties, and that they had been misled to the belief that it was located in Juab county, and had accordingly brought their suit in that county, and that when said suit was dismissed as aforesaid it was too late for them to bring suit in the proper county, and that if patent was allowed to issue to the defendant company upon said application and defective publication, great injustice would be done them (protestants) and they would thereby suffer great loss.

A hearing was ordered by the local office on April 7, 1898, and set for April 10, 1898, and on April 23, 1898, the entry was inadvertently allowed by the local office, and for that reason the hearing was continued sixty days and the proceedings were reported to your office.

On August 2, 1898, you decided that the claimant company should be required to procure an amended survey of said claim and give new notice by publication and posting of notice, and that unless the proper steps were taken to comply with said requirement, or an appeal filed within sixty days from receipt of notice of said order, the entry should be canceled without further notice.

Notice was served on August 6, 1898, and September, 1898, applicant appealed to this Department and assigned errors.

On May 29, 1899, protestants withdrew their protest.

The only question for consideration, therefore, is whether or not a patent should issue for this claim in the absence of any protest, in view of the proceedings hereinbefore referred to.

The act of Congress approved May 10, 1872 (Rev. Stat. Sec. 2325), prescribes the manner of proceeding necessary to the issuance of patent for mineral lands, and requires that the applicant shall file in the land office, with his application,

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 . . . 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 . . . he shall also post such notice in his office for the same period. The claimant . . . shall also file with the register a certificate of the United States surveyor general . . . that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim and furnish an accurate description to be incorporated in the patent.

By general mining regulations approved December 10, 1891 (sec. 29, p. 23), which were in force at the time this application was made,

The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim, mine or lode, the mining district *and county*.

In the case at bar, the description of the claim as given in the surveyor's certificate and in the notices posted and published by the applicant and the register of the land office, shows it to be located in Juab county, and this description is shown to be incorrect in that the claim is not located in Juab county, but is located in Utah county. These notices informed the public that the applicant would apply for patent upon a claim of a certain name and description located in Juab county, and parties owning claims located wholly in Utah county were not thereby notified that an application was to be made for a patent upon a claim which conflicted with their claims.

It may be said that the other data found in the plat of survey, certificate and notices, showed the claim to be located in Utah county, and showed that the statement that it was in Juab county was a mistake. How could one, from reading the description as given, determine which part of it was correct, and which part was a mistake?

The case of *John K. Castner et al.* (17 L. D., 565) is parallel with the case at bar in almost every material respect, and in that case it is said:

The *locus* of a mining claim should be fixed with mathematical accuracy, as well in the report of the official survey, as upon the surface of the earth.

This has not been done in the case at bar, and therefore your decision is found correct and is affirmed.

#### MINING CLAIM—SURVEY—STATUTORY EXPENDITURE.

##### HIDDEN TREASURE LODGE.

To hold land lawfully included in a location the lines of survey may be laid upon the surface of conflicting and excluded claims under subsequent locations.

The statutory expenditure required as a pre-requisite to mineral patent must be shown to have been made upon, or for the benefit of, the claim as presented for patent.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(F. L. C.) *September 12, 1899.* (E. B., Jr.)

By your office decision of August 30, 1897, Joseph B. Hardon, claimant of the Hidden Treasure lode mining claim, mineral entry No. 1153, made May 26, 1896, survey No. 11475, Durango, now Denver, Colorado, land district, was required to procure an amended survey establishing the westerly end line of the claim at the point of intersection of the southerly side line thereof with the easterly side line of the Tip Top lode claim, survey No. 8870, and "to show compliance with the law in the matter of expenditure," on pain of cancellation of the entry with-

out further notice, upon his default or failure to appeal. On review, November 11, 1897, your office adhered to its previous decision. The claimant has appealed from these decisions, contending that both the above requirements are erroneous.

It appears that, proceeding westward from its center along the lode line, the Hidden Treasure claim as located crossed, in the order following, the Tip Top and the Chandler lode claims, survey No. 8870, a small triangle belonging to the Hidden Treasure lying west of the Chandler; that the Hidden Treasure location was made prior to the location of the Tip Top and Chandler, and that the conflict between these claims was excluded from the notices of the Hidden Treasure application for patent and from its entry.

Your office decision holding that under these circumstances the westerly end line of the Hidden Treasure must be established at the point of intersection of the southerly side line of that claim with the easterly side line of the Tip Top claim is, to that extent, erroneous. The ground within the said triangle appears to have been lawfully embraced within the Hidden Treasure location and is still claimed thereunder, and to hold such ground the lines of survey of that claim may be laid upon the surface of the said conflicting and excluded claims (Paragraph 8, Mining Regulations, approved June 24, 1899, 28 L. D., 577). The end line of the Hidden Treasure appears to be properly placed by the approved survey of that claim, in accordance with the foregoing regulation.

The improvements relied upon by the claimant to meet the requirement of the statute, section 2325 of the Revised Statutes, that as a condition to the issue of patent an expenditure of five hundred dollars must have been made upon the claim by himself or his grantors, consist of a discovery cut valued at \$125.00, and two shafts, one of which is valued at \$400.00 and the other at \$120.00. Both these shafts are within the conflict, the excluded ground above mentioned. They are not shown to be of any value toward the development of the claim as now constituted, are not part of such claim, and are apparently not the property of the claimant or under his control. They cannot, under these circumstances, be credited to claimant toward the necessary statutory expenditure (Antediluvian Lode, 8 L. D., 602; Independence Lode, 9 L. D., 571; and Lone Dane Lode, 10 L. D., 53). Without them the expenditure shown is insufficient. The requirement of your office upon this point was a proper one, and is therefore approved.

Before proceeding to cancel the entry, however, you will allow the claimant a reasonable time within which to file a certificate of the surveyor general, showing other expenditure, if any there be, additional to that in the said discovery cut, and aggregating in value \$500.00, made by himself or his grantors, upon or for the benefit of the claim as now constituted, at any time prior to the expiration of the period of publication of notice of the application for patent. See *Draper et al. v. Wells et al.* (25 L. D., 550).

The decisions of your office are modified accordingly.

## MINING CLAIM—FORT BELKNAP INDIAN RESERVATION.

## EUREKA AND TRY AGAIN LODE CLAIMS.

Section 8, act of June 10, 1896, authorizing mineral entries of lands formerly embraced in Fort Belknap Indian reservation contemplates that such entries shall be made in accordance with the procedure set out in sections 2325 and 2326 of the Revised Statutes.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(F. L. C.) *September 12, 1899.* (E. B., Jr.)

This is an appeal by Samuel K. McDowell and others from the decision of your office, dated October 12, 1897, rejecting their application to purchase the Eureka and Try Again lode claims, surveys Nos. 5098 and 5099, Helena, Montana, land district. The said application was presented June 9, 1897, and, it is stated therein, was made "under the provisions of section 8 of Chapter 398, U. S. Statutes at Large." Section 8 referred to (act June 10, 1896, 29 Stat. 321, 353,) accepts, ratifies and confirms an agreement therein set out providing for the cession to the United States of a certain portion of the Fort Belknap Indian reservation in the State of Montana, makes provision for the survey of the boundary lines thereof, and further declares:—

That upon the filing in the United States local land office for the district in which the lands surrendered by article one of the foregoing agreement are situated, of the approved plat of survey authorized by this section, 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: *Provided*, That said lands shall be sold at ten dollars per acre: *And provided further*, That the terms of this section shall not be construed to authorize the occupancy of said lands for mining purposes prior to the date of filing said approved plat of survey: *Provided, however*, That any person who in good faith prior to the passage of this act had discovered and opened, or located, a mine of coal or other mineral, shall have a preference right of purchase for ninety days from and after the official filing in the local land office of the approved plat of survey provided for by this section.

See the repeal of the last of the foregoing provisos by section 10 of the act of June 7, 1897 (30 Stat., 62, 93).

With their said application said McDowell and others also presented an application for patent, the field notes and plat of survey of the said claims, affidavits of citizenship of the claimants, copies of location notices and abstracts of title. Protests against the application for patent and application to purchase were filed, June 10, 1897, by Robert Orman, and Thomas O'Hanlon and others, alleging, in each instance, ownership of a claim or claims in conflict with the said Eureka and Try Again, and, generally and specifically, failure on the part of the Eureka and Try Again claimants to comply with the provisions of section 2325 of the Revised Statutes. It appearing that no copy of the plat or notice of the application for patent had been posted on the land nor in the local office, and that notice had not been published, as required

by section 2325 of the Revised Statutes, the local office, on June 12, 1897, for those reasons rejected the application to purchase.

In its decision, on appeal, your office, in affirming the decision of the local office, said:

Although it is impossible to definitely locate these mining claims the township being unsurveyed, it is evident from the record that they are situated, partly at least, in said Fort Belknap Indian reservation.

Your decision must be affirmed for two reasons, first, because the approved plat of survey of the boundary line of said ceded land has not been filed as required by the act, and, second, because application for the purchase of said lands when opened must be made in accordance with the mining laws and regulations. The application offered is irregular and could not be accepted even were these lands not in a state of reservation.

In their appeal claimants assign error upon all the holdings of your office decision, contending that the plat of the survey authorized by said section 8 had been filed in the local office pursuant thereto prior to the presentation of their said applications, and that under that section it was not necessary for them "to comply with the requirements of the mining laws and regulations applicable in ordinary cases," but that they were only required thereunder

to make the application in question and pay the price provided for by the law upon affirmatively showing that the locations were made before the cession of said strip in good faith.

It is alleged that the said claims are within the ceded lands, and that the claims were located in 1892. The Department has not been able to determine from any data in the papers of the case nor from the records of your office whether the said claims are either wholly or in part within the ceded lands, nor whether the approved plat of survey of the boundary lines thereof had been filed as required by section 8 prior to the presentation of the said applications. But assuming that when these applications were presented the lands in question were open to occupation, location and purchase, and that the said claims had been duly located, the proceedings for their purchase and patenting would be the same as if they were outside the ceded lands, that is, the proceedings set out in sections 2325 and 2326 of the Revised Statutes. Without considering any other question it is enough, therefore, to find that claimants did not so proceed. They posted no copy of the plat of the claim thereon, together with a notice of the application for patent, previous to the attempted filing of their application, as required by said section 2325; neither did they give the other notices required by that section, nor furnish the certificate of the surveyor-general as to expenditures. Under these circumstances the application to purchase was properly rejected, and the application for patent should also have been rejected.

The decision of your office is affirmed, in accordance with the views herein expressed.

## MINING CLAIM—AMENDMENT OF PATENT—ADVERSE PROCEEDINGS.

OWERS *v.* KILLORAN ET AL.

The right to have a mineral patent so amended as to describe the land actually applied for and purchased, is not defeated by a subsequent adverse location, nor by an entry, based on said location, allowed during the pendency of proceedings instituted to secure such amendment.

One who is entitled to a mineral patent under an entry, made after due compliance with statutory procedure, is not required to file an adverse claim as against the subsequent application of another that embraces part of the land so entered.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(F. L. C.) *September 12, 1899.* (G. C. R.)

On September 4, 1895, Joseph M. Killoran *et al.* located five lode claims, viz., Eclipse Nos. 1, 2, 3, 4 and 5, embracing practically the whole of the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 14, T. 9 S., R. 80 W., 6th p. m., Leadville, Colorado.

January 9, 1897, Killoran *et al.* applied for patent for said claims, and after publication of notice, filing of said plat, etc., mineral entry No. 4150 was allowed therefor, and final certificate issued March 22, 1897.

On April 6, 1897, Frank W. Owers filed in the local office his protest against the issuance of patent on said mineral entry, claiming that the land covered thereby is owned by protestant and others as the Edna placer.

Killoran, as one of the claimants of the Eclipse lodes, moved to dismiss the protest.

The question raised by the protest and motion were considered by your office on December 20, 1897; you held for cancellation said mineral entry No. 4150 for the Eclipse lodes and rejected the application for patent based thereon. From that judgment Joseph M. Killoran has appealed to this Department.

The land in controversy is the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 14, in said township.

Frank W. Owers and others claim the land upon the following state of facts:

On February 26, 1880, Peter Quigley *et al.* located the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  (the land in controversy), the E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  and the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , Sec. 14, T. 9 S., R. 80 W., Leadville, Colorado, as a placer claim. On February 27, 1880, a certificate of location was filed for record, and on the same day the locators, seven in number, conveyed their interests in said claim to P. J. Coston. The deed (a quitclaim) was filed for record February 28, 1880.

March 4, 1880, P. J. Coston filed his application for a patent for the land described in said location certificate, which, as before seen, included the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of said Sec. 14, the land in controversy; on the same day notice of the application was duly published, describing the

land as in the location certificate; a plat of the land was filed on the same day; the plat also contained the same description.

May 10, 1880, Coston filed an application in writing to purchase the land embraced in his application for patent, but in doing so he misdescribed one of the forty-acre tracts. This application to purchase (an unnecessary proceeding) described the NW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  (not the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$ ) of said section, with other lands above described. On the same day the receiver issued his receipt to Coston for \$400, describing the land as in Coston's said application to purchase, and not, as he should have done, as in the application for patent, the published notice, and the plat. The register on the same day issued his final certificate, following the description made by the receiver.

A duplicate receipt was issued and delivered to Coston, which correctly described the land as given in the application for patent, the published notice, and the plat. The records of the local office show that Coston's entry for the Edna placer embraced the lands as in the application for patent, the notice, and plat, which, as before seen, described the land in controversy.

On May 16, 1881, patent was issued to Coston for the NW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of said Sec. 14, with other lands described in his application, the patent thus following the description contained in the register's certificate. This patent was delivered to Coston on October 3, 1881, upon the surrender of the duplicate receipt, which, as before seen, correctly described the land.

It would appear that Coston did not observe the misdescription in the patent when delivered to him, since he soon thereafter had it recorded in its incorrect form. But long before the Eclipse lode claims (covering the land in question) were located, and, on June 18, 1890, Frank W. Owers, of Leadville, Colorado, one of the then owners of the Edna placer, advised your office of the error made in the issuance of the Edna placer.

Your office, under date of July 3, 1890, advised Mr. Owers that before a new patent could be issued for the claim as applied for the patent then issued must be surrendered, accompanied by a request that the same be canceled; that a reconveyance of the land described in the patent to the United States should be transmitted, together with evidence from the county records of present ownership of the parties in whose interest the request for a new patent is made, and showing that there are no incumbrances on the title.

In the meantime, as shown by certified abstract of title, fractional parts of the land described in the Coston patent had been transferred to sundry parties, and mortgages had been given and recorded. Coston's interest in the land was extinguished, October 14, 1885, by virtue of a sale under a fee bill out of the supreme court of Colorado.

On March 21, 1898, G. W. Bowen, representing himself as attorney for F. W. Owers and the judgment creditors, informed your office that

three-fourths of the Edna placer was sold under a judgment in September, 1897, and

as nine months are allowed within which to redeem the same, we are unable at this time to convey to the United States the forty acre tract erroneously patented to the entryman; when the time of redemption expires, and the conveyance has been made, we shall attend to the matter promptly, and have the correction made.

By your office letter of February 23, 1895, the register and receiver were fully advised that the land in controversy was included in the Edna placer entry. Those officers were also cognizant of the fact that proceedings looking to the correction of the Edna placer patent had been begun when they allowed said entry No. 4150 for the Eclipse lodes.

It is insisted that no adverse claim was filed during the period of publication of the application for patent for the Eclipse lodes, and that under the provisions of section 2325 of the Revised Statutes no objection from third parties to the issuance of patent therefor can now be raised. The answer to this contention is that the Edna placer claimants made due publication, which correctly described the land for which patent was applied, and which embraced the land in question. No adverse claim appears to have been filed against the Edna placer application for patent and the entry was duly allowed thereon.

The Edna applicants were then entitled to a patent upon their entry, so far as appears from this record, and they were, therefore, not required to file an adverse against any subsequent application for a patent for any part of the land so entered, and their failure to adverse the Eclipse application in nowise interferes with their rights secured under the entry. *Iron Silver Mining Co. v. Campbell*, 135 U. S., 287.

Again, the records of the local office showed that the land in controversy had been entered under the name of the "Edna Placer" when Killoran *et al.* located their five lode claims thereon. The Eclipse applicants were therefore charged with notice of the Edna placer entry.

It is certain that the local officers, acting for the government, sold the land in question to Coston under his application for patent for the Edna placer claim. It is equally certain that Coston bought and paid for the land in question. It is not shown that the entryman or his grantees ever abandoned the land entered; on the contrary, they are still claiming it. They repeatedly sought to have the patent corrected to properly describe the land so entered, long before Killoran *et al.* ever located the Eclipse lodes.

The land in question, not having been patented, is still under the jurisdiction of this Department; but for a palpable mistake of the local officers it would have been properly described in the Edna patent.

On a reconveyance to the United States of the land erroneously described in the patent, a new or corrected patent will issue so as to include the land in controversy. *Bell v. Hearne*, 19 How., 252; *Wilson v. Byers*, 77 Ills., 76; *Portland General Electric Co.*, 17 L. D., 25; *Hans P. Hanson*, 20 L. D., 376; *Baldwin Star Coal Co. v. Quinn*, 28 L. D., 307.

The land in question was not subject to disposition at the date of said entry No. 4150 for the Eclipse lodes; that entry will therefore be canceled.

The decision appealed from is affirmed.

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HOMESTEAD—SOLDIERS' WIDOW—SECTION 2307, R. S.

LUCY A. BOGART.

The widow of a deceased soldier who makes a homestead entry under section 2307 R. S., in her own name, and perfects title thereto, exhausts her right under the homestead law.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(F. L. C.) *September 12, 1899.* (H. G.)

Lucy A. Bogart appeals from the decision of your office of May 14, 1898, rejecting her second homestead entry, made September 10, 1892, for the SE $\frac{1}{4}$  of the SE $\frac{1}{4}$  of Sec. 10; the SW $\frac{1}{4}$  of the SW $\frac{1}{4}$  of Sec. 11, and the W $\frac{1}{2}$  of the NW $\frac{1}{4}$  of Sec. 14, T. 25 N., R. 27 E., embracing one hundred and sixty acres, in the Waterville, Washington, land district.

It appears that the applicant, as Lucy A. Andrews, widow of James S. Andrews, a soldier, deceased, made original homestead entry at the local office in said district, under section 2307 of the Revised Statutes, January 22, 1892, for the S $\frac{1}{2}$  of SW $\frac{1}{4}$  and W $\frac{1}{2}$  of SE $\frac{1}{4}$  of Sec. 10, T. 25 N., R. 27 E.

August 21, 1897, she submitted final proof in support of her first entry and final certificate was issued thereon under her name of Lucy A. Bogart, as she had remarried. The attention of your office was directed to the fact that she had made a second entry for another tract, and your office held such entry invalid.

Your office so held under the authority of the departmental decision in the case of Adelia S. Royal (15 L. D., 408), wherein it was held that a widow of a deceased soldier, who makes homestead entry under section 2307 of the Revised Statutes, in her own name, exhausts her right under the homestead law, as section 2298 provides that no person shall be permitted to acquire title to more than one hundred and sixty acres under the provisions of the chapter relating to homesteads; that as both of the entries were made in the year 1892, in the months of January and September, respectively, and deducting the term of military service of her deceased husband, which was a little over one year, Mrs. Bogart would be required to reside on the land embraced in her first entry nearly four years, which would preclude her residence on the second tract so entered, during that period; and further, that had her husband exercised his right to make the first entry, she could have perfected the same without interfering with her right to make



citizen; and that on March 19, 1886, he and Johnson conveyed the claim to Henry Anderson and Rudolph Orth, who subsequently executed a mortgage thereon, through which Megginson derails title.

Section 2319 of the Revised Statutes declares that all valuable mineral deposits in lands belonging to the United States are 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." It is not necessary to decide in this case whether the location of mineral land under this section by an alien who has not declared his intention to become a citizen of the United States may be defeated by a relocation of the premises by a qualified locator prior to the filing of such declaration of intention. Hanley's location was not void, but voidable, and his declaration of intention made June 3, 1884, and before there was a relocation or attempted relocation of the ground in controversy related back to the date of his location and operated to validate it, and upon declaring that intention he was entitled to the advantage of work previously done, and of the record previously made by him in the location of said claim. (See *Leary v. Manuel*, 12 L. D., 345; *Lone Jack Mining Co. et al. v. Megginson*, 82 Fed. Rep., 89; *Croesus Mining, Milling and Smelting Co. v. Colorado Land and Mineral Co.*, 19 Fed. Rep., 78; *North Noonday Mining Co. v. Orient Mining Co.*, 1 Fed. Rep., 524.)

The remaining allegations of this protest, even if true, are without force. The notice of the Lone Jack location was recorded in Book A, at page 190 of the mining records, instead of page 19, as stated in the application for patent, but it is not alleged by the protestant that he was misled or deceived thereby to his injury, and as a matter of fact the record shows that he was not misled or deceived by this clerical oversight to his injury, or at all. It is doubtful whether the assessment work was done on this claim for the year 1897, but even if it was not, this delinquency does not furnish a ground of protest. The doing of annual assessment work is not a condition to obtaining patent, but only a condition to the continued right of possession to an unpatented claim as against other and adverse claimants, and a failure to perform such work furnishes no argument for the cancellation of an entry, in the absence of an adverse claim legally asserted. *Hughes et al. v. Ochsner et al.*, 27 L. D., 396, 398.

There was no relocation of the premises in controversy prior to Megginson's entry, and no assertion of an adverse claim in the manner provided by law.

The decision appealed from is affirmed.

## PRICE OF LAND—RAILROAD LIMITS.

## INSTRUCTIONS.

The instructions of June 6, 1899, 28 L. D., 479, with respect to the price of the alternate reserved sections within the limits of the grant along the constructed main and branch lines of the Southern Pacific and within the forfeited limits of the Atlantic and Pacific, adhered to on review.

The cases of Thomas A. Holden, 16 L. D., 493, and Edward D. McGee, 17 L. D., 285, overruled.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(F. L. C.) *September 14, 1899.* (F. W. C.)

Under date of June 6, 1899 (28 L. D., 479), in response to a request from your office for instructions, you were advised that the alternate reserved sections within the limits of the grant along the constructed main and branch lines of the Southern Pacific railroad, and also within the limits of the forfeited Atlantic and Pacific grant, must be held at the double minimum price irrespective of any question as to whether the Southern Pacific Railroad Company can acquire title to any or all of the odd-numbered sections within said conflicting limits.

Under date of July 13, last, there was filed in this Department a request for a reconsideration of the instructions above referred to, said request being filed by Messrs. Harvey Spalding and Sons, representing themselves as attorneys for a number of entrymen in the Los Angeles district, California.

After careful consideration of the briefs filed in support of the request for a reconsideration, and of the authorities cited in support thereof, the Department adheres to the conclusion reached in the instructions of June 6th last, and must therefore deny the request. So far as the decisions of the cases of Thomas A. Holden, 16 L. D., 493, and Edward D. McGee, 17 L. D., 285, are in conflict with those instructions they will no longer be followed.

## HOMESTEAD—AMENDMENT—ADJOINING FARM ENTRY.

PICARD *v.* REHBEIN.

The right of a homesteader to change his entry to an adjoining farm homestead is not affected by his failure to comply with the law under his original entry of the tract, in the absence of a valid intervening adverse claim.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(F. L. C.) *September 14, 1899.* (G. J. H.)

October 19, 1894, Charley Rehbein made homestead entry for the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 28, T. 31, R. 22, St. Cloud land district, Minnesota.

April 11, 1896, Rehbein offered his commutation proof on said entry,

under section 2301 Revised Statutes, before the clerk of the district court of Anoka county, at Anoka, Minnesota; and on the same day Eusibe Picard filed a corroborated protest against the acceptance of said proof, alleging that he was in possession of, and had made valuable improvements upon, the land in question at the time Rehbein made entry thereof; that he has continued in the possession and occupancy of the same, and has made other improvements thereon, since the date of said entry; and that Rehbein has never resided upon and improved said land as required by law.

Testimony on behalf of both parties was taken at Anoka, Minnesota, before the clerk of the district court of Anoka county.

April 15, 1896, Rehbein filed an application for leave to amend his homestead entry so as to make it an adjoining farm entry.

August 11, 1896, the local officers found, upon the testimony submitted, that Rehbein had not complied with the requirements of the homestead law in reference to settlement and residence, and recommended that his final proof be rejected. They also recommended that Rehbein's application to change his entry to an adjoining farm homestead be disallowed, on the ground that "the adverse right of said Eusibe Picard has intervened." From said finding Rehbein appealed to your office, which, on October 11, 1897, affirmed the action of the local officers and rejected "Rehbein's final proof and application to amend his entry." From this decision no appeal was taken, but, on February 15, 1898, your office, of its own motion, again took up the matter and rendered decision, which is in part as follows:

This office by letter "H" of October 11, 1897, affirmed your decision, but did not, in terms, hold Rehbein's H. E. No. 17046 for cancellation.

October 16, 1897, you notified Rehbein's attorney by registered letter, and on January 28, 1898, you reported that no appeal had been filed.

As to the matter already adjudicated, the case is hereby closed. It is necessary, however, to pass on the validity of Rehbein's H. E. No. 17046. The final proof shows that he never established a residence on the land and he did not attempt to change his entry to an adjoining farm entry, until after Picard had showed the fact of his failure to comply with the law. He, Picard, was then entitled to the preference right of entry under the 2nd section of the act of May 14, 1880 (21 Stat., 140).

Therefore H. E. No. 17046 is hereby held for cancellation, subject to the right of appeal.

From this latter decision Rehbein has appealed, assigning the following grounds of error:

Error to again take up this matter on his own motion until the defendant shall make, or neglect to make, his offer of final proof. The case having been closed by final order of October 11, 1897, and the plaintiff not having made application to correct the said order.

Error to find from all of the files and proofs in the matter that the defendant, Rehbein, did not in good faith establish a residence upon the land in question and did not in good faith improve the same.

Error to find that this plaintiff, Picard, was entitled to a preference right of entry to this land.

Error to find under all of the files and proofs in this action that H. E. No. 17046 is or should be held for cancellation.

The facts of the case, in reference to Rehbein's settlement and residence upon the tract in dispute, are sufficiently set forth in your office decision of October 11, 1897, and need not be herein repeated. It is clear from the evidence that he has never in good faith established a residence upon his claim to the exclusion of a home elsewhere, and therefore, not having complied with the requirements of the homestead law up to the time of the presentation of his commutation proof, said proof was properly rejected.

Rehbein's application to amend was made prior to adverse action on his final proof, and was in effect an abandonment of all rights under his original entry and an application to make adjoining farm entry. He states under oath that the reason he did not at first make an adjoining farm entry of the land was because he was ignorant of the fact that he was entitled to make such entry. His failure to reside on the land under his first entry in no wise affects his qualifications as an applicant to thus amend his entry. He stands on the same footing as anyone else owning an adjoining farm, subject only to any intervening right on the part of the protestant. It does not appear that the latter is a settler on the land or that he paid the costs of the proceedings on the protest. It is not seen, therefore, from the record as now made, that his standing in the case is such as to defeat the right of amendment on the part of Rehbein. Nor can the rights of Rehbein be affected by the fact that the judgment of your office holding his entry for cancellation was not rendered until after the expiration of the time allowed for appeal.

It is therefore directed that Rehbein's entry be canceled and he be notified that he will be permitted, within thirty days from notice hereof, to file in due form an application to make adjoining farm entry of the land involved, and that protestant be notified of the action herein taken and be given thirty days within which to show cause, if any, why such entry should not be allowed. In the event of any adverse showing on the part of protestant the papers will be transmitted to your office for appropriate action, otherwise the application will be allowed, if Rehbein is shown to be in other respects qualified to make such entry.

Your office decision is modified as above indicated.

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PREFERENCE RIGHT OF ENTRY—APPLICATION TO ENTER.

JACOBY *v.* KUBAL ET AL.

A preferred right of entry under the act of May 14, 1880, cannot be secured by proceedings on protest against an application to enter.

The case of *Cline v. Urban*, 29 L. D., 96, cited and followed.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(F. L. C.) *September 14, 1899.* (J. L. McC.)

Joseph Kubal, on March 26, 1891, made homestead entry for the SW.  $\frac{1}{4}$  of Sec. 32, T. 98, R. 67, Mitchell land district, South Dakota.

He made final proof, upon which patent was issued February 11, 1895. On November 5, 1894 (subsequently to his making final proof), he and his wife Anna Kubal conveyed the land by general warranty deed to another party.

On June 24, 1895, James J. Kubal made homestead entry for the SW.  $\frac{1}{4}$  of Sec. 14, T. 96, R. 62, same land district. On August 28, 1895, he relinquished said entry, and filed an application to make entry for the NE.  $\frac{1}{4}$  of Sec. 25, T. 97, R. 66, same land district. A few days later he applied to amend his application to the NW.  $\frac{1}{4}$  of Sec. 29, T. 97, R. 65. His application was refused by your office letter of February 8, 1896. He appealed to the Department, which, on August 19, 1897, reversed the action of your office, and directed the allowance of his entry as amended—for the NW.  $\frac{1}{4}$  of said Sec. 29 (25 L. D., 132). Said departmental decision was promulgated by your office on August 31, 1897.

Prior to the last-named date, however—to wit, on August 26, 1897—Anna Kubal, claiming to be the deserted wife of said Joseph Kubal, filed homestead application for said NW.  $\frac{1}{4}$  of Sec. 29. The local officers rejected said application because of conflict with that of James J. Kubal.

On September 13, 1897, Anna Kubal appealed from said decision, contending that her application should have been received, and held to await the decision in the matter of James J. Kubal's application to amend.

On September 9, 1897, Jacob Jacoby filed an affidavit alleging that James J. Kubal was the same person who, under the name of Joseph Kubal, had on March 26, 1891 (*supra*), made homestead entry for the SW.  $\frac{1}{4}$  of Sec. 32, T. 98, R. 67. He asked that a hearing be ordered, and offered to pay the expenses thereof; but he did not file an application to enter the land, nor for a preference right of entry. Notices were issued for a hearing to be held October 19, 1897, before the local officers, on the above charge.

On September 25, 1897, Anna Kubal filed a second application to make homestead entry for said NW.  $\frac{1}{4}$  of Sec. 29, alleging that she was the deserted wife of Joseph Kubal, was the head of a family, and had five small children to support; that she was, and had been for more than ninety days, an actual settler on the land. At the same time she filed James J. Kubal's withdrawal of his application to enter the land and allowing Anna Kubal to complete her filing.

On October 13, 1897, the local officers, acting upon the above application, held that the withdrawal of James J. Kubal was in effect a relinquishment of his right to make entry of said tract—the NW.  $\frac{1}{4}$  of Sec. 29; also that, as said withdrawal or relinquishment was filed while a contest was pending against his right to enter said tract, it was proper to presume that his relinquishment was the result of said contest; therefore they awarded the preference right to make entry of said

tract to said contestant, Jacob Jacoby; and rejected Anna Kubal's application to enter the same. All parties in interest were notified October 18, 1897.

At the hearing had October 19, 1897, the defendant, James J. Kubal, made no appearance; but Mrs. Kubal appeared as intervenor. The local officers made no finding upon the question as to whether said James J. Kubal and Joseph Kubal are one and the same person, but transmitted all the papers to your office. The withdrawal by James J. Kubal of his application renders a decision of this question unnecessary.

On October 28, 1897, your office returned to the local officers Anna Kubal's first application, with instructions that it be received and held to await the final determination of the Department in the matter of James J. Kubal's application (which application, however, had been allowed by departmental decision of August 9, and the decision promulgated by your office August 31, 1897; and on September 25, 1897, Anna Kubal had filed in the local office James J. Kubal's withdrawal of said application).

On December 17, 1897, Anna Kubal personally applied at the local office to enter said land; but the local officers again rejected her application, and the same was "held to await the final determination of the case of the United States *v.* James J. Kubal;" and she was notified that when said case was closed in accordance with the terms of your office letters of August 31 and October 28, 1897, appropriate action would be taken by them relative to her application to enter. From this decision also Anna Kubal appealed.

Your office, on February 8, 1898, in view of the facts above set forth, rendered a decision finding and holding as follows:

Jacoby has not asked for the preference right of entry, and has not attempted to enter the land. He appealed apparently as a friend of the government. Anna Kubal was, when she filed her first application to enter, qualified, being then a deserted wife and the head of a family. She kept her rights, gained by such application, alive; and when James J. Kubal filed his relinquishment of all claims to the land applied for by her, her application attached. It should now be allowed; and unless Jacoby appeals, it will be returned for acceptance by you.

Jacoby has appealed. He alleges, in substance, that your office was in error in holding that because of his omission to file application to enter and to ask for a preference right, he is not entitled to the benefit of the same; and in not considering "the fraud and collusion shown to exist between Anna Kubal, the intervenor, and her husband, James J. Kubal, alias Joseph Kubal."

The preference right to contest an entry is created by statute (act of May 14, 1880, 21 Stat., 140):

In all cases where any person has contested, paid the land office fees, and *procured the cancellation of any preemption homestead, or timber culture entry, etc.*

In the case at bar no entry was ever made on James J. Kubal's application; so there could be no cancellation of an entry, and no basis for a preference right. Also, technically speaking, no relinquishment

could be made. Withdrawal of an application to enter may be made at any time; and upon such withdrawal the land is at once relieved from any claim under such application (*Hughey v. Dougherty*, 9 L. D., 29).

Jacoby charges, in substance, that the divorce between Anna Kubal and her husband was collusive and fraudulent—she “suing for a divorce which had been consented to on the part of her husband for the purpose of holding this land.” The proof that such divorce has been granted (September 30, 1897,) is on file in the record. The Department has held (*Cline v. Urban*, syllabus, 29 L. D., 96):

The good faith of an entrywoman in securing a decree of divorce, as affecting her qualifications under the homestead law, is not a matter of investigation through a contest under the act of May 14, 1880.

Anna Kubal, at the time of presenting her first application, was a deserted wife (since divorced); and was qualified to make homestead entry of the land. She was actually residing on the land, it was subject to entry, and she has by her repeated appeals kept alive the rights gained by her application. On James J. Kubal's withdrawal of his application, hers at once attached.

The decision of your office is hereby affirmed.

Certain *ex parte* affidavits, filed after the hearing, have not been considered in arriving at a conclusion herein.

#### CONTEST—RELINQUISHMENT—PREFERRED RIGHT OF ENTRY.

##### HORNSBY *v.* CARSON ET AL.

A relinquishment filed after the initiation of a contest, and independently thereof, will not defeat the preferred right of the contestant, if the facts shown at the hearing require the cancellation of the entry on the ground charged.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(F. L. C.) September 15, 1899. (G. C. R.)

On July 11, 1895, Richard M. Carson made homestead entry of the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 3, and the E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 10, T. 20 N., R. 31 W., Harrison land district, Arkansas.

On July 19, 1897, Richard Hornsby filed his contest against said entry, alleging that the same

was not made honestly and in good faith . . . . for the benefit of himself . . . . but for the benefit . . . . of one John Morris; that said contestee in entering said land was acting as agent for said Morris and that by agreement between said Carson and Morris the title which said Carson obtained from the United States was to inure to the benefit of said Morris.

Notice was issued on the day the contest was filed (July 19, 1897), and the same was served on Carson on July 24 next following. B. F. Dunn, a notary public of Bentonville, Arkansas, was commissioned to take the testimony, the hearing being set for September 6, 1897, and the testimony to be considered by the register and receiver on September 13, 1897.

On July 23, 1897, Carson relinquished his entry and at 9 o'clock, July 26, 1897, the relinquishment was filed in the local office. Simultaneous with the filing of said relinquishment, John Morris and the contestant, Richard Hornsby, presented their respective applications to make homestead entry of the land. On the filing of the relinquishment, Carson's entry was canceled; Morris's application was rejected because Hornsby had previously filed a contest. On August 13, 1897, Morris asked for a hearing to show that Carson's entry was made in good faith and that the relinquishment of his entry was not made as a result of Hornsby's contest.

Morris was advised to appear at the time and place of the hearing in *Hornsby v. Carson*, viz., September 6, 1897. This he did and testimony was duly taken, upon Hornsby's allegations against Carson's entry.

The register and receiver recommended that the contest be dismissed and that Morris's application be accepted. This recommendation was made because of the finding that "the evidence is not sufficient to sustain the charge, nor to show that the relinquishment was filed as a result of the contest."

On appeal your office, by decision dated April 12, 1898, reversed that action, and held Morris's application for the land subject to that of Hornsby. Morris's appeal brings the case here.

The testimony shows that Carson is an evangelist; that he was absent from the land for considerable periods preaching, and claimed to be engaged in charitable work; that he solicited old clothing from friends in Memphis, Tennessee, Missouri, Kentucky and other places, part of which he gave to the needy poor in the country where his land is situated. Some of this clothing he exchanged with his neighbors in return for work done on the land. When called on to explain why he should thus make merchandise of goods given for the benefit of the poor by exchanging them for labor in improving his homestead, he replied in a letter (admitted by him) addressed to Judge S. N. Elliott, of Bentonville, Arkansas, as follows:

I told you for one thing that this homestead was not mine and that I was not running it, as I am no farmer and have no use for one. A friend Mr. Morris from Texas owns it as soon at least as he fulfills his contract to repay me the money I advanced him for the improvements that were on it . . . . It was to *help him* with farm work that I allowed men and boys to work for clothing as they were very willing to do so . . . . Counting up I found that about 95 days of work for clothing were put in altogether; . . . . I gave them (the clothes) for one third their real value. Fifty cents a day is the usual price for man, boys less. So far as any benefits of such work go in "improving the farm" they are for Mr. Morris and not for me. All this has not been a dime in my pocket. As all this clothing (about 40 barrels and boxes) was nearly all obtained from personal friends for the destitute and those needing help, I know of no one more destitute than Morris, as he has not a dollar on earth and is unable to work and can only do small jobs about the house and is abed most of the time; . . . . that some of the people here who have been most helped in their distress have been the very ones who have acted most basely and ungratefully in misrepresenting things and lying by wholesale. Such is evil human nature. They must now root for themselves without my help.

On July 8, 1897, he wrote to the "Benton County Democrat" in further explanation of his conduct. He admits writing the letter which as published contains this statement:

A former friend of mine, a most worthy man, John Morris by name coming from Texas, was very desirous of securing this homestead and having no money at the time, I advanced it to him by buying the improvements upon it; to do this of course I had to enter the place in my own name. He has not been able to repay me the money I advanced. Hence of necessity the homestead has continued to stand in my name. I obtained it solely and only for Mr. Morris.

This publication probably gave to Hornsby the information upon which he brought the contest. On being served with notice Carson wrote Hornsby a letter which was introduced in evidence. In said letter Carson says:

Not having read the terms and conditions of obtaining homesteads at the time I filed and my attention having been called to my error or the illegality of the transaction as now appears, as soon as I learned this, I at once resigned and abandoned all claims to said homestead as I have already stated. It was a very careless thing in me not to carefully read the paper over at the time but it was owing to the haste and brief space I had to do it in. The result is I have lost it, which I suppose is a sufficient penalty for carelessness. I could do nothing else in such a case but to abandon all claims to the homestead, as I wish and endeavor always to be a law abiding man—as all should be. I have no design whatever of acting crookedly or illegally in what I did but all was the result of pure carelessness.

Both in the letters and communications as also in his testimony taken at the hearing, Carson endeavored to excuse his mistake in making his homestead affidavit (he did not recollect having sworn to it) wherein he stated that his 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 corporations . . . that he has not directly or indirectly made and will not make any agreement or contract by which the title which he . . . might acquire from the government . . . should inure, in whole or in part to the benefit of any person except himself, etc.

As before seen he admitted that he obtained the homestead "solely and only for Mr. Morris," hence it could not have been obtained in good faith for his "own exclusive use and benefit."

It is probable that Carson's relinquishment was the result of Hornsby's contest. While both Carson and Morris swore that they had no information that a contest had been filed when the relinquishment was executed, yet Carson testified that he had heard "a vague rumor that somebody had threatened to do it" and Morris did not know "for certain" that there was a pending contest.

But whether the relinquishment was the direct result of the contest or not makes no difference in this case. The hearing shows that Carson's entry was not made for his own use and benefit, but for the benefit of John Morris; that was the allegation in the contest affidavit and the hearing clearly established its truth. The contestant did not invoke the relinquishment in aid of his contest, but proved his allegations independently thereof. The contestant's rights in such case are determined by the status of the land at the time of the initiation of

the contest and his rights can not be defeated by the subsequent act of the entryman relinquishing the entry, although the entryman may have relinquished in good faith without knowledge of the pending contest. *Brakken v. Dunn et al.* (9 L. D., 461). See also *Webb v. Loughrey et al.* (*idem.*, 440).

The decision appealed from is affirmed.

TIMBER CULTURE CONTEST—FINAL PROOF—EQUITABLE ACTION.

WRIGHT *v.* DIGGS.

A contest against a timber culture entry on the ground of failure to submit final proof within the statutory period will not defeat the right of the entryman to have said proof equitably considered, where it is submitted prior to notice of such contest and without knowledge thereof.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(F. L. C.) *September 18, 1899.* (L. L. B.)

July 21, 1879, Edward A. Diggs made timber culture entry for the NE.  $\frac{1}{4}$  of Sec. 26, T. 124 N., R. 50 W., in what is now the Watertown, South Dakota, land district.

September 22, 1896, Joseph Wright filed contest against said entry, in which he alleged that:

The said Edward A. Diggs has neglected and failed to comply with the law. That more than thirteen years have elapsed since making said entry and said Edward A. Diggs has not made, offered or filed final proof for said entry and tract of land, or proof that he has planted or cultivated ten acres of trees or any amount of trees on said tract as required by the tree culture laws of the United States. That on August 22, 1896, affiant filed, in due form, in the U. S. land office at Watertown, S. D., his application to enter said tract as a homestead.

At the date of filing the affidavit of contest, the defendant was residing in the State of New York.

Notice was issued, November 11, 1896, and upon a proper showing service of same was made by publication, and the first publication was made December 12, 1896. Prior to this first publication, namely, November 25, 1896, the entryman submitted his final proof, which was accompanied by his affidavit showing sufficiently that he was prevented by sickness and adversity from submitting it during the lifetime of his entry.

At the hearing, oral testimony was submitted, showing that more than thirteen years had expired since the date of the entry, and that final proof had not been submitted within the statutory life of the entry, but no sufficient evidence was submitted to impeach his final proof, which showed compliance with the requirements of the timber culture law as to planting and cultivation of trees, nor was there any evidence tending to contradict the statement in the defendant's affidavit filed with his final proof, to the effect that he was prevented by

sickness and misfortune from submitting his final proof within the statutory period.

It is also sufficiently appears that the entryman had no knowledge, intimation, or suspicion that a contest had been filed against his entry prior to the time he submitted his final proof.

Upon the foregoing facts, the register and receiver recommended the cancellation of the entry, upon the ground that the entryman had failed to submit his final proof within thirteen years after the date of his entry. Upon appeal, your office, by decision of February 4, 1898, reversed the action of the local office, dismissed the contest and directed the issue of final certificate, and that the entry of Diggs be submitted, in due course, to the board of equitable adjudication.

Wright has appealed.

It is a general departmental rule that when a default is cured by the entryman before notice of the contest is served upon him and before he has any actual knowledge or intimation that a contest affidavit has been filed against his entry, the contest must be dismissed. *Heptner v. McCartney*, 11 L. D., 400.

The only default shown to exist against the entryman here is failure to submit timely final proof, and, as heretofore shown, before knowledge or notice of the contest, the defendant made final proof, and thus placed himself in a position where he is entitled, under the circumstances of the case, to the equitable consideration of the Department, as against any rights of the contestant.

The case at bar comes within the law as announced in *Thompson v. Bartholet*, 18 L. D., 96. See also as bearing upon the case under consideration, *Meads v. Geiger*, 16 L. D., 366, and *Zickler v. Chambers*, 22 L. D., 208.

The decision appealed from is affirmed. The entry of Diggs will be submitted to the board of equitable adjudication.

#### OKLAHOMA TOWNSITE—LOT CLAIMANTS.

##### LEACH *v.* TANNAHILL.

A townsite entry under the act of May 14, 1890, is for the use and benefit of the occupants of the land at the date of the entry; and priority of possession or occupancy can only be material in case of conflicting claims of occupancy existing at such time.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(F. L. C.) *September 18, 1899.* (C. J. W.)

The townsite of Cross, Oklahoma, was entered by townsite board No. 6, on April 16, 1897.

On May 14, 1897, William Tannahill filed an application for a deed for lots 13 to 24 inclusive (except lot 19), in block 13, of said townsite.

On July 27, 1897, A. L. Leach filed application for a deed to the same lots, including lot 19, omitted from Tannahill's application.

The case having been set for a hearing, Tannahill applied to have taken the depositions of E. T. Warren, J. H. Dwyer, C. H. Stowell, F. A. Badger, A. C. Rogers and William Tannahill, and the depositions of said Rogers, Dwyer, Stowell and Badger were taken before a notary on September 25, 1897, the others not appearing.

The case standing for trial on September 28, 1897, Leach moved for a continuance on the ground of the absence of material witnesses, the motion indicating what the testimony of said witnesses would be; whereupon Tannahill admitted that the witnesses would testify as stated, if present, and the motion was overruled. The admission was to the effect that the witness if present would testify that Leach was the prior settler upon the lots in question. The case was then continued to the following day, when Tannahill was allowed, over the objections of Leach, to amend his application so as to include lot 19, omitted from the original application, and the hearing proceeded.

On October 11, 1897, the board rendered a decision, wherein lot 19 was awarded to Leach and the remaining lots to Tannahill. Leach filed a motion for a review of said decision, which was allowed, and, on April 4, 1898, the board reviewed its former decision and rendered a second one, in which the former decision was modified to the extent of awarding lot 20 to Leach, instead of Tannahill. On said April 4, 1898, Leach gave notice that he would appeal from said decision to your office. A motion to dismiss the appeal, subsequently filed, was made by Vesta M. Tannahill, alleging herself to be the widow and heir of William Tannahill, deceased, and alleging, *inter alia*, that Tannahill died without being served with notice of the appeal, and that his heirs had not been served.

In reference to the matter of service, your office, on December 21, 1898, held the service to be defective, but allowed Leach fifteen days from notice in which to secure service of his appeal upon the proper parties. It appears that he was notified of this requirement on January 9, 1899, and on January 21, 1899, transmitted evidence of service upon the alleged heirs of Tannahill; thereafter, on April 13, 1899, your office considered the appeal of said Leach, and the decision of the townsite board was affirmed.

Leach has appealed to the Department, alleging various errors in your office decision.

The principal allegations of error are:

First. That your office erred first in not awarding all of said lots to Leach as the prior settler and occupant.

Second. That your office erred in not finding that the board erred in overruling Leach's motion for continuance, and that your office erred in not sending the case back for rehearing.

It is further alleged that it was error to find that Tannahill ever occupied the lots in question as an adverse claimant to Leach.

Leach and Tannahill were the only witnesses who appeared in per-

son and testified before the townsite board. The remaining testimony consists of the depositions offered by Tannahill and of Tannahill's admission that Leach's witnesses would testify if present that Leach occupied the lot before Tannahill did. In so far as the personal testimony of Leach and Tannahill conflicts, neither party is aided by the other testimony in the record.

The vital question in the case was, and is, whether the relation of landlord and tenant existed between the parties so as to make Tannahill the tenant of Leach on the lots. Leach now insists that it did, but his testimony very weakly supports the contention, if it does so at all, and the testimony of Tannahill pointedly refutes it.

It appears that the lots in dispute (not awarded to Leach) were selected and partially enclosed and occupied on the opening of the country by parties other than Leach or Tannahill. Their improvements were slight and comparatively valueless, and appear to have been speedily abandoned, and none of these parties was in possession personally or through tenants when the entry was made by the townsite board.

A townsite entry made by trustees in Oklahoma has been uniformly held to be for the several use and benefit of the occupants of the land at the date of entry, the same as though the entry were made under the provisions of section 2387 of the Revised Statutes. See instructions, 15 L. D., 270.

It follows that the entry made by the board on April 16, 1897, of the townsite of Cross, was for the benefit and use of the actual or constructive occupants of lands at that date, under the second section of the act of May 14, 1890 (26 Stat., 109). The mere priority of possession or occupancy in such cases is material only where more than one person is in actual or constructive possession at the date of entry. An early possession which had been abandoned or lost, and was not maintained at the time of entry, conferred no right. In view of this rule, the admission of Tannahill that Leach could show by absent witnesses that he had been in possession of the lots in dispute at a period antedating his (Tannahill's) possession, was not necessarily an admission of Leach's right. It appeared clearly from the testimony that Tannahill had all the lots, except 19 and 20, in possession and under fence at the date of the townsite entry, and was cultivating and claiming them. Leach failed to show any actual occupancy by himself and was unable to show that the relation of landlord and tenant existed between him and Tannahill. His contention that the case should have been continued to enable him to have his witnesses examined by the board, notwithstanding Tannahill's admission, is not tenable, and your office did not err in refusing to order a rehearing on this ground.

While the testimony as a whole is somewhat vague and unsatisfactory, it supports the conclusion reached by the board, and your office decision is accordingly affirmed.

## VACATION OF PATENT—APPLICATION—PREFERRED RIGHT OF ENTRY.

MATTHEWS ET AL. *v.* LINES.

On the judicial vacation of a patent the land involved should not be held as open to application until such time as the entry is canceled of record in the local office. Conceding that one who furnishes evidence on which a patent is set aside is equitably entitled to a preferred right of entry, there is no authority for recognizing such equity as the subject of transfer.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(F. L. C.) *September 22, 1899.* (C. J. W.)

On November 11, 1889, Thomas J. Brady made cash entry for the E.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  and the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 3, and the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 10, T. 5 N., R. 21 W., Missoula, Montana, upon which patent issued November 3, 1891.

Suit was subsequently instituted in the district court of the United States for Montana to cancel said patent upon the ground of fraud in its procurement, which suit appears to have been tried on the 16th day of June, 1897, and a decree rendered by the court that said patent be canceled, and George W. Sproule was appointed a commissioner to convey said land to the United States for and on behalf of said Thomas J. Brady. A deed was accordingly executed by said Sproule conveying said land to the United States on June 24, 1897, and was duly recorded in the record of deeds of Ravalli county, Montana, on June 26, 1897.

On August 31, 1897, your office addressed the register and receiver of the land office at Missoula, in substance, reciting the facts above stated and notifying them that the patent to the land described and the final certificate on which the patent was based had been canceled on the records of your office, and said officers were directed to cancel the said entry on the records of their office, and they were informed that the land embraced in said entry was subject to entry by the first qualified applicant.

The entry appears to have been canceled on the records of the local office in accordance with said instructions, on September 7, 1897.

Your office having under consideration the applications of the heirs of Hannah Bullock, George W. Matthews, and James A. Lines to enter said land, on September 24, 1897, decided that Lines was entitled to the preference right of entry, and returned his application to the local office for allowance.

On October 30, 1897, Lines made entry for said land.

On October 1, 1897, the local officers forwarded to your office the rejected homestead application of Thomas E. Evans for said land, which was filed September 8, 1897.

From this it appeared that your office, in allowing Lines a preference right of entry, by your decision of September 24, 1897, had acted upon an incomplete record; whereupon your office, on November 6, 1897,

directed the local officers to notify Lines and Matthews of Evans's application, and that they would be allowed thirty days in which to file any desired statement in regard thereto. Both Lines and Matthews filed such statement, and your office, on March 11, 1898, proceeded to review your former action, in which you decide adversely to the contentions of both Evans and Matthews, and hold intact the entry of Lines.

From this decision Evans has appealed.

Your office expressed the opinion that the land in controversy was restored to the public domain on the 16th day of June, 1897, when the United States court adjudged and decreed that said patent be canceled, annulled, and set aside. You also find that Thomas E. Evans was the first qualified applicant for the land after its restoration to the public domain, but that he forfeited his rights under his first application by his failure to appeal from the action of the local officers. He made a second application on September 8, 1897, the day after the entry of Brady was canceled in the local office, which was rejected because of the prior application of Matthews and Lines, from which action he appealed.

It appearing from the record that Matthews had an existing entry of record for another and different tract, and that he did not appeal from the action of the local officers in rejecting his application, your office properly denied his application. This narrows the controversy to Lines and Evans.

It is insisted that two leading propositions announced in your office decision are inconsistent the one with the other:

1st. That the land in dispute became subject to entry upon the signing of the decree of the court canceling the patent; and

2d. That the local officers did not err in rejecting applications while the entry remained of record in their office after the signing of the decree.

The contention is suggestive that the propositions may have been too broadly stated. As an administrative rule the latter proposition is in accordance with the latest instructions of the Department to registers and receivers on the subject (29 L. D., 29).

The first proposition is too broad in this: that it assumes that the decree of the court canceling the patent operated to cancel the entry on the records of the Department also, and allowed of no time within which to take the necessary steps to have the records of the land department conformed to the decree. In such a case it would be more in accord with the general purpose of disposing of the public lands through the land department to hold that the decree of the court canceling the patent took effect so as to open the land to entry on the cancellation of the entry on the records of the local office, pursuant to notice through your office of the decree.

In the case of Emory H. Marker *et al.* (23 L. D., 407), it was held (syllabus):—

On the judicial vacation of a patent issued under a railroad grant, the Secretary of the Interior may lawfully fix a day when the lands embraced in such decree shall be open to entry; and in such case an application to enter filed prior to the time so fixed should not be allowed.

The same principle would seem to be applicable where a patent to a single tract is canceled.

So long as the entry remained of record it had the effect of segregating the land. Lines filed his application while the entry of Brady was still of record, and his application was properly rejected. He therefore acquired no right by virtue of said application. Evans acquired no right under his first application, for the reason that the land was not then open to entry. As Evans filed another application on September 8, 1897, the next day after the land was open to entry by the cancellation thereof on the records of the local office, which was rejected and he appealed from the action of the local officers in rejecting it, he would be entitled to have his application allowed, unless Lines's entry should be upheld on grounds not previously discussed, but which will be now considered.

Mary E. Lines makes affidavit that she furnished the means with which the land was improved by Hannah Bullock, her mother, and that she and one Daniel K. Sparks first brought the facts concerning the fraud of Brady's entry to the attention of the government by stating the facts to a government timber inspector, and subsequently made affidavits to the facts, which were forwarded to the Department. The facts appear to have led to the cancellation of the patent. She alleges that she believes herself and family to be justly entitled to the land, and asks that her husband, James A. Lines, be allowed to enter it.

If it were conceded that Mrs. Lines, by her acts contributing to the discovery of the fraud which led to the cancellation of the patent of Brady, clothed herself with equities which might properly be recognized by the Department, if she was qualified to make entry and was herself applying to do so, there would still be wanting the authority for the transfer of such equities to another.

It must therefore be held that her acts constitute no ground for a preference right of entry to her husband.

It is further alleged that Lines is living on the land, and made valuable improvements upon it after the allowance of his entry. In an affidavit made by him on the 22d of November, 1897, he states that he is residing upon this land, with his family, having moved thereon on the 24th day of October, 1897. There is no allegation that any acts of settlement were performed by him after the cancellation of the patent, and before Evans's application to enter, made September 8, 1897. Nothing appears therefore in the showing made by Lines in support of his entry which defeats the right acquired by Evans, by virtue of his prior application to enter.

It follows that your office decision must be reversed, Lines's entry canceled, and the application of Thomas E. Evans allowed, and it is so ordered.

MINERAL LAND—SCHOOL LAND INDEMNITY SELECTION.

MCQUIDDY ET AL. v. STATE OF CALIFORNIA.

A certificate of the location of a mining claim is not in itself sufficient evidence of the mineral character of land to overcome an agricultural return.

Land chiefly valuable for the gypsum and petroleum contained therein can only be disposed of under the laws governing the sale of mineral land, and hence is not subject to school land indemnity selection.

Prior to the approval of a school indemnity selection the land embraced therein, if mineral in character, is open to exploration and purchase under the mining laws.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(F. L. C.) *September 22, 1899.* (F. C. D.)

The State of California has appealed from the decision of your office, rendered March 18, 1898, in the case of Thomas J. McQuiddy *et al.* v. State of California, wherein the decision of the local office was reversed and the State's indemnity school selection for the S.  $\frac{1}{2}$  of Sec. 20, T. 19 S., R. 15 E., Visalia, California, land district, was rejected on the ground that the said land is mineral in character.

On December 17, 1896, the State of California filed in the local land office indemnity school selections, No. 4208, for the NE.  $\frac{1}{4}$  of Sec. 20, T. 19 S., R. 15 E., M. D. M., and other lands, No. 4209 for the S.  $\frac{1}{2}$  of Sec. 20, same township and range; and No. 4210 for the NW.  $\frac{1}{4}$  of said section 20, which selections were noted on the records of the local office, subject to approval.

In January, 1897, Thomas J. McQuiddy, Joshua Warsuick and Marcus M. Lavelle filed protests alleging that they were owners, by location, of mining claims located on section 20, T. 19 S., R. 15 E., M. D. M., and that they disputed the right of the State thereto.

Your office, upon considering said protests, ordered a hearing therein to determine the character of the land of said section 20, and such hearing was duly had and testimony was submitted by the mineral claimants. The State submitted no testimony but contented itself with cross-examining the witnesses for the mineral claimants.

On May 17, 1897, the local officers rendered a joint decision in favor of the State, holding that the protestants had totally failed to prove the land mineral in character. On appeal, your office reversed the action of the local office, and held the land mineral in character.

On July 8, 1897, after the rendition of the decision of the local officers, a protest was filed by A. Showers *et al.* alleging that they have valuable mining claims on the NE.  $\frac{1}{4}$  and SW.  $\frac{1}{4}$  of section 20, T. 19 S., R. 15 E., M. D. M., and that said land is more valuable for mineral than for agricultural purposes, which protest was transmitted to your office

and the same was acknowledged by your said office decision and held pending final action herein.

The State of California on January 27, 1898, relinquished the NW.  $\frac{1}{4}$  Sec. 20, T. 19 S., R. 15 E., M. D. M., (selection No. 4210) and on February 19, 1898, the State also relinquished the NE.  $\frac{1}{4}$  of said section 20 (being part of the land embraced in selection No. 4208). Said relinquishments were forwarded to your office and were accepted by your office in the decision herein.

On February 4, 1899, the State of California also relinquished a portion of the land embraced in its selection No. 4209, the SE.  $\frac{1}{4}$  of Sec. 20, T. 19 S., R. 15 E., M. D. M., but asked that the remaining portion of said selection No 4209, viz., the SW.  $\frac{1}{4}$  of said section 20, be allowed to stand.

The said relinquishment of the SE.  $\frac{1}{4}$  of said section 20, will be accepted and there remains for determination now only the SW.  $\frac{1}{4}$  of said section 20.

The local officers in determining this case placed the burden of proof upon the mineral claimants, as the land in controversy was not returned as mineral land, but your office held that the local office erred in placing the burden of proof upon the mineral protestants, as they had made several mining locations on the S.  $\frac{1}{2}$  of the section (20) and were in possession thereunder prior to and at the date of the filing of the State indemnity selection, citing in support thereof the case of the Northern Pacific R. R. Co. v. Marshall (17 L. D., 545).

The Department, by decision rendered March 6, 1899, in the case of Magruder v. Oregon and California R. R. Co. (28 L. D., 174), held that a certificate of the location of a mining claim is not in itself evidence of the mineral character of the land, and therefore would not be sufficient to overcome an agricultural return of the surveyor-general,

and therefore overruled the theory announced in the said case of Northern Pacific R. R. Co. v. Marshall, that a certificate of a mineral location was in itself sufficient evidence of the mineral character of the land to cast the burden of proof upon one who asserted the agricultural character of the land.

Besides the certificate of location, evidence of the mineral character of the land, or a discovery of mineral, sufficient to warrant a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine, must be shown to overcome an agricultural return.

It appears that the claims of these protestants were located August 8, 1889, and are on the S.  $\frac{1}{2}$  of said section twenty, and were located more particularly for the deposits of gypsum contained or alleged to be contained therein.

It is admitted by the mineral claimants that they have made no discovery of precious metals on said land, but they claim that gypsum and petroleum have been discovered thereon and that the land is valuable therefor.

If the land in controversy contains a deposit of gypsum or petroleum, and is more valuable on account of such mineral than for agriculture, it can only be entered as mineral land (*Phifer v. Heaton*, 27 L. D., 57, and *Union Oil Company*, 25 L. D., 351).

It was also held, in the case of *Union Oil Company, supra*, that lands chiefly valuable on account of the petroleum deposits contained therein are not subject to selection as indemnity under a railroad grant wherein mineral lands are excepted from the operation of the grant; and by parity of reasoning it must be, and is, held that lands chiefly valuable on account of the petroleum deposits contained therein are not subject to selection as indemnity under a school land grant.

The State of California takes its right to indemnity school lands under the seventh section of the act of March 3, 1853 (10 Stat., 244), construed by the sixth section of the act of July 23, 1866 (14 Stat., 218), and also under sections 2275 and 2276 Rev. Stat., as amended by the act of February 28, 1891 (26 Stat., 796).

In the case of *Swank et al. v. State of California et al.* (27 L. D., 411), decided September 16, 1898, which involved the right of the State of California to select certain lands as indemnity school lands under its grant by the said act of March 3, 1853, *supra*, it was held that prior to the approval of a school indemnity selection the land included therein, if mineral in character, is open to exploration and purchase under the mining laws of the United States.

The selection here in controversy has not been approved or certified, and as it has been above shown that lands embraced in school indemnity selections are open to exploration and purchase under the mineral land laws before the selections are approved, and as it has been further shown that lands more valuable for their deposits of gypsum or petroleum are subject to entry only under the mining laws, there remains to be decided only the question: is the land in dispute (the SW.  $\frac{1}{4}$  of said section 20) shown to be more valuable for its deposits of gypsum and petroleum than for agricultural purposes?

There is very little testimony as to the agricultural value of the land, the greater part of the testimony submitted being relative to the amount of assessment work performed upon the said mineral claims by the claimants, and as the question properly in issue is the mineral or non-mineral character of the land and not whether the said mining claims are valid or not, the testimony is very unsatisfactory and, in fact, the testimony relative to all the questions presented is indefinite and unsatisfactory. But from such evidence as was submitted relative to the agricultural value of the land in said section twenty, it appears that none of the said lands in said section have any agricultural value, except a small portion, not specifically described, which is suitable for grazing purposes.

During the progress of the trial, the State of California admitted (pp. 47 of testimony)—

that the section of land, being section 20 in township 19 south range 15 east, Mt. Diablo base and meridian, that it is an oil producing section. That there are now

upon said section, flowing oil wells, to wit: on the north half of the northeast quarter. That there is gypsum or rock of the character introduced as exhibits 4, 5, and 6, in evidence, and we will admit there is more or less of the same kind of rock upon the three claims, Discovery, First Extension and Second Extension of the so-called Crescent Gypsum lode or lead.

It is thus admitted by the State that section 20, of which the SW.  $\frac{1}{4}$  is a part, is oil producing; that there are flowing oil wells on the north half of the NW.  $\frac{1}{4}$  of the section and that there is gypsum, or what is claimed to be gypsum by the mineral claimants, upon the claims of the said claimants.

The protestants admitted that there are no oil wells on the three lode claims, the Discovery, First Extension and Second Extension of the Crescent Gypsum lode or lead, but claim that there are oil seepages thereon.

One of the protestants and mineral claimants, Mr. Marcus M. Lavelle, has an interest in a placer claim, known as the Phoenix Oil claim, which is situated on the S.  $\frac{1}{2}$  of said section 20, the exact part of the south half of the section upon which it is located is not shown. Lavelle says he can not tell the exact part. This claim was located in 1894, and Lavelle testifies that in 1895 he sunk two incline shafts thereon, built a house, barn and a road; put up a two thousand gallon galvanized tank thereon and put in two Douglas force pumps and several hundred feet of pipe. In 1896, oil was extracted from the shafts, barreled up and shipped. Lavelle testifies that seven hundred dollars' worth of oil was taken from the Phoenix claim in one year.

The evidence shows that gypsum has been discovered upon the said mineral claims and that about the year 1891 a car load of gypsum was taken from the First Extension claim and shipped, part of which was sold and part used upon the ranch of the claimant McQuiddy. Since that time what work has been done upon the claims has been in the nature of assessment work, building and repairing roads, some short tunnels have been made and a few prospect holes have been dug. There has been no further actual production of gypsum, at least to any extent, upon the said claims.

While it appears that the mineral deposits upon the land in dispute have not been extensively developed, and no large results have been obtained therefrom, yet the fact that mineral has been discovered thereon and that further expenditures have been made in the development of the same, considered together with the admission of the State relative to the mineral character of the land and considered also together with the fact that the evidence submitted herein shows the land to have but very little if any agricultural value, it must be and is hereby determined that the agricultural return is overcome and the land shown to have a greater value for mineral than agricultural purposes.

The decision holding that the land in dispute is mineral land is accordingly affirmed.

Since the case has been pending here on appeal, the following mineral protests have been filed, viz., The Dewey Mining Company and the California Oil and Gas Company, of California, against the State selection of the S.  $\frac{1}{2}$  of said Sec. 20; the Dewey Mining Company of the Territory of Arizona against the selection of the State of the NE.  $\frac{1}{4}$  and the SE.  $\frac{1}{4}$  of said section 20; which protests, together with the protest of A. Showers (which you held to await final action herein) you will dispose of in accordance with the views herein expressed. Protests have also been filed by H. G. Gates *et al.* against the State selection of Sec. 22, T. 19 S., R. 15 E.; Charles G. Wilcox against the State selection of NW.  $\frac{1}{4}$  of Sec. 22, T. 19 S., R. 15 E., but these protests do not embrace the land here involved and are herewith transmitted for appropriate action therein by your office.

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ADDITIONAL HOMESTEAD—SECTION 5, ACT OF MARCH 2, 1889.

POCAHONTAS MARTIN.

A widow, who perfects title under the homestead entry of her deceased husband, is not entitled to make an additional entry of contiguous land under section 5, act of March 2, 1889.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(F. L. C.) *September 22, 1899.* (H. G.)

Francois Martin, on January 12, 1885, made homestead entry for the N.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 1, T. 7 S., R. 12 W., in the Jackson, Mississippi, land district. Subsequently, the entryman died, and his widow, Pocahontas Martin, made final proof. Final certificate issued to her as widow of the deceased entryman, August 8, 1888, and patent issued on said final certificate, June 25, 1890.

On January 27, 1890, said Pocahontas Martin, as widow of said Francois Martin, deceased, was allowed to make additional homestead entry, under section 5 of the act of March 2, 1889 (25 Stat., 854), for the W.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 1, T. 7 S., R. 12 W., in the said land district, which tract lies immediately adjoining the tract for which her husband made entry.

On May 17, 1898, the local officers transmitted to your office the application of Mrs. Martin for final certificate for her additional entry, with the statement that they had declined to issue such certificate "for the reason that the entrywoman is not the one who made the first entry, to which this is additional", and submitted the matter for the consideration of your office.

Your office, on July 29, 1898, sustained the action of the local officers, holding that the said act of March 2, 1889, "makes no provision for any person other than the original entryman to make an additional entry under the said section 5." The additional entry was held for cancellation as illegal, and the entrywoman appeals.

The section of the act under which the entry was made, provides:

That any homestead settler who has heretofore entered less than one-quarter section of land may enter other and additional land lying contiguous to the original entry which shall not, with the land first entered and occupied, exceed in the aggregate one hundred and sixty acres, without proof of residence upon and cultivation of the additional entry.

If the entryman had lived, he could have brought himself within the provisions of this section, as he had entered, prior to the passage of the act, but eighty acres of land, and he could have made an additional entry for the tract of eighty acres in question which is contiguous to the original entry.

Can the privilege thus granted to a "homestead settler" be held to apply to his widow, who completes the original entry of her deceased husband? She was not compelled to reside upon the homestead after her husband's death in order to obtain title to the land covered by the original entry, and for that reason it can not be assumed that she is a "homestead settler" in contemplation of the law. The statute also has reference to an original entryman, and not to his widow, heir, or personal representative, after his death. The right of completing the entry of a deceased homesteader is, by the general homestead law, vested in his widow, if there be one, and if he leaves no widow surviving him, in his heirs; but this privilege is extended to the widow and heirs by plain statutory words and nothing is left to be implied. If Congress had intended to grant the same privilege to the widow of an entryman to make an additional entry, that it had conferred in certain cases upon the entryman himself, it would have employed language clearly indicating such intention.

The homestead law originally permitted but one entry of public land of one hundred and sixty acres or less. More recent legislation has allowed, under certain restrictions, an additional entry, so that one hundred and sixty acres may be covered by both entries. This is a personal privilege and is not extended to the widow or heirs by statutory words.

As the law now stands, the widow of a deceased homestead entryman may complete his entry of public land and receive a patent therefor, because the statute in express terms permits her to do so; but she can not make an additional entry, allowed to the original entryman to fill out the complement of one hundred and sixty acres, because that privilege is not extended to her, either by express statutory words or by necessary implication.

In the case of *Dillivan v. Snyder* (5 L. D., 184), cited in the case of *Martha E. White* (23 L. D., 52), it was held that a widow may make in her own right a homestead entry, though at such time holding land covered by the homestead entry of her deceased husband upon which final proof had not been made. This ruling gives the widow the right in her own name to make a new entry although she may have had the

benefit of the entry made by her deceased husband. Mrs. Martin may avail herself of this right, but she evidently seeks to obtain the contiguous land covered by her additional entry, without residing thereon, as the original entryman may do who makes additional entry under the terms of section 5 of the act of March 2, 1889, *supra*, where his original entry was made prior to the passage of that act.

If the right to make an additional entry be permitted to the widow of a deceased entryman, it must also be conceded to his heirs, for they have the right to complete his original entry under the general homestead law, where there is no widow. The statute evidently did not contemplate that such a privilege should be extended to them and permit them to exercise such an inchoate right vested only in their ancestor and not even initiated by him at the time of his death.

The decision of your office cites the case of Carrie A. Englebright (16 L. D., 350), wherein it is held that the heir of a deceased homesteader—a sister—can not secure an amendment of the original entry by a new entry under section 2 of the act of March 2, 1889, for the reason that while the law allows the legal representative of a deceased entryman to complete an entry which he has initiated, or to amend an entry which he has made by mistake, it nowhere allows a legal representative to initiate a new entry; and to allow this to be done would be equivalent to importing a new provision into the statute which Congress has not seen fit to place there.

So it may be said with the present entry, for, although it is termed an additional entry, it is really a new entry, and was made without statutory authority.

Attention is called to the case of Annie Anderson (1 L. D., 24), by an endorsement made on the homestead application of Mrs. Martin that the entry appears to have been properly allowed under the authority of that case which held that the act of March 3, 1879 (20 Stat., 472), granting additional rights to homestead settlers on public lands within railroad limits, comprehends and includes all persons who in any manner by original entry or by operation of law have succeeded to the right to make final proof. As this right is cast upon the widow by operation of law, she was held, under the wording of the statute last mentioned, to have taken the homestead under existing laws, and could not be deprived of the benefit of such amendatory statute, which provided for additional entries in certain cases prescribed in that act.

It will be observed that the widow had complied with the requirements of the statute governing the disposition of that case, requiring occupancy, residence and cultivation of the tract additionally entered, and that the language of such statute is much broader than the one under consideration. For these reasons, the case last cited is not applicable to the circumstances of the case at bar.

The decision of your office directing the cancellation of the entry is affirmed.

## REPAYMENT—PURCHASER OF RAILROAD LANDS.

WARREN S. BAXTER.

The repayment statute does not authorize the return of the purchase price on the ground alone that the entryman might have secured patent without such payment.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(F. L. C.) *September 22, 1899.* (C. J. G.)

Warren S. Baxter has appealed from your office decision of April 23, 1898, denying his application for repayment of purchase money paid by him on cash entry, No. 5813, for the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 5, T. 10 N., R. 3 W., Helena land district, Montana.

Baxter made application to purchase the land described, and entry therefor was allowed, under section 5 of the act of March 3, 1887 (24 Stat., 556), which provides that the purchaser shall make payment to the United States for such land at the government price. The said land was patented to him December 10, 1897.

In his appeal Baxter contends that notwithstanding he applied to purchase said land under section 5, he was entitled to make entry therefor under section 4 of said act, which provides for the issuance of patent to a *bona fide* purchaser without payment.

For the purpose of this decision it is unnecessary to determine that question. Repayment can not be made solely on the ground that the entryman might have secured patent without payment. In the absence of express statutory authority money once covered into the United States Treasury can not be repaid. It does not appear that the local officers committed error in the allowance of Baxter's application filed under said section 5; but even if they did patent has already issued in this case and the entry has therefore been confirmed. There is no authority for repayment in such instances. The case not coming within any of the provisions of the repayment statute, your office decision is hereby affirmed.

## REPAYMENT—MINERAL ENTRY.

JOHN REED.

Repayment of the purchase price paid on a mineral entry can not be allowed, where the entry is canceled for failure to supply supplemental proof, and it is not made to appear that the entry could not have been confirmed.

*Secretary Hitchcock to the Commissioner of the General Land Office, Sep-*  
(F. L. C.) *tember 22, 1899.* (C. J. G.)

This is an appeal by John Reed from your office decision of March 19, 1898, denying his application for repayment of purchase money paid by said Reed, E. G. Herendeen, William Welch and Charles Hossfeld

on mineral entry No. 1001, Hungry Hollow placer, for lot 55 in unsurveyed township 7 S., R. 3 W., Helena, Montana, land district.

The basis of your office action is:

In this case the entry was allowed on insufficient proof, but the element of bad faith on the part of the entryman precludes my approval of the application for repayment.

It appears that said mineral entry was made by the claimants named herein, July 11, 1883, who were required by your office June 11, 1884, to furnish a report in conformity with the provisions of the circular of September 22, 1882 (1 L. D., 685). A report was furnished but the same not being satisfactory, your office on June 18, 1886, directed that a supplemental statement, covering certain specified points, be filed. The claimants declined to take any further steps in the matter, and the entry was subsequently canceled, due notice of your office decision of May 24, 1887, holding the same for cancellation, having been given and no appeal taken. In said decision it was stated:

The claimants were required through the surveyor-general, to file a supplemental report under circular N approved September 23, 1882, to supply defects in the one then on file and show whether the claim is a *bona fide* mining claim with mining improvements or expenditures to the amount of \$500 . . . . The claimants' refusal to furnish the evidence called for confirms my suspicion that patent is sought, not in good faith for a mining claim but for a water right. Muffley signs one of the letters as attorney for the Highland Flume Co. claimants which is strongly corroborative of that view.

Under date of May 3, 1892, Hossfeld and Reed filed a petition for the reinstatement of this entry in which they set forth, among other things, that they are now the joint owners of the claim in question, having purchased the interests of Welch and Herendeen.

May 19, 1892, your office, after fully stating the allegations contained in the said petition for reinstatement and considering the same, found that:

The suspicion that this claim was really presented with the purpose and intention of getting thereby, control of a valuable water right, and not to obtain, in good faith title thereto under the United States placer mining laws I think is satisfactorily removed by a careful and fair consideration of all the evidence now contained in the record.

Thereupon your office concluded that if the petitioners would furnish "a continuation of the abstract of title, continued from April 9, 1883, to the present time," and evidence as to other and further matters enumerated in your said office decision, "the petition for reinstatement of said canceled entry will be definitely acted upon."

In pursuance of this decision the petitioners furnished additional evidence in support of their petition for reinstatement; and December 22, 1892, your office, after practically repeating the contents of your office decision of May 19, 1892, concluded as follows:

This record fully discloses that these petitioners had due notice of the decision holding this entry for cancellation, and their failure to appeal is in the nature of an acquiescence therein. By the regular and orderly cancellation of this entry the land

therein embraced fell again into the category of the public land belonging to the United States and if mineral in character, free and open to exploration and purchase.

The evidence now submitted that no adverse interest would be affected by the reinstatement of this entry rests upon ex parte affidavits, whereas the law contemplates that that important fact shall be evidenced by giving due notice of the application for patent, and a failure to file an adverse claim.

Where it is shown, as in this case, that a particular tract of land has been public land for more than five years, it would not be proper to decide that no adverse right exists and that in other respects the law has been complied with upon such evidence as that submitted by the petitioners; to do so seems to be equivalent to allowing an original entry without due publication of notice of the application for patent, and showing otherwise due compliance with the law. Upon a careful consideration of all the evidence before me this petition is denied.

From what is set forth herein it is apparent that your office erred in denying the application for repayment solely on the ground of bad faith on the part of the entryman. Furthermore, it is unnecessary for the Department to consider whether or not your office properly denied the petition for reinstatement in this case, as that question has no bearing on the question of repayment. It appears that this entry was canceled solely because of claimants' failure to furnish the supplemental evidence required by your office. The said claimants declined or failed to take any appeal from the action of your office holding their entry for cancellation for that reason. No showing has been made by them here that their entry could not have been confirmed. In the absence of such showing no authority exists for repayment. If it be conceded, therefore, that the entry was erroneously allowed within the meaning of the repayment statute, on account of insufficient proof, still it does not appear that that error would necessarily have defeated its confirmation, for, if the mineral claimants had furnished the evidence required, which was a matter solely within their power, and to procure which an effort was made by your office, the defect would have been cured, and in so far as that matter is concerned the entry would have been allowed to stand and might have been confirmed. Anthracite Mesa Mining Co. (28 L. D., 551).

For the reasons herein given your office decision denying the application for repayment is hereby affirmed.

#### HOMESTEAD ENTRIES IN BLACK HILLS FOREST RESERVATION.

##### INSTRUCTIONS.

*Acting Commissioner Richards to register and receiver, Rapid City, South Dakota, September 22, 1899.*

Your attention is invited to the following provision of the act of March 3, 1899 (30 Stat., 1095) making appropriation for sundry civil expenses of the government for the year ending June 30, 1900:

*Provided further;* That any person who made actual, bona fide settlement and improvement and established residence thereon in good faith, for the purpose of

acquiring a home, upon lands more valuable for agriculture than for any other purpose, within the boundaries of the Black Hills forest reservation, in the State of South Dakota, prior to September nineteenth, eighteen hundred and ninety-eight, may enter, under the provisions of the homestead law, the lands embracing his or her improvements, not to exceed one hundred and sixty acres; and if the lands are so situated that the entry of a legal subdivision, according to existing law, will not embrace the improvements of such settler or claimant, he or she may make application to the surveyor-general of the State of South Dakota to have said tract surveyed at the expense of the claimant by metes and bounds and a plat made of the same and filed in the local land office, showing the land embraced in his original settlement which he desires to enter, not to exceed one hundred and sixty acres, and thereupon he shall be allowed to enter said land, as per said plat and survey, as a homestead; and the Secretary of the Interior shall make the necessary rules and regulations to carry this Act into effect: *Provided*, That in any case where, upon investigation by a special agent of the Interior Department and after due and proper hearing, it shall be established that an entry interfered with the general water supply, or was detrimental in any way to the public interests, or infringing upon the rights and privileges of other citizens, the Secretary of the Interior shall have authority to cause said entry to be modified or amended or in his discretion to finally cancel the same.

Until the system of public surveys is extended over a township, and the plat thereof duly filed in your office in accordance with the circular of October 21, 1885 (4 L. D., 202) the notice given to be modified, however, and to state that entries will be allowed only under said act of March 3, 1899, no entries can be allowed for lands in the Black Hills forest reservation, South Dakota.

A party desiring to enter land in said reservation will be required to file, in addition to the usual application, (form 4-007) and affidavits (form 4-062 and 4-063) his affidavit, corroborated by that of two other persons, showing that he is entitled to the benefits of the act cited. He will be required to state the date of his actual bona fide settlement, the date he established residence on the land for the purpose of acquiring a home thereon, for what period of time he has maintained a residence on the land, the character and value of his improvements, and the extent of his cultivation of the land, as well as for what the land is principally valuable. Such additional affidavit, as well as the affidavits of the corroborating witnesses, may be made before any officer qualified to administer oaths, in homestead cases.

Should it satisfactorily appear that an applicant is entitled to the benefits of said act you will allow his entry to go to record.

Before an entry can be allowed for a claim which can not be adjusted to the existing legal subdivisions without detriment to the interests of the settler, it will be necessary to have the claim surveyed in accordance with the instructions for that purpose (approved by the Honorable Secretary of the Interior Sept. 22, 1899, 29 L. D., a copy of which is hereto attached) and the plat thereof filed in your office.

Approved,

E. A. HITCHCOCK,

*Secretary.*

## SURVEY OF SETTLERS' CLAIMS IN BLACK HILLS FOREST RESERVATION.

## INSTRUCTIONS.

*Commissioner Hermann to the United States Surveyor General, Huron, South Dakota, September 7, 1899.*

The act of March 3, 1899, making appropriation for sundry civil expenses of the government for the fiscal year ending June 30, 1900 under the head of "protection and administration of forest reserves" (30 Stat., 1095), contains the following:

*Provided further,* That any person who made actual bona fide settlement and improvement and established residence thereon in good faith, for the purpose of acquiring a home, upon lands more valuable for agricultural than for any other purpose, within the boundaries of the Black Hills forest reservation in the State of South Dakota, prior to September nineteenth, eighteen hundred and ninety-eight, may enter under the provisions of the homestead law, the lands embracing his or her improvements not to exceed one hundred and sixty acres, and if the lands are so situated that the entry of a legal subdivision, according to existing law, will not embrace the improvements of such settler or claimant, he or she may make application to the surveyor general of the State of South Dakota to have said tract surveyed at the expense of the claimant by metes and bounds and a plat made of the same and filed in the local land office, showing the land embraced in his original settlement which he desires to enter, not to exceed one hundred and sixty acres, and thereupon he shall be allowed to enter said land, as per said plat and survey as a homestead, and the Secretary of the Interior shall make the necessary rules and regulations to carry this act into effect: *Provided,* That in any case where upon investigation by a special agent of the Interior Department and after due and proper hearing, it shall be established that an entry interfered with the general water supply, or was detrimental in any way to the public interests, or infringed upon the rights and privileges of other citizens, the Secretary of the Interior shall have authority to cause said entry to be modified or amended, or in his discretion to finally cancel the same.

By said act settlements within the Black Hills forest reservation in the State of South Dakota, made prior to September 19, 1898, upon lands which are more valuable for agricultural than for any other purpose, are protected by extending to the settlers the privilege of entering the land so settled upon under the provisions of the homestead law. As an entry can not be made under the homestead law prior to the government survey of the land desired to be entered, an entry can not be made under this law prior to the extension of the government survey over the lands thus settled upon. By such survey it will be disclosed whether the improvements of the settler can be protected by entry according to legal subdivisions without a special survey, and until such time a special survey will not be ordered. Where upon the government survey, however, it is disclosed that an entry according to legal subdivisions will not include the improvements of the settler, he may adjust his claim to the legal subdivisions established by the government survey or apply to the surveyor general of South Dakota for a special survey of his claim. When an application is made for the survey of a claim under the provisions of this act, the settler may

designate a surveyor, to whom the requisite instructions will be issued from your office for the survey and marking of the boundaries of his claim and such connections with prior surveys as may be necessary to a proper platting of the claim and of the fractions of public lands surrounding the same, consequent upon the survey of such claim.

Under the law a special survey is required to be at the expense of the settler, and the surveyor performing the work must look to the settler for his compensation, without recourse to the United States, and a provision to that effect should be embodied in the instructions issued to such surveyor by your office. The amount of compensation to the surveyor will be left to private arrangement between the settler and the surveyor.

Where the surveyor designated by the settler is not a United States deputy surveyor or a United States deputy mineral surveyor, it will be necessary to submit with the application satisfactory evidence of the professional skill and ability of such surveyor. Such surveyor will be required to furnish a bond in the penal sum of five hundred dollars for the faithful execution of the work.

The application for survey should contain a complete description of the claim, date of settlement, improvement, and established residence, character, extent, and approximate value of improvements, character of the land, and location by township, range, and section (or sections) of the public land surveys. The application should be accompanied by a diagram showing as accurately as practicable the contour of the claim. The statements contained in the application for survey should be verified under oath.

It is not the intention of this act to permit any one settler to take long and narrow strips of land on both sides of a stream, and thus monopolize the water privileges, to the detriment of other settlers, and claims should be taken in square form, *as nearly as it is practicable to do so*, and include the improvements of the settlers. In no case should the claims be of less width than that of the smallest legal subdivision (twenty chains). Whenever an application shall be received for the survey of a settler's claim in such shape as appears to you to be detrimental to the public interests, or to infringe upon possible rights of other citizens, you will, if in doubt as to the propriety of making a survey in the shape applied for, forward the application for the consideration of this office, stating the reasons why in your opinion the survey should not be allowed as applied for.

The necessary office work connected with these surveys will be performed by the regular clerical force of your office.

Your office is regarded as being particularly conversant with the varied requirements and details pertaining to the public land surveys, and I therefore desire that you prepare and submit for my consideration a draft of general instructions for the execution of surveys under

the above-quoted provisions of law, prescribing the method of running and marking the boundaries of settlers' claims and their connection with and closings on the lines of the prior surveys in the townships in which such claims are located.

As this law provides that the lands to be surveyed and entered thereunder must be "more valuable for agricultural than for any other purpose," it is expressly desired that the instructions to surveyors making surveys under this act, require such surveyors to embody in their field notes an accurate description of the character of the lands surveyed with regard to their value for any purpose other than agriculture.

The plats of these surveys will be prepared in triplicate, as usual with public land surveys, and the duplicate plats for the files of this office will be accompanied by duly authenticated transcripts of the field notes of the surveys.

Approved, September 22, 1899.

E. A. HITCHCOCK,  
*Secretary.*

#### MINING CLAIM—ADVERSE PROCEEDINGS.

##### LITTLE GIANT LODE.

In the denial of the motion for review herein attention is called to the fact that the decision in question did not hold that the proceedings under consideration therein constituted an adverse suit as contemplated by section 2326 R. S., but that under the facts shown a stay of proceedings was warranted.

*Secretary Hitchcock to the Commissioner of the General Land Office, September 25, 1899.* (F. L. C.) (G. B. G.)

This is a motion for review of departmental decision of May 23, 1896 (22 L. D., 629), which affirmed your office decision of May 2, 1895, holding that an order of October 24, 1890, suspending action on mineral entry No. 285, made December 31, 1889, by Harvey Young *et al.*, for the Little Giant lode claim, Glenwood Springs, Colorado, could not be revoked and action taken while a suit, involving the question of the right of possession to part of the premises embraced in said entry, was pending in the courts.

It appears from the record in this case that the suit referred to was instituted by the owners of the Little Giant lode claim against S. L. Garrett *et al.*, then owners of the Teaser lode claim, and it appears from the files of your office that a final judgment has been rendered in said cause, and that an application is now pending in your office for patent for the Teaser claim, and that the question at issue before your office in said proceeding is as to the regularity and effect of said judgment.

Inasmuch as the motion for review herein only complains of the said holding of the department that action should be suspended upon the

Little Giant application while said suit was pending in the courts, and inasmuch as a final judgment has been rendered by the court in said cause, action upon the motion for review is thereby rendered unnecessary, and it is hereby dismissed.

That your office may not be embarrassed in the final disposition of the applications for patent upon the Little Giant and Teaser lode claims, by reason of a possible misapprehension as to the effect of said departmental decision of May 23, 1896, it is thought well to here call attention to the fact that said decision did not affirm your said office decision of May 2, 1895, upon the ground that the said suit instituted by the owners of the Little Giant lode claim was an adverse suit such as was authorized by section 2326 of the Revised Statutes, but that said departmental decision only approved the order of your office suspending proceedings upon the Little Giant application, because, under the facts as shown by the record, it was believed that there was not an improper exercise of discretion in ordering a suspension of said proceedings.

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TIMBER LAND ENTRY—SECOND APPLICATION.

PIETKIEWICZ ET AL. v. RICHMOND.

The right to make a timber land entry is not affected by the fact that the applicant prior thereto applied for a different tract, and, upon proper grounds, withdrew said application.

*Secretary Hitchcock to the Commissioner of the General Land Office, September 25, 1899.* (C. J. W.)

Robert Richmond on April 4, 1895, made timber and stone statement for N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  and S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 17, T. 66 N., R. 21 W., at Duluth, Minnesota. Afterward, on the same day, Adam Pietkiewicz made homestead entry for the NE.  $\frac{1}{4}$  of said section 17, and on April 5, 1895, Henry Kolanak made homestead entry for the N.  $\frac{1}{2}$ , SE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 17, T. 66 N., R. 21 W.

October 25, 1895, on the offering of final proof by Richmond, Pietkiewicz and Kolanak protested and called attention to the fact that on June 19, 1893, Richmond filed a timber and stone statement for lots 1, 2 and 3 of Sec. 14 and lot 1, Sec. 15, T. 66 N., R. 17 W., and relinquished the same August 17, 1893.

October 27, 1895, the local officers found that the facts alleged by way of protest and which appeared of record, were sufficient in law to bar a second entry of the same kind by Richmond and recommended the cancellation of his timber and stone statement. Richmond appealed to your office and on April 12, 1898, your office reversed the local office and held the homestead entries of Pietkiewicz and Kolanak for cancellation so far as they conflict with Richmond's timber and stone statement. The case is before the Department on the appeal of said homestead

entrymen from your office decision. It appears that when Richmond filed his timber and stone statement on April 4, 1895, he accompanied it with an affidavit, signed by himself and corroborated by two other persons, explanatory of his relinquishment of the land covered by his timber and stone statement of June 19, 1893. It is in substance stated in said affidavit that Richmond was mistaken as to the lines of the land first applied for, although he made what he deemed a careful examination of the land. Learning that one Leonard Hoffman claimed lot 2 as a preemption, he returned with Hoffman to the land and found that he had not previously seen the lines correctly, and that Hoffman had a house and clearing of from one and a half to two acres on lot 2, and was convinced of Hoffman's good faith, and to avoid a conflict with Hoffman's prior claim and a contest with him, he relinquished. As lot 2 was between lots 1 and 3 and by relinquishing lot 2 he could retain but one lot, he relinquished all.

The local officers in making up the statement of facts on which they founded their decision, found that the affidavit above referred to was filed by Richmond on October 25, 1895, when he submitted his final proof, a circumstance which, if true, might be just ground for questioning the *bona fides* of Richmond's relinquishment. This decision appears to have been rendered October 27, 1897.

On the transmission of the final proof of Richmond, the register in his letter of January 26, 1898, refers to the mistake made in reference to this reported fact, and states, in substance, that the record does not show that the affidavit referred to was filed at the time of making final proof nor is the date of filing upon it or otherwise affirmatively shown. It is dated, however, on the second day of April, 1895, two days before the filing of the timber and stone sworn statement, which is in controversy here. It is from that fact, and there is no other indication as to when it was filed, a fair inference that it was filed with the sworn statement. The register adds that this change of facts does not change the conclusion reached by the office to the effect that Richmond is not entitled to make a second entry under the timber and stone act, but that he has exhausted his right.

The application to purchase is made under the act of June 3, 1878 (20 Stat., 89), as amended by the act of August 4, 1892 (27 Stat., 348).

The opinion of the local officers appears to be based upon the idea that no second application can be considered under this act. This interpretation is proper where there has been a completed application. In other words, a purchase under the act. Where there has simply been an offer to purchase, which is upon proper grounds withdrawn, it is not believed that such relinquishment or withdrawal affects the right of the party to make a second application and purchase. It was the purpose and intention of the act to allow each qualified person to purchase one tract of land of not more than one hundred and sixty acres subject to sale under its provisions.

Counsel for the protestants in the brief filed by him, concedes that if Richmond immediately upon discovery of his alleged mistake, had come forward and voluntarily relinquished his first application, without consideration, he might be allowed to make a second application, but counsel proceeds to argue the case upon the theory that the affidavit of Richmond, before referred to, was not filed until after the homestead entries in question had been made and the protest against Richmond's final proof filed. This contention finds no support in the record.

Richmond's affidavit explanatory of his relinquishment of the land embraced in his first application, was sworn to before a commissioned notary public two days before his application of April 4, 1895, and all the circumstances indicate that it was filed in the local land office with that application. The theory that Richmond got up his excuse for the relinquishment of his first application after he had filed his second application of April 4, 1895, is so clearly inconsistent with both reason and the record that it requires no further consideration. Adopting the view that the affidavit is true and was filed with the application of April 4, 1895, the action of your office in reversing the local office was proper. The homestead entries of Pietkiewicz and Kolanak were made after the filing of the timber and stone statement of Richmond, filed April 4, 1895, and your office properly held said entries for cancellation so far as the same conflict with said filing. Your office also found, that it was shown by the final proof submitted by Richmond, that the land in question is most valuable for its merchantable timber; that it is sterile and broken; unfit for agriculture and chiefly valuable for timber, which appears to be in accordance with the record. Your office decision is accordingly affirmed.

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NOTICE OF SETTLEMENT CLAIM—FRACTIONAL SUB-DIVISIONS.

WARREN *v.* GIBSON.

In the case of a settlement claim for land in different fractional quarter sections, and surveyed as lots, the notice of the extent of the claim, given by occupancy and improvement, is limited to the particular lots occupied and improved.

Posted notices of the extent of a settlement claim, that embraces land in fractional quarter sections, placed on the sub-divisions not occupied and improved by the settler, serve to protect his priority of right thereto.

A posted notice of a settlement claim that covers land in different sections will not protect such claim for sub-divisions outside the section on which said notice is posted, as against a subsequent applicant who is without knowledge of such posting.

*Secretary Hitchcock to the Commissioner of the General Land Office, September 25, 1899.* (F. L. C.) (W. M. W.)

The case of Mark S. Warren *v.* Robert Gibson has been considered upon the appeals of both parties from your office decision of February

17, 1898, involving lots 1, 2, 3 and 4 of Sec. 31, and the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  and the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 32, T. 5 N., R. 10 W., Oregon City, Oregon, land district.

The record shows that said land was formerly embraced in the pre-emption cash entry of one Joseph Walsh, which remained of record until October 15, 1894, when it was canceled by your office pursuant to departmental decision of July 2, 1894 (not reported).

October 5, 1894, Warren filed his homestead application for the land, which was rejected by the local officers for conflict with Walsh's entry, of which Warren was notified but took no appeal.

On the day Walsh's entry was canceled, Robert Gibson filed his homestead application for lots 1, 2, 3, 4 and the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  and the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 32, T. 5 N., R. 10 W., which was rejected by the local officers for conflict with Walsh's entry; and on October 31, 1894, he filed an affidavit stating that the correct description of the land he sought to enter was lots 1, 2, 3 and 4 of Sec. 31, and the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  and the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 32, T. 5 N., R. 10 W., and asked to amend his application so as to give the correct description of the land claimed, and on the same day he appealed from the decision of the register and receiver rejecting his homestead application.

November 13, 1894, Warren filed his second homestead application, which was rejected for conflict with the homestead application of Gibson, then pending on appeal to your office. With said application Warren filed his corroborated affidavit alleging among other things that he made settlement on said land on October 11, 1894, and had made valuable improvements thereon; that Gibson had never made settlement upon the land; and asked for a hearing upon his charges.

December 24, 1894, Warren again applied to make homestead entry of the land, and his application was rejected.

December 28, 1894, your office rendered its decision on Gibson's appeal and directed the local officers to allow his application to enter upon his amending the same as he requested, "subject to any valid adverse claim."

February 11, 1895, Warren filed an amended affidavit covering the same facts set forth in his former affidavit and in addition alleging that Gibson, Walsh and Logan "have conspired together and are now attempting to secure title to said land for the purpose of speculation, and his, Robert Gibson's, attempted entry is fraudulent."

February 12, 1895, Gibson was allowed to make homestead entry for the land after amending his application as permitted by your office.

A hearing on Warren's charges was ordered and had before the local officers. They recommended the cancellation of Gibson's entry. On his appeal, your office, on December 26, 1896, modified the judgment of the register and receiver by holding that Gibson's entry should remain intact except as to said lots 1 and 2, to which Warren was adjudged to have the better right.

Warren filed a motion for rehearing, and Gibson filed an appeal and thereafter withdrew it and asked for review of your office decision so far as it awarded said lots 1 and 2 to Warren.

May 15, 1897, your office revoked its decision of December 26, 1896, and returned the record in the case to the register and receiver with the direction that they order a further hearing after due notice to the interested parties.

Such hearing was had, at which the parties appeared and submitted evidence. The register and receiver recommended the cancellation of Gibson's entry and that Warren be allowed to enter all of the land.

Gibson appealed, and on February 17, 1898, your office held his entry subject to Warren's superior right as to lots 1, 2, 3 and 4, and should he make final proof the same to be referred to the board of equitable adjudication, the two forty-acre tracts remaining to him being non-contiguous.

Gibson appeals from so much of the decision as awards said lots to Warren; and Warren appeals from so much of it as awards the two forties to Gibson.

The lots in question f on the Pacific ocean on the west, one and two being in the northeast quarter and three and four in the southeast quarter of fractional section thirty-one. The other land in controversy is situated in the northwest and the southwest quarters of section thirty-two and adjoins said lots one and four, respectively, on the east.

The record and the evidence taken at both of the hearings have been examined.

The evidence clearly shows that Warren commenced to build a dwelling house upon lot three on the 11th day of October, 1894, and continued its construction until it was completed, and established his actual residence therein; that during the 11th, 12th and 13th of said month he caused some slashing to be done and some brush to be cut and piled up, beginning on lot three close to where he was building his house and thence extending north upon lot two to a certain redwood log out of which he expected to make shingles with which to cover his house, but the log was afterwards found to be unsuitable for that purpose.

The evidence also shows that on October 12, 1894, Warren posted up notices on lots one and four, reciting that he made settlement on all the land involved in this case October 11, 1894, for the purpose of holding the same as a homestead. The notice on lot one was nailed on an old shanty built by a former entryman, the one on lot 4 about fifty feet from the beach by nailing it to a tree near a pathway leading from the beach in an easterly direction across said lot. It appears that these notices could have been seen on the 15th of October, 1894, by persons passing by the places where they were posted.

The evidence fails to show that at the time Gibson applied to enter the land he had actual notice of Warren's claim.

While Gibson's entry was not actually made until February 1895, his

rights, whatever they may be, depend solely upon his entry and relate back to and date from October 15, 1894, the time he filed in the local office his application to enter.

Warren's claim to the land in controversy is predicated upon his settlement and improvements upon it which were initiated October 11, 1894, and the posting of the notices on lots 1 and 4 on October 12th of that year. At the time Warren's settlement claim was initiated the land was covered by Walsh's entry and he could acquire no right by such settlement as against the entryman or the government so long as the entry remained of record. The Walsh entry was canceled on October 15, 1894, and whatever right Warren had as a settler attached immediately as against Gibson's claim under his application to enter. See *McMichael v. Murphy et al.* (20 L. D., 147); *Pool v. Moloughney* (11 L. D., 197).

It is well settled that the notice given by a settlement claim as defined by occupancy and improvements is limited to the technical quarter section on which such acts are performed. See *L. R. Hall* (5 L. D., 141); *Pooler v. Johnston* (13 L. D., 134); *Shearer v. Rhone* (Id. 480); *Staples v. Richardson* (on review) (16 L. D., 248); *Kenny et al. v. Johnson et al.* (25 L. D., 394).

Warren's house and improvements were on lots 2 and 3, which were embraced in the northeast and southwest quarters of fractional section 31 as shown by the public surveys, and under these circumstances it would follow, under the rule announced in these cases, that notice given by his settlement claim would not extend to the other portions of the respective quarters upon which no settlement or improvements were made, but notice of his claim should be limited to the particular lots upon which his settlement and improvements were made. It is therefore held that Warren's settlement and improvements on lots 2 and 3 operated as notice to Gibson of Warren's claim as to said lots, but such settlement and improvements were not notice of his claim to other portions of said quarter section.

Warren posted notices defining the extent of his claim on lots 1 and 4 but made no improvements thereon; these notices were posted in places where they could have been seen, and under well settled rulings they were sufficient to protect his claim as against subsequent settlers, applicants to enter or entrymen. See *Driscoll et al. v. Doherty et al.* (25 L. D., 420); *Smith v. Johnson et al.* (17 L. D., 454); *Jordan v. Smith* (26 L. D., 527).

Warren made no improvements on the land in section 32, neither did he post any notice thereon defining the extent of his claim. In the notices put up on lots 1 and 4 he described the two forty acre tracts in said section but it does not appear that either their posting or contents were known to Gibson before or at the time he filed his application to enter said tracts. Under these circumstances, it is clear that Warren by posting said notices secured no right as against Gibson's application to enter said forty acre tracts in section 32.

After a careful examination of the record and evidence and considering all the questions presented by the respective appeals, the Department concurs in the conclusion reached by your office in the decision appealed from, and it is accordingly affirmed.

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BAYLISS *v.* BROOK.

Motion for review of departmental decision of June 14, 1899, 28 L. D., 503, denied by Secretary Hitchcock, September 26, 1899.

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SETTLEMENT RIGHT—INTERVENING ENTRY.

DE LONG *v.* FROST.

Priority of settlement, as against an intervening entry, should be asserted by contest initiated within three months after settlement.

*Secretary Hitchcock to the Commissioner of the General Land Office, September 26, 1899.* (F. L. C.) (G. C. R.)

This case involves the NE.  $\frac{1}{4}$  of Sec. 18, T. 163 N., R. 56 W., Grand Forks, North Dakota, upon which Edward J. Frost made homestead entry April 8, 1889.

It appears from the recital of the register and receiver that on March 5, 1895, or more than five years and ten months after said entry, Isaac E. De Long filed his affidavit of contest, alleging that Frost had abandoned the land for the past six months or more and has wholly failed to reside thereon as required by law, and that said Frost made an

illegal homestead entry for the land, for the reason that the land was at the date of said entry in the actual and peaceable possession of said contestant, who had settled thereon under the provisions of the homestead law and did within the time provided in said homestead law present at the local land office, through the clerk of the district court, who in this matter was acting as an officer of the land department, his homestead application for the northern half of said land to be placed of record.

This contest affidavit was rejected by the register and receiver because the same was insufficient; also because the question raised "is *res adjudicata*." From that action De Long appealed; but in transmitting the appeal the local officers forwarded "an amended and supplemental affidavit," sworn to by De Long April 13, 1895. In the amended affidavit De Long alleged, substantially, that Frost had abandoned the land for a period of more than six months prior to the expiration of five years from date of entry.

It appears that your office, on June 29, 1895, sustained the action of the register and receiver in rejecting the original application to

contest, but ordered a hearing on said amended contest affidavit. The hearing was duly had, and the register and receiver recommended that the contest be dismissed. On appeal, your office, by decision of April 5, 1898, affirmed that action. A further appeal brings the case here.

At the hearing the register and receiver refused to allow any testimony as to when contestant settled on the land, or whether contestant was the prior settler. Contestant was required to fix a date as the beginning of the alleged abandonment. October 1, 1893, was so fixed, the alleged abandonment running to April 8, 1894. Considerable testimony was given tending to show that the entryman did not live on the land during that period. The testimony, however, was of a negative character and when considered with other testimony to the effect that the entryman was frequently seen in and about his house on the land during that period, it can not be held that the allegation was established.

Among other things, De Long contends that complete justice can not be had in this case until a hearing is ordered on the question of his alleged prior settlement on the land and of his application made therefor within ninety days from date of settlement.

Counsel states that,

on May 30, 1889, less than ninety days after his settlement, he De Long made homestead application for the tract of land through the clerk of the district court, which application was sent by said clerk of the court to the local officers, and said application was erroneously returned to said clerk of the court without any notice to said De Long as to what his rights were in the premises; that said clerk was simply acting in his capacity as clerk of the court and in no way was he acting as attorney for said De Long; that subsequently the local officers held as a matter of fact, that De Long had not presented his Hd. application within ninety days from date of settlement; that said holding was utterly false and contrary to the facts.

It is insisted that De Long did present his application in due time, that he thereafter lived upon and improved the land for more than six years, has asserted his claim in every possible way and has been deprived of his rights thereto "through the mistake, ignorance, wrongdoing and prejudice of the local officers," and the "harsh" and technical rulings of the land department, rendered without a full and complete knowledge of the facts in the case.

If it were admitted that De Long did present his application to enter the land within ninety days from date of settlement, his application could not have been properly accepted, because the land had then been entered by Frost. An appeal would not have aided him.

If he were the prior settler on the land, his remedy was to file a contest within three months from date of settlement (*Rumbley v. Causey*, 16 L. D., 266; *Mills v. Daly*, 17 L. D., 345), alleging such prior settlement, and ask for a hearing. He failed, however, to take this course, and thus forfeited all his rights under his alleged prior settlement.

The decision appealed from is affirmed.

## HOMESTEAD CONTEST—SETTLEMENT RIGHTS—LEAVE OF ABSENCE.

MCCALLA *v.* ACKER.

A leave of absence is no protection against a charge of abandonment, if, at the date when it was granted, the entryman was not a *bona fide* resident on the land. During the pendency of a contest against an entry, in which the issue is priority of settlement, the entryman must maintain the continuity of his residence, and his failure in this respect cannot be cured by the establishment of residence prior to the institution of proceedings by the adverse settler charging such default.

*Secretary Hitchcock to the Commissioner of the General Land Office, September 28, 1899.* (F. L. C.) (C. J. G.)

The land involved in this controversy is the SE.  $\frac{1}{4}$  of Sec. 9, T. 27 N., R. 2 E., I. M., Perry, Oklahoma, land district.

It appears from the record that on October 5, 1893, Calvin S. Acker made homestead entry No. 1600 for said land, having settled thereon September 16, 1893, and that on October 10, 1893, John S. McCalla filed contest against said entry, alleging priority of settlement; and June 6, 1894, an amended affidavit alleging Acker's disqualification by reason of his having started in the race from the Chilocco Indian school reservation. A hearing was had on this contest which was concluded July 24, 1894. The local officers rendered decision in favor of Acker April 17, 1895, from which McCalla appealed. Prior to this decision, however, to wit, on March 25, 1895, Acker filed application to make final commutation proof before a probate judge at New-Kirk, Oklahoma, naming May 10, 1895, as the date for that purpose. The testimony of Acker and his witnesses was accordingly taken and at the same time McCalla appeared and protested against the allowance of said proof on account of the pending contest. The testimony and protest were forwarded to the local officers, who, on May 25, 1895, dismissed the protest because of McCalla's refusal to pay the required fees for examining and approving such testimony.

On July 26, 1895, Acker filed with the local officers a request to withdraw and dismiss his said proof, which was forwarded to your office and considered in connection with McCalla's appeal from the decision of the local officers of April 17, 1895.

On February 13, 1896, your office affirmed the decision of the local officers in the contest proceeding, allowed Acker to withdraw his said proof, and dismissed the protest of McCalla, from which action the latter appealed.

On August 31, 1896, McCalla filed affidavit of contest against Acker, alleging abandonment. No notice issued on this contest because of the pending contest relating to prior settlement.

In December, 1896, your office approved an application for leave of absence filed by Acker, the period granted being from November 1, 1896, to June 1, 1897.

The Department on September 22, 1897 (25 L. D., 285), affirmed that part of your office decision of February 13, 1896, which found that Acker was the prior settler and was not disqualified from making entry, but reversed the part having reference to the withdrawal of Acker's said proof and the dismissal of McCalla's protest.

The Department on January 19, 1898 (26 L. D., 64), rendered a decision denying a motion for review and a petition for rehearing filed by McCalla, it being held therein *inter alia*:

In this case McCalla was a settler upon the land, claiming the right to enter it by virtue of priority of settlement which issue was pending undetermined before the local office upon his protest when Acker filed his application to make final proof. From the adverse decision of the local officers upon that contest he filed his appeal in due time. His rights were fully protected by his protest against the allowance of the final proof and after the submission of such proof it could not be withdrawn to his prejudice, and so the Department held in the decision now asked to be reviewed, wherein it was said that 'neither the sufficiency of the final proof nor the right of defendant to withdraw it, should be passed upon pending the contest, and your office erred in allowing the withdrawal of said proof and the dismissal of the protest, and so much of your office decision as refers thereto, is reversed, and said proof and protest will be held to await the final disposition of the contest, when they will be returned to the local office for appropriate action.'

There was no error in the decision complained of. It was therein directed that the final proof should be returned to the local office for appropriate action. If that proof shows that the entryman has complied with the law as to residence and cultivation for the time covered by such proof, his entry should be allowed. If it shows that he has not complied with the law as to residence and cultivation during that period, his entry should be canceled.

The question of priority having been decided in favor of Acker, no other course could be pursued under the rules. See Rule 53, Rules of Practice.

And your office was accordingly directed as follows:

You will instruct the local officers to pass upon the final proof, together with the testimony offered by protestant both on direct and cross-examination and to forward the result of their action to your office without delay.

January 31, 1898, your office returned Acker's proof, together with accompanying papers, to the local officers, with instructions to proceed in accordance with the above-quoted directions; but on February 2, 1898, and before they took any action, Acker appeared and filed a motion to withdraw said proof, which was granted. Thereafter on February 18, 1898, McCalla filed another affidavit endorsed, "Affidavit of contest and protest," in which, after reciting the facts connected with his contest of October 10, 1893, his protest against Acker's said proof of May 10, 1895, and his contest affidavit filed August 31, 1896, he alleges that Acker has not resided on the land since May 10, 1895, as required by the homestead law, and that he has never been a resident on said land since he made settlement thereon September 16, 1893. The said affidavit concludes as follows:

The above charges and allegations this protestant and contestant John S. McCalla is ready to prove at such time and place as may be named by the register and receiver for the hearing, and he therefore asks that a hearing be had that he may be allowed

to prove such allegations and charges and that the protest and contest affidavit together with this affidavit of contest and protest be merged into one hearing and that a day be set for said hearing. That said homestead entry No. 1600, issued to Calvin S. Acker as aforesaid be canceled and forfeited to the United States, and that said affiant, John S. McCalla, pay the expense of such hearing or such portion as may be charged to him.

Notice issued upon this affidavit the same day, which, after reciting the filing of McCalla's protest of May 10, 1895, and his contest of August 31, 1896, concluded as follows:

It is therefore ordered by the office that all the charges and issues made between the parties on the question of abandonment or failure to reside on the land, whether the same arose upon the protest or upon said contest, be heard and determined at the hearing to be had in this office on April 5, 1898.

Therefore, with a view to the cancellation of homestead entry number 1600, made by the said C. S. Acker for the south-east quarter of section 9, township 27, range 2 east, dated October 5, 1893, the said parties are hereby summoned to be and appear at the United States land office, at Perry, Oklahoma, on the 5th day of April, 1898, at one o'clock, p. m., to respond and furnish testimony concerning all the matters at issue between said parties on the aforesaid charges of abandonment and failure of residence.

A hearing was had upon the consolidated protest and contest beginning May 6, and ending May 16, 1898, a continuance having been granted from April 5, 1898. Both parties appeared and introduced testimony, Acker inviting attention to his motions theretofore filed in which he asked a dismissal of so much of the notice of contest and service thereunder as relates to his commutation proof and McCalla's contest of August 31, 1896. Pending the hearing Acker objected to the introduction of testimony by McCalla relating to any period prior to May 17, 1897, since which date he claimed to have been continuously residing on the land; but he raised no further objection to the hearing as ordered by the local officers.

On June 13, 1898, the local officers rendered decision in which they expressed the opinion that Acker could not, in view of McCalla's protest, withdraw his final proof. They found that from September 16, 1893, to May 10, 1895, the time covered by said proof, Acker had not complied with the law in the matter of residence, although he had sufficiently improved and cultivated the land. They also found that he never actually established residence on the land until May 17, 1897, and in view of the fact that McCalla had prior thereto filed his protest of May 10, 1895, and his contest of August 31, 1896, the entryman could not cure his laches by establishing residence and maintaining the same since that time. They therefore recommended cancellation of the entry. From this action Acker appealed to your office where decision was rendered March 7, 1899, reversing said action. McCalla has now appealed to the Department.

Your office held that the decision of the local officers finding that Acker had not complied with the law during the period covered by his final proof, "was not based upon the proof and the testimony intro-

duced at the time of making the proof, but upon said proof and testimony together with the testimony introduced at the hearing." Continuing your office said:

Under the decision of the Department it would have been necessary, if the contestant had taken no further steps, to consider the proof and testimony submitted May 10, 1895, and to cancel the defendant's entry if he had not, at the time of submitting said proof, complied with the requirements of the homestead law. But it will be observed that the contestant's application for a notice of contest, above set out, is in effect a waiver of the separate examination of said proof and testimony.

\* \* \* \* \*

Your failure to determine from said proof and testimony of May 10, 1895, whether the defendant had up to that date complied with the requirements of the homestead law was not error. It was the result of contestant's affidavit in which he prayed that all the issues between the parties be merged into one hearing. The contestant had a right to the waiver of the examination ordered by the Department. It follows that the case can not now be remanded for the judgment contemplated by the departmental direction above set out, but that the contestant must rely solely upon the showing made at the hearing had upon his affidavit of contest.

Then, after setting out the facts surrounding Acker's connection with the land since September 16, 1893, your office concludes as follows:

On these facts it must be held that, whatever the defendant's laches may have been as to residence prior to May, 1897, he has at least since then complied with the requirements of the homestead law. By such compliance with the law he had cured any laches that may have existed prior thereto. In the case of *Glover v. Swarts*, decided by letter "H" of October 8, 1898, this office, after a full discussion of the question, the case of *Bates v. Bissell*, 9 L. D., 546, being cited adversely, held, under circumstances similar to those in the case at bar, that Swarts, by reestablishing his residence on the land in the presence of Glover's adverse settlement claim, but before Glover's contest on the charge of abandonment, cured his default. It follows that it is unnecessary to determine whether the defendant had prior to May, 1897, complied with the requirements of the homestead law as to residence. The decision appealed from is reversed and the contest dismissed.

It is apparent that the action of the local officers in allowing Acker to withdraw his commutation proof, and in ordering a rehearing in the case upon the affidavit filed by McCalla February 18, 1898, instead of obeying the instructions of your office of January 31, 1898, based upon the former departmental decision of January 19, 1898, was wholly irregular. The directions given were clear and explicit and should have been followed by them.

It is equally apparent that neither party is in a position to take advantage of such irregularity—McCalla, because he filed his affidavit asking for the hearing which was had May 16, 1898, in face of the departmental order directing that Acker's proof be examined and the case closed in accordance with the conclusion reached; nor Acker, because he acquiesced in the ordering of said hearing by his appearance thereat and participation therein without objection, and because he again asked to withdraw his said commutation proof. The only objection raised by Acker at the hearing was as to the admissibility of certain testimony. In view of this mutual acquiescence in the irregularity, both parties having appeared and submitted testimony, the

Department will not again remand the case for a compliance with its former directions. Notwithstanding Acker was improperly allowed to withdraw his commutation proof the said proof accompanies and will be considered as part of the record here. The Department will therefore determine the case upon the present record and the evidence as far as properly introduced.

The hearing on the contest filed October 10, 1893, involving priority of settlement, closed July 24, 1894. Acker's commutation proof was filed May 10, 1895, and in consequence covers a period beyond the date of said hearing. The failure of the local officers, however, to pass upon said proof left undetermined the question of Acker's compliance with the law during the period from July 24, 1894, to May 10, 1895. While all question of his compliance with law up to and including July 24, 1894, was settled by decision of the Department, and objection to the admissibility of testimony covering the period prior to that date should have been sustained, yet there was nothing to preclude an investigation of McCalla's charges covering the time from and after July 24, 1894. In this view the only remaining question to be determined is whether Acker continuously maintained residence on the land, as he was in duty bound to do pending the contest involving priority of settlement. Upon a careful examination of the voluminous record, and without specifically setting forth the facts, the Department is of opinion that a preponderance of the evidence shows that Acker did not maintain residence on the land prior to May, 1897. Your office in effect reached the same conclusion, but held that by resuming his residence on May 17, 1897, Acker cured his laches, and that it was therefore unnecessary to consider evidence relating to the period prior to that time. But on account of the pendency of the contest involving priority of settlement, as heretofore stated, and the fact that McCalla has continuously resided on and cultivated the land, as shown by the evidence, Acker could not thus cure his laches existing prior to the date named. The fact that Acker was granted a leave of absence from November 1, 1896, to June 1, 1897, can avail him nothing, as the evidence shows that at the date from which it was granted he was not a *bona fide* resident on the land. In the case of Noble *et al. v. Roberts* (28 L. D., 480, syllabus), it is held:

During the pendency of a contest, in which each party alleges priority of settlement, both are bound to comply with the law and maintain residence upon the land; and if the successful party therein fails so to do, such failure is properly the subject of inquiry on behalf of the losing party, and, although such inquiry is in the nature of a new contest, it is in effect a continuation of the original case.

And in the case of Glover *v. Swarts* (29 L. D., 54), it is held (syllabus):

If the entryman fails to maintain the continuity of his residence during the pendency of a contest involving priority of settlement, his laches can not be cured by the resumption of residence prior to the institution of proceedings by the adverse settler charging said default.

A leave of absence is no protection against a contest for abandonment, where the entryman, prior to such leave has failed to comply with the law.



Auerbach No. 3, the Auerbach No. 4, the Auerbach No. 5, and the Auerbach Fragment lode mining claims, situated in the Camp Floyd mining district, Tooele county, Utah.

January 7, 1896, the said John P. Sorenson conveyed his interest in said claims to one Alma Samuelson, and on or about September 1, 1896, the said F. H. Auerbach died, leaving a will in which Samuel H. Auerbach, Gustave Meyer, Theodore Meyer and Isadore Meyer were named as the executors thereof. This will, which directed, among other things, that the real property belonging to the decedent's estate should be managed and controlled by his executors for a period of at least five years after his death, and that the net proceeds accruing from such management should be annually divided among his residuary legatees, was admitted to probate at Salt Lake City, Utah, October 10, 1896, and letters testamentary were that day issued to the executors named therein.

December 11, 1896, Samuel Auerbach, Alma Samuelson and P. W. Madsen located the Auerbach Fraction No. 1 lode mining claim, adjoining the group theretofore located as hereinbefore recited, and December 23, 1896, the said Samuel Auerbach, the said P. W. Madsen and the said Alma Samuelson, describing themselves as present owners, made amended locations of all of said mining claims, except the Auerbach Fraction No. 1, for the purpose as recited in the amended notices of location of more accurately and definitely describing the locations of said claims, but "claiming no new or more ground and taking nothing less."

December 17, 1897, the receiver's final receipt and the register's final certificate of entry were issued to, and mineral entry No. 2310 embracing all of the above named claims, was allowed in the name of P. W. Madsen, Alma Samuelson and Samuel Auerbach, and Samuel H. Auerbach, Gustave Meyer, Theodore Meyer and Isadore Meyer, "executors of the estate of Frederick H. Auerbach, deceased, as trustees for and on behalf of the heirs of Frederick H. Auerbach, deceased."

F. H. Auerbach, the locator, and Frederick H. Auerbach, the decedent, are one and the same person, and Samuel Auerbach, the locator, and Samuel H. Auerbach, the executor, are one and the same person.

April 16, 1898, your office, having the matter of said entry under consideration, found that it was not shown that Samuel H. Auerbach has any interest in the Auerbach Nos. 1, 2, 3, 4 and 5 and the Auerbach Fragment, that Frederick H. Auerbach had no interest in the Auerbach Fraction No. 1, and directed that the name of Samuel H. Auerbach be stricken from the final certificate of entry and held the entry for cancellation, to the extent of the Auerbach Fraction No. 1.

June 21, 1898, upon an inquiry by counsel for the entryman, whether the objection to issuing a patent for said claims upon the final certificate as issued would not be removed in case the executors of Frederick H. Auerbach should now deed to Samuel H. Auerbach an interest in

the Auerbach claims 1, 2, 3, 4, 5, and the Auerbach Fragment claim, and, in case P. W. Madsen, Alma Samuelson and Samuel H. Auerbach should deed an interest in the Auerbach Fraction No. 1 to the heirs of Frederick H. Auerbach, deceased, your office held that the present execution of the deeds as suggested would not warrant a modification of your said office decision of April 16, 1898.

The entrymen have appealed to the department.

At the date of entry the possessory title to the Auerbach Fraction No. 1 was in the locators P. W. Madsen, Samuel Auerbach and Alma Samuelson. At that date John P. Sorrenson, having been divested of title to the Auerbach Nos. 1, 2, 3, 4, 5 and the Auerbach Fragment by his conveyance to Alma Samuelson, the title to these claims was in P. W. Wadsen, Alma Samuelson and the heirs of Frederick H. Auerbach, unless the amended locations of these claims gave Samuel Auerbach an interest therein. These amended locations did not so operate. The certificates of amended locations do not have the same of F. H. Auerbach, one of the original locators, but the title acquired by original location cannot be divested by leaving out of the certificate of amended location the name of an original locator, unless done with the knowledge and consent of such original locator, and, inasmuch as at the date of the amended locations herein F. H. Auerbach was dead and did not have knowledge of or give his consent to the amended locations, his estate was not thereby divested of title. This being so, Samuel Auerbach took nothing by these amended locations, for, if no estate was divested thereby, none vested in him. At the date of entry, therefore, Samuel Auerbach had no interest in the Auerbach Nos. 1, 2, 3, 4, 5 and the Auerbach Fragment, and the heirs of Frederick H. Auerbach had no interest in the Auerbach Fraction No. 1, and the entry as made cannot stand, unless the necessary interests be granted by deed.

February 25, 1898, Alma Samuelson, for an expressed consideration of one dollar, conveyed by quitclaim deed to Samuel H. Auerbach an undivided one-ninth interest in the Auerbach Nos. 1, 2, 3, 4, 5 and the Auerbach Fragment claims, and December 12, 1898, Samuel H. Auerbach, for an expressed consideration of one dollar, conveyed by quitclaim deed to Samuel H. Auerbach, Gustave Meyer, Theodore Meyer and Isadore Meyer, executors of the last will and testament of Frederick H. Auerbach, deceased, an undivided one seventy-second interest in the Auerbach Fraction No. 1 claim. These deeds have been filed with the record, and appear to have been properly recorded.

At common law, and the rule in the State of Utah is not otherwise, an executor takes no interest in the real estate of his decedent, except by force of the provisions of the will, and where a will contains no special provision on the subject, the land of the deceased descends to his heirs, and their rights cannot be divested or impaired by the unauthorized acts of the executor. *Bush v. Ware* (15 Pet., 93). But, on the other hand, the rule is that executors may accept a conveyance to them of real property where it is to the best interest of the estate to do



The local officers sustained the entry of Hakel and dismissed Heath's contest, and by your office decision of July 8, 1898, adhered to on review, the action of the register and receiver was approved.

Heath has appealed.

The testimony introduced in support of Heath's contest was directed exclusively to showing that Hakel's contest was made in collusion with the defendant, Kisling, and that the allegation of abandonment in the contest of Hakel was not true.

The evidence tends very strongly to show that Hakel's contest was brought by consent of the entryman, but there is an entire failure of evidence showing or tending to show that he was disqualified by reason of minority, as alleged in the contest of Heath, and the clear preponderance of the evidence is to the effect that he had not abandoned his entry at the date of Hakel's contest, as therein alleged.

There is therefore nothing in the record to show that at date of either contest or at date of hearing the entry of Kisling was assailable for any cause.

The charge of collusion between a contestant and the contested entryman presupposes that the entryman is in default as to some requirement of law, and that the collusive contest is brought to shield him from the consequences of such default by preventing an honest contest.

Heath having failed to show any default upon the part of the entryman, his contest must fail.

The relinquishment of Kisling having been made when he was not chargeable with any failure to comply with the homestead law, the entry of Hakel, though improperly allowed pending the contest of Heath, will be allowed to remain intact, it appearing from the record that Heath's contest allegation against the entry of Kisling was without foundation, or, at least, was not sustained by the evidence.

The decision appealed from, in so far as it dismisses the contest of Heath and allowed the entry of Hakel to await compliance with the homestead law, is affirmed.

#### TIMBER LAND PURCHASE—SECOND ENTRY.

##### JOSIE QUINN.

An entry for timber land under the act of June 3, 1878, exhausts the right of purchase under said act, though said entry is made for less than one hundred and sixty acres.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(F. L. C.) October 9, 1899. (G. C. R.)

Josie Quinn has appealed from your office decision of June 21, 1898, which affirms the action of the register and receiver rejecting her application to make entry for the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 21, T. 60 N., R. 6 W., Duluth, Minnesota, under the act of June 3, 1878 (20 Stat., 89), entitled, "An act for the sale of timber lands," etc.

Her application was rejected because she had, on December 7, 1897, made an entry under the same act of the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 9, T. 60 N., R. 20 W., same land district.

The first section of the timber and stone act, above cited, provides that the lands therein described and designated may be sold to citizens, etc., "in quantities not exceeding one hundred and sixty acres."

Appellant contends that the purpose of the timber and stone act was to allow all citizens to purchase one hundred and sixty acres of the land subject to entry under the provisions of the act and that it was not the intention of Congress to restrict persons to one application or entry if such an entry covered a less area than the maximum quantity which the act permits one person to purchase.

The second section of said act requires the applicant to make oath that he "has made no other application under this act," and the circular of instructions issued in pursuance of said act provides that "one entry or filing *only* can be allowed any person or association of persons." (Gen. Cir. 1895, p. 44.)

While the act permits a qualified person to enter "not exceeding one hundred and sixty acres," yet if an entry is made for a quantity of land less than the maximum area allowed, the right to make a further entry is exhausted, as shown by the plain provisions of the second section of said act.

The decision appealed from is affirmed.

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RIGHT OF WAY—SECTIONS 2339 AND 2340, R. S.

SANTA FE PACIFIC R. R. Co.

Sections 2339 and 2340, R. S., make no provision for the filing and approval of maps showing the location of reservoir sites and pipe lines.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(F. L. C.) *October 9, 1899.* (F. W. C.)

The Santa Fe Pacific Railroad Company has appealed from your office decision of December 8, 1898, declining to submit for the approval of this Department the applications filed by said company, under sections 2339 and 2340 of the United States Revised Statutes, for reservoir sites and right of way for pipe lines therefrom, as shown upon maps filed by said company.

Said sections provide:

SEC. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.

It would seem that these sections make no provision for the filing and approval of maps of location, and as it appears that the reservoirs and pipe lines have been actually constructed, the rights of the company under the sections is not dependent upon approval by this Department of maps of location showing the same.

In the appeal and the argument filed in support thereof it seems that the company has abandoned its claim for approval of its maps under the sections of the Revised Statutes before quoted, and is now urging that the maps should be approved under the provisions of the act of May 11, 1898 (30 Stat., 404). It is stated in the brief filed on the part of the company—

that sections 2339 and 2340 of the Revised Statutes of the United States are not acts granting any rights, but are acts confirmatory of rights that may be acquired under local customs, usages, decisions of the courts, or law, while the act of 1898 is a direct grant from the United States of the rights applied for . . . ; that under the act of 1898, heretofore referred to, this Department should approve and authorize by such approval the acquisition of these reservoirs, and the conduct of water therefrom over government lands to the road of the railroad.

After review of the matter it is held no error was committed by your office in refusing to submit these maps for approval under sections 2339 and 2340 Revised Statutes, as an approval under said sections is not required, nor would it be warranted.

The question raised by the appeal as to whether approval of these maps can be given under the act of May 11, 1898, has not been considered by your office, and the matter is herewith returned, without expression of opinion thereon, for your further consideration and action.

#### TIMBER CULTURE ENTRY—CULTIVATION—COMMUTATION.

JOSEPH KELLY.

A timber culture entryman who submits final proof within the statutory life of his entry is entitled to credit for each year of actual cultivation, if eight years of cultivation are shown.

The right to commute a timber culture entry under the act of March 3, 1891, can be exercised at any time within the life of the entry by one who can show that he has complied with the timber culture law for the four years preceding the application to commute.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(S. V. P.) October 9, 1899. (A. S. T.)

On July 27, 1888, Patrick Kelly made timber culture entry, No. 3056, for the N.W.  $\frac{1}{4}$  of Sec. 32, T. 161 N., R. 68 W., Devil's Lake, North Dakota, land district.

On September 1, 1898, C. A. Lounsberry, special agent, reported that he had made a personal examination of said tract and found no improvements, and that no trees, seeds or cuttings had ever been planted thereon, and thereupon on September 28, 1898, you held said entry for cancellation.

On December 16, 1898, Joseph Kelly filed in the local office at Devil's Lake applications for hearing in this and three other similar timber culture entries, all signed by Joseph Kelly. These applications were duly transmitted to your office where, on February 16, 1899, they were rejected "for ambiguity" and the local officers were directed to notify the parties that they would be allowed fifteen days additional in which to file proper applications.

On March 15, 1899, Joseph Kelly filed in the local office his application for a hearing, supported by his affidavit wherein he alleges that—

deponent expects to be able to prove that ten acres of said land was broken in 1889; that said ten acres was cultivated in 1890 and 1891; that in 1891 said ten acres was planted to tree seeds; that owing to extremely dry seasons no further cultivation of said tract for the reason that the same was deemed useless, until the year 1897, when all of said ten acres was again cultivated thoroughly, and in the spring of the year 1898, said ten acres was planted to box elder tree seeds in a proper and workmanlike manner; that said planting was done in the spring of 1898, long prior to the making of the Commissioner's order in the matter, and long prior to any notice had by deponent that any steps were being taken for the cancellation of said entry; that said entryman, Patrick Kelly, died on or about the 6th day of July, 1894, and that deponent is one of his heirs; that the other heirs of said Patrick Kelly, deceased, are Dennis Kelly, Patrick Kelly, John Kelly, and Mary Considine.

This application was duly transmitted to your office, where, on May 8, 1899, a decision was rendered rejecting the application for a hearing, and from that decision the applicant has appealed to this Department.

It appears from said affidavit that from 1891 to 1897, the entryman and his heirs wholly failed to comply with the requirements of the law in the matter of cultivation of the land and planting and cultivating trees, seeds and cuttings.

It is provided by the act of Congress, approved March 3, 1893 (27 Stat., 593), that when trees, seeds or cuttings were in good faith planted as required by law, and the land cultivated as required by law, final proof may be made without regard to the number of trees then growing on the land, but this is allowed only when the requirements of the law have been, in good faith, complied with by the entryman in the planting and cultivation of trees, seeds and cuttings, and in the cultivation of the land. In other words, if the entryman has done the things required by the law, he shall not forfeit his entry because, owing to drought or other causes, the trees planted may not grow.

In the case at bar it is not pretended that the law was complied with from 1891 to 1897. The entryman, Patrick Kelly, died July 6, 1894, and the applicant is one of his heirs, and as such entitled to take the place of the entryman in the performance of the duties required of him by law and to the benefits accruing to him under the law. He swears

that in 1897 he cured whatever default had then accrued, by cultivating the land, and in 1898 planted ten acres of the land to tree seeds.

In the case of *Gahan v. Garrett* (1 L. D., 137), it is held that—

In a timber culture entry there is no restriction upon an entryman as to the time when the work must be done, provided it is done within the required limit.

If the statements contained in said affidavit be true, the applicant may yet comply with the law by doing the necessary work within the required limit, and in that case would be entitled to make his final proof and receive patent for the land.

This entry was made on July 27, 1888. Final proof could not be made till the expiration of eight years from date of entry and may be made at any time within five years thereafter, thus allowing thirteen years from date of entry, which, in this case, extends to July 27, 1901.

The applicant alleges that ten acres of land were broken in 1889, cultivated in 1890 and 1891, and again in 1897 and 1898, making in all five years of cultivation up to and including 1898, and if he shall continue the cultivation during the years 1899, 1900 and 1901 he will have cultivated it eight years by the time when he will be required to make final proof.

By the act of Congress approved March 3, 1891 (26 Stat., 1095), it is provided—

That in computing the period of cultivation, the time shall run from the date of the entry, if the necessary acts of cultivation were performed within the proper time.

And provided further, That the preparation of the land and the planting of trees shall be construed as acts of cultivation, and the time authorized to be so employed and actually employed shall be computed as a part of the eight years of cultivation by statute.

Provided,—That any person who has made entry of any public lands of the United States under the timber culture laws, and who has for a period of four years in good faith complied with the provisions of said laws, and who is an actual *bona fide* resident of the State or Territory in which said land is located, shall be entitled to make final proof thereto and acquire title to the same, by the payment of one dollar and twenty-five cents per acre for such tract under such rules and regulations as shall be prescribed by the Secretary of the Interior.

Under the provisions of said act if the applicant in good faith complied with the law in 1897 and 1898, and shall continue such compliance during the years 1899 and 1900, he will then be entitled to commute said entry, regardless of the alleged cultivation prior to 1897.

Your said decision rejecting said application for a hearing, and holding said entry for cancellation is therefore reversed, and you are directed to cause a hearing upon the said allegations of the applicant.

#### ADJOINING FARM ENTRY—ADDITIONAL HOMESTEAD.

THOMAS N. UPTON.

The statute authorizing an adjoining farm entry does not provide for the privilege where the applicant has theretofore exercised the homestead right, though for a less amount than one hundred and sixty acres.



additional entry is made must be contiguous to the tract covered by the original entry, whereas, it is shown to be half a mile distant.

Your office held that the entry must be canceled because there is no provision of law under which an additional entry may be made as an adjoining farm, but directed that the entryman be advised that in the event of the cancellation of the entry, he may, if qualified, make another entry under section 5 or section 6 of the said act of March 2, 1889.

The entry could not be made either as an adjoining farm homestead entry, or as an additional entry, under the facts as presented by the record, and the entry must, therefore, be canceled.

#### RAILROAD INDEMNITY SELECTION—APPLICATION—SETTLEMENT.

##### O'BRIEN *v.* CHAMBERLIN.

The departmental order of May 22, 1891, 12 L. D., 541, restoring to settlement and entry, "in accordance with the rules established in similar cases," certain lands withdrawn for railroad indemnity purposes, referred to the "rules" contained in the special circular of September 6, 1887, 6 L. D., 131, governing the restoration of railroad indemnity lands.

Under the provisions of the special circular of 1887, an applicant for the right of entry, who attacks the validity of a prior indemnity selection, is entitled to the allowance of his application, if the company, after due notice, fails to respond, and such allowance of necessity works an avoidance of the selection.

On the allowance of such entry it is incumbent upon one claiming an adverse settlement right, by reason of residence on the land, to assert such right within three months thereafter.

A settlement on public land must be followed, within a reasonable time, by actual residence, in order to give the claimant any rights thereunder.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(F. L. C.) *October 10, 1899.* (F. W. C.)

Myron E. Chamberlin has appealed from your office decision of May 13, 1898, holding his homestead entry covering the N.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  and the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 17, T. 123 N., R. 44 W., Marshall land district, Minnesota, "subject to the prior right of Annie O'Brien."

This tract is within the indemnity limits of the grant for the St. Paul, Minneapolis and Manitoba Railway Company opposite its main line and is included in list of selections filed October 13, 1883. A second selection was filed by said company on July 23, 1891, in which the loss assigned as a basis for this selection is along what is known as the St. Vincent Extension of said line of road.

On January 9, 1895, Chamberlin tendered a homestead application for this land, the same being accompanied by an attack upon the company's selection, it being alleged that said selection was invalid and therefore no bar to the allowance of an entry.

The company was duly advised of the showing made, to which it made no response, and on March 28, 1896, Chamberlin was permitted to complete homestead entry of the land.

On June 29th following Annie O'Brien tendered a homestead application for this land, which was rejected for conflict with the previously allowed entry by Chamberlin and also on account of the railroad

selection, from which rejection she appealed, and in her appeal alleged settlement upon the land long prior to the allowance of Chamberlin's entry and that she had improvements upon the land of considerable value.

On July 10th following your office held for cancellation a list of selections by the railroad company, which list included the tract in question, because the basis assigned was not sufficient; from which action the company failed to appeal and its selection was formally canceled by your office October 23, 1896.

No action was taken upon the appeal by O'Brien from the rejection of her application until, by your office letter of April 6, 1897, a hearing was directed, after due notice to Chamberlin "that the conflicting claimants may show by competent testimony which has the superior right to the land."

Acting under said order, the local officers set the hearing for May 29, 1897, the testimony to be taken before the clerk of the district court of Bigstone county on May 25, 1897. On the last-mentioned date the taking of the testimony was by agreement continued until June 15, 1897, when both parties appeared and introduced testimony in support of their respective claims.

Upon the record made at said hearing the local officers found that Annie O'Brien was under twenty-one years of age at the time of the presentation of her application on June 29, 1896. Further, that Chamberlin's entry was made in good faith and that he had made an honest endeavor to comply with the requirements of law from the date of his entry to the time of contest. They therefore recommended that the rejection of Annie O'Brien's application be adhered to and that the entry of Chamberlin be held intact.

Upon appeal, your office decision of May 13, 1898, reversed the local officers, finding upon the record that Annie O'Brien was duly qualified to make entry at the time of the presentation of her application; that it was incumbent upon Chamberlin to show compliance with law after the allowance of his entry, which he had failed to do; and therefore held his entry subject to the prior right of Annie O'Brien. From said decision Chamberlin has appealed to this Department.

In the appeal it is urged that Chamberlin's entry was properly allowed under the circular of September 6, 1887 (6 L. L., 131); that its allowance in effect worked a cancellation of the railroad selection; that if Annie O'Brien had at that time any prior right by reason of settlement upon the land, in order to protect herself under such settlement it was incumbent upon her to tender her application within three months thereafter, which she failed to do. Further, that she had no such claim to the land at the time of the allowance of Chamberlin's entry, by reason of alleged prior settlement, as would bar the allowance of Chamberlin's entry, never having taken up a residence upon the land, and the rejection of her application by the local officers was therefore proper.

In the answer filed to the appeal it is urged that the circular of September 6, 1887, *supra*, had no application to the lands within the limits of the grant under consideration, the same being included in a legislative withdrawal at the time of the issue of said circular, and that it was not incumbent upon Annie O'Brien to present her application until after the formal cancellation of the railroad selection, October 23, 1896.

While it is true that this land was included within a legislative withdrawal at the time of the issue of the circular of September 6, 1887, yet such withdrawal was subsequently revoked by departmental order May 22, 1891 (12 L. D., 541), and by the terms of that order the lands were restored to settlement and entry "in accordance with the rules heretofore established in similar cases." The rules "established in similar cases" must have had reference to the circular of September 6, 1887, being the special circular governing the restoration of railroad indemnity lands. By the terms of said circular it was provided as follows:

As to lands covered by unapproved selections, applications to make filings and entries thereon may be received, noted, and held subject to the claim of the company, of which claim the applicant must be distinctly informed and memoranda thereof entered upon his papers.

Whenever such application to file or enter is presented, alleging upon sufficient *prima facie* showing that the land is not from any cause subject to the company's right of selection, notice thereof will be given to the proper representative of the company, which will be allowed thirty days after service of said notice within which to present objections to the allowance of said filing or entry.

Should the company fail to respond or show cause before the district land officers why the application should not be allowed, said application for filing or entry will be admitted, and the selection held for cancellation; but should the company appear and show cause, an investigation will be ordered under the rules of practice to determine whether said land is subject to the right of the company to make selection of the same which will be determined by the register and receiver, subject to the right of appeal in either party.

In the case of *Olson v. Welch* (28 L. D., 431), it was held:

No rights are secured by an appeal from the rejection of an application to enter lands embraced within a railroad indemnity selection, made in accordance with the rulings then in force, where said application is not accompanied by any attack upon the validity of the pending selection.

The right of one who is residing on a tract of land embraced within a railroad indemnity selection at the date of the cancellation thereof, and thereafter applies within three months of such cancellation to make entry, is superior to any adverse claim made after said cancellation. (Syllabus.)

In that case, as will be seen, the application tendered for the land while embraced within the railroad indemnity selection was not accompanied by an attack upon the validity of the pending selection. In the present case, as before stated, the application was accompanied by a *prima facie* showing that the selection of record was invalid, and in accordance with the terms of the circular due notice was given the company, and it failed to respond or show cause why Chamberlin's appli-

cation should not be allowed. Said application was therefore admitted, and of necessity worked an avoidance of the railroad selection.

Had O'Brien been a resident upon the tract at the time of the allowance of Chamberlin's entry, it would therefore have been incumbent upon her, in order to protect any rights gained by reason of such residence, to take appropriate action to protect such rights within three months after the allowance of Chamberlin's entry. This she failed to do, as her application was not presented until June 29, 1896.

From an examination of the record made at the hearing, her alleged claim antedating the allowance of Chamberlin's entry is not supported. William O'Brien, the father of the present claimant, owns adjoining land, and within his fence was included a portion of the tract here in question. This fence was placed upon the land a number of years prior to 1896, and a good portion of the land in dispute had been during this period cultivated by the O'Brien family. It is clear that the O'Briens were seeking to hold this land until title might be acquired in some way, it being alleged that it was the intention to hold it until Annie O'Brien, the present claimant, might be permitted to make entry thereof under the settlement laws. As to whether she became of age in July, 1896, there is much doubt from the record as made. In 1895 her father transferred to her the improvements previously made upon this tract, and during 1895 a small shanty was moved upon this land. No pretense of residence within this shanty is alleged its only purpose being admittedly to keep others from going upon and initiating claim to the land.

At the time of the tender of her homestead application in June, 1896, the claim of Annie O'Brien to this land was based solely upon the transfer to her of improvements placed thereon by her father and brothers. Even after the tender of her application to enter she made no pretense of establishing residence upon the land until after the order issued by your office for a hearing. Said order was predicated, as before stated, upon her appeal from the rejection of her application tendered June 29, 1896.

It has been repeatedly ruled by this Department that a settlement upon public land must be followed within a reasonable time by actual residence in order to create in the claimant any rights thereunder; so that if it be admitted that Annie O'Brien was at the time of her alleged purchase of the improvements placed upon this land by her father, duly qualified, and that by such purchase she initiated a right to the land, it must be held, in the presence of the adverse claim, that such right was waived or lost by her failure to take up a residence upon the land within a reasonable time thereafter. It therefore follows that the rejection of her application by the local officers was proper. *Hastings, etc., v. Grinden.* (27 L. D., 137.)

In your office decision it was held, as before stated, that it was incumbent upon Chamberlin to show compliance with the law after the allowance of his entry, which he had failed to do. It cannot be determined from said decision whether such failure, or the alleged prior



Upon a hearing duly had the local officers sustained the contest, and on appeal, by your office decision of July 2, 1898, the action of the register and receiver was disapproved and the contest of Kort was dismissed.

The appeal of the contestant brings the record here for further consideration.

The question presented by the record is one of law, there being practically no dispute as to the facts, which are substantially stated in your office decision.

It will be noted that this contest was brought less than six months (about four months) after the entryman's leave of absence had expired. It is contended by counsel for the defendant that the contest, having been brought within six months after the expiration of the entryman's leave of absence, cannot be sustained, unless it is shown that the leave was fraudulently obtained, and that the facts show that it was not so obtained.

Counsel for contestant insists that, notwithstanding the failure to show that the leave of absence was obtained by fraud on the part of the defendant, the fact that the defendant was absent from the claim for nine months before he obtained his leave, as shown at the hearing, is sufficient to sustain the contest, and that a contest alleging a default that happened before the leave of absence was granted may be brought and prosecuted during the time covered by the leave.

In support of this contention, he cites the case of *Yarneau v. Graham*, 16 L. D., 348, which clearly holds that contest may be brought during the continuance of a leave of absence where default prior to the leave is charged.

This leaves for consideration only, Does the record show that there was such a default on the part of the entryman prior to the granting of his leave of absence as would sustain the contest of the plaintiff? The defendant established residence on the tract in controversy shortly after the opening of the land to settlement in 1893; he continued to reside, with his family, on his entry, until March 7, 1895; during this time he cultivated from eighty to a hundred acres of the land, and faithfully performed all the requirements of law as to settlement and improvements. During all this time the tract was embraced in the homestead entry of Stewart M. Decker, which was being contested, on the ground of prior settlement, by the defendant herein. That controversy was finally determined in favor of Williams, who made entry, August 27, 1895, four months prior to the date of his leave of absence.

Until he made his entry his right to the land was not contestable by a stranger other than a settler. Until the cancellation of Decker's entry, he (Decker) was entitled to the land as against all the world, except Williams, who was contesting it. The right to contest Williams' entry, certainly, could not accrue until his entry was made, and conceding that he had not been residing upon the land between that date and December 26, 1895, when he obtained his leave of absence,



Said tract is within the primary limits of the grant for the Cascade branch line and also within the primary limits of the grant opposite that portion of the main line of said railroad extending northward from Portland, Oregon, to Puget Sound.

The map showing the line of definite location of the main line opposite the land in question was filed May 14, 1874, and that showing the definite location of the Cascade branch opposite this land was filed on March 26, 1884.

The case under consideration arose upon the tender of an application by Wasmund, in August, 1885, to file preemption declaratory statement for this land. In said declaratory statement settlement was alleged in 1881. The local officers rejected his application for conflict with the grant; from which action he appealed. Thereafter hearing was ordered by your office, and upon the record made the local officers recommended the allowance of Wasmund's application.

During the pendency of the case arising upon Wasmund's application, to wit, on June 30, 1888, this tract was listed by the company and a patent issued December 13, 1894.

From certified copies of deeds filed by the company it appears that on May 30, 1878, the tract here involved was conveyed by the railroad company to one Isaac W. Anderson, and on December 3, 1881, Anderson conveyed a portion of the land to Wasmund. In the decision under review it was erroneously stated, following the recitation of your office decision, that Anderson conveyed all the land purchased of the company to Wasmund.

In the decision under review it was held that at the date of the passage of the joint resolution of May 31, 1870, the tract here involved was occupied by a qualified preemptor, and, following the decision of this Department in the case of *Corlis v. Northern Pacific Railroad Co.* (23 L. D., 265), wherein it was held that in determining what lands passed to the main and branch lines as provided for in the joint resolution of May 31, 1870, said resolution must be considered as in the nature of a new grant, and that only such lands as were in a condition to pass under the terms of the grant to said company at the date of the passage of said resolution were intended to be granted thereby, the land in question was held to be excepted from the company's grant.

As it appeared that Wasmund was claiming the land both under his application tendered in 1885, and also by reason of the conveyance from Anderson, who purchased of the railroad company, his claim was held to have been confirmed by the act of March 2, 1896 (29 Stat., 42), and directions were therefore given to demand of the company the price of the land as therein provided for.

Since the filing of the motion now under consideration, the decision in the case of *Corlis v. Northern Pacific Railroad Co.*, *supra*, has been vacated (26 L. D., 652), and it is now held by this Department that the joint resolution of May 31, 1870, did not make a new grant for the



very small fraction of an acre, not estimated by the surveyor-general, near the line between corners 1 and 2 of the said Snowbird survey.

The local officers rejected said application for patent, for the reason that all of the ground covered by said survey was also embraced in prior applications for patent which had been received and filed.

July 15, 1898, your office found that tract "A" is within the limits of the June Blizzard claim, survey No. 11564, Newmarket claim, survey No. 9641, and the Victor Consolidated No. 2 claim, survey No. 8747, and that no evidence has been submitted to show that the applications for patent for the June Blizzard and Newmarket claims excluded said tract "A" or that the applicants for said claims ever relinquished said tract, and it does not appear that these applications have been canceled, in whole or in part; that tracts "B" and "C" are within the exterior limits of the Bodie mining claim, survey No. 9541, and that there is no evidence of record to show that the application for patent for said claim excludes said tracts "B" and "C" or that the Bodie application has been canceled as to said conflicts with the Snowbird claim; that the said tract near corner No. 1 is within the exterior limits of the Bonanza mining claim, survey No. 8791, and that there is no evidence of record that the owners of the said Bonanza claim have ever relinquished any portion of their claim or that their application has been canceled as to the ground in conflict with the Snowbird claim, and no evidence that the ground in conflict was excluded from the Bonanza application.

Your office thereupon rejected McConaghy's application, and he has appealed to the department.

With the appeal is filed a certified copy of a relinquishment to the United States, of date November 18, 1897, of all that portion of the Bonanza claim in conflict with the Snowbird claim, and it is stated, in a brief filed in support of the appeal, that if your office had called on the local officers, as is alleged to be customary in such cases, for the papers in the Bonanza application, said relinquishment would have been found therein, and it is argued, "if this is so in the Bonanza claim, why should it not be so in the other cases?"

This is queer reasoning. The fact that the Bonanza claimants have relinquished their claim to the ground in conflict with the Snowbird claim furnishes no argument whatever that other conflicts have been either relinquished or excluded. Moreover, it is altogether probable that inasmuch as search was made in the record of the Bonanza application, search was also made in the record of other conflicting applications for patent, and it not now being affirmatively asserted that these other conflicts have been excluded or relinquished, the presumption is that no such other relinquishments or exclusions have been made.

There would not seem to be any sufficient reason why your office should, in considering an application for patent for a mining claim, call upon the local officers for the records of conflicting applications, where, as in this case, these officers have reported to your office that the ground

applied for is covered by other and prior applications for patents and the correctness of such report is not specifically denied by the party whose interests are adversely affected thereby.

The decision appealed from is affirmed.

RAILROAD GRANT—LANDS EXCEPTED—HOMESTEAD ENTRY.

CHICAGO, ROCK ISLAND AND PACIFIC RY. CO. *v.* BETTS.

Land embraced within a homestead entry at the passage of the act of June 2, 1864, 13 Stat., 95, is not of the character authorized to be certified under said act on account of the modified line provided for therein.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(F. L. C.) *October 13, 1899.* (F. W. C.)

An appeal has been filed on behalf of the Chicago, Rock Island and Pacific Railway Company from your office decision of December 20, 1897, holding for cancellation its selection made under the act of June 2, 1864 (13 Stat., 95), covering the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 18, T. 80 N., R. 32 W., Des Moines land district, Iowa.

By the act of May 15, 1856 (11 Stat., 9), a grant was made to the State of Iowa to aid in the construction of a railroad from Davenport to Council Bluffs, in said State, which grant was conferred upon the Mississippi and Missouri Railroad Company.

By the act of June 2, 1864, *supra*, the Mississippi and Missouri Railroad Company was authorized to modify or change the location of the uncompleted portion of its line, so as to secure a better and more expeditious line for connection with the Iowa branch of the Union Pacific railway, and by the second section of said act it was provided:

That whenever such new location shall have been established, the said railroad company shall file in the general land-office at Washington a map, definitely showing such new location; and the Secretary of the Interior shall cause to be certified and conveyed to said company from time to time, as the road progresses, out of any public lands now belonging to the United States not sold, reserved, or otherwise disposed of, or to which a pre-emption claim or right of homestead settlement has not attached, and on which a bona fide settlement and improvement has not been made under color of title derived from the United States or from the State of Iowa, within six miles of such newly located line, an amount of land per mile equal to that originally authorized to be granted to aid in the construction of said road by the act to which this is an amendment; and if the amount of land granted by the original act to aid in the construction of said railroad shall not be found within the limit of six miles from such line, then such selections may be made along such line within twenty miles thereof: *Provided*, That the said company shall not be entitled to, and shall not receive, any land under this grant which is situate within fifteen miles of the line of the Burlington and Missouri River Railroad, as indicated by the map of said road, now on file in the general land office.

The Chicago, Rock Island and Pacific Railway Company is the successor of the Mississippi and Missouri Railroad Company, and on May 29, 1884, it filed in the local office at Des Moines a list of selections embracing the tract here in question.

From the records of your office it appears that this tract in controversy was included in the homestead entry of Theodore Rogenstroth, made April 20, 1863, which entry remained of record until canceled April 29, 1872.

June 9, 1881, one L. H. Teeters made timber-culture entry including said tract, which entry was canceled February 12, 1890.

On February 28, 1890, Allen Betts filed pre-emption declaratory statement upon said land, alleging settlement thereon April 1, 1889, and on October 27, 1891, he made homestead entry for said land, under which final proof was offered, and final certificate has issued to him for the land.

Your office decision finds that at the date of the withdrawal made on account of this grant the tract in question was included in an entry of record and was therefore excepted from the operation of said withdrawal; further, that at the date of the filing of the company's selection list, to-wit, on May 29, 1884, it was also embraced in an entry of record, and was therefore not subject to such selection.

Your office decision further finds that the company failed to comply with the requirements made under departmental decision in the case of *LaBar v. Northern Pacific R. R. Co.* (17 L. D., 406), by designating a basis for the selection in question, although notified of such requirement through Mr. Philetus E. Hall, President of the Iowa Railroad Land Company, its successor in interest.

In its appeal the Chicago, Rock Island and Pacific Railway Company asserts that neither Mr. Philetus E. Hall nor the Iowa Railroad Land Company have any interest in the lands on account of the grant above described; further, that it has already been determined and recognized by the Department that its grant is largely deficient and that the requirement of a specification of losses as bases for selections under said grant should not be exacted, referring to the decision of this Department in the case of *Chicago, Rock Island and Pacific Ry. Co. v. Wagner*, 25 L. D., 458. As viewed by this Department, however, these questions are immaterial.

The land in question being part of an even-numbered section, was not affected by the act of May 15, 1856, the grant made by said act being limited to the odd-numbered sections.

Under the modified location provided for in the act of June 2, 1864, the Secretary of the Interior is only authorized to certify and convey, on account of the grant, "public lands *now* belonging to the United States not sold, reserved, or otherwise disposed of, or to which a pre-emption claim or right of homestead settlement has not attached," etc.

At the time of the passage of said act, as will be seen, the tract in question was embraced in the homestead entry of Theodore Rogenstroth. It was therefore not of the character authorized to be certified on account of the modified line. The fact that Rogenstroth's entry was thereafter canceled did not bring it within the class of lands authorized to be certified, and for this reason the decision of your office is affirmed, and the selection by the company is ordered canceled.



2325 of the Revised Statutes have not been complied with, in the matter of publication and posting of notice of the application for patent.

October 22, 1898, your office dismissed the protest, and protestants have appealed to the department.

The statutory period of publication of notice of the application for patent for the Marburg claim expired June 17, 1896. The tenth insertion of the notice in said newspaper was unnecessary, and the adverse claim of these protestants, filed June 20, 1896, and after the full statutory period had elapsed, was out of time. *Davidson v. The Eliza Gold Mining Company* (28 L. D., 224).

Neither the allegation of adverse ownership nor the allegation of failure to perform the annual assessment work presents any question for the consideration of the department. Section 2326 of the Revised Statutes clearly points out the way in which an adverse claim may be asserted and these protestants having failed to proceed as directed by that section, the allegation of adverse ownership as now made has no effect other than to give the protestants a status under the rules of practice somewhat different from that of a protestant who alleges no interest, in that they are accorded appeal as a matter of right, and such allegation will only be considered by the department as an inducement to accord them such status. The allegation of failure to perform annual assessment work will not be considered, because "the doing of annual assessment work is not a condition to obtaining patent, but only a condition to the continued right of possession of an unpatented claim as against other and adverse claimants." (*Hughes et al. v. Ochsner et al.*, 27 L. D., 396, 398.)

The record shows that the Marburg claim was located by the remote grantors of the present claimants, January 4, 1892, and that the certificate of location was duly recorded, that an amended location of the claim was made by the applicant for patent, the Auburn Gold Mining and Milling Company, January 17, 1896, and that the certificate of amended location was duly recorded. The certificate of amended location based on the field notes of survey describes the claim as 281.49 feet in width. This last fact will have its proper consideration further on. It is enough here to say that it is not specifically alleged in the protest wherein the location and record of the Marburg claim were or are invalid, and no invalidity has been found, and it affirmatively appears that a discovery sufficient to support a location and patent was made.

In the matter of the alleged non-compliance with the provisions of section 2325 of the Revised Statutes, the record shows that the application for patent was sworn to April 3, 1896, describes the claim as 281.49 feet in width, was filed in the land office of the district wherein the claim is situated, April 4, 1896, and with it a plat and field notes of the claim made under the direction of the surveyor-general of the State of Colorado, showing accurately the boundaries of the claim,

which were distinctly marked by monuments upon the ground; that a copy of the plat, together with a notice that application had been made by the "Marburg" Gold Mining and Milling Company, for the Marburg claim, described as 281.49 feet in width, was posted in a conspicuous place on the land embraced in such plat previous to the filing of the application for patent and on April 2, 1896, and that an affidavit of two persons was filed that such notice had been duly posted; that a copy of the notice was filed in said land office; that the register of said office published a notice that such application had been made for the period of sixty days, as hereinbefore stated, and also posted such notice in his office for the same period. The notice so published by the register and the notice so posted in his office described the claim as three hundred feet in width, but, further on, refer to the field notes of survey, and quote therefrom at sufficient length to show that the area applied for is 281.49 feet in width, and not three hundred feet in width as thereinbefore stated.

The principal contention of the appellants is that the error in the notice posted upon the land describing the applicant for patent as the "Marburg" Gold Mining and Milling Company, instead of the "Auburn" Gold Mining and Milling Company, and the error in the published notice and the notice posted in the local office that the claim was three hundred feet in width, instead of 281.49 feet in width, are of such importance that republication of notice of the application for patent should be ordered.

This contention will not be admitted. These errors were clerical, and not calculated to mislead or deceive any one, and it is not shown or alleged that any one was misled or deceived thereby to his injury or at all. The posted and published notices of the application for patent herein contained such matter as was sufficient to inform a person of ordinary intelligence and prudence, having an interest in a mining location conflicting with the Marburg claim, that application for patent for said claim had been made. Taken as a whole, they point out the ground applied for and meet the requirements of the law as to notice. *Hallett and Hamburg Lodes* (27 L. D., 104).

Nothing is offered in support of the allegation in the protest that the notice of the application for patent for the Marburg claim was not published in a newspaper published nearest the claim. It was published in a newspaper by the register "designated as published nearest to such claim," and it does not appear that that officer abused his discretion in making such designation. See *Instructions of Secretary Bliss to your office, February 3, 1898* (26 L. D., 145).

The decision appealed from is affirmed.

Since the appeal herein, and on June 27, 1899, your office forwarded to the department a protest against the entry and patenting of the Marburg claim, filed in the local office June 4, 1899, by one Joseph Crumby. Said protest is herewith returned, with the papers, for appropriate action.

## HOMESTEAD ENTRY—REINSTATEMENT—ADVERSE RIGHT.

OLSON *v.* OLSON.

The reinstatement of an entry, that has been canceled without due notice, is not defeated by an intervening adverse claim.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(F. L. C.) *October 14, 1899.* (H. G.)

Lars Olson appeals from the decision of your office of March 20, 1899, holding for cancellation his homestead entry, made November 25, 1895, for the W.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  and the W.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 12, T. 146 N., R. 58 W., in the Fargo, Dakota (now North Dakota), land district, and directing, should the decision of your office become final, the reinstatement of the homestead entry of Gustav Olson for the said tract, made June 15, 1882, and permitting Iver I. Seim, the guardian of Martha M. Olson, an adjudged insane person, to submit final proof.

The record facts in the case were set out in the departmental decision of November 23, 1897 (Martha M. Olson, 25 L. D., 402), wherein the petition of said Iver I. Seim, as guardian of Martha M. Olson, an insane person, was considered. A hearing was thereby ordered by this Department before the local office to determine the truth of the allegations of said petition. Such hearing was had, at which the present entryman and the said guardian were present. This hearing resulted in the finding of the local officers, and of your office upon appeal, in favor of the cancellation of the entry of Lars Olson, the entryman and appellant here, and the reinstatement of the entry of Gustav Olson, permitting the guardian of Martha M. Olson, an adjudged insane person, to submit final proof for her, as the deserted wife of Gustav Olson, the original entryman.

From the testimony taken at the hearing and the agreed statement of facts filed by stipulation of the parties, it appears that the allegations of the petition of the guardian have been sustained.

October 23, 1885, Martha M. Olson, as agent for Gustav Olson and as his deserted wife, gave notice by publication of her intention to make final proof. This proof was not made at the time mentioned in the notice, but was made eight-days later. The cause of the delay was that Mrs. Olson was not aware of the date set for taking testimony upon her final proof until after the time had elapsed, and that she was in poor health and unable to travel in cold weather. This Department on November 9, 1887, modified the decision of your office, and held that the absence of Mrs. Olson from the land caused by her sickness and poverty and during her confinement in an asylum for the insane, was excusable, and that such periods should be considered as part of the required residence of five years upon the tract, but also holding that the excuse for failure to make proof at the time advertised was not sufficient, and ordering that new proof should be made.

It was suggested in the departmental decision that the character and extent of the cultivation and use of the land during Mrs. Olson's

absence be fully shown in the new proof, and when the final proof should thus be made the entry should be referred to the board of equitable adjudication for confirmation. (Martha M. Olson, 6 L. D., 311.)

No record appears of the service upon Mrs. Olson of the said departmental decision. Shortly after making her final proof she returned to the insane asylum, from which she had been released on parole during a lucid interval, and has ever since been confined there. No report was ever made of the service of such notice upon her, or her attorneys, to your office, and it is impossible to ascertain any facts from the local office, as the records of the local office were destroyed by fire before inquiry was directed to the matter. On March 21, 1894, notice issued from the local office to Gustav Olson, the husband, to show cause why his entry should not be canceled for failure to make proof within the statutory period, nearly twelve years having then elapsed since the date of his entry. This notice was sent by letter to the wrong post office, and not to the one where Gustav Olson and his wife had received their mail for many years, and was returned unclaimed. No notice whatever was ever sent to Mrs. Olson, who appears to have been the proper person to notify of the cancellation of the entry, as she made final proof, which was rejected, the status of the case having been preserved by the published departmental decision of November 9, 1887.

Owing to this state of the record, fully detailed in the former departmental decision (Martha Olson, *supra*), and the additional facts developed at the hearing, it is clear that the entry of Lars Olson should be canceled and that of Gustav Olson reinstated, and that the guardian of Martha M. Olson, an insane person, should be permitted to make new final proof after legal notice. The matter of the sufficiency of the residence of Mrs. Olson has already been passed upon and the failure to give notice of the departmental decision requiring new proof is established by the record, as is also the fact that neither Mrs. Olson nor her representative, agent or attorney has been notified of the rule to show cause why the original entry should not be canceled, and no proof to the contrary was adduced at the hearing.

Although the present entryman, Lars Olson, has made improvements upon the tract to the extent of one hundred dollars, and may have had no knowledge or notice of the state of the record, the fact that he was misled in making his entry, and acted in good faith, is no reason why the deserted and insane wife of the former entryman should not be protected in her antecedent rights.

The decision of your office is affirmed, and the guardian will be permitted to make new proof on behalf of his ward, upon due advertisement, when the case will be referred to the board of equitable adjudication for confirmation in accordance with the first departmental decision in the case. (6 L. D., 311.)

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BRUMMETT *v.* WINFIELD.

Motion for review of departmental decision of June 23, 1899, 28 L. D., 530, denied by Acting Secretary Ryan, October 14, 1899.

## MINING CLAIM—TUNNEL LOCATION—ADVERSE CLAIM.

## BYRON B. BURTON.

The pendency of adverse proceedings, based on a tunnel location, operates as a stay of all action under an application for mineral patent that embraces ground included in said adverse claim.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *October 18, 1899.* (G. B. G.)

December 7, 1891, and March 24, 1892, Albert Worden and B. B. Burton located the Ella W. and Mary A. lode mining claims respectively, situated in the Cripple Creek mining district, El Paso county, Colorado. The title acquired by these locations having, by virtue of sundry mesne conveyances, passed to and vested in Byron B. Burton, the said Burton, on February 7, 1894, applied for a patent for said lode claims and the surface ground as officially surveyed and platted.

May 22, 1894, and within the sixty days' period of publication of the notice of said application for patent, E. M. De La Vergne, as director and manager for The El Dorado Mining and Milling Company, filed in the local office at Pueblo, Colorado, an adverse claim against the application for patent, alleging that certain portions of the premises described in the plat, field notes of survey and application, are claimed adversely and owned by The El Dorado Mining and Milling Company, as the Sangre de Christo Tunnel site.

June 20, 1894, and within the time provided by section 2326 of the Revised Statutes, the said The El Dorado Mining and Milling Company commenced proceedings in the district court of the fourth judicial district of Colorado, within and for El Paso county, against the said Byron B. Burton, to sustain its adverse claim, and "to recover possession of all that parcel of the Sangre de Christo Tunnel and Tunnel site embraced within the lines of the survey of the Ella W. and Mary A. claims." So far as the record shows, this adverse suit has not been settled or decided by said court, nor has the adverse claim been waived.

January 19, 1898, the said Byron B. Burton filed in the local office his application to purchase "that mining claim known as the Ella W. and Mary A. lodes," but the application expressly excepted and excluded therefrom

those portions of the Sangre de Christo Tunnel Site described in the adverse plat thereof by metes and bounds as follows, to wit: Beginning at the S. W. Cor. of Tunnel Site, point A.; thence N. 70° 30' E. 374.4 ft.; thence S. 82° 12' W. 49.3 ft.; thence S. 70° 30' W. 326.1 ft.; thence S. 19° 30' E. 10 ft. to beginning; also beginning at point E.; thence N. 70° 30' E. 106. ft.; thence N. 33° 51' W. 10.32 ft.; thence S. 70° 30' W. 63.2 ft.; thence S. 56° 34' W. 41.53 ft., to beginning.

On the same day mineral entry No. 1603 was allowed on said application, the receiver's receipt and register's final certificate of entry both noting the exclusions named in the application to purchase.

July 2, 1898, your office suspended said entry until such time as evidence of the final disposition of the adverse suit is furnished, because, as stated in your office decision of that date:

It appears that the exclusion consists of strips of land ten feet wide along the line of the tunnel, but I am unable to tell from the papers on file whether the adverse claimant claimed simply these tracts, or whether its claim is of wider scope, including the "dumping ground" shown on plat and possibly the lodes contained in the Ella W. and Mary A. claims.

A tunnel location under the mining laws of the United States is a mining claim, and may be made the basis of an adverse claim. *Bodie Tunnel and Mining Co. v. Bechtel Consolidated Mining Co. et al.* (1 L. D., 584.) This being so, the filing of the adverse claim in the local office and the commencement of suit thereon in the district court will operate as a stay of all proceedings upon Burton's application for patent until the controversy shall have been settled by a court of competent jurisdiction or the adverse claim waived, unless the applicant for patent has excluded from his application the land covered by the adverse claim, in which event he may take a patent for the remainder. *Branagan et al. v. Dulaney* (2 L. D., 744); *Black Queen Lode v. Excelsior No. 1 Lode* (22 L. D., 343).

The location certificate of the Sangre de Christo Tunnel Site covers the ground hereinbefore described by courses and distances which was excluded from mineral entry No. 1603, and in addition thereto said certificate calls for a square tract of land two hundred and fifty feet on each side of and below the mouth of said tunnel "for dumping purposes;" and the greater portion of this tract forms also a part of the surface ground within the exterior lines of said mining claim as entered, and was not excluded from said entry. The adverse claim filed in the local office and the adverse plat filed therewith show that the adverse claimants claim this piece of ground. No copy of the complaint filed in the district court is found in the record in this case, but it will be assumed that the complaint follows the adverse claim and plat thereof filed in the local office, and that it alleges ownership of and the right of possession to this piece of ground.

It is objected that section 2323 of the Revised Statutes, which recognizes the right to locate tunnel sites upon the public mineral domain of the United States, does not authorize the location of ground for dumping purposes. This presents a question which the Department will not undertake to decide in this case. It is one which of necessity arises in the adverse suit and of which the court wherein that suit is pending has jurisdiction.

The action of your office in suspending said entry is approved, and the decision appealed from is affirmed.

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RAILROAD GRANT—DEFINITE LOCATION—PRELIMINARY ROUTE.

SOUTHERN PACIFIC R. R. Co.

The grant of July 25, 1866, does not in express words provide for the "definite location" of the road, but contemplates that the "map of the survey of said railroad," for which provision is made, shall perform that service.

The map of September 13, 1867, filed under said grant, was for the purpose of showing a trial or preliminary line, upon which an anticipatory executive withdrawal could be made, so as to hold the lands in reservation until after survey and final location of the road; and the order of withdrawal based on such map of preliminary route was executive in character, not taking effect, according to its terms, until received at the local office.

In case of a demand upon a railroad company for the value of lands, the title to which is confirmed for the benefit of a bona fide purchaser by the act of March 2, 1896, the minimum government price thereof is to be taken as the value of said lands.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) October 18, 1899. (F. W. C.)

In your office letter of December 11, 1897, report was made of demand upon the Southern Pacific Railroad Company, as successor to the Central Pacific Railroad Company, for the payment to the United States of \$14,652.40, on account of the confirmation of title in the purchasers from the railroad of 5,860.96 acres erroneously patented under the grant made by the act of July 25, 1866 (14 Stat., 239); to which demand you reported that the company had failed to respond.

From the papers transmitted with your office letter of April 30, 1898, it appears that on December 16, 1897, resident counsel for the company questioned the correctness of the action of your office in including in the list accompanying said demand the E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  and the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 17, T. 31 N., R. 3 W., M. D. M., California, which was held to have been excepted from the railroad grant because of the homestead entry made October 30, 1867, by Samuel Wayman, which entry remained of record until canceled August 7, 1873. January 5, 1898, your office refused to strike said tracts from the list, and the company appealed, urging that said entry was improperly allowed after the filing of the map of preliminary route, September 13, 1867, on account of which it is claimed the act making the grant provided for a statutory withdrawal.

The grant made by the act of July 25, 1866 (*supra*), is:

every alternate section of public land, not mineral, designated by odd-numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified.

This act does not provide in words for the "definite location" of the line of road and make the status of the land at that time the criterion by which shall be determined the lands granted and the lands

excepted for which indemnity may be had. Such granting acts usually provide for the filing of a preliminary map of the line of road, called a map of general route, which is to be supplanted and superseded by another and more accurate map, showing the line of the road as finally adopted, and called the map of definite location. That portion of this act providing for the filing of a map is as follows:

and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified.

As this is the only map for the filing of which provision is made, and it was necessary to give location to the lands granted in some definite manner, it was evidently the intention that this map should perform that service.

The railroad company claims that the map of 1867 was filed in pursuance of this requirement and should be given effect accordingly in the adjustment of the grant. That map, however, was not intended by the railroad to identify or fix the line of railroad as finally adopted. On its face it was described as a map of preliminary route, and the company subsequently filed other maps specifically denominated by it as maps of definite location. The limits of the grant were projected upon the line of location shown upon these later maps, and according to these limits the grant has been practically adjusted.

The map of 1867 must be considered as filed for the purpose of establishing a mere trial or provisional line, upon which an anticipatory executive withdrawal of lands could be made so as to hold them in reservation until after the survey and final location of the road and the filing of the map thereof when the withdrawal demanded by the statute would be made.

The orders of withdrawal upon the maps of 1867 were merely executive, and according to their terms were not to become effective until received at the local office. Wayman's entry was allowed before the receipt at the local office of the order withdrawing the lands upon the map of 1867, and must be considered as properly allowed. It was a subsisting claim on August 5, 1871, when the map showing the line of definite or final location of the road opposite this tract was filed and accepted, and is therefore held to be sufficient to except the tract covered thereby from the operation of the railroad grant.

In this connection it is noticed that by far the greater portion of the land included in this list of lands said to have been erroneously patented on account of the railroad grant is land returned as mineral at the date of the survey of the township. Upon inquiry at the mineral division of your office it is learned that all of these lands were adjudged to be non mineral before the patenting thereof on account of the railroad grant. The mere return of the land as mineral by the surveyor, even though before the filing of the map of definite location, would not affect the rights under the grant, if, upon investigation, the

land was found not to be mineral. Further investigation of this matter should therefore be made, before any action is taken looking to the bringing of suit for the value of the land.

Relative to the recovery of lands found to have been erroneously patented, but shown to have been sold to a *bona fide* purchaser, the act of March 2, 1896 (29 Stat., 42), provides "that suit be brought . . . for the value of said land, which in no case shall be more than the minimum government price thereof." This makes the maximum recovery one dollar and twenty-five cents per acre, and in making demands you will be governed thereby.

Your attention is called to the enclosed letter from the railroad company, returned with the record, in which the desire is expressed that the matter may be adjusted without the necessity for suit.

#### INDIAN LANDS—CONVEYANCE OF ALLOTTED LANDS,

##### PEORIA AND MIAMI INDIANS.

No conveyance of lands, allotted to Peoria and Miami Indians under the act of March 2, 1889, made by the allottee, or his heirs, within the period of inhibition named in the statute, has the effect of transferring title until approved by the Secretary of the Interior.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,*  
October 18, 1899. (W. C. P.)

By your communication of June 19, 1899, you submitted a copy of a letter from the Commissioner of Indian Affairs, dated June 15, 1899, and accompanying papers, relative to the conveyance of lands by members of the Peoria and Miami tribes of Indians, saying:

I have, therefore, to request that you will give the Department your opinion whether an adult heir of a deceased allottee who was a member of either the Peoria or Miami tribe of Indians, can convey the lands inherited by him, and give a good and valid title by deed when said deed is not approved by the Secretary of the Interior; and, also, whether the deed of a minor heir to land inherited by him from an allottee of either of said tribes must be approved by the Secretary of the Interior in order to give a good and valid title.

The first general provision for the allotment of lands in severalty to the individual members of the various Indian tribes was made by the act of February 8, 1887 (24 Stat., 388). It was, however, specifically provided that the provisions thereof should

not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory.

The act of March 2, 1889 (25 Stat., 1013), declared the provisions of the act of 1887, *supra*,

applicable to the confederated Wea, Peoria, Kaskaskia, and Piankeshaw tribes of Indians, and the Western Miami tribe of Indians, now located in the northwestern part of the Indian Territory, and to their reservation, in the same manner and to the same extent as if said tribes had not been excepted from the provisions of said act, except as to section six of said act and as otherwise hereinafter provided.

Section six of the act of 1887 is that which accords citizenship to Indians upon receiving allotments.

The act of 1889 then directs that there be allotted to each member of said confederated Wea, Peoria, Kaskaskia, Piankeshaw, and Western Miami tribes of Indians not to exceed two hundred acres of land each, and provides as follows:

The land so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of patent therefor, and said lands so allotted shall be exempt from levy, sale, taxation or forfeiture for a like period of years. As soon as all the allotments or selections shall have been made as herein provided, the Secretary of the Interior shall cause a patent to issue to each and every person so entitled, for his or her allotment, and such patent shall recite in the body thereof that the land therein described and conveyed shall not be alienated for twenty-five years from the date of said patent, and shall also recite that such land so allotted and patented is not subject to levy, sale, taxation, or forfeiture for a like period of years, and that any contract or agreement to sell or convey such lands or allotments so patented entered into before the expiration of said term of years shall be absolutely null and void.

These are the only provisions of that act necessary to consider.

Allotments were made under the provisions of this act and by the act of June 7, 1897 (30 Stat., 62, 72), Congress permitted the sale of a part of said allotments, as follows:

That the adult allottees of land in the Peoria and Miami Indian reservation in the Quapaw agency, Indian Territory, who have each received allotments of two hundred acres or more may sell one hundred acres thereof, under such rules and regulations as the Secretary of the Interior may prescribe.

“Rules and regulations to be observed in the conveyance of lands allotted to members of the Peoria and Miami tribes of Indians within the Peoria Reservation of the Quapaw Agency, Indian Territory,” were prescribed by the Secretary of the Interior July 10, 1897, which, after directions as to the manner of execution and acknowledgment of the deed, as to how payment shall be made and as to the proofs to be submitted with the deed, say:

IV. Male grantors must be twenty-one years of age and female grantors must be eighteen years of age at the date of the execution of the deed of conveyance to entitle them to sell their land. (See Manfield's Digest of the Statutes of Arkansas 1884, Sec. 3464.)

V. The right of conveyance of allotted lands by Peoria and Miami Indians is restricted to adult persons, as mentioned in paragraph IV, who have each received allotments of two hundred acres thereof.

VI. The title of the land conveyed by such deed shall not vest in the grantee therein named unless the deed is approved by the Secretary of the Interior.

A modification of these rules March 1, 1898, related only to the payment for lands sold and does not affect the question now under consideration.

It will be noticed that the plan of the allotment act of 1887, *supra*, to issue first a trust or conditional patent declaring the United States would hold the allotted lands in trust for the allottee or his heirs for the period of twenty-five years and at the expiration of that period would convey it absolutely to such allottee or his heirs is not followed

in the act of 1889, *supra*. This later law declares that the land shall be inalienable for twenty-five years and directs that a patent shall be issued to each allottee and that such patent "shall recite in the body thereof that the land therein described and conveyed shall not be alienated for twenty-five years from the date of said patent." This instrument vests in the allottee the full title to the land and clothes him with all the attributes of absolute ownership except the one of power to alienate. The validity of such a condition has been recognized by the supreme court. *Smith v. Stevens* (10 Wall., 321); *Taylor v. Brown* (147 U. S., 640).

It was deemed necessary to modify the restriction against alienation contained in the act of 1889, *supra*, and hence the provision in the act of 1897, *supra*, authorizing the sale by adult allottees who had received two hundred acres of land of one hundred acres. Even this provision was not without a qualification for such sales were to be made "under such rules and regulations as the Secretary of the Interior may prescribe." As to the original allottees there can be no question. Only adults were allowed to sell allotted lands and they only one hundred acres thereof and only in pursuance of rules and regulations to be prescribed by the Secretary of the Interior. Such rules and regulations were adopted, one of the requirements being that all conveyances should be approved by the Secretary of the Interior to make them effective.

If the inhibition in the act of 1889 attached to the lands in the hands of heirs it still applies in the absence of the consent of the Secretary of the Interior because the rules made in pursuance of the authority of the act of 1897, *supra*, require his approval as to all deeds. The language of the act of 1889 shows that it was the land and not the person that was in the mind of Congress. The provision is that the "land" shall not be alienated not that the allottee shall not sell his land and that "any" contract or agreement to sell or convey such land or allotments so patented, entered into before the expiration of said term shall be absolutely null and void. The purpose was, as has been said by the supreme court of similar provisions in other laws, to protect the Indian owner from improvident disposition of his lands. The requirement in the rules and regulations that all sales shall be subject to the approval of the Secretary of the Interior is a just one and as circumstances have frequently proven a necessary one to proper protection of the Indian.

I am of opinion, and so advise you, that no conveyance of these allotted lands by the Indian allottee or his heirs, made within the period of inhibition mentioned in the statute, has the effect of transferring title until approved by the Secretary of the Interior.

Approved, October 18, 1899.

THOS. RYAN,  
*Acting Secretary.*



and Duluth, and were certified to the State of Minnesota on account of the grant for the Lake Superior and Mississippi Railroad Company June 7, 1873.

Rooney's claim to the land is based upon the tender of a homestead application on September 9, 1897, which was rejected for conflict with the application to select the land filed by the Northern Pacific Railroad Company; from which action he duly appealed to your office, and upon consideration of said appeal the action of the local officers in rejecting his application was, as before stated, reversed by the decision of your office appealed from. Said application does not allege settlement upon the land prior to the tender thereof.

In the matter of the adjustment of the grant to the Northern Pacific Railroad Company, it was held in departmental decision of August 27, 1896 (23 L. D., 204), that the arrangement between the Northern Pacific and the Lake Superior and Mississippi companies, with respect to the latter company's line of road between Thomson's Junction and Duluth, was a consolidation, confederation and association of the two companies, and that in the adjustment of the grant to the Northern Pacific Railroad Company between the points named, the Northern Pacific Railroad Company would be entitled to indemnity only for losses sustained outside the limits of the grant to the Lake Superior and Mississippi Railroad Company.

It was under this decision that the eastern terminus of the Northern Pacific grant was fixed at Duluth, in the State of Minnesota, and the correctness of this decision is involved in the cases now pending in the supreme court of the United States.

Without regard to the result in that case, it must be held that the basis assigned is not a proper and sufficient one to support the selection, because, by the terms of the joint resolution of May 31, 1870, *supra*, under which this selection is made, indemnity selections within the second indemnity belt therein provided for can only be made for such lands as "have been granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four."

As this land was reserved prior to the passage of the act of July 2, 1864, it could not therefore support selections within the second indemnity belt. It follows that the selection is not a proper one, and for that reason its rejection by the local officers is affirmed.

Rooney has not made entry of nor purchased the land, and, as before stated, his homestead application, upon which his claim is based, does not allege settlement prior to the tender thereof. The conflicting claims of the parties do not, therefore, seem to come within the purview of the act of July 1, 1898 (30 Stat., 597, 620). (See Northern Pacific Railroad Company *v.* Sherwood, 28 L. D., 126.)

There being no withdrawal of lands within the indemnity limits on account of the Northern Pacific grant, no reason appears why Rooney should not be permitted to complete entry thereof as applied for, and your office decision according him such right is affirmed.







On March 28, 1898, he filed in the land office at Woodward, Oklahoma, his application to make homestead entry for the NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 27, and the E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 22, and NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 23, T. 4 N., R. 28 E., C. M., Woodward, Oklahoma, accompanied by his affidavit wherein he alleges in regard to said entry No. 21180—

That during May of said year he built a house 16x18 feet on said lands and established his actual residence therein immediately thereafter. That he had been in that county but a short time, and believed that he could clear off the timber and underbrush from the lands, and place it under cultivation. That soon after making his settlement, he commenced clearing the land, and only succeeded in clearing about one or two acres during the year. That he found the soil to be of poor grade, and the following spring, his means being exhausted, and believing he would never be able to clear the lands and raise any crops, and seeing nothing but starvation ahead of him, he abandoned the lands, gathered together what goods he had, and started overland for Beaver county, Oklahoma, where he hoped to be allowed the privilege of filing on a homestead.

That while on the road, at Carthage Mo., he met a resident of that place, who, in a conversation, asked him where he was from. Affiant told him he was from Douglas county, and the party stated that he intended soon to move to that county. Affiant stated that he had left a homestead there, abandoning it because he had to go away to seek a living, and the party offered him a consideration of about forty dollars for the improvements affiant had left on the lands, which he accepted, and relinquished the lands back to the government.

He further states that he was about out of money, and needed the means badly for the purpose of defraying his expenses while on the road, and without it, would not have been able to reach here.

That he did not receive what his improvements had cost him, and did not consider or believe that he was receiving any consideration for his relinquishment, or in any way jeopardizing his chances of securing a homestead in this country, and would not have accepted the offer if he had considered that it would do so.

He further states that he came to this country in good faith for the purpose of securing a home and living. That he has in view, a tract of land upon which he is confident he can live and improve and make a home. And he respectfully asks leave to make a second homestead entry upon said tract, which is the NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 27, and E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 22 and NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  Sec. 23, Tp. 4 N. range 28 E., C. M.

Affiant further states that while he innocently accepted a consideration for the improvements on his former homestead, that should the Hon. Commissioner of the General Land Office consider that such acceptance is a bar to his securing a second homestead, he is ready and willing to refund to the purchaser, the amount he received for said improvements, if by doing so he would be able to remove such disability.

On July 30, 1898, a decision was rendered by your office rejecting said application on the ground that the applicant relinquished his said entry for a valuable consideration and therefore could not be allowed a second homestead entry. The land applied for is a portion of what is known as the Cherokee Outlet, in Oklahoma, and as to the allowance of second homestead entries on said lands Congress has enacted special laws.

By section ten of the act of Congress approved March 3, 1893 (27 Stat., 642), being the statute under which the lands in question were opened to settlement, it is provided that—

The President of the United States is hereby authorized, at any time within six months after the approval of this act and the acceptance of the same by the Cherokee

Nation as herein provided, by proclamation, 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.

In the case of *Walton et al. v. Monahan* (on review, 29 L. D., 108, 112), it is held that—

A fair construction of the language quoted is, that it was intended thereby to make applicable the provisions of said section 13, in the disposal of lands in the Cherokee Outlet, not only as to the manner of opening said land to settlement and entry, but also as to the qualifications of claimants.

Said section 13 of the act of March 2, 1889 (25 Stat., 1005), provides—

That any person who having attempted to, but for any cause, failed to secure a title in fee to a homestead under existing law, or who made entry under what is known as the commuted provision of the homestead law, shall be qualified to make a homestead entry upon said lands.

In the case of *James W. Lowry* (26 L. D., 448), it is held that the words used in said statute to prescribe the qualifications of entrymen have reference to the status of the applicant at the time of making his application and not at the time of the passage of the act; hence the question in this case is: What was the status of the applicant on March 28, 1898, the date of his application? Was he a person who had attempted to, but for any cause failed to acquire title in fee to a homestead under a law existing at the time of the passage of the act of March 2, 1889?

The said entry, No. 21180, was made under a law existing before, and at the time of, the passage of the act of March 2, 1889. The applicant swears in his application, in substance, that he did all he could to make a homestead on the land. He exhausted his means and saw starvation awaiting him if he remained there, and was forced to abandon the land to get a living. If this be true, he had certainly attempted and failed to acquire a homestead under a law existing at the time of the passage of the act of March 2, 1899, and is therefore, so far as concerns said previous entry, qualified to make entry for the land applied for.

Your said decision of July 30, 1898, is therefore reversed and the application will be allowed.

#### RAILROAD GRANT—CLASSIFICATION OF LANDS.

##### *BEAUDETTE v. NORTHERN PACIFIC R. R. Co.*

Land more valuable for the deposit of sandstone therein than for agricultural purposes is mineral in character, and should be so classified under the act of February 26, 1895.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) October 18, 1899. (G. B. G.)

It appears from the duplicate report of the commissioners appointed for the Helena, Montana, land district, under the act of February 26, 1895 (28 Stat., 683), entitled, "An act to provide for the examination

and classification of certain mineral lands in the States of Montana and Idaho," dated January 3, 1898, and now on file in the mineral division of your office, that section 23, township 5 north, range 11 west, in said land district, was examined and classified by said commissioners as non-mineral.

February 1, 1898, Ernest Beaudette filed with the register and receiver of said land office a verified protest against the acceptance of said classification, alleging that he is one of the owners of Beaudette Sandstone Placer mining claim, which claim was located on the 25th day of February, 1897, and covers the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 23, Tp. 5 N., R. 11 W., in Deerlodge county, State of Montana, and that the certificates of said placer location was duly filed in the office of the county clerk and recorder of said county, as provided by law, that the land covered by said mineral location contains a valuable deposit of sandstone suitable for building purposes, that it is rocky, hilly, and unfit for agricultural purposes, and that it is more valuable for mining than for agricultural purposes.

A hearing was ordered on this protest, which was held April 22, 1898, the Northern Pacific Railroad Company appearing by its attorney thereat and defending the classification made by said commissioners. May 9, 1898, the local officers held that the land in controversy is mineral, and recommended that the non-mineral classification be set aside. August 1, 1898, your office, upon the appeal of said company, concurred in said recommendation and dismissed the appeal, and the company has appealed to the department.

This protest, hearing and appeal are authorized by section 5 of the act of February 26, 1895, *supra*, and the instructions of the department of April 13, 1895 (20 L. D., 350), issued to facilitate the administration of that act.

The evidence shows that the land in controversy was located as a placer mine as alleged in the protest; that it contains a very large deposit of sandstone suitable for building purposes; that a quarry has been opened thereon and is being operated; that large quantities of dimension stone are being shipped therefrom to the adjacent city of Anaconda, and that it has been used in the erection of ten or twelve buildings in that place; that this stone will sustain a pressure of 3,125 pounds to the square inch, and that it is worth between twenty-five and thirty-five cents per cubic foot as it comes from the quarry; that the land is quite valuable on account of this deposit of sandstone, and that it is of little or no value for agricultural purposes.

In the case of *Hayden v. Jamison* (on review), 26 L. D., 373, it was held that sandstone is a mineral substance, and that land more valuable on account of the sandstone it contains than for agricultural purposes is mineral in character and subject to disposition under the mineral laws.

It appearing that the land in controversy is of vastly more value on account of the sandstone it contains, than for agricultural purposes,



June 24, 1899 (28 L. D., 594, 601), which regulation does not provide that the notice of an application for patent shall give the names of all adjoining and conflicting claims, but that such notice shall give "the names of adjoining and conflicting claims as shown by the plat of survey." It is, therefore, not now necessary to give the names of *all* adjoining and conflicting claims in the notice of an application for patent under section 2325 of the Revised Statutes, but only such as are shown in the plat of survey.

The plat of survey of the Mountain Mayd and Gold Reef claims was not forwarded by the local officers in this case; but from informal inquiry in your office it is ascertained that at the date of said survey the Rustler was not a surveyed claim. The Manual of Instructions for the survey of the mineral lands of the United States, issued by your office October 25, 1895, directs that the United States surveyors-general and United States deputy mineral surveyors in making surveys of mining claims will not show conflicts with unsurveyed claims, unless the same are to be excluded. It may be safely assumed that the manual was followed in the survey of the Mountain Mayd and Gold Reef claims, and that the plat of said survey does not show the Rustler as an adjoining or conflicting claim. But even if it does show such conflict, the Rustler being an unsurveyed claim such showing is not required by the letter of section 2325 of the Revised Statutes, nor is it necessary to a proper administration of said section, and being not required and unnecessary, the failure of the applicants for patent to give in the notice of their application the name of the Rustler as an adjoining claim was not such error as authorizes an order of republication.

The motion is denied.

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COLEMAN ET AL. *v.* MCKENZIE ET AL.

Motion for review of departmental decision of May 4, 1899, 28 L. D., 348, denied by Acting Secretary Ryan, October 18, 1899.

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INDIAN LANDS—MISTAKE IN ALLOTMENT—INDIAN OCCUPANCY.

LEE *v.* THOMAS.

The right of an Indian to the lands actually surveyed for, and allotted to him, but omitted from the trust patent by mistake, is not defeated by the erroneous inclusion of such lands in the schedule of lands opened to settlement by proclamation; and subsequent adverse claimants for said lands are bound to take notice of the occupancy and possession of the allottee.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) October 29, 1899. (C. W. P.)

The land involved in this case is lots 5, 6, 11, 12, and 13 of Sec. 9, T. 34 N., R. 3 W., Lewiston land district, Idaho, and was formerly embraced in the Nez Perce Indian reservation in Idaho.

The general allotment act of February 8, 1887 (24 Stat., 388-389), provides that at any time after lands have been allotted to all the Indians of any tribe as therein provided, or sooner, if, in the opinion of the President, it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, and it is provided that the lands so bought shall be disposed of to actual settlers, etc.

Under the provisions of this act an agreement, dated May 1, 1893, was made with the Nez Perce Indians in Idaho for the sale of their unallotted lands within the reservation, with certain exceptions. This agreement was ratified by the act of Congress approved August 15, 1894 (28 Stat., 286, 326); and the lands were declared to be open to settlement on November 18, 1895, by the proclamation of the President, dated November 8, 1895.

On December 6, 1895, Daniel Lee made homestead entry of lots 27 and 28 of Sec. 4 and lots 5, 6, 11, 12, 13 and 14 of Sec. 9, T. 34 N., R. 3 W.

The Commissioner of Indian Affairs, having informed the Secretary of the Interior that complaints were being made to Indian Agent Fisher, of the Nez Perce Agency, Idaho, by Nez Perce Indians, that their lands were being encroached upon by other allottees, or by adjoining settlers, and that the lands conveyed in their trust patents did not correspond with the original tracts which they had selected at the time allotments were being made, the Secretary of the Interior directed that in each instance where the lands which said Indians intended to enter have been entered by white settlers a hearing should be ordered between the Indians claiming the land and the white entrymen. In pursuance of this direction, on May 10, 1897, a hearing was ordered by your office between said Daniel Lee and Ignace Eneas Thomas, who some years before Lee's entry received a trust patent for lots 1, 2 and 3 of Sec. 10, and lot 3 of Sec. 11, T. 34 N., R. 1 W., Lewiston land district, Idaho, and claimed that lots 5, 6, 11, 12 and 13 of Sec. 9, T. 34 N., R. 3 W., embraced in Lee's homestead entry, had been surveyed and located as his allotment, but by some mistake lots 1, 2, 3, of Sec. 10, and lot 3 of Sec. 11, T. 34 N., R. 1 W., had been substituted.

A hearing was had before the local officers, who decided in favor of Lee. Thomas appealed. Your office reversed the decision of the local officers. Lee appeals to the Department.

The schedule of lands declared to be open to settlement under the homestead law by the proclamation of the President, dated November 8, 1895, showed that the land in controversy was part of the public domain and open to settlement and homestead entry.

At the hearing, Edson D. Briggs testified that as United States deputy surveyer he surveyed the land here in dispute as an allotment for Ignace Eneas Thomas, who is a minor and the son of Mission Thomas, a Nez Perce Indian, as directed by Special Allotting Agent

Alice Fletcher, and that he marked the allotment in red ink on his plat of the survey, which was still in his possession, that about sixty acres of the land are agricultural and forty acres grazing land, and that lots 12 and 13 and a portion of lot 5 were in cultivation at the time of his survey; that subsequently, in 1896, he was employed by the Indian Office to re-examine certain allotments in which it was alleged that errors existed, and that he found that the allotment of Ignace Eneas Thomas by his patent did not include the land that was selected "and graded" by Miss Fletcher and surveyed by him, but did include land in T. 34 N., R. 1 W., that he never surveyed the last mentioned land for Ignace Eneas Thomas, and that he did not know until he saw the patent that there was such an error in Thomas' patent.

Mission Thomas, the allottee's father, testified that he had part of the land in cultivation for fifteen years and part of the time at least forty acres, and that the land was fenced in at the time Lee made his homestead entry, and that he had hay stacked on the land at that time.

In an agreed statement of facts, signed by the attorneys for both parties, it is admitted that Lee went upon the land soon after his entry was made and has resided thereon ever since, and has made valuable improvements thereon, and has cultivated a considerable part of the land.

That the land in dispute was duly allotted to Ignace Eneas Thomas by the allotting agent of the United States, and that the land embraced in his trust patent was allotted to him by mistake, is not disputed. The evidence shows that the allottee, or his father, was in open notorious occupancy and possession of the land at the time Lee made homestead entry of the land, and Lee was bound to take notice of any rights that might exist in the occupant at the time he made his entry. I agree with you that the fact that the land was erroneously embraced in the schedule of lands declared to be open to settlement by the proclamation of the President would not defeat the allotment of the land to the Indian claimant.

Holding that Lee was bound to take notice of the rights of the allottee, it seems to be clear, whatever hardship may result from the loss of the land and the improvements thereon, that the Indian allottee is entitled to the land which was allotted to him long before Lee made his homestead entry.

The act of January 26, 1895 (28 Stat., 641), authorizing and directing the Secretary of the Interior, where a mistake has been made in a trust patent issued for Indian lands in the description of the land, to correct and rectify such mistake during the time the United States holds the title to the land in trust for the Indian allottee, you will, upon the cancellation of Lee's entry as to the land in question, cause the patent issued to Ignace Eneas Thomas to be corrected in accordance with the provisions of said act.

Your office decision is affirmed.

BRYANT ET AL. *v.* GILL ET AL.

Motion for review of departmental decision of July 27, 1899, 29 L. D., 68, denied by Secretary Hitchcock, October 23, 1899.

## RAILROAD GRANT—SELECTIONS UNDER ACT OF AUGUST 5, 1892.

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

Lands "classified as non-mineral" at the time of actual government survey, are of the class of lands subject to selection under the act of August 5, 1892, and the character of lands, so classified and selected, will not be investigated on indefinite charges, or protests alleging mineral locations made after survey and selection.

The provisions of paragraph 104 of the Mining Regulations are not applicable to selections made under said act.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) October 23, 1899. (E. J. H.)

The Department is in receipt of the appeal of the above mentioned railway company from your decision and order, dated February 19, 1898, to the local officers at Seattle, Washington, land district, requiring said company, under and pursuant to the provisions of paragraph 104 of the United States Mining Regulations, approved December 15, 1897, to give notice by publication and posting of its selection of certain lands therein described in T. 31 N., R. 10 E., in said district.

On March 24, 1894, the St. Paul, Minneapolis and Manitoba Railway Company, under authority of the act of Congress of August 5, 1892 (27 Stat., 390), filed list No. 5 for certain lands in said township, the same being then unsurveyed. On April 8, 1895, the plat of survey of said township was filed in the local office.

On August 8, 1895, the local officers forwarded to your office a protest signed by John Helan and others and dated "July, 1895," against the patenting of lands in townships twenty-nine to forty-one north of ranges eight to ten east, to the Northern Pacific Railroad Company or any other corporation, because of the alleged mineral character of the lands, as said lands were in an organized mining district, and locations had been made of mining claims by the said protestants. The local officers were advised by your office letter, dated August 20, 1895, that said protest would receive consideration in connection with lists of selections by the Northern Pacific Railroad Company of lands in said townships.

On September 9, 1895, and September 3, 1897, the Manitoba company amended its selections of March 24, 1894, by conforming the same to the lines of the public survey as required by the act of August 5, 1892, the lands selected not having been returned or denominated as mineral by the government survey.

On January 24, 1898, the local officers forwarded to your office a protest by James Bedal and others against the approval of list No. 25 of

selections by the St. Paul, Minneapolis and Manitoba Railway Company, embracing lands in Sec. 23, T. 31 N., R. 10 E., W. M., claiming that in the year 1897 they had located mineral claims on lands in said section. Thereupon your office instructed the local officers that the company would be required to give notice of its selections by publication and posting under paragraph 104 of the United States Mining Regulations. The railway company was notified thereof and has appealed from said order, urging that your office erred in holding that said provisions of the mining regulations are applicable to selections made by said company under the act of August 5, 1892.

By the terms of said act, the railway company, in consideration of its relinquishment of certain Dakota lands, was permitted to select "an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual government survey which has been or shall be made."

The foregoing language of the act of 1892, as to the lands that the railway company might select in lieu of the Dakota lands upon their conveyance back to the government, does not seem to be ambiguous.

The lands involved were not classified as mineral at the time of the government survey in 1895. The failure to designate lands upon the field notes and plat as mineral is to classify them as non-mineral. It is not customary to specifically designate thereon the agricultural lands as such. See *Savage v. Boynton*, 12 L. D., 612.

Relative to the protests filed; the first is too vague and indefinite. It alleges that mineral locations were made for some lands not described and the date of location is not given, so that it can not be said whether before or after the selection of the lands by the railway company.

The second protest alleges that mineral locations were made in 1897, long after the government survey, and the selection of the land by the railway company.

The lands here involved, as before stated, were not classified as mineral at the time of the government survey, and the selections made before survey were thereafter adjusted to conform to such survey. Being of the class subject to selection under the act of August 5, 1892, the allegations made in the protests are not sufficient to invalidate such selections, or warrant investigation as to the character of the land. Furthermore, the provisions of paragraph 104 of the mining regulations are not applicable thereto. The selections by the railway company will therefore be submitted for approval as the basis of patent, if upon further investigation no other and sufficient reason appears to the contrary.

Your decision requiring the railway company to give notice of its selection of said lands by publication and posting, etc., is reversed, and the protests, as far as they relate to the lands included in said selections are dismissed.





State of Wisconsin, to determine the practicability and cost of creating and maintaining reservoirs upon the headwaters of said rivers and their tributaries for the purpose of regulating the volume of water and improving the navigation of said rivers and that of the Mississippi river, and an estimate of the damage to result therefrom to property of any kind," and by the provisions of the acts of March 3, 1879, June 14, 1880, and March 3, 1881, appropriation was made for the completion of the survey above referred to and the construction of said reservoirs; and

Whereas, it appears by the report of the United States engineer having in charge the survey provided for by said act, which report was made to the Secretary of War, and dated Saint Paul, Minnesota, November 4, 1881, that certain vacant public lands of the United States in the State of Minnesota will be affected in the event of affirmative Congressional action upon said matter, and which action by the appropriations aforesaid has now been taken: Therefore,

I, Chester A. Arthur, President of the United States, do hereby direct that the following-described public lands in the State of Minnesota, being lands referred to in said report, be withheld from sale or disposal under the various acts for the sale and disposal of the public lands:

It appears that the attention of the company was called to the fact that the line of location shown upon said map crossed water reserve lands, and replying thereto it was stated that—

This company had supposed they would be treated as vacant lands in so far that right of way would be granted across them under the statute of March 3rd, 1875. Will you kindly request the Hon. Secretary of the Interior to render a decision on this matter, as in case they are not considered as vacant, it will be necessary to obtain a special act of Congress before this company can obtain a right of way across such lands.

Section 5 of the act of March 3, 1875 (*supra*), provides:

That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty-stipulation or by act of Congress heretofore passed.

Your office letter submitting this matter refers to the act of March 3, 1899 (30 Stat., 1214, 1233), making appropriations to supply deficiencies in the appropriations for the fiscal year ending June 30th, 1899, in which it was provided—

That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby.

and states that—

The words 'reservoir site' mentioned in the act have reference to those reserved by the act of October 2, 1888, as amended by the act of August 30, 1890 (26 Stat., 371-391). The lands reserved by the proclamation of November 28, 1881, were for a similar purpose, and if in the opinion of the Department the act of March 3, 1875, is applicable to these lands by virtue of the act of March 3, 1899, *supra*, it is recommended that the map be submitted to the Secretary of War for a statement as to whether any public interest will be injuriously affected by the granting of right of way over said lands; and if not, it is further recommended that the map be approved as to such tracts and the tracts that are vacant public lands subject to all valid existing rights.

While your office letter does not make a direct recommendation in favor of the approval of this map under the legislation referred to, in

the event that the War Department made no objection thereto, yet that seems to be the effect thereof.

After careful consideration of the matter it is the opinion of this Department that approval can not be given of that portion of the location shown upon the map which crosses the water reserve lands put in reservation by the proclamation of November 28, 1881.

It is clear that they are specially excepted from the operation of the act of March 3, 1875, by the provisions of section 5 of that act.

The act of March 3, 1899, was not intended to embrace this particular class of reserved lands. That act permits approval of any map location by the Secretary of the Interior "across any forest reservation or reservoir site when in his judgment the public interest will not be injuriously affected thereby."

This seems to limit the scope of the act to those reservations falling within the control or under the jurisdiction of the Secretary of the Interior. It is only over such lands that he could exercise his judgment.

The lands in question were selected by the War Department and are exclusively within the control of said department.

By the acts of September 10, 1888 (25 Stat., 473), and January 30, 1889 (25 Stat., 654), the water reserve lands within the State of Wisconsin were declared to be subject to the provisions of the act of March 3, 1875, *supra*. By these acts it was provided, however,

That the railroad companies availing themselves of this act shall, in addition to filing the maps now required by law to be filed, also file maps of definite location of their proposed lines of railroad, over said water reserve lands, in the office of the Secretary of War, and until the approval of said maps by the Secretary of War no right to occupy said lands shall vest in such companies; and no location shall be permitted which takes for right of way or stations lands needed for the use of the present reservoir system, or in the construction of dams or other works, or any proposed or probable extension of the same, or which will obstruct or increase the cost of the present or prospective reservoir system; or shall any railroad company be permitted to take material for construction from any of said reservoir lands outside the right of way granted herein.

In this legislation the lands in Wisconsin, having the same status of these here in question, are referred to as "water reserve land." These lands were put in reservation for the purpose of storing the water near the source of the Mississippi river, thus reducing chances for overflows in the Mississippi valley.

The lands reserved under the acts of October 2, 1888, and August 30, 1890, for reservoir sites, were for the double purpose of storing the surplus waters in the springtime, thus reducing chances of freshets and overflows, and also as a means of husbanding water to be used for irrigation. These lands fall properly under the control of the Secretary of the Interior and were evidently the class referred to in the act of March 3, 1899, as a "reservoir site."

As the "water reserve lands" must be excluded, the map of right of way presented does not otherwise show such a continuous line as should receive the departmental approval, and for this reason the map is herewith returned without approval.





of the grant to the Union Pacific Railway Company, opposite to and coterminous with the third hundred miles of the road west from Omaha.

In your decision you state that—

a map of the proposed road from one hundred miles west of Omaha to Salt Lake was filed June 25, 1865, and a map of the definite location of the third one hundred miles west of Omaha was filed Mch. 30, 1867, from which date the right of the company attached,

and moreover that as the executive order approving the reduction of the reservation to four miles square was issued on January 22, 1867, and the subsequent extensions were not made until 1870, the odd numbered sections in the portion of said reservation outside said four miles square, being free both at the date of the grant and at the date of definite location, passed to the company. As to the portion within said four miles square, you held that—

the lands having been reserved prior to the definite location, *in fact* prior to withdrawal on general route, and so remained until long after said definite location, were clearly excepted and excluded from the grant,

and that the same will be disposed of, as hereinbefore stated, under the provisions of said act of August 23, 1894.

In your office decision no mention was made of the filing of a map of definite location by the railroad company on July 23, 1866, but the attorney of said company in his brief calls attention to the fact that in a "statement showing land grants made by Congress to aid in the construction of railroads," etc., published by the Secretary of the Interior in 1888, it is shown that two maps of definite location as to this third hundred miles were filed, one on July 23, 1866, and the other on March 30, 1867, and says in relation thereto that "no reason is stated for filing more than one such map." He further says that—

there having been no change of route as between the two maps, there would certainly seem to be no good reason why the rights of the company to the lands in question should not be held to have attached as of date of filing the first of said two maps of definite location, to wit: July 23, 1866.

From an examination of the records and correspondence relating thereto, it appears that the second map, filed by the company on March 30, 1867, did not show any change of location of the line opposite the lands in controversy *but did show a change* of "the line on the western end, crossing the north fork of the Platte River some two or three miles from the confluence of the north and south forks of said river, instead of following up the north bank of the north fork." It also appears that the company asked that the map filed March 30, 1867, might be "substituted" for the former one, and that their reason therefor was because the road had been actually constructed upon the line shown by this corrected map.

Secretary Browning in transmitting the same to the Commissioner of the General Land Office said:

This map of the third hundred miles will be substituted for the copy of a map, bearing same date, now on file in your office, the original of which was filed as the location of said hundred miles,

and he further directed that it be placed on file in said office "as the basis for the adjustment of the land grant."

It is held by the Department and in the courts that the right of a company attaches immediately upon filing its map of definite location, but in the case of Oregon and California R. R. Co. v. Kirkendall (26 L. D., 593), it was said that—

where the limits of the grant have been readjusted under the amended location, and the changed limits have been recognized by the company and the government, it must be held, *as to the portion of the road so changed*, that the right of the company attached as of the filing of the amended location."

It was further said in that case, that—

in order to separate the lands opposite the unchanged portion of the location of 1871 from those opposite the amended location of 1882, it is directed that you establish a terminal line at the point of divergence, etc.

In the case under consideration the Department can not concur in your ruling that the right of the road attached on March 30, 1867, but holds that the company's right attached as to that portion of the road not changed, upon the filing of the first map on July 23, 1866.

It will be seen, however, by reference to the foregoing statement, that on September 27, 1863, a general order was issued by the commanding general of the department establishing the "Cottonwood Springs" reservation, and that the limits were fixed at fifteen by twenty miles; that subsequently said limits were extended to fifteen by thirty miles by similar orders, and on February 20, 1866, by general order from headquarters of the department at St. Louis, the name of said reservation was changed from "Cottonwood Springs" to "Fort McPherson," and that the Secretary of War approved the same on March 6, 1866. This approval by the Secretary of War was necessarily an approval by him of the military reservation as theretofore defined by the military authorities.

In the case of *Wilcox v. Jackson*, 13 Peters 496, the legality of the establishment of the Fort Dearborn military reservation at Chicago, Ill., was involved. It appeared that military orders for the establishment thereof had been approved by the Secretary of War but never formally by the President of the United States. The court held that—

the President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department; a reservation of lands made at the request of the Secretary of War for purposes in his department must be considered as made by the President of the United States.

In the case of *Wolsey v. Chapman*, 101 U. S., 755, the court after quoting the language of the foregoing decision said:

It follows necessarily from the decision in *Wilcox v. Jackson* that such an order sent out from the appropriate executive Department in the regular course of business is the legal equivalent of the President's own order to the same effect.

This doctrine seems to be thoroughly established by the United States supreme court decisions and under it the Department is bound



sented on August 13, 1894, covering the W.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  of Sec. 7, T. 120 N., R. 40 W., Marshall land district, Minnesota, for conflict with the selection made of such land by the Hastings and Dakota Railway Company.

This tract is within the indemnity limits of the grant made by the act of July 4, 1866 (14 Stat., 87), to aid in the construction of what was afterward known as the Hastings and Dakota Railway, and selection was made of this tract, as indemnity on account of said grant, in the list filed in the local office October 29, 1891.

In support of his homestead application, presented on August 13, 1894, Ross alleges that he established residence upon the land in the fall of 1892; that he bought the improvements then upon the land from one Edward Layland, who had settled thereon in June, 1891, and who was alleged to have been in possession of the land on October 29, 1891, the date of the filing of the list of selections, including this tract.

It appears that the company was given notice of Ross's application and the showing filed in support thereof, and it protested against the allowance of his application and asked for a hearing; no hearing has been held however.

Your office decision holds that as Ross does not claim to have been an actual settler on the land at the date of selection his subsequent settlement and improvement "could not give him a claim to the land superior to that of the company," and therefore reject his application, from which action he has appealed to this Department.

In the case of *Dunnigan v. Northern Pacific Railroad Company* (27 L. D., 467), it was held that a purchaser of the possessory claim and improvements of a settler upon land at the date of the filing of a railroad indemnity list of selections does not by such purchase strengthen the position resulting from his own settlement upon the land at a date subsequent to the railroad selection. It follows that as Ross settled upon the land subsequently to the filing of the railroad list of selections any claim under such settlement is subject to the right of the company under its selection. In his appeal, however, he urges that the selection list of October 29, 1891, is defective (1st) because no specific loss was designated as a basis for the selection of the particular tract here in question. It is not alleged that the lands specified as a basis for the selection in question were not actually lost to the grant, so that the contention made on this point is identical with that raised and considered by this Department in the case of said company against Grinden (27 L. D., 427), wherein it was said that—

The motion does not question that the several tracts set forth in the last column were actually lost to the grant. If they were all lost, and are otherwise a proper basis, there is really no good ground to be urged against the inclusion of them all, being in one section, in a single loss.

It is further urged as against said selection list—

That the basis selected in support of the selection attempted October 29, 1891, is wholly and absolutely without merit for the reason that Congress did not grant, and did not intend to grant, any right, title, or interest to or in the land in lieu of which

the land here in controversy is claimed as indemnity; but that said tract was intentionally excluded from the operations of the Hastings and Dakota Railway grant by the express language of the granting act of July 4, 1866 (14 Stat., 87).

The tracts alleged as a basis for the selection in question are said to have been lost to the Hastings and Dakota grant because included in the prior grant made to aid in the construction of what was afterward known as the St. Paul, Minneapolis and Manitoba Railway, main line.

The grant of July 4, 1866, under which selection was made of the land in question, contains the following proviso to the first, being the granting section of that act, namely:

*And provided further*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or other purpose whatever, be, and the same are hereby, reserved and excepted from the operations of this act, except as far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way shall be granted, provided the United States has yet in possession the title thereto.

The effect of the appellant's contention is that the above proviso not only excludes from the grant the lands covered by the proviso, but that no indemnity is allowable therefor.

In the case of *United States v. Missouri, etc., Railway* (141 U. S., 358, 366), the court had under consideration the act of July 26, 1866, making a grant to the State of Kansas for the use and benefit of the Union Pacific Railroad Company, southern branch, in which is found a reservation clause practically identical with that above quoted. In referring to said clause it was stated by the court that—

A reservation clause, such as the one in the act of 1866 first appeared in the act of Congress of September 20, 1850, granting lands to the State of Illinois in aid of the construction of what is now the Illinois Central Railroad. 4 Land Decisions, 575. Congress, by an act passed March 2, 1827, had made a similar grant in aid of the construction of the Illinois and Michigan Canal, with a reservation of each alternate section to the United States. In order that the canal might have the full benefit of the lands covered by the grant of 1827, the following clause was inserted in the act of 1850: '*And provided further*, That any and all lands reserved to the United States by the act entitled "An act to grant a quantity of land to the State of Illinois for the purpose of aiding in opening a canal to connect the waters of the Illinois River with those of Lake Michigan," approved March 2, 1827, be, and the same are hereby, reserved to the United States from the operations of this act.' 9 Stat. 466, c. 61; Cong. Globe, vol. 21, p. 900. The policy indicated by this reservation was pursued in all subsequent acts granting lands to aid in the construction of railroads; the only difference between the reservation clause in the act of 1850, and those inserted in subsequent acts, being that the former was special in its application to a particular previous grant, while each one of the latter class was general in its application to prior grants of every kind. The manifest object of the general proviso was to exclude from the particular grant all lands previously reserved to the United States for any specific object whatever, and, thereby, enable the government to accomplish those objects without confusion or conflict in the administration of the public domain, and thus keep faith with those to or for whose benefit prior grants were made. *Dubuque and Pacific Railroad v. Litchfield*, 23 How. 66; *Wolcott v. Des Moines Co.*, 5 Wall. 681, 687; *Homestead Co. v. Valley Railroad Co.*, 17 Wall. 153; *Wolsey v. Chapman*, 101 U. S., 755; *Litchfield v. Webster County*, 101 U. S., 773; *Dubuque, etc., Railroad v. Des Moines Valley Railroad Co.*, 109 U. S., 329; *Kansas Pacific Railway v. Dunmeyer*, 113 U. S., 629; *Bullard v. Des Moines, etc., Railroad*, 122 U. S., 167, 176; *Hastings and Dakota Railroad v. Whitney*, 132 U. S., 357.



$\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 10, T. 9 S., R. 38 E. Said application was rejected as to the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  and lot 1 of said Sec. 9, because of Hallinan's prior entry. She appealed to your office, alleging in an affidavit filed in support of said appeal that she settled upon the land in controversy in 1893, three years prior to any settlement by Hallinan, and had expended five hundred dollars in improving the same. Your office ordered a hearing, which was had December 17, 1897. As the result thereof, your office sustained the action of the local officers in rejecting Mrs. Heath's application. She has appealed to the Department.

The testimony taken at the hearing showed that her former husband, Charles John, went upon the land in 1889 or 1891; that she went upon the land at that time, but was absent for a large portion of the time for two or three years thereafter; that in 1892 Mr. John deserted her and abandoned the land; that in 1893 she established her permanent residence upon the land, and about the same time obtained a divorce; that on September 29, 1896, she was married to George Heath; that, with the assistance of her children and her present husband, she has continued to improve the tract in controversy, the improvements at the date of her application to enter being valued at between five and six hundred dollars; that she and her present husband, Heath, were residing on the land on March 4, 1897, when it became subject to entry.

The appellant contends:

That under the law of May 14, 1880, the date of entry must relate back to the date of settlement; and as the plaintiff settled on the land in controversy in 1893, when as a deserted wife she had a right to make such settlement, she is entitled to the fruits of that settlement; and her remarriage before her act of settlement could be perfected, by reason of the land being unsurveyed and not subject to entry until after her remarriage, did not alter her right acquired by her settlement.

Whatever rights Mrs. Heath might otherwise have had under the homestead law she lost upon her marriage (Rachel McKee, 2 L.D., 112; Martha O. Murray, *ibid.*). The appellant cites authority to the effect that after a sole woman or a deserted wife has made entry, her marriage will not invalidate such entry. The citations are not in point, inasmuch as in the present case there had been no entry nor application to enter by the appellant prior to her marriage. A person seeking to make entry must at the time of the application be a qualified entryman.

The decision of your office rejecting Mrs. Heath's application is therefore affirmed.

#### RAILROAD GRANT—LANDS EXCEPTED—PRE-EMPTION FILING.

##### OREGON AND CALIFORNIA R. R. CO.

An unexpired pre-emption filing existing of record at the date of the passage of the act of July 25, 1866, is a subsisting claim that excepts the land covered thereby from the operation of the grant made by said act.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) October 25, 1899. (F. W. C.)

An appeal has been filed on behalf of the Oregon and California Railroad Company from your office decision of June 24, 1899, holding



Your office, on November 21, 1895, ordered a hearing to determine the character of the following described lands, embraced in the Southern Pacific Railroad Company's indemnity list, No. 48, upon the protest filed by the said Tulare Oil and Mining Company alleging the same to contain valuable deposits of asphaltum, oil and gypsum, and that they are owners of mining locations thereon. The said land is all in township 30 S., R. 22 E., M. D. M. Visalia, California, land district, and is more particularly described as follows: the S.  $\frac{1}{2}$  (fractional) of Sec. 19; the E.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , the SE.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  of Sec. 21; the NW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$ , the E.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ , and the E.  $\frac{1}{2}$  of Sec. 27; and the SE.  $\frac{1}{4}$  of Sec. 29, of said township and range.

Pursuant to your office order, a hearing was had at the local office, on March 24, 1896, with both parties present and testimony was duly submitted.

The protestant introduced no testimony as to the N.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  of Sec. 21, the NW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  and E.  $\frac{1}{2}$  of Sec. 27, but withdrew their protest as to the same.

The railroad company submitted testimony to the effect that the said lands, as to which the protest was withdrawn, were agricultural and not mineral.

Upon considering the case, the local office recommended that the selection of the railroad company be canceled as to the SE.  $\frac{1}{4}$  of Sec. 19; E.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  of Sec. 21; and the SE.  $\frac{1}{4}$  of Sec. 29; and that the protest of the Tulare Oil and Mining Company be dismissed as to the N.  $\frac{1}{2}$  of Sec. 21; SW.  $\frac{1}{4}$  of Sec. 19; N.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  and E.  $\frac{1}{2}$  of Sec. 27, all of the said township 30 S., range 22 E., M. D. M.

On appeal, your office affirmed the action of the local office. The railroad company has appealed from your said decision, but the Tulare Oil and Mining Company has not appealed from that part of your decision which dismisses its protest as to the lands above described.

Since the case has been under consideration by the Department, on September 25, 1899, your office transmitted a motion for rehearing, filed in the local office by the Tulare Oil and Mining Company, on September 15, 1899, and that motion will be disposed of before proceeding further in the case.

Said motion alleges newly discovered evidence and asks that a rehearing be granted as to the N.  $\frac{1}{2}$  of Sec. 21; the SW.  $\frac{1}{4}$  of Sec. 19; the N.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  and E.  $\frac{1}{2}$  of Sec. 27, T. 30 S., R. 22 E., M. D. M., which lands are the same lands held to be non-mineral by your office decision (from which decision the protestants failed to appeal), and all of these lands, except the SW.  $\frac{1}{4}$  of Sec. 19 and S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of Sec. 21, are the same lands as to which the protestant withdrew its protest.

Without discussing the question whether or not a rehearing could properly be granted the protestant as to those lands against which its protest was withdrawn, it is sufficient to say, in disposing of the said

motion for rehearing, that the development relied on as the basis of said motion is not on the lands embraced in the said motion, but only on lands adjoining and in the vicinity thereof. The motion is accordingly denied.

While it is alleged by the protestant that the lands which are the subject of this appeal contain and are chiefly valuable for their deposits of asphaltum, petroleum oil, gypsum, and kaolin, the testimony is directed more particularly toward the discovery and production of asphaltum and petroleum oil.

This Department in the case of Union Oil Company (25 L. D., 351,) held that lands chiefly valuable on account of the petroleum deposits contained therein are only subject to entry under the mining laws and not subject to selection as indemnity under a railroad grant wherein "mineral lands" are excepted from the operation of the grant, and asphalt or asphaltum has for a very long period been recognized as a mineral deposit by this Department, and clearly comes within the doctrine announced by the Department in *Pacific Coast Marble Co. v. Northern Pacific R. R. Co.* (25 L. D., 233) that—

Whatever is recognized as a mineral by the standard authorities, whether of metallic or other substances, when found in the public lands, in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, must be treated as coming within the purview of the mining laws.

Accordingly, it must be held that lands chiefly valuable for their deposits of asphaltum are not subject to selection as indemnity under a railroad grant wherein mineral lands are excepted.

The question as to the character of the lands in controversy herein will now be considered.

Upon examination of the field notes of the surveys of these lands, on file in your office, it appears that deputy surveyor John Reed, who surveyed the parts of the township involved herein, except Sec. 21, in July, 1874, says, in the general description of the land surveyed (see California Field Notes, G. L. O., Vol. 80, page 573):

The part of the township which has been surveyed lies at the edge of the Tulare Plains and is noted for containing a number of sulphur and petroleum oil springs. In the NE. corner of section 29 is a large spring of petroleum; the oil of which in a hardened state has covered the surface of the ground to the extent of four or five acres, and to the depth of several feet. In sections 20 and 28 there are other springs of a similar character though smaller. The part of the township surveyed is valuable for nothing except the above mentioned springs.

Deputy Surveyor Howard B. Carpenter, who, in May, 1893, surveyed the lands in dispute, says, in his general description of the same (Vol. 2, pp. 300 and 383, California Field Notes, G. L. O.), that—

the land embraced in the portion of the township surveyed by me is rolling hills, with small valleys between them covered generally with grass and scattered sage brush. There are extensive beds of asphaltum and bituminous sand stone in secs. 19, 20, 28 and 29. There is one oil well in Sec. 29 and another being sunk in the same section. There are many mineral locations in these sections. . . . The Southern Pacific R. R. Co. have recently built a branch line from Bakersfield to the asphaltum beds, and have their terminus at Asphalto, in section 20.

These returns of the surveyors constitute a "mineral return" of the lands in controversy, except those in Sec. 21, which are not included in the mineral return, and while the surveyor's return as to the character of land constitutes but a small element of consideration when the question as to the true character of the land is at issue (*Aspen Consolidated Mining Co. v. Williams*, 27 L. D., 1), yet it is sufficient to cast the burden of proof. (*Magruder v. Oregon and California R. R. Co.*, 28 L. D., 174.) Hence as the lands, the subject of this controversy, except those in Sec. 21, are returned as mineral, the burden of proof is upon the railroad company, and upon a careful examination of all the evidence in the case, it is very clear that the railroad company has failed to successfully sustain this burden as to those lands embraced in the mineral return and held both by the local office and your office to be more valuable for mineral than agricultural purposes, to wit: the SE.  $\frac{1}{4}$  of Sec. 19, and SE.  $\frac{1}{4}$  of Sec. 29, T. 30 S., R. 22 E., M. D. M., and no sufficient reasons appearing for disturbing your office decision as to those lands, the same is hereby affirmed.

As to the lands situate in section 21, it appears that they were not returned as mineral lands in the surveys made thereof, hence the burden of proof in establishing the character of the lands situate in said section 21 and held to be mineral lands, to wit, the E.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  and the SE.  $\frac{1}{4}$ , is upon the mineral claimants, and upon a careful examination of the evidence submitted herein relative to said lands it is shown, as to their agricultural character, that while they are not suitable for raising agricultural crops thereon, yet they have some value as sheep grazing lands; and as to their value for mineral purposes it appears from the testimony of the mineral claimants themselves that no mineral of any quantity or value has been found on said lands. Some few pieces of asphaltum were found, but the principal result of what little prospecting and developing have been done is the finding of "indications" of mineral, and it can not be said that the indications found on these lands in section 21, of oil and asphaltum, demonstrate that there is a permanent deposit of those minerals which will pay to work. Accordingly, it must be held that the evidence herein fails to show that the said lands, to wit, the E.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  and the SE.  $\frac{1}{4}$  of said section 21, are more valuable for mineral than agricultural purposes, and your office decision is therefore hereby reversed as to the same.

As to the lands embraced in the withdrawal of the protest of the protestants, and held to be non-mineral by the local office and your office, to wit, the N.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  of Sec. 21; the NW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  and the E.  $\frac{1}{2}$  of Sec. 27, T. 30 S., R. 22 E., M. D. M., no evidence was introduced relative thereto by the protestants, and the evidence submitted by the Southern Pacific Railroad Company seems to warrant the conclusion that the lands have more value for agricultural or grazing than for mineral purposes. Therefore your office decision is affirmed as to those lands.



On August 4, 1898, your office replied to said letter of July 22, 1898, indicating the manner in which under the rules of practice appeal could be taken.

On August 23, 1898, Talbot, replying to your letter of August 4, 1898, asked for additional time within which to prepare his appeal and argument, and requested that the appeal and argument should apply also to certain other cases in which he claimed to be the purchaser of similar rights.

On September 16, 1898, your office, in response, informed Talbot that each case would require a separate appeal, and allowed thirty days from date of said letter within which to file appeals. He appealed in the case of his purchase from Haughawont, and exception is taken to the refusal of your office to accept notice of the assignment of the additional right, until there is filed in the local office having jurisdiction over the tract applied for, evidence of the assignment of the right and a formal application for the tract desired. The contention of the appellant is that this rule, or regulation of the Department, tends to diminish the value of the additional right granted the soldier under section 2306, Revised Statutes, and is in the nature of a restriction upon the right which is contrary to the spirit and meaning of said section. Without admitting the soundness of this contention, it is to be observed that in the case under consideration it is presented and urged by the purchaser of the soldier's additional right and not by the soldier himself, whose interest in the right has ceased. Such a purchaser certainly has no right to complain, so long as he is left free to prove his purchase and exercise the right under the regulations in force at the time of his purchase. Prior to the decision of the supreme court of the United States in the case of *Webster v. Luther* (163 U. S., 331), the Department had held the additional right granted by section 2306, Revised Statutes, to be a personal one, not transferable, and to be exercised only by a donee. The supreme court, however, in the case cited held the right to be transferable, and assignable, and recognized it as having the qualities of a property right, which the donee might dispose of as he saw proper.

Thereafter, departmental rulings and regulations in reference to the right in question were as nearly as possible made to conform to this ruling. Prior to this decision, to wit, on February 13, 1883 (1 L. D., 654), the practice of certifying the additional right, was discontinued. After the decision of the supreme court hereinbefore referred to, in the case of *Elijah Putman* (23 L. D., 152), the propriety of returning to the rule of certifying the additional homestead right was considered. It was therein held in reference to said right:

The soldier may obtain this right for himself, or sell it to another; it is not necessary to the exercise of either privilege, that the right be certified; no statute requires it, and good administration forbids it.

It will thus be seen that in every case where the soldier or sailor is



that on October 10, 1893, David N. Nelson was appointed legal guardian of said minor heirs, and making, substantially, the same allegations against the entry as were made in the original affidavit of contest.

A hearing was had, and upon the testimony adduced the local officers found in favor of Buford's heirs and recommended that the contest be dismissed. On appeal your office held that, while the facts warranted the conclusion that Buford made his entry in good faith and that it was his intention to make the land his home, and that if he had not been taken ill he would have done so, yet it appeared that he never in his lifetime established a residence on the land, and that while the heirs have not been in default as to cultivation and improvement, they have not as to residence cured the entryman's default by residing on the land, and reversed the decision of the local officers.

Buford's heirs appeal to the Department.

It may be admitted that Buford never established residence upon the land, but such default, had he lived, might have been cured by him, or it might have been cured by his wife, had she lived longer, but she died a few days after the death of her husband. There had been no forfeiture of the entry prior to the death of both parents, and the contest was not instituted until more than two years after their death, when the right to the land had vested in their infant children, and, in my judgment, these minor children were not required to do anything towards curing the default, if any existed. The fact of their being infant children and the death of their parents was all that was required to establish their right to the land and to a patent.

The supreme court, in the case of *Bernier v. Bernier*, 147 U. S., 242, 247, in construing sections 2291 and 2292 of the Revised Statutes, said:

The object of the sections in question was . . . to provide the method of completing the homestead claim and obtaining a patent therefor, and not to establish a line of descent or rules of distribution of the deceased entryman's estate. They point out the conditions on which the homestead claim may be perfected and a patent obtained; and these conditions differ with the different positions in which the family of the deceased entryman is left upon his death. If there are adults as well as minor heirs, the conditions under which such claim will be perfected and patent issued are different from the conditions required where there are only minor heirs and both parents are deceased. In the one case the proof is to extend to that of residence upon the property, or its cultivation for the term of five years, and show that no part of the land has been alienated except in the instances specified, and the applicant's citizenship and loyalty to the government of the United States; but in the other case, where there are no adult heirs and only minor heirs, and both parents are deceased, the requirements exacted in the first case are omitted, and a sale of the land within two years after the death of the surviving parent is authorized for the benefit of the infants. The fact of their being infant children and the death of their parents is all that is required to establish their right and title to the premises and to a patent.

Section 2292 was, in our judgment, only intended to give to infant children the benefit of the homestead entry and to relieve them, because of their infancy, from the necessity of proving the conditions required when there are only adults, or adults and minors, mentioned in the previous section, and to allow a sale the land within a prescribed period for their benefit.

Hensley's contest should be dismissed, and a patent issued to the minor heirs of the entryman.

Your office decision is accordingly reversed.

INDIAN HOMESTEAD—ACT OF JULY 4, 1884.

DELORME *v.* CORDEAU.

The word "located," as used in the act of July 4, 1884, is employed in the sense of *settlement*, and refers to a settler who is living on the land.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *October 30, 1889.* (C. J. G.)

April 13, 1897, Prosperé Cordeau made homestead entry No. 8784, for the S.E.  $\frac{1}{4}$  of Sec. 21, T. 161 N., R. 71 W., Devils Lake, North Dakota, land district.

May 29, 1897, Frank Delorme filed affidavit of contest against said entry, alleging:

That the said Prosperé Cordeau has made no improvements upon said land of any kind whatever, and that said land is improved and cultivated and has been improved and cultivated by deponent as an American Indian of the Turtle Mountain Chippewa tribe for a period of nine years; that deponent claims said land as an American Indian, and desires to file an Indian homestead thereon; that deponent has on said land the following improvements, to wit, twenty-two acres under cultivation, which I have sown to wheat, furnished by the government, for the past seven years, forty acres in hay land, which I have cut for same length of time. I built a log house twelve feet square, about eight years ago, which was stolen off the land. I am now living in a tent on the land with my family.

A hearing was duly had, at which both parties appeared, and upon the evidence submitted thereat the local officers rendered decision in favor of Delorme, on the ground that he has been in possession of the land in question under color of right for several years, thinking his title to be good. From this decision Cordeau appealed to your office.

August 22, 1898, your office reversed the decision of the local officers, finding that

the plaintiff has not and never has been an inhabitant of said land, and his possession, occupation, and use of the same at the time of and prior to said entry, were not such as to entitle him to the benefits of the act of July 4, 1884 (23 Stat., 96).

Delorme has appealed to the Department.

The record in this case discloses, among other things, that the plaintiff is a Chippewa Indian of the Turtle Mountain tribe and is borne on the rolls of the agency as such. He lives, or did live until after this contest was initiated, with his wife and two children on the Turtle Mountain Indian reservation four or five miles from the land in controversy. He owns a house there in which he has lived for two years, prior to which time he lived with his father on said reservation. He has claimed the land in controversy for eight or nine years and has culti-

vated about eleven acres every year that he "could get seed from the agency to sow it." He cut about forty loads of hay on the land each year. He had no crop there in 1896 but in 1897 after Cordeau's entry he sowed ten bushels of wheat and started to build a log cabin, which was not completed at the date of the hearing. When he did work on this land he went to his home on the reservation each night. He testifies that he was going to move on said land in the spring of 1897, "if the place had not been jumped," and that "I never filed upon this land because I was told we would have a big reserve and this land would be inside of it." He does not claim to have resided upon the land until after the date of Cordeau's entry, and at time of hearing was living thereon in a tent.

The defendant testifies that when he made his entry he was not aware that there were any improvements on the land embraced therein, that there were about eleven acres of plowing which were covered with "wild grass and foul weeds," and that there was no building on the land. About two weeks prior to the hearing he broke five or six acres of said land and has thereon a frame shanty twelve feet square. He sleeps on the land and boards with his father on an adjacent tract.

It is provided by the act of July 4, 1884, *supra*, under which the plaintiff applies to make an Indian homestead:

That such Indians as may now be located on public lands, or as may under the direction of the Secretary of the Interior, or otherwise, hereafter so locate may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States.

From what is set forth herein it is obvious that plaintiff has not shown himself entitled to make entry under the provisions of this act. He does not claim to have been "located" on the land prior to defendant's entry but merely alleges cultivation and improvement of a small portion thereof for the past eight or nine years. The word "located" as used in the act of July 4, 1884, is evidently used in the sense of settlement. Therefore, in order to avail himself of "the provisions of the homestead laws," under said act, and to defeat Cordeau's entry, it was necessary that Delorme should have been "located" on the land in controversy when said entry was made; which means, in other words, that he must have been a settler living on said land at that time. Not being so located your office properly dismissed Delorme's contest and held Cordeau's entry intact.

As six months had not elapsed since the date of defendant's entry he was not yet subject to the charge of non-compliance with the law in the matter of improvements, as made in plaintiff's affidavit of contest.

Your office decision is hereby affirmed.

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MORGAN ET AL. v. ANTLERS PARK-REGENT CONSOLIDATED  
MINING Co.

Motion for review of departmental decision of August 21, 1899, 29 L. D., 114, denied by Secretary Hitchcock, October 30, 1899.

## HOMESTEAD ENTRY—MINING CLAIM—APPLICATION.

## ELDA MINING AND MILLING CO.

A mineral application should not be allowed for land embraced within a prior subsisting homestead entry.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) October 30, 1899. (H. G.)

On June 13, 1896, Estella Gertrude Flint (now Estella Gertrude Johnson) made homestead entry for lots 13 and 14 of Sec. 4, and lots 28, 29 and 44 of Sec. 5, T. 15 S., R. 69 W., in the Pueblo, Colorado, land district. On March 20, 1899, this Department affirmed the decision of your office rejecting her application for an extension of time for one year within which to make payment for the said land under her commutation proof offered on September 27, 1897 (unreported).

After said homestead entry was made, and on September 30, 1896, the Elda Mining and Milling Company, a corporation organized and existing under the laws of the State of Colorado, filed mineral application No. 1926 for the Leslie E. Keeley and other lode mining claims in said land district, and on December 28, 1898, made mineral entry No. 1880, said land district, therefor. The delay in making the mineral entry was doubtless owing to the pendency of a number of adverse suits instituted in the local court by the owners of conflicting mining claims. A portion of the said Leslie E. Keeley lode claim lies in lot 14 of said section 4, T. 15 S., R. 69 W., covered by said homestead entry.

Your office on April 27, 1899, held that the said homestead entry being prior in date to the mineral application and entry, the said Elda Mining and Milling Company would be allowed sixty days from notice thereto within which to show cause why its said mineral entry should not be canceled as to its conflict with the said homestead entry.

In response to this rule the said company filed its unverified answer, made by its attorney, in substance, alleging: That the land adjoining the tract in question, and in its immediate vicinity, is mineral land and has been known to be valuable for mineral for many years; that the said location of the Leslie E. Keeley lode was based upon a valid discovery of mineral, was made long prior to the inception of any rights of the homestead entrywoman, and that this prior location of said lode mining claim, based upon a discovery of mineral in rock in place, constituted a reservation of the land as against a mere homestead entry which confers only an inchoate right; that in view of the facts that the surrounding land is occupied by mineral locations, and within the limits of a noted mineral belt, and as the location was made prior to the homestead entry, your office should have held the homestead entry for cancellation or cited the homestead claimant to show cause why her homestead entry should not be canceled to the extent of the conflict.

Your office, considering said answer to its rule *nisi*, on May 19, 1899,

held that it was error for the local office to allow the subsequent mineral application and entry in disregard of the fact that said lot 14, upon a portion of which it was laid, was covered by a prior homestead entry. Paragraph 49 of the Mining Regulations, approved December 15, 1897, is cited, wherein it is, in effect, provided that the local officers before receiving and filing a mineral application must ascertain that it includes no land which is embraced in a prior application for patent or entry. Your office further held:

The said erroneous allowance of the mineral application cannot operate to place the burden of proof upon the homestead claimant, nor is the certificate of location of the Leslie E. Keeley in itself evidence of the mineral character of the land in question (See 28 L. D., 177; Lindley on Mines, Sec. 379). Neither does the fact that the ground is situate in the Cripple Creek mining district and adjoined by numerous mining claims, justify an assumption that it is mineral.

Your office, therefore, adhered to its decision of April 27, 1899, and held the mineral entry for cancellation to the extent of its conflict with said homestead entry.

From these decisions the corporation making the mineral entry appeals. No argument in support of the appeal has been filed.

In a communication dated October 6, 1899, your office calls attention to the departmental decision of March 20, 1899, refusing to allow to the homestead entrywoman an extension of time within which to make payment and states that the homestead entry of Mrs. Johnson is in conflict with numerous pending mineral entries, the claimants to which are urging action in the matter. In compliance with the recommendation in your said advice, the case has been advanced from its order for consideration.

It is apparent that the mineral entry, to the extent that it conflicts with the existing prior homestead entry of Mrs. Johnson, was erroneously allowed by the local officers. The application for mineral patent should either have been rejected to the extent of such conflict, or notice should have been given to the homestead entrywoman for the purpose of affording her an opportunity to be heard. Her entry, existing of record at the date of the application for mineral patent, was notice to the world of a prior record appropriation and segregation of the land in controversy, and no further entry thereof could be lawfully allowed while her entry still existed of record.

Even if it be true, as now alleged, that the conflicting mining claim was located prior to the homestead entry, it is nevertheless equally true that the homestead entry was regularly allowed, in the absence of any claim of record in the local office at the time, as to any portion of the tract so entered. With the application to make homestead entry was filed the usual non-mineral affidavit, declaring that the land contained no mineral, and that no portion thereof was claimed for mining purposes, thus establishing *prima facie* the non-mineral character of the land covered by the homestead entry.

The certificate of location of the mining claim is not, of itself, evi-



recommended the cancellation of the entry, and upon appeal to your office, their action was affirmed, but upon a further appeal to this Department said decision of your office was reversed and the contest was dismissed. (*Labathe v. Robords*, 25 L. D., 207.)

Labathe filed a motion for review of said departmental decision, but the same was denied December 13, 1897 (25 L. D., 499).

Pending action on the motion for review, however, Labathe filed a new affidavit of contest, wherein he alleges—

that said land has been wholly abandoned by said Charles Love and by said E. M. Robords, curator of said Charles Love, and that neither said Charles Love nor said curator, nor any person, on behalf of them or on behalf of either of them, has settled upon or cultivated or improved or done any work upon or resided upon said land, at any time since the month of July, 1895, and that the little shanty or cabin that was erected upon said land in the spring of 1895 by Lyman M. Linnell, ostensibly for said minor but really not for said minor, has become and is uninhabitable and gone to decay by reason of neglect and abandonment of it. This contestant says that said land is wild and uncultivated and unimproved pine timberland and that no person has in any way cultivated or improved or resided upon or settled upon or worked up or in said land, at any time since the month of July, 1895, and that said land has been wholly abandoned by said Charles Love and by said E. M. Robords, his curator; and this contestant further says that no other house or improvements of any kind were ever placed upon said land, ostensibly or otherwise, in the interest of said Charles Love or of said E. M. Robords, curator; and this contestant further says that said Charles Love arrived at the age of twenty-one years being of full age in the month of August, 1896, fourteen months ago, and that at the present time he is of unsound mind and that said E. M. Robords is the curator of said Charles Love duly appointed as such curator by the probate court of Green county, Missouri, where said minor and said Robords reside, and now qualified and acting as said curator and that he was appointed said curator upon the ground that said Charles Love was at the time of said appointment, and is a person of unsound mind; and this contestant further says that said Charles Love and said Robords never resided in the State of Minnesota at any time during the four years last past and that they have lived in Green county, Missouri during the whole time;

Wherefore, this contestant says that said land has been wholly abandoned, ever since the month of July, 1895, by said Love and said Robords, curator, if ever any right was initiated therein prior to that time,—and this the said contestant is ready to prove at such time and place as may be named by the register and receiver, for a hearing in said case;

Notice of this contest was served on January 31, 1896, and after some continuances the case was heard by the register and receiver on July 13, 1898, all parties being represented by counsel. On September 9, 1898, the local officers found in favor of the contestant and recommended the cancellation of the entry. Robords appealed to your office, where, on April 3, 1899, a decision was rendered reversing the action of the local officers, dismissing the contest and holding the entry intact, and contestant has appealed to this Department.

The reason given by you for this decision is as follows:

This second contest affidavit is substantially the same as the first, and the Department having held that the law had been sufficiently complied with, the matter is *res judicata*.

The original affidavit of contest charged, in substance, that the

homestead entry was unlawful and fraudulent in that it was made by said Robords in collusion with said Linnell in pursuance of a corrupt agreement between them to secure title to the land for their own use and benefit. In the departmental decision hereinbefore referred to it was held that an agreement had been made by Robords with Linnell to sell him the land and that such agreement was in violation of the homestead law and fraudulent on the part of Robords, yet that this was a matter with which the minor had nothing to do; that he was in no sense a party to such agreement; that he knew nothing of it; and that as an attempted fraud or act of bad faith it could not be in any way imputed to him. The contest was therefore dismissed and the entry was sustained for the benefit of the minor.

The present affidavit of contest charges abandonment and failure to cultivate and improve the land since July, 1895, which are matters not considered or determined in the former departmental decision, and your office decision holding them to be so is therefore to that extent erroneous.

The record shows that Robords was appointed curator for said Charles Love, a minor, by the probate court of Greene county, Missouri, at its May term, 1894. It is expressly stated in the court's order of appointment that said Love was then a minor under twenty-one years of age, and the reasonable inference is that the curator was appointed for that reason.

The present contest affidavit sets forth that said Charles Love became twenty-one years of age in August, 1896, fourteen months before the filing thereof, and that at the time of the initiation of the contest he was of unsound mind.

Robords having been appointed curator for Love on account of the minority of the latter, the authority of such curator necessarily ceased upon the minor becoming twenty-one years of age, which, as the contest affidavit states, was in August, 1896, long before the initiation of the contest. Furthermore, the contest affidavit avers that Love is of unsound mind.

In view, therefore, of the contestant's own showing, said Charles Love, for whose benefit the entry was made, is over twenty-one years of age and of unsound mind, and it does not appear that any guardian or curator has been appointed for him on the ground of his insanity or since he became twenty-one years of age. Under these circumstances it must be held that the present contest proceedings have been irregular from the beginning, inasmuch as there could be no legal proceedings against said Charles Love or his estate if he is as alleged of unsound mind, and has no guardian or curator through whom his interests may be protected.

For these reasons the contest must be dismissed. It is accordingly so ordered, and the papers in the case are herewith returned.



The act of January 14, 1889 (25 Stat., 642), directed the appointment of commissioners to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the cession of their interest in all reservations in said State except the White Earth and Red Lake reservations and so much of those as should not be required to fill allotments provided for by said act and others. It was provided that the acceptance and approval of such cession by the President of the United States should

operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this act provided.

It was directed that, as soon as the cession should be obtained, all the Indians except those on Red Lake reservation should be removed to White Earth reservation, and that land should be allotted to those upon Red Lake reservation there, and to all others upon the White Earth reservation, with the proviso, however, that any Indian residing upon any reservation might in his discretion take his allotment upon the reservation where he should be living when the removal provided for should be effected, instead of being removed to White Earth reservation.

It was further provided that as soon as the cession was obtained and approved the land ceded should be surveyed and examined to ascertain upon what tracts pine timber was standing or growing, which tracts were to be termed "pine lands," while all other tracts were to be termed "agricultural lands." The "pine lands" were to be appraised and offered for sale at public auction to the highest bidder for cash, and all tracts remaining unsold after such public offering were to be sold at private sale at the appraised value thereof. The agricultural lands not allotted under said act nor reserved for the future use of the Indians, were, after thirty days' notice, to be "disposed of by the United States to actual settlers only under the provisions of the homestead law."

It was further provided:

That each settler under and in accordance with the provisions of said homestead laws shall pay to the United States for the land so taken by him the sum of one dollar and twenty-five cents for each and every acre, in five equal annual payments, and shall be entitled to a patent therefor only at the expiration of five years from the date of entry, according to said homestead laws, and after the full payment of said one dollar and twenty-five cents per acre therefor, and due proof of occupancy for said period of five years.

The money accruing from the disposal of said lands was, after deducting certain expenses mentioned, to be placed in the Treasury of the United States to the credit of said Indians as a permanent fund, which should draw interest at the rate of five per cent per annum, payable annually, for the period of fifty years after the allotments provided for by said act should have been made. The interest was to be paid to, or

expended for, said Indians annually in the manner specified in said act, and at the expiration of fifty years the permanent fund was to be divided and paid to all of said Chippewa Indians and their issue, then living, in cash and equal shares.

A commission was appointed as directed, which secured from the Indians a cession of lands for the purposes and upon the terms provided in said act, which cession was approved by the President of the United States. The lands embraced in Gray's application have been examined and each of the tracts returned as agricultural.

Gray's application, together with the purchase price and fees, was presented to the local officers, who refused the same. Your office also rejected said application, from which decision an appeal was taken to this Department.

It is admitted by counsel for Gray that from the date of the treaty of March 11, 1863, until the approval by the President of the United States of the agreement for a cession procured under the provisions of the act of 1889, this land was not subject to entry under article six of the treaty of 1855. It is, however, further claimed that immediately upon the approval of said agreement the Indian title and right of occupancy were completely extinguished and the land became subject to entry under said article six.

By the act of 1889 it was provided that these lands should be disposed of in a particular manner, and these provisions are couched in such language as to preclude the possibility of their disposal in any other way, in the absence of subsequent legislation authorizing such other disposition. The "pine lands" were to be sold for cash at not less than the appraised value, and the "agricultural lands" are to be "disposed of by the United States to actual settlers only under the provisions of the homestead law."

It is urged, however, that the right given to claimants by said treaty of 1855 is the result of a solemn compact between the Indians and the government, which neither party may violate by demanding or authorizing any disposition of said lands that would interfere with that right. To carry this contention to its logical conclusion would be to say that Congress could not make any provision for the disposition of any tract within the boundaries of these ceded lands until all the claims under said article of the treaty of 1855 shall have been satisfied. The statement of this proposition is a sufficient refutation of the claim.

The right given to such claimants could not attach to any particular tract of land until application was presented. It is in the nature of a grant of a specified quantity of land to be satisfied with certain larger boundaries. In the case of such grants the government is not bound to withhold from disposition all the lands within the outer boundaries until the grant shall have been satisfied by the designation of the particular quantity needed to satisfy the grant. It is sufficient if enough land be withheld to satisfy the grant. In this case it is admitted that

there is land ceded by the treaty of 1855, and yet undisposed of, sufficient in quantity to satisfy all claims that can possibly arise under said treaty many times over.

The decision of your office rejecting Gray's application is hereby affirmed.

In arriving at this conclusion it has not been necessary to consider or pass upon the evidence as to the applicant's qualifications under said article 6.

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MINING CLAIM--AMENDED ENTRY--JUDGMENT--RELINQUISHMENT.

CARRIE S. GOLD MINING CO.

A tract included in a mineral application, and in the notice given thereof, but not embraced in the entry on account of a defect in the chain of title, may be afterwards included within the entry, by way of amendment, if the defect in the title is cured.

A judgment rendered on stipulation between parties to an adverse proceeding is conclusive as to the right of possession, and the tract so awarded to an applicant may be properly included in his survey and entry.

An applicant for mineral entry may properly eliminate by way of relinquishment, or otherwise, any part of a location, not essential to its validity, without prejudice to his claim for the residue.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *November 1, 1899.* (E. B., Jr.)

This is an appeal by The Carrie S. Gold Mining Company, hereinafter for convenience called the company, from the decision of your office, dated June 14, 1898, in the matter of mineral entry No. 1554, made December 31, 1897, in the Pueblo, Colorado, land office, by the company for the Jessie May, Evening Star, and Bessie C. lode mining claims, survey No. 10,309.

The grounds set out in your office decision for denying the company's application to amend its entry so as to include therein the Baby P. lode mining claim, and for requiring it to show cause why the entry should not be canceled as to that part of the Bessie C. claim awarded the company by a judgment in an adverse suit, and for calling in question the regularity and validity of the relinquishment of a small part of the Evening Star claim, do not appear to be well taken.

The Baby P. claim was included in the company's application for patent and the notice thereof, but when the company made entry of the other claims there existed a defect in the chain of title to the Baby P., and for that reason only, it is alleged, that claim was not embraced in the entry. The defect having been cured in the meantime, the company, on March 9, 1898, made application to pay for the Baby P. and to have the same included in the entry.

The reasons given in your office decision for rejecting this application are that the entry as already made includes, as part of the Bessie C.

claim, that portion of the Baby P. which embraces its discovery shaft, and that such shaft seems, from its situation, to be on the Bessie C. lode, and there is no evidence of discovery of a vein or lode elsewhere in the Baby P. claim.

In view of the fact, as appears from your office decision, that your office was unable, from the data before it, to determine whether or not the area of the other three claims is correctly given in the certificate of entry, and that, as will appear hereinafter, the Department also recognizes the inadequacy of such data for that purpose, the finding as to the inclusion in the Bessie C. claim of that part of the Baby P. which embraces its discovery shaft is, to say the least, open to question. If such finding should be true, however, it would be no reason for rejecting the last named application. The locations of the Baby P. and Bessie C. overlap. The former, however, is the prior location, and in all the proceedings for patent, with the possible exception of the entry, that part of the overlap which embraces the Baby P. discovery shaft is shown and claimed as belonging to the Baby P., and hence, if embraced in the entry as heretofore made, its inclusion was evidently due to inadvertence and is error. Under the proceedings had it can only be included in the entry, if at all, as part of the Baby P. claim. The finding that the Baby P. discovery shaft seems to be on the Bessie C. lode is not supported by the evidence. The survey shows that such shaft is several feet to the right of the supposed Bessie C. lode line. No sufficient reason appearing why application to include the Baby P. in the entry should not be allowed, it is hereby directed that the same be allowed and the entry amended accordingly.

The refusal of your office to recognize and give effect to a judgment rendered December 30, 1897, pursuant to a stipulation between the parties, in an adverse suit by the company against the owner of the Tiger lode mining claim, survey No. 10,055, whereby a small tract of the Bessie C. claim abutting on the southerly end line thereof was awarded to the company, was erroneous, for reasons fully set out in the case of Stranger lode (28 L. D., 321). See also the case of Greater Gold Belt Mining Company (28 L. D., 398). The judgment being conclusive as to the company's right of possession to such tract, it was properly included in its survey and entry as part of the Bessie C. claim. The southerly end line of that claim, established so as to embrace that tract, is therefore properly placed in the survey, and it was error to require such end line to be established at another point, as was done in your office decision.

The Department is unable to discover any reason for questioning the validity or regularity of the relinquishment to the United States executed March 30, 1897, by the company "in favor of survey No. 10,769, Grover Cleveland lode," of a certain tract, containing .002 of an acre, as part of the Evening Star claim. The relinquishment runs directly to the United States; and whether such tract shall or shall not inure



thirty days thereafter commenced a suit in the district court of Juab county, Utah,<sup>9</sup> to determine the right of possession to the ground in conflict, which suit was dismissed by the court upon the motion of the defendants and upon a showing made by them that said claim is situated in Utah county, and not in Juab county, and because the court was for this reason without jurisdiction.

April 7, 1898, the said adverse claimants filed a protest against the issuance of patent for the Salvator claim, alleging that the requirements of section 2325 of the Revised Statutes and the regulations of the department thereunder had not been complied with, because of the erroneous statement contained in the field notes of survey, application for patent and the posted and published notices thereof that said claim is situated in Juab county, and that by reason of such erroneous descriptive statement the adverse claimants had been misled and induced to bring the suit upon their adverse claim in Juab county, and that by reason of such erroneous and misleading description and the filing of the suit in Juab county induced thereby, the adverse claimants had been deprived of their statutory right to assert an adverse claim.

The applicant for patent having been inadvertently permitted by the local officers to make an entry of the claim after the filing of said protest, the papers were forwarded to your office, but before action thereon the protest was withdrawn. August 2, 1898, your office, considering the matter *ex parte*, held that the published notice of the application for patent was not good, and that the applicant company would be required to procure an amended survey of said claim and give a new notice of the application for patent therefor by posting and publication. September 8, 1899 (29 L. D., 154), upon the appeal of the company to the department, the decision of your office was affirmed.

The company has filed a motion for a review of said departmental decision presenting no new questions, but assigning as error the ruling of the department that said notice as a whole is not sufficient.

Upon a careful examination of this motion and a reexamination of the record, it is still believed that the notice given of the application for patent in this case is fatally defective. Regulation 29 of the mining regulations approved December 10, 1891, in force at the time the notice was given, regulation 44 of the mining regulations approved December 15, 1897, and regulation 44 of the mining regulations approved June 24, 1899, and now in force, all provide that the notice of an application for patent for a mining claim shall give the county in which the claim is situated. When the Sioux Consolidated Mining Company advertised the Salvator claim as being located in Juab county, a person asserting a right to a mining claim in another and different county had a right to rely upon this statement in the company's published notice. Conceding that the notice, taken as a whole, showed the claim to be in Utah county, the statement therein that it was in Juab county may have operated to stop further inquiry by persons having conflicting claims in

Utah county. The notice was especially deceptive in this case in view of the fact shown by the record that the western boundary of the Savior claim is only a few hundred feet from the eastern boundary of Juab county, and that the location notice of said claim and the evidences of transfer of the possessory title thereto are all of record in Juab county, so that a statement in the notice which followed and corroborated these evidences of the situs of the claim would naturally be accepted as correct without extended inquiry. It is argued that the notice, taken as a whole, was sufficient to put a man of ordinary diligence and prudence having a mining claim in the neighborhood upon inquiry, but the vice of a ruling which would admit this contention would be aptly illustrated by the facts of this case. The adverse suit of Wright *et al.* was brought in the county wherein the notice in specific terms fixed the situs of the claim. These adverse claimants were misled by it, and as a result thereof lost their opportunity to assert an adverse claim in the only way provided by law, and the record shows that the applicants for patent took advantage of their own mistake to deprive the adverse claimants of a legal right. There is now no adverse claimant protesting against the issuance of patent herein, but it does not follow that there would not be had proper notice been given.

Giving due consideration to the opinion of the supreme court of Montana in the case of Metcalf *et al. v. Prescott* (25 Pacific Reporter, 1037), it is believed that the decision under review should not be disturbed.

The motion is denied.

RAILROAD GRANT— STATE ACT OF MARCH 1, 1877—RELINQUISHMENT.

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

A patent issued by the State on account of the Manitoba grant, prior to the passage of the State act of March 1, 1877, is no bar to the State relinquishing thereunder a tract embraced in such patent for the benefit of a settler, if at the passage of said act the company had not earned title to said land.

The Northern Pacific company took nothing by the decree of the United States supreme court (139 U. S., 1), in its favor against the St. Paul and Pacific, as to lands properly relinquished by the State under said act prior to the institution of said suit.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) November 3, 1899. (F. W. C.)

With your office letter of September 18th last was forwarded the petition of Carl Fogelberg praying a reversal of departmental decision of October 26, 1889 (9 L. D., 509), and the reinstatement of his homestead entry covering the E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  and the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 11, T. 135 N., R. 43 W., Fergus Falls land district, Minnesota. This tract is within the indemnity limits of the grant made to aid in the con-

struction of the St. Vincent Extension of the St. Paul, Minneapolis and Manitoba Railway, was selected on account of said grant November 25, 1873, and was patented to the State on account of said grant January 14, 1875. On June 23, 1880, the governor of the State, assuming the right to do so under the act of March 1, 1877, relinquished the land to the United States in favor of Fogelberg. In the matter of the controversy that thereafter arose between Fogelberg and the St. Paul, Minneapolis and Manitoba Railway Company this Department, on December 19, 1888 (unreported), directed the allowance of Fogelberg's application covering this land. Thereafter, the railway company claiming that the said act of March 1, 1877, did not affect this land, the case was reviewed in departmental decision of October 26, 1889 (9 L. D., 509), wherein the contention of the company was sustained and Fogelberg, who had in the meantime, to wit, January 15, 1889, been permitted to complete homestead entry for the land, was allowed ninety days within which to show cause why said entry should not be canceled. The report made in your office letter forwarding the application now under consideration details the proceedings had under said decision resulting in the cancellation of Fogelberg's entry. It further appears from the said report that this tract was involved in the controversy between the St. Paul and Pacific Railroad Company, now known as the St. Paul, Minneapolis and Manitoba Railroad Company and the Northern Pacific Railroad Company, resulting in the decision of the supreme court dated March 2, 1891 (139 U. S. 1), by which the decree of the lower court, awarding the tract in question to the Northern Pacific Railway Company, was affirmed.

In the affidavit filed in support of the application for reinstatement of Fogelberg's homestead entry he alleges that he settled upon this land in January, 1876, and that he has since continuously resided thereon and improved the land to the value of \$1,500.

Under the state of facts hereinbefore detailed it becomes material to inquire, first, as to whether the Manitoba Railway Company, or its predecessors, had earned the title to this land prior to the passage of the act of March 1, 1877. It had been patented to the State January 14, 1875, on account of the railroad grant, and the State had conveyed it to the company prior to March 1, 1877, but, unless the company had entitled itself to the land prior to the last-named date, it became subject to the provisions of the State act under which the governor reconveyed the land to the United States for the benefit of Fogelberg. As the governor's relinquishment or reconveyance was prior to the suit by the Northern Pacific Railroad Company against the St. Paul and Pacific company, the Northern Pacific Railroad Company took nothing by reason of the decree against the St. Paul and Pacific Railroad Company, if the governor's relinquishment or reconveyance was effective in passing the title of the St. Paul and Pacific company back to the United States.

In the case of *Ellingson v. St. Paul, Minneapolis and Manitoba Railway Company*, on review, 26 L. D., 582, it was held that (syllabus)—

The act of March 1, 1877, of the State legislature of Minnesota, providing that the railroad company taking the benefits thereof should not acquire any title or right to any land to which "legal and full title" had not theretofore been perfected, and to which there was an existing settlement claim, contemplated in the use of the words "legal and full title," a perfect or complete title which could not be successfully assailed; hence a conveyance of lands by the State to the company in excess of the amount to which the company was then entitled, and prior to the passage of said act, is no bar to the State's reconveyance to the United States of a tract embraced therein for the benefit of a settler as provided by said act.

In said decision, in referring to Fogelberg's case, it was said:

In the Fogelberg case, however, the land was in the indemnity limits and whether opposite constructed or unconstructed road at the date of the act of 1877 is not stated in the decision.

Upon inquiry at your office it is learned that the land in question was opposite unconstructed road on March 1, 1877, and that what was said in the decision in the *Ellingson* case relative to the rights of the St. Paul and Pacific company to the land there in question, applies equally to the tract claimed by Fogelberg. It follows that the St. Paul and Pacific Railroad Company did not have "legal and full title" in the land claimed by Fogelberg on March 1, 1877, and, as a consequence, the title which passed out of the United States by the patent of January 14, 1875, was restored by the reconveyance of the governor of the State executed in 1880.

It but remains to consider whether the Northern Pacific Railroad Company has such claim to this land as prevents the reinstatement of Fogelberg's homestead entry. From what has been said it is apparent that it took nothing by reason of the decree against the St. Paul and Pacific company, as the company had no title whatever in the land either at the date of the decree or at the time when the suit was commenced.

The land is within the thirty miles or first indemnity belt of the grant for said Northern Pacific Railroad Company and was included in the list of selections filed by that company July 8, 1885. Following the decree referred to, it filed a further list of selections, including this tract, and specified as a basis for this tract land claimed to have been lost to its grant to the east of the terminus established at Duluth, Minnesota.

Upon the record it would be accorded the status of a claimant to the land by reason of its indemnity selections, and as thus presented the conflicting claims of Fogelberg and the Northern Pacific Railroad Company are of such a character as to bring the case within the act of July 1, 1898 (30 Stat., 597, 620), and the regulations of February 14, 1899 (28 L. D., 103), thereunder, and it will be disposed of under said act, if after due notice the Northern Pacific Railroad Company specifies a new and sufficient basis for its selection of this land in lieu of that given to the east of the terminal limit.



It appears from the evidence that on the 18th day of October, 1888, the Sioux City and St. Paul Railroad Company contracted to convey said quarter section, "less right of way of C., M. & St. P. Ry.," to C. H. Bishop for \$1,540, upon which \$160 was paid at date of contract, the balance to be paid in ten annual instalments of \$138 each with accrued interest. Bishop made no further payment, but some time after his said agreement with the company he assigned his interest in said contract to O. M. Barrett, his father-in-law, but failed to endorse thereon his said assignment.

September 23, 1892, O. M. Barrett transferred, by assignment on the back, all his "right, title, interest and claim in and to the within contract" to Edward E. Campbell, the claimant herein, the consideration named being \$1,644. Thereafter, to wit, September 25, 1893, in order to complete the chain of title, the transfer of C. H. Bishop was procured, duly executed, and attached to the original contract. In said assignment the consideration named is one dollar.

Campbell has paid about one half of the amount of the consideration (\$1,644), and has improved the land to the extent of about \$600, and has paid the taxes since his purchase from Barrett.

There is nothing in the record tending to impeach the good faith of Bishop in entering into the contract with the company, nor is there any evidence tending to show that the original contract was changed or modified, as in the case of *Olsen v. Traver* (26 L. D., 350); nor does it appear that at the date of Bishop's purchase there was any settlement claimant for this tract, and since said purchase it has been in the exclusive possession of Bishop or one of the assignees of his right.

At the date of Campbell's purchase he was in possession of the tract as a tenant of Barrett.

The objections raised by counsel for the homestead claimants against the proof offered by Campbell are substantially the same as those which were considered and decided in the case of *Schneider v. Linkswiller et al.*, 26 L. D., 407. In the case at bar, however, there is the additional contention that, admitting that Bishop was a purchaser in good faith from the railroad company, Campbell can not be so considered, because his purchase was not made until 1892, after a decree had been rendered by the United States circuit court declaring the title to the tract to be in the United States.

Section 4 of the statute of March 3, 1887, says that lands

which have been sold by the grantee company to citizens . . . the person or persons so purchasing in good faith, *his heirs or assigns*, shall be entitled to the land so purchased, etc.

The plain interpretation of this is, that the right so bestowed upon a good faith purchaser (that is, a purchaser without knowledge of the failure of title in the company,) is a property right which would descend to his heirs or vest in his assigns, as any other property. It is only necessary, then, to inquire as to whether Bishop was a purchaser in good

faith, and whether Campbell at the time of his application was the *bona fide* assignee of the right that passed to Bishop under said act. The term *bona fide*, as used in the last sentence, means a real and not a fraudulent or sham purchaser.

The evidence leaves no doubt as to the good faith of Bishop in his purchase from the company, and is positive and undisputed as to the purchase of Campbell being a real purchase for value.

The history of the claim of the Chicago, Milwaukee and St. Paul Railway Company, briefly stated, is as follows:

The grant to the State of Iowa, made May 12, 1864 (13 Stat., 72), in aid of the construction of two lines of railroad finally became vested in the present claimant (Chicago, Milwaukee and St. Paul Railway Company) and the Sioux City and St. Paul Railway Company. The lines crossed in O'Brien county, so that certain lands therein came within the common limits of the two grants. A legal controversy arose between these two companies as to which of these roads was entitled to the lands within these common limits. The Chicago, Milwaukee and St. Paul Railway Company claimed a priority by reason of being the first to locate its line of road through this county, while the Sioux City and St. Paul Company claimed priority by reason of having first constructed its road through these overlapping limits. By the decision of the supreme court (117 U. S., 406), it was adjudged that each of these roads was entitled to a moiety of the lands in dispute. Under this decision commissioners were appointed to make partition of these lands between the two claimants, and it happened that sections and parts of sections awarded to one of these roads were crossed by the road bed of the other. In the case now being considered, the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 31, the S.  $\frac{1}{2}$  of Sec. 33, and the S.  $\frac{1}{2}$  of Sec. 35, T. 97 N., R. 42 W., was awarded by the commissioners to the Sioux City and St. Paul Company, and the right of way of the Chicago, Milwaukee and St. Paul Company passed through these several subdivisions, the said right of way covering, in the aggregate, 25.80 (not 25.26, as stated in your office decision) acres of the land set apart to the former company. By arrangement between the companies, it was mutually agreed to exchange deeds conveying the right of way to either company where its road bed crossed the lands set apart for the other, and under that agreement the claimant herein purchased and received a warranty deed from the Sioux City and St. Paul Company for the 25.80 acres above described. This deed was executed and delivered February 28, 1887, before any action had been taken by the government to regain the title to this land. It is this land so acquired that the Chicago, Milwaukee and St. Paul Railroad Company now asks to have patented to it, under the provisions of the said act of March 3, 1887. The record leaves no doubt of the purchase having been made in good faith and in the belief that the title to the land conveyed was in the grantor.

This narrows the inquiry to the question, is the Chicago, Milwaukee

and St. Paul Railroad Company entitled to the benefits of the statute of March 3, 1887? This question was affirmatively decided in the case of *Daily v. Marquette, Houghton and Ontonagon R. R. Co. et al.* (19 L. D., 148), cited in your office decision, wherein it was held, quoting from *Louisville R. R. Co. v. Letsen* (2 How., 497)—

that a corporation created by and doing business in a particular State is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State for the purposes of its incorporation, capable of being treated as a citizen of that State as much as a natural person,

and in contemplation of law is a citizen of the United States and entitled to the remedy provided by the 4th section of the act of March 3, 1887.

In *Union Colony v. Fulmele et al.*, 16 L. D., 273, it was held that under the 5th section of said act patent may issue to the purchaser for the amount of land he may make payment for to the United States, without respect to the acreage embraced therein, even though it be less than a legal subdivision; that the provisions of the homestead and pre-emption laws, as to the quantity of land to be entered, do not apply to lands purchased under the act of March 3, 1887. Applying the reasoning in said case to the case at bar, patent may issue, containing proper recitals and descriptions, to the land herein claimed by the Chicago, Milwaukee and St. Paul Railroad Company.

The decision of your office is affirmed. The papers in the case are herewith returned.

It should be noted that in this record the claim for right of way presented by the Chicago, Milwaukee and St. Paul Railroad is not confined to the quarter section in dispute between the individual claimants, but extends into two other sections. All these claims were considered at the hearing and were all forwarded in one record, and inasmuch as evidence at the hearing was adduced establishing the claim of the said company to its right of way through all these tracts, and no objection was raised to the grouping of these several claims, they have all been herein considered and adjudicated.

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HOMESTEAD ENTRY—SUCCESSFUL CONTESTANT—MARRIED WOMAN.

MC GUIRE *v.* ROGERS.

A preferred right of homestead entry can not be secured through a contest instituted by a single woman, if she marries prior to the exercise of said right.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) November 9, 1899. (J. L. McC.)

Hattie J. Rogers (formerly Hattie J. Edmonds) has appealed from the decision of your office, dated February 28, 1898, in the case of Joseph S. McGuire against said Rogers, holding for cancellation her



portion of the grant by act of July 27, 1866 (14 Stat., 592), to the Atlantic and Pacific Railroad Company (indemnity limits), forfeited to the United States by the act of July 6, 1886 (24 Stat., 123), by which act of forfeiture "Congress . . . . determined what should become of the lands forfeited. It enacted that they be restored to the public domain." *United States v. Southern Pacific Railroad Company* (146 U. S., 570, 607); *United States v. Colton Marble and Lime Company*, and *United States v. Southern Pacific Railroad Company* (id., 615); *Southern Pacific Railroad Company v. United States* (168 U. S., 1). It is also within the boundaries of the San Gabriel forest reserve, created by President's proclamation of December 20, 1892 (27 Stat., 1049), which proclamation excepts from the force and effect thereof—

all lands . . . . upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired.

The plat of the survey of said township was filed in the local office at Los Angeles, California, February 28, 1894.

For further necessary preliminary statement, it appears from decisions and orders of the Department, from informal inquiry in your office, and from an examination of the records and files thereof, that on March 24, 1893 (16 L. D., 317-318), the Department issued an order instructing your office to take such steps as were necessary to restore said forfeited lands "to settlement and entry;" that this order was supplemented by departmental order of July 15, 1893 (unreported), containing more specific instructions to your office on the same subject, but that before any final or decisive step was taken by your office in the matter the Department on November 8, 1893 (unreported), because of the fact that said lands were involved in a suit then pending between the United States and the Southern Pacific Railroad Company, and because of a suggestion from your office that the proposed opening of said lands to entry be deferred until a decision has been rendered in said suit, revoked the instructions contained in said departmental orders of March 24, and July 15, 1893. The matter stood thus until May 3, 1898, when the Department approved instructions (26 L. D., 697), to the register and receiver at Los Angeles, California, that the restoration of said forfeited lands to entry be proceeded with, excepting as to "the lands lying within the San Gabriel timber land reserve," and directed as to these lands, that "any claims therein, initiated prior to its creation, which was by proclamation of the President, December 20, 1892, will upon presentation receive due consideration;" and it appears that pursuant to said instructions the local officers published a notice that claims for lands in said reserve could be presented on and after September 6, 1898.

Some time between September 8, 1898, and November 4, 1898, George L. Turk filed homestead application for the above described land, which was allowed November 4, 1898. Final proof on this entry was

submitted January 10, 1899, and final certificate issued January 19, 1899.

April 20, 1899, your office held the entry for cancellation for the stated reason that Turk failed to place his claim of record within the statutory period.

The final proof upon this entry shows that Turk settled and established his residence upon the land in controversy "in the fall of 1891," but in his application to enter he states under oath that he "settled upon said land in December, 1891," and this is corroborated by two witnesses, who aver personal knowledge of the facts. His application to enter and the papers accompanying the same were all sworn to before a United States commissioner, September 7, 1898, and this same United States commissioner swears that he mailed the application papers to the local officers, September 8, 1898, together with a draft for the entry fees, but the application was not stamped "filed" in the local office until November 4, 1898, the day the entry was allowed.

The "statutory period within which to make an entry or filing of record," referred to in the excepting clause of the said proclamation creating the San Gabriel forest reserve, is three months from the date of settlement in case of surveyed lands in case of unsurveyed lands three months from the date of the receipt at the district land office of the approved plat of the township survey. (Section 3 act of May 14, 1880, 21 Stat., 140, 141; sections 2265 and 2266 Rev. Stat.) Turk's settlement was upon unsurveyed public lands of the United States subject to such settlement, and at the date of the proclamation this land was still unsurveyed and the statutory period within which to make an entry thereof of record had not even begun to run, and it appearing that he had previous to that time made and then maintained a valid settlement thereon pursuant to law, the reservation was not operative as against such settlement claim.

Assuming for the sake of the argument but not deciding that ordinarily the President's proclamation creating said forest reserve would have been such an adverse claim to the land involved as to compel Turk to place his claim therefor of record within three months from the filing of the township plat of survey, to protect his settlement right as against the government, still, because of the fact that opportunity to make an entry was not given until September 6, 1898, he can not be held guilty of laches in failing to file his application before that time. This land has been opened to settlement by the forfeiture act, but in the course of the administration of that act by the land department it was not restored to entry in the sense that an application therefor would be received at the local office until September 6, 1898. Without reference to the exact date when Turk's application to enter was received at the local office, it having been received within a reasonable time and within less than three months after September 6, 1898, and it appearing that he has resided on and cultivated the land in accordance with law



June 20, 1896, Samuel Burnside *et al.* applied for patent for the Mary Navin lode. This application excluded that part of the land in conflict between the Hibernia and the Mary Navin which lies south of the south line of the Tiva placer as originally surveyed, but included the land in conflict north of that line, the latter being the land which was excepted in the Hibernia application as in conflict with the Tiva placer and afterwards relinquished by the Tiva placer. No adverse was filed by the Hibernia within the period of publication.

May 25, 1897, the register issued final certificate for the Mary Navin, excluding from the purchase that portion of the ground designated as excepted in the application for patent, but when the matter come before your office said entry was suspended to await the final disposition of the suit now pending before the supreme court of Colorado.

From the above summary it appears that the land in conflict between the Tiva placer, the Hibernia, and the Mary Navin was first applied for by the Tiva placer and no adverse was filed by the Hibernia during the period of publication. The Hibernia application, filed subsequent to the Tiva placer application, expressly excluded said ground. The Mary Navin, however, filed an adverse against the Tiva placer within the period of publication and as a result of this adverse the Tiva placer relinquished the land in question. The Mary Navin application for patent covered said ground, publication was made in its behalf and again no adverse claim was filed by the Hibernia. The Hibernia having failed to adverse both the Tiva placer and the Mary Navin, as to the ground covered by the latter's entry, the Hibernia has no standing before the Department, as an adverse claimant or otherwise, such as to warrant the suspension of the Mary Navin's entry to await the result of the suit by the Mary Navin against the Hibernia.

Your office decision is accordingly reversed and mineral entry No. 1228 will be passed to patent if found to be regular in all respects.

#### APPEAL—MINING CLAIM—ANNUAL EXPENDITURE—SECTION 2324 R. S.

##### P. WOLENBERG ET AL.

An order of the General Land Office directing a hearing, though generally not appealable, will be reviewed by the Department, when brought to its attention by appeal or otherwise, if it is made to appear that said order involves matters which the Land Department can not inquire into, or is contrary to law, or the settled rulings of the Department, or is otherwise palpably erroneous.

The annual expenditure of one hundred dollars in labor or improvements, required by section 2324 R. S., is solely a matter between rival or adverse claimants for the same mineral land, and goes only to the right of possession, the determination of which is committed to the courts and not to the Land Department; a hearing therefore, involving such matter, should not be ordered by the General Land Office.

The statutory assumption declared in section 2325 R. S., that no adverse claim exists, where no such claim is filed in the local office during the period of publication, has relation only to adverse claims which might have been made known at the local office during that time.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *November 13, 1899.* (A. B. P.)

December 2, 1896, P. Wolenberg *et al.* filed in the local office an application for patent for the Mascot and Pennsylvania lode mining claims, survey No. 10825, in the Cripple Creek mining district, Pueblo, Colorado. Notice of this application was duly posted and published, but no adverse claim was filed during the period of publication, which ended February 3, 1897. The applicants did nothing more in the way of prosecuting this application for patent until November 3, 1898, when they filed in the local office the proofs of the posting and publication of the notice of the application, offered to pay the purchase price for the land, and asked that the application be passed to entry. December 21, 1898, payment of the purchase price was made and entry was allowed.

April 13, 1897, Robert A. Christy filed in the local office a corroborated protest against this application for patent, alleging, in substance, that the applicants failed to make an expenditure of one hundred dollars, in labor or improvements, upon the Mascot claim during the year 1896, or at any time thereafter, and that by reason of such failure the protestants had relocated that claim on March 23, 1897. This protest was inadvertently placed among the files relating to another claim, also called the Mascot, and was apparently lost sight of, as a result of which no action was taken thereon by the local officers. It does not appear that Wolenberg or any of his associates were notified of the filing of the protest, or that they were aware of its existence at any time before the allowance of their entry. Counsel for Christy having thereafter invited the attention of your office to the filing of the protest, and to the fact that no action had been taken thereon, the local officers were called upon for a report in the matter, in response to which the protest was transmitted to your office April 19, 1899, with a statement of the inadvertence leading to its loss and the failure to give it consideration.

May 9, 1899, your office, upon consideration of the protest, ordered a hearing to determine, among other things, whether an expenditure of one hundred dollars, in labor or improvements, had been made upon the Mascot claim for the year 1896, and, if not, whether work had been resumed thereon prior to the alleged relocation thereof on March 23, 1897. The entrymen have appealed.

Ordinarily an order of your office directing a hearing, being an interlocutory proceeding, will not be disturbed upon appeal. Indeed, generally speaking, such an order is not appealable. This rule, however, is not without exception, and where it is made to appear that the order involves matters which the land department can not inquire into, or is for any reason contrary to law or the settled rulings of the Department, or is otherwise palpably erroneous, the same may be considered and corrected or wholly vacated when brought to the attention of the Department, whether by direct appeal or otherwise.

In the present case the order for a hearing, in so far as it directs an inquiry into the charge of failure to make an expenditure of one hundred dollars, in labor or improvements, on the Mascot claim during the year 1896, and the alleged relocation of the claim by reason thereof, clearly relates to matters over which the land department is without authority. The annual expenditure of one hundred dollars, in labor or improvements, required by section 2324 of the Revised Statutes, is solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed to the courts and not to the land department. In this respect the requirement made by section 2324 is essentially different from that made by section 2325, which makes the expenditure of five hundred dollars, in labor or improvements, a condition to the issuance of patent, and therefore a matter between the applicant for patent and the government, the determination of which is committed to the land department. Where the required expenditure of five hundred dollars has been made upon a mining claim, failure to perform annual assessment work will not, in itself, prevent the issuance of patent or furnish any ground of protest against the allowance of a mineral entry. (*Hughes v. Ochsner et al.*, 27 L. D., 396; *Opie v. Auburn Gold and Mining Co.*, 29 L. D., 230.)

The action of your office in ordering a hearing to determine whether the annual assessment work for 1896 had been done upon the Mascot, and, if not, whether work upon that claim had been resumed before the alleged relocation thereof, was erroneous.

As before shown, the entry in question was not made until December 21, 1898, nearly two years after the expiration of the period of publication of the notice of the application for patent. No reason is shown for this delay. The protest was not filed until more than two months after the expiration of the period of publication. The applicants had not then made proofs of posting and publication, or tendered payment of the purchase price, and did not make such proofs or such tender until November 3, 1898, twenty-one months after the expiration of the period of publication. The protest of Christy having been lost, and the applicants for patent having no knowledge thereof, it was not, even after its filing, considered an obstacle to making the entry.

In the recent case of *Cain et al. v. Addenda Mining Company* (29 L. D., 62), the Department said:

The mining laws contemplate that proceedings under an application for patent should be prosecuted to completion within a reasonable time after the required publication, or after the termination of proceedings on adverse claims, if any are filed; otherwise by making application for patent and giving notice thereof, but without making payment of the purchase price one would become entitled to project, indefinitely into the future the assumption of section 2325 "that no adverse claims exists" notwithstanding the requirement of section 2324 that an expenditure of one hundred dollars in labor or improvements should be made upon a mining claim during each year until entry is allowed.

And in that case it was held that the failure of the applicant company

to so prosecute to completion its application for patent, within a reasonable time after the expiration of the period of publication of the notice thereof, and after the termination of adverse proceedings in the courts, constituted a waiver of all rights obtained by the earlier proceedings upon the application.

In this case nearly two years elapsed after the required publication before any effort was made to carry the application to completion, and in the meantime there may have been, as claimed, a legal relocation of the claim, based upon a failure by the claimants to make the annual expenditure in labor or improvements which is necessary to the continued maintenance of their possessory right as against subsequent locators. The assumption, declared in section 2325 of the Revised Statutes, that no adverse claim exists in those instances where no adverse claim is filed in the local office during the period of publication, relates to the time of the expiration of the period of publication and to adverse claims which might have been made known at the local office before that time. It has nothing to do with adverse claims which are initiated subsequent to that time and which could not therefore have been made known at the local office during the period of publication. The statutory declaration does not compel any assumption in this instance to the effect that no adverse claim intervened between the earlier proceedings upon the application for patent, which ended February 3, 1897, and the making of the entry on December 21, 1898. In the presence of the claimed relocation of the Mascot after the expiration of the period of publication, the applicants for patent are not in a position to ask or urge that their laches or delay be disregarded. It follows that the entry must be canceled. The applicants will be at liberty to renew proceedings for patent if they so desire, and Christy will have opportunity to present, for determination by the proper tribunal, his claim under his alleged relocation.

The decision of your office ordering a hearing upon said protest is therefore vacated, and the matter will be disposed of by your office in accordance with the views herein expressed.

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HOMESTEAD—SECOND ENTRY.

CHARLES S. PALMER.

A second homestead entry under which the entryman has shown due compliance with law may be permitted to pass to patent, where the first was relinquished on erroneous advice, and without compensation, and the second was allowed by the local office with full knowledge of the facts.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *November 13, 1899.* (H. G.)

Charles S. Palmer appeals from the decision of your office of October 31, 1898, rejecting his final proof, made June 1, 1898, based on his home-

stead entry for the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{2}$ , and the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 28, T. 138 N., R. 38 W., made May 21, 1892, in the Crookston, Minnesota, land district.

The appellant made homestead entry on April 17, 1890, for the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 34, T. 138 N., R. 38 W., in the said land district, which he relinquished March 5, 1892. The local office rejected his final proof on his second entry for the reason that he had exhausted his homestead right in making his first entry. Your office, on appeal, finding that the final proof disclosed that Palmer settled upon the tract for which he made his second entry on April 1, 1892, and has since continuously resided there with his family, and that his improvements thereon are valued at nine hundred dollars, in order that the entryman may not be deprived of his home and improvements, directed that his second entry should be treated as an additional entry for eighty acres, and allowed him the period of sixty days within which to elect which of two contiguous forty-acre tracts he desired to have embraced in his final entry, and that if such entry be made, it would be submitted to the board of equitable adjudication for action.

It appears from the affidavit of the appellant accompanying his appeal to your office, that he relinquished his first entry without compensation, having been advised by the clerk of the district court of the county wherein he resided that he could do so without prejudice to the initiation of a new entry. The local office allowed his second entry without question, although his application therefor disclosed that he had already made an entry, but upon the submission of his final proof thereon, rejected the same for the reasons stated.

Accompanying his appeal to this office, is an affidavit made by the entryman stating that he can not surrender any portion of the tract embraced within his present entry without sacrificing a considerable portion of the land now under actual cultivation and unless he removes his dwelling, and the difficulties in complying with the order of your office in electing to take two forty-acre tracts, contiguous to each other, as an additional entry, is illustrated by a diagram incorporated in his affidavit, showing the tracts under cultivation, those enclosed, and the location of his buildings.

There is no question, from the statements made by the entryman, that he has acted in the utmost good faith, and that he relied upon the advice given him prior to the time he relinquished his first entry and made his second entry, and upon the action of the local office in permitting him to make entry for the tract he now claims as a homestead. While his affidavits are not corroborated by other testimony, yet the record shows that his second entry was allowed nearly two months after his relinquishment of the first entry was filed, with full knowledge of his former entry.

It is evident that it is the purpose of the law that every citizen possessing the requisite qualifications should be entitled to a homestead of one hundred and sixty

acres of public land subject to entry, and that a second entry may be made in instances where, for some cause unforeseen, the first entry has failed without fault or fraud upon the part of the entryman (*Bohun v. Brest*, 24 L. D., 16).

The provisions of the homestead law are that every person shall be entitled to enter one quarter section or a less quantity of unappropriated public lands, and that no person shall acquire title to more than one quarter section of land. In order to prevent persons from making entry of land, holding it for speculative purposes, selling their rights, and making another entry, the regulations of the land department have provided not only that a person shall not "acquire title" to more than one hundred and sixty acres, but that he shall not make more than one entry, even though under his first entry he may not "acquire title;" but there have been a number of instances where the right to make a second entry has been recognized under certain contingencies, such as the uninhabitable condition of the land, the non-potable condition of the water thereon, its worthless character, the ignorance of the entryman, or some contingency arising which has misled the entryman in his selection or in abandoning his original entry. There seems to be no inflexible rule applied to meet the circumstances of every case. (*James J. Kubal*, 25 L. D., 132; *John Herkowski*, 28 L. D., 259; *Lewis Wilson*, 21 L. D., 390.)

Where one applied for a restoration of his homestead rights, his petition was denied, although his entry was relinquished upon the erroneous advice of the local officers that by such act the entryman would not exhaust his homestead rights (*Lewis M. Huntley*, 4 L. D., 188), but in that case the entryman had not been induced by such erroneous advice to make a new entry and establish and maintain a residence upon the tract for which the second entry was made and make valuable improvements thereon, as in this case.

The appellant makes oath that his relinquishment of his first entry was made without compensation, relying upon the advice of the clerk of the court, and he was permitted to make a second entry by the local officers, although his application papers disclosed that he had made a former entry. Relying upon the validity of his second entry, the entryman has devoted years of toil to the improvement of his homestead.

He should not be deprived of the fruits of his labor, even though he can not bring himself within the provisions of the act of December 29, 1894 (28 Stat., 599), permitting a second entry under certain circumstances, and although his case is not met by the provisions of section two of the act of March 2, 1889 (25 Stat., 854), permitting a second entry to those who had not perfected title to a homestead entry prior to the passage of the act. Under the peculiar circumstances of the case, considering the good faith of the entryman and his reliance upon his second entry, allowed by the local officers with full knowledge of the fact that he had made a former entry, followed by his improvement,



In the recent case of *Cain et al. v. Addenda Mining Company* (on review, 29 L. D., 62), it was said:

The difficulty here arises from the fact that the Addenda company filed its application for patent in the local land office in 1879, made due posting and publication thereof and upon the termination of certain adverse proceedings in 1882 became entitled, upon paying the purchase price, to make entry of all the ground embraced in its application and notices which had not been awarded to others in such adverse proceedings. Instead of exercising this right the company took no further proceedings under its said application until in 1894 after the lapse of twelve years . . . . The mining laws contemplate that proceedings under an application for patent should be prosecuted to completion within a reasonable time after the required publication, or after the termination of proceedings on adverse claims, if any are filed; . . . . The Addenda company permitted its application to lie dormant so many years without making payment of the purchase price that it must be held to have waived the rights obtained by the earlier proceedings upon the application. Its entry in 1894, therefore, ought not to have been allowed, and for that reason must be canceled.

Applying to the case at bar the doctrine of the case just cited it must be held that by permitting its application to lie dormant in the local office without further proceedings thereon after the publication of notice, for the period of seven years, the appellant company waived all its rights under that application, and must proceed anew before it can be allowed to complete its entry. On this ground your office decision refusing to allow said company to make entry under its application filed in 1890, is affirmed.

In this connection your attention is called to the fact that the several applications filed by the Esmeralda Mining Company appear to be practically in the same condition as the application of the appellant company here. If such should be found to be the case of course action in those cases will have to be taken according to the principles herein announced.

The Scotia Mining Company will be at liberty to renew proceedings to obtain patent for the land in question if it desires to do so.

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#### SIoux HALF BREED SCRIP—LOCATION.

JOHN W. POE.

Sioux half breed scrip is not transferable; and the right to locate the same on unsurveyed land can only be exercised where the improvements placed thereon are for the personal use and benefit of the scribee.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) November 16, 1899. (H. G.)

John W. Poe, attorney in fact for Exevier Freyneer, father and sole heir of Exevier Freyneer, deceased, on August 27, 1885, located in his own name Sioux half breed scrip No. 451 "B," issued November 24, 1856, on a tract of unsurveyed land in what was then the Las Cruces

land district, now within the limits of the Roswell land district, New Mexico. The tract covered by such location was adjusted September 11, 1894, by the local office of the latter land district, and certificate therefor was issued on the last mentioned date to John W. Poe, "attorney in fact," for the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 19, T. 10 S., R. 14 E., New Mexico meridian.

On February 5, 1895, your office received a communication from one John C. Judge, an attorney at law of Minneapolis, Minnesota, claiming to represent the heirs of Exevier Freyneer, deceased, stating that at the time of the location of said scrip the scribee was dead and that the location was made without the knowledge or consent of the heirs; that the heirs claim to be entitled to the possession of the scrip; and that the said attorney gave notice in order that the location might not be patented. Your office, in reply to such communication, advised said attorney of the condition of the record of such location of scrip, reciting the facts, appearing from documentary evidence submitted at the time the location of the scrip was made by said Poe, to the effect that on March 24, 1883, the judge of the probate court of Ramsey county, Minnesota, certified that the estate of Exevier Freyneer, deceased, had been duly administered upon in said court, and that Exevier Freyneer is the father and sole heir at law of Exevier Freyneer, deceased, to whom was issued said piece of scrip; that on October 27, 1881, the heir of the scribee executed a power of attorney to John W. Poe, authorizing him to act for said heir in the location of said piece of scrip, and further, giving the facts of the location of said scrip by Poe. The said Judge was also advised that he had not complied with the departmental regulations relative to the admission of attorneys to practice before this Department, and for that reason could not prosecute the case before this Department. No further action was taken by such attorney. The local office, however, was advised by your office to notify the parties in interest that they would be given thirty days within which to show cause why said scrip location should not be canceled because of its illegality.

Within the time limited, and on March 3, 1898, Poe's affidavit was transmitted to your office, in which he substantially sets forth his identity as the locator of said scrip and his location thereof; that he had filed all of his proof, including corroborative affidavits, of the improvements and the value thereof, at the time of filing the scrip and making the location; and the absence of some of such proof, he suggests, was owing to the loss of some papers during the transfer of the records of the land office from Las Cruces to Roswell; that he used his best endeavors to honestly and honorably comply with the law and believed that he had done so; that his affidavit and corroborated affidavit as to the improvements on the land, showed the same to be a log house of four rooms, stable, corral, and about one-half mile of wire fencing, the value of which was six hundred dollars, and that these improvements

remained upon the land at the date of the final adjustment of the survey.

Your office decided, on March 31, 1898, that as there was no showing that the improvements were made on the land by or under the personal supervision or direction of the Indian (meaning the heir of the scribee) and for his personal use and benefit, and did not disclose that the said Indian had a direct connection with the land, claiming the same for his personal use and not for the gain and advantage of third parties, the location must be held for cancellation. This ruling was followed by another affidavit from Poe, who reiterated what he had stated in his former affidavit, and further stating that all of the improvements were placed upon the land in good faith by him as attorney in fact, for Exevier Freyneer, the sole heir of the scribee. This affidavit was treated by your office as a motion for a review, but as the same was not accompanied by the affidavit required by the rules of practice, to the effect that the motion was made in good faith and not for the purposes of delay, it was not considered. Poe then transmitted his petition for a rehearing on the ground that his last affidavit was not intended as a motion for a review, but simply as additional evidence in the cause, and this petition is accompanied by the required affidavit. In view of an erroneous notice given by the local office, your office considered the motion on its merits, although it was filed out of time, and held that Poe had not shown a compliance with the requirements of your office, and the motion for a rehearing was denied. The local officers were directed to proceed *de novo* and to allow the parties in interest the period of sixty days within which to appeal from the decision of your office of March 31, 1898, holding the scrip location for cancellation, "or to take whatever action they may deem proper in the premises."

Poe appeals from said decision of your office, alleging that the same is erroneous for the reason that the evidence offered by him when he made the proof on said land, and the proof filed thereafter amendatory of the former evidence, do allege and show that all of the improvements were placed in good faith on the land by him as attorney in fact for Exevier Freyneer, deceased, under and by direction of said Freyneer.

Assuming that the improvements were made upon the land by Poe, as agent of the heir of the scribee, in good faith, and at the direction of the principal, the location is invalid, since the application therefor was made by Poe for himself and the certificate was issued to him personally and not to his principal. The letter of attorney submitted with the application for the location purports to give Poe authority to make the location "in the name, place and stead" of Freyneer, according to the usual form employed in such documents. There was no authority whatever for the issuance of such certificate to Poe, and your office properly held at the outset that the certificate, if it should have issued at all, should have issued to the heirs of the original scribee.

The piece of scrip issued to Freyneer states that "this certificate of

scrip is not by law transferable, and any assignment or conveyance of the same is therefore void," and thus notice was brought home to Poe that he could not obtain the location in his own name. This was not necessary, as the act of July 17, 1854 (10 Stat., 304), under which the scrip was issued, provided that no transfer or conveyance of the scrip should be valid, and this Department has followed the plain wording of the statute in this respect.

The circular instructions of May 28, 1878 (2 Copps Land Laws, 1355), issued for the guidance of local officers and parties interested, require in filing said Sioux half-breed scrip—

That the application must be accompanied with the affidavit of the Indian, or other evidence that the land contains improvements made *by* or under the personal supervision or direction of said Indian, giving a detailed description of said improvements, and that they are for his personal use and benefit; in other words, you should be satisfied that the Indian has a direct connection with the land, and is claiming the same for his personal use. Unless such evidence is filed, you will reject the application.

The act itself provides that the scrip may be located upon any other unsurveyed lands not reserved by the government, upon which they the scribees have respectively made improvements.

This provision has been so construed in the departmental instructions that the improvements must be made by the scribee, or under his personal supervision or direction. The last affidavit filed by Poe, which was forwarded to your office subsequently to the location, alleges that the improvements were placed in good faith on the land by Poe as attorney in fact for the heir of the scribee, under and by his direction. There is no allegation that these improvements were made by the Indian or under his personal supervision or direction or for his personal use and benefit, as the instructions require, and it does not appear from the record that the Indian has a direct connection with the land and is claiming the same for his own personal use. As the affidavits of Poe, including the one he states was filed in corroboration of his affidavit at the time the location was made, but which is not in the record, do not set forth these necessary facts, they were properly held to be insufficient by your office.

Assignments of such scrip by a double power of attorney, one giving the right to locate and the other to sell, where made for the purpose of divesting the scribee of his interest, have been declared to be invalid, and the location made thereunder was canceled. (*Strong v. Pettijohn et al.*, 21 L. D., 111, 113.) It has also been held that the right to locate such scrip on unsurveyed land can only be exercised where the half breed has made improvements on the land for his use and benefit, and the improvements in such case are a condition precedent to the location. (*Allen et al. v. Merrill et al.*, on review, 12 L. D., 138, 154; *McGregor et al. v. Quinn*, 18 L. D., 368; *Morgan v. Missoula Electric Light Company*, 21 L. D., 306.)

The decision of your office is affirmed.

## HOMESTEAD ENTRY—EXTENSION OF TIME FOR PAYMENT.

## CHARLES R. B. SPRENKLE.

A homestead entryman who has complied with the requirements of the law for a period of five years from date of settlement is entitled to submit final proof, and to an extension of time within which to make payment under the act of September 30, 1890, if otherwise within the terms of said act.

Cases involving the question of the right to an extension of time for payment should be treated as special.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(F. L. C.) *November 16, 1899.* (C. J. G.)

August 23, 1898, Charles R. B. Sprenkle submitted final proof on his homestead entry, made February 20, 1897, under section 21 of the act of March 2, 1889 (25 Stat., 888), for the W.  $\frac{1}{2}$  NW.  $\frac{1}{2}$ , Sec. 28, and the E.  $\frac{1}{2}$  NE.  $\frac{1}{2}$ , Sec. 29, T. 35 N., R. 15 W., 6th p. m., Ponca series, O'Neill land district, Nebraska.

The said proof, which was approved by the local officers, shows that the entryman is a native born citizen of the United States; that he built a house on the land described in the year 1891 and continuously resided thereon from June, 1892, to date of proof; that he has about eighty acres under cultivation and has cropped the land each season; and that his improvements are worth about \$800.

On the same day he made application, under the joint resolution of Congress approved September 30, 1890 (26 Stat., 684), for an extension of time in which to make payment. This resolution provides:

That whenever it shall appear by the filing of such evidence in the offices of any register and receiver as shall be prescribed by the Secretary of the Interior that any settler on the public lands, by reason of a failure of crops for which he is in no wise responsible, is unable to make the payment on his homestead or preemption claim required by law, the Commissioner of the General Land Office is hereby authorized to extend the time for such payment for not exceeding one year from the date when the same becomes due.

In support of his application, the entryman alleged failure of crops due to severe drouth and hail storms. October 18, 1898, your office denied the entryman's application for extension of time and rejected his proof on the ground that under section 2291 of the Revised Statutes, as construed by your office in connection with other specified acts having reference to proof and payment, "he is not entitled to the benefits of said joint resolution until eight years from the date of entry." At the same time, however, your office granted him the privilege of making payment within the time allowed for appeal, which he now takes to the Department.

Section 2291 provides, among other things, that no certificates shall be given for land or patent issued therefor, until the expiration of five years from date of entry, but that at the expiration of that time or at any time within two years thereafter, the entryman shall be entitled to

patent upon satisfactory proof of residence and cultivation for the term of five years immediately succeeding the time of making entry. The entryman herein submitted his proof, which was found satisfactory by the local officers, five years from date of actual settlement. This was before he made application for extension of time for payment, and he thus brought himself within the rules governing such applications. Circular of January 14, 1891 (14 L. D., 293). In construing said section 2291 your office apparently overlooked the act of May 14, 1880 (21 Stat., 140), the third section of which provides that the right of a homestead entryman "shall relate back to the date of settlement." In the language of the supreme court in the case of *Sturr v. Beck* (133 U. S., 541, 547)—

A claim of the homestead settler, . . . is initiated by an entry of the land, which is effected by making an application at the proper land office, filing the affidavit and paying the amounts required by sections 2238 and 2290 of the Revised Statutes. Under section 2291 the final certificate was not to be given or patent issued 'until the expiration of five years from the date of such entry.' But under the third section of the act of May 14, 1880 (21 Stat., 140), providing that 'any settler who has settled, or who shall hereafter settle on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the preemption laws to put their claims of record, and his right shall relate back to the date of settlement, the same as if he settled under the preemption laws,' the ruling of the Land Department has been that if the homestead settler shall fully comply with the law as to continuous residence and cultivation, the settlement defeats all claims intervening between its date and the date of filing his homestead entry, and in making final proof his five years of residence and cultivation will commence from the date of actual settlement.

See cases of *Clark S. Kathan* (5 L. D., 94); *Hall v. Dearth* (5 L. D., 172); *Tobias Beckner* (6 L. D., 134); *Falconer v. Hunt et al.* (6 L. D., 512); *Prestina B. Howard* (8 L. D., 286); and *Bryant v. Begley* (23 L. D., 188). In the last case cited it is said (syllabus):

Under the act of May 14, 1880, the right of a homestead settler relates back to the date of his settlement, and if at the date of his application to enter he has prior thereto lived on the land and complied with the law for the statutory period, his interest therein, in the absence of any intervening adverse claim, becomes at once a vested and devisable right.

The full five years having elapsed since his settlement accompanied by the actual establishment of residence, and having complied with the law during that period, the entryman was entitled to submit his proof. As proof and payment must be made at the same time, payment therefor became due when the entryman submitted his proof. Introductions of November 18, 1884 (3 L. D., 188); *Lottie Merwin* (5 L. D., 221); *Ida May Taylor* (6 L. D., 107), and *R. M. Barbour* (9 L. D., 615). The joint resolution of September 30, 1890, provides for an extension of time in which to make payment for one year "from the date when the same becomes due." It is true, as stated in your office decision, that an entryman is not required to make proof and payment until the expiration of the full time allowable under the acts providing for extension of

time therefor (Circular of October 18, 1894, 19 L. D., 305), but there is nothing in the said joint resolution that forbids him, upon showing compliance with law for the requisite period, from sooner submitting his proof and applying for such extension—Charles H. McCune (14 L. D., 509); and when he does so, and said proof is found satisfactory, he is entitled under the joint resolution of September 30, 1890, upon the acceptance of such proof and proper showing, to an extension of time for one year in which to make payment. Nathaniel Woodiwiss (15 L. D., 339); Edward W. Sheldon (16 L. D., 390), and George W. Robinson (21 L. D., 116).

It appearing that the entryman in the case at bar comes within the remedial provisions of said joint resolution his application for extension should have been granted.

The entryman applied for an extension of time for one year from August 23, 1898. It will be observed therefore that more time has already elapsed than asked for in his application. To avoid, as far as possible, this condition of things, directions have at intervals been given to your office that cases involving the question of the right of extension of time be made *special* "to the end that the smallest possible time may elapse from the date of the application to that of a final judgment thereon." See cases of Parker V. Brown (20 L. D., 323) and George W. Robinson (21 L. D., 116).

Your office decision is hereby reversed and Sprenkle will be allowed a reasonable time, to be fixed by your office, in which to make payment upon the proof already offered by him.

#### MINING CLAIM—STATUTORY EXPENDITURE.

##### HIDDEN TREASURE LODE.

*Not in harmony with later decisions - See, March 20, 1907 -*  
The departmental decision herein of September 12, 1899 (29 L. D., 156), modified on review.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) November 21, 1899. (E. B., Jr.)

By its decision of September 12, 1899 (29 L. D., 156), in the case of the Hidden Treasure lode mining claim, mineral entry No. 1153, made May 26, 1897, survey No 11,475, Durango, now Denver, Colorado, land district, the Department affirmed so much of your office decisions of August 30, and November 11, 1897, as required the claimant Joseph B. Hardon, upon pain of cancellation of the entry without further notice, in case of default, "to show compliance with the law in the matter of expenditures," but directed that—

Before proceeding to cancel the entry, however, you will allow the claimant a reasonable time within which to file a certificate of the surveyor general, showing other expenditure, if any there be, additional to that in the said discovery cut, and



road Company, under the provisions of the act of July 1, 1898 (30 Stat., 597, 620), embracing certain lands included in a list approved by this Department on August 8th last as a basis for relinquishment by the company under said act.

In submitting these relinquishments you fail to note that they are made by the Northern Pacific Railway Company and embrace lands in the State of Minnesota. Paragraph two of the regulations issued under said act, approved February 14th last (28 L. D., 103), states that:

As to all lands within the limits of the grant situated in the State of Minnesota and in the State of North Dakota east of the Missouri river, the Northern Pacific Railroad Company has no successor in interest, but its property and affairs are now in the hands of receivers, appointed and acting under the authority and direction of certain circuit courts of the United States . . . . Within the limits of that portion of the grant situated in the State of Minnesota and in the State of North Dakota east of the Missouri river, relinquishments should be executed by the Northern Pacific Railroad Company, and also by the receivers thereof, and selections in lieu thereof should be made by such receivers on behalf of the railroad company; the receivers, in executing relinquishments and in making lieu selections, to act under proper authorization first obtained from the proper court.

Since the forwarding of said relinquishments, however, there have been filed in this Department examined copies of special masters' and receivers' deeds, dated September 22, 1899, conveying to the Northern Pacific Railway Company all the rights of the Northern Pacific Railroad Company in and to lands east of the Missouri river, whether under the grant expressed in the act of Congress of July 2, 1864, or under any subsequent grant, by way of indemnity or otherwise, subject, however, to a certain mortgage or deed of trust dated the first day of January, 1881, and known as the general first mortgage of said Northern Pacific Railroad Company, and executed by it to the Central Trust Company of New York as trustee; also a certificate of satisfaction of said general first mortgage, said certificate having been executed by the Central Trust Company of New York on the 13th instant. The relinquishments under consideration were executed October 5th last, subsequent to the deed from the special masters and receivers to the Northern Pacific Railway Company, before referred to.

In view of the showing above referred to, the circular of February 14th last will be modified so as to recognize the Northern Pacific Railway Company as the lawful successor in interest as to all the lands within the limits of the grant provided for in the acts making grants to the Northern Pacific Railroad Company.

It is noted that said relinquishments do not include all of the lands covered by the list approved by this Department on August 8th last as the basis for relinquishment, the exceptions being as follows: W.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 7, T. 133 N., R. 40 W., shown to have been sold to Anton J. Egeberd in December, 1895, and a strip of land one hundred feet wide, extending through lots 6 and 7 of Sec. 35, T. 133 N., R. 41 W., sold in 1892 to the Northern Pacific, Fergus and Black Hills Railroad Company.

By paragraph thirty of the regulations of February 14, 1899, it is provided :

Where it satisfactorily appears from the record in any contest that the lands in controversy come within the terms of this exemption, the Commissioner of the General Land Office in calling upon the individual claimant to exercise the privilege accorded to him (see paragraphs 17 and 18) will notify him that the railroad claimant can not be required to relinquish such lands, and that unless he elects to relinquish the same and take other lands in lieu thereof the contest will proceed to final determination without further regard to said act; and where such exemption is satisfactorily shown after the individual claimant has elected to hold the lands in contest (see paragraph 23), the Commissioner of the General Land Office will notify him thereof and accord him another opportunity, to be exercised within a stated time, to relinquish the lands in contest and take other lands. In the event that this privilege is declined, the contest will proceed to final decision in the usual way.

Relative to the tract first above described, it must be held that the showing is sufficient to exempt the company from relinquishing said tract, and under the above paragraph it becomes the duty of your office to advise the individual claimant who has elected to hold said tract of said showing, and to accord him another opportunity, to be exercised within a fixed time to be named by your office, to relinquish his claim to said tract and take other lands. He should also be advised that in the event this privilege is declined, the contest will proceed to final decision in the usual way.

Relative to the tract included in the right of way of the Northern Pacific, Fergus and Black Hills Railroad Company, the claimant to this land should also be advised of the showing and accorded an opportunity to retain this tract, subject to such right of way, or to relinquish his claim thereto and take other lands in lieu thereof as provided for in said act.

Relinquishment No. 1 is, upon examination, accepted by the Department, but action upon relinquishment No. 1-A, which includes only the tract covered by the right of way above referred to, is suspended, subject to the action of the individual claimant thereto under the privilege of election herein accorded him.

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FEES—LOCAL OFFICERS—STATE SELECTIONS.

S. W. AUSTIN ET AL.

Local officers are not entitled to fees collected on approved State selections that become final prior to their incumbency.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *November 21, 1899.* (E. F. B.)

With your letter of January 23, 1899, you transmit the appeal of S. W. Austin, register, and F. E. Densmore, receiver, of the district land office at Independence, California, from the decision of your office

of December 14, 1898, declining to allow appellants the fees paid by the State of California upon lists 1 and 116, of selections of lands made by said State for internal improvements under the act of September 4, 1841 (5 Stat., 453).

List No. 1 was filed in the Aurora, Nevada, land office, July 5, 1871, and was approved October 26, 1871. It embraced selections in townships 3 and 4 S., R. 29 E., aggregating 6640 acres. List No. 116 was filed January 18, 1866, in the Stockton, California, land office, and embraced selections in section 35, T. 1 S., R. 31 E., and in section 2, T. 2 S., R. 31 E., aggregating three hundred and twenty acres, which were approved in list No. 2, August 8, 1876.

It not appearing from the records of your office that the State had paid the fees required by section 2238, Revised Statutes, for said selections (amounting to \$88.00), the local officers at Independence, California, said lands now being within the limits of that district, were required to notify the State and to request payment thereof.

In compliance with said request the State paid said sum to F. E. Densmore, as receiver of the district land office, at Independence, California who reported it in his account for October, 1898, as fees for selections of lands made by the State of California, as per lists Nos. 1 and 116.

Your office, by letter of December 15, 1898, informed appellants that they were not entitled to fees for said selections as they were earned by the local officers performing the duties of register and receiver at the time the lists were filed. From this ruling they have appealed. Their contention is that the payment of fees is a prerequisite to the validity of a selection, and that no valid selection was made of the lands embraced in said lists until October 18, 1898, when the fees were paid to them. Hence, they insist that the fees were earned during their incumbency.

The approval of the list was an adjudication of the validity of the selections and vested the title in the State, although the statutory fees had not been paid. It remained a charge against the State but that did not affect the validity of the selection or render it any the less final. Territory of Oklahoma (29 L. D., 72). No service was required of or performed by appellants in the filing and approval of said lists. Every act essential to the finality of the selection had been performed by others prior to their incumbency, and growing out of such service there simply remained a charge against the State in favor of the United States which could be collected through the medium of the local land office. The annual salary paid to such officers is the compensation for public land services performed by them, for which no fees are specifically provided.

Your decision is affirmed.

## REPAYMENT—SALE OF ISOLATED TRACT.

JOHN RICHLI.

Repayment of an alleged excess paid on the purchase of an isolated tract can not be allowed, where the bid and payment are voluntary, and not for the protection of any interest of the purchaser.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *November 23, 1899.*

This case relates to the sale of the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 4, T. 13 N., R. 19 W., Missoula, Montana, land district, under section 2455 of the Revised Statutes, as amended by the act of February 26, 1895 (28 Stat., 687).

February 26, 1898, your office, upon the application of John Richli, ordered said tract into the market as an isolated and disconnected tract or parcel of the public domain, at a price of not less than \$2.50 per acre. After due publication the offering was had April 11, 1898, at the local office, at which time Richli appeared as a bidder and at first bid \$1.25 per acre for the tract. The local officers, acting under the instructions in the order for the offering, declined to receive a bid of less than \$2.50 per acre, whereupon Richli increased his bid to that sum. There being no other bidders, Richli's increased bid was accepted by the local officers and he made payment for the land accordingly. In making his increased bid and in paying for the land he protested that his first bid of \$1.25 per acre should have been accepted, and that the action of your office and of the local officers in refusing to receive any bid less than \$2.50 per acre was erroneous, and also gave notice that he would apply for repayment of the claimed excess.

Without discussing whether the action of your office in fixing \$2.50 per acre as the minimum price at which this tract would be offered was authorized by section 2455, as amended by the act of February 26, 1895, it is sufficient to say: That the order for the sale was made upon the application of Richli and in terms stated that the offer would be at not less than \$2.50 per acre; he took no exception to the terms of the order; he had no interest in the tract which it was necessary for him to protect by bidding, nor was he otherwise under any obligation to become a bidder at any price. His bid and payment of \$2.50 per acre were therefore voluntary. Under these circumstances he has no right to repayment. *Railroad Co. v. Commissioners* (98 U. S., 541). The action of your office in denying his application therefor is, for these reasons, affirmed.

## RAILROAD LANDS—SWAMP CLAIM—ACT OF MARCH 3, 1887.

GENEVAY ET AL *v.* GOERGEN ET AL.

Where lands are patented to a State for the use of a railroad company, and the patent is accepted, the State is thereafter precluded from claiming any of said lands under the swamp grant, as against a purchaser under the act of March 3, 1887, whose purchase was made in good faith while the title was in the trustee for the benefit of the vendor.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *November 23, 1899.* (L. L. B.)

John F. Genevay and Delmer Worthington have joined in an appeal from your office decision of February 4, 1899, in which the right to patent for the E.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 31, T. 95 N., R. 42 W., Des Moines, Iowa, was awarded to Theodore Goergen, and the same right as to the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of the same section was awarded to Elizabeth Goergen, wife of said Theodore, under the act of March 3, 1887 (24 Stat., 556), in virtue of their respective purchases of the same from the Sioux City and St. Paul Railroad Company, as against the claim of Delmer Worthington for the E.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and the claim of John F. Genevay for the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of the said section, whose claims thereto were initiated by application to make homestead entry of these tracts, February 27, 1896, when these and other lands were opened to entry under departmental direction.

An examination of the record discloses no error in your judgment, in so far as it awards the said tracts to the purchasers from the railroad company as against the claims of the appellants.

It appears, however, that the records of your office show that there is pending a "swamp claim" which conflicts with the purchase of Elizabeth Goergen of the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of said section 31, and in your office decision the local officers were instructed to allow her entry for said tract to be made of record, under the circular of December 13, 1886 (5 L. D., 279), which provides that the governor shall be notified that he may within sixty days object to the perfection of the entry. This direction was unnecessary, because when these lands were patented to the State of Iowa, for the use of the railroad company, and the patent accepted by the State, the claim of the State as to all swamp lands included within such patents was adjudicated and the State precluded from thereafter laying claim to any lands so certified as against a purchaser under the act of March 3, 1887, whose purchase was made in good faith, while the title to the lands purchased was in the trustee for the benefit of the vendor. (See *Rogers Locomotive Machine Works v. American Emigrant Company*, 164 U. S., 559-575.)

The decision appealed from is accordingly modified.

## SALE OF TIMBER—ACT OF MARCH 3, 1891.

J. W. McCUTCHEM ET AL.

The sale of timber on unreserved public lands is not authorized by the act of March 3, 1891 (26 Stat., 1093).

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,*  
November 27, 1899. (G. B. G.)

By letter of September 9, 1899, the Commissioner of the General Land Office transmitted to the Department, and favorably recommended the allowance of, the separate applications of J. W. McCutchen and Charles H. Dudley for a permit under the act of March 3, 1891 (26 Stat., 1093), and the regulations thereunder, approved March 17, 1898 (26 L. D., 399), to purchase, cut, remove and dispose of timber from sections 4 and 5 and the E.  $\frac{1}{2}$  of Sec. 6, T. 14 S., R. 69 W., 6th P. M., in Teller county, Colorado, the same being unreserved public timber lands.

By your reference of November 14, 1899, I am asked for an opinion whether the sale of timber on unreserved public lands under said circular of March 17, 1898, is authorized by the act of March 3, 1891, *supra*, on which said circular is based.

The said act of March 3, 1891, amends another act of that date (26 Stat., 1095, 1099), entitled "An Act to repeal timber culture laws and for other purposes," and is in part as follows:

And in the States of Colorado, Montana, Idaho, North Dakota, and South Dakota, Wyoming [New Mexico and Arizona, by the act of February 13, 1893, 27 Stat., 444], and the District of Alaska, and the gold and silver regions of Nevada and the Territory of Utah in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior and has not been transported out of the same, but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, provided that the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations, but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands.

There is nothing in this act which suggests that it was the purpose of Congress to thereby authorize or provide for the sale of timber on the public lands. As gathered from a careful examination of the terms of the act, its purpose seems to have been to modify the law relating to the cutting and removal of timber from lands of the United States by denying to the government the right then existing to demand a conviction in a criminal prosecution, or a recovery in a civil action, when in any of the States, territories or regions named, timber is cut or

removed from the public timber lands for use in such State or territory by a resident thereof for agricultural, mining, manufacturing or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior, and is not transported out of that State or territory.

Section 2461 of the Revised Statutes contained a general prohibition against cutting or removing timber from the lands of the United States and imposed penalties for its violation. It was to avoid the effect of this statute, in instances deemed by Congress to be meritorious, that the act under consideration was enacted. It must be construed with section 2461 as if their several provisions appeared in one act, one part of which in general terms prohibited the cutting or removing of timber from the lands of the United States and the other part of which authorized the cutting and removing of such timber in specified localities by designated persons for enumerated purposes, under rules and regulations to be made and prescribed by the Secretary of the Interior. The act says nothing about selling timber or collecting any compensation or price for that which is cut or removed under the statute and the regulations prescribed thereunder, and it seems to me that authority on the part of the Secretary of the Interior to sell such timber or to make the right or privilege of cutting or removing the same dependent upon payment therefor can not be implied from the general authority given to him to prescribe rules and regulations to carry out the provisions of the act.

I am of opinion that the legislation under consideration does not authorize the sale of timber, and inasmuch as the regulations of March 17, 1898, *supra*, provide for sales thereof, I advise that said regulations be reformed and brought within the authority given the Secretary of the Interior by the statute under which they were prescribed.

Approved, November 27, 1899:

E. A. HITCHCOCK,  
*Secretary.*

FINAL PROOF—PUBLICATION OF NOTICE.

CHARLES YOST.

If final proof is not submitted within ten days following the time fixed therefor new publication of notice must be made.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *November 27, 1899.* (C. J. G.)

April 29, 1895, Charles Yost made homestead entry No. 11,499 for lot 3, SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ , Sec. 3, T. 14 N., R. 15 W., and the S.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$ , Sec. 34, T. 15 N., R. 15 W., Salt Lake Mer., Salt Lake City land district, Utah.

May 10, 1898, he, with one of his witnesses, appeared before the clerk

of Box Elder county, at Brigham City, Utah, and submitted final proof testimony, in accordance with published notice; but the testimony of his other witness was not taken until June 10, 1898, or thirty days after the date advertised, the said witness testifying that the delay was caused by his being out of the city on official business. Final certificate No. 6101 issued June 13, 1898.

December 13, 1898, your office, under rule 2 (9 L. D., 123), required Yost to make new advertisement, he being allowed sixty days therefor, or to appeal, and pending compliance with this order held his final certificate for cancellation. He was also notified that in the event of republication, and at the expiration of that period no protest had been filed, his proof already submitted would be accepted.

January 27, 1899, your office denied a motion for review, the basis of said motion being a certificate under the hand and seal of the clerk of Box Elder county, to the effect that no protests or objections to the final proof in question have been made or filed in his office. Yost now appeals to the Department, and in addition to alleging error in the action of your office in requiring him to make new publication, asks that his case be referred to the board of equitable adjudication.

Section 7 of the act of March 2, 1889 (25 Stat., 854), provides:

That the "act to provide additional regulations for homestead and pre-emption entries of public lands," approved March third, eighteen hundred and seventy-nine, shall not be construed to forbid the taking of testimony for final proof within ten days following the day advertised as upon which such final proof shall be made in cases where accident or unavoidable delays have prevented the applicant or witnesses from making such proof on the date specified.

Departmental circular approved July 17, 1889 (9 L. D., 123), containing rules to be observed in passing upon final proofs, "where the same are required by the general laws or regulations of the Department," and which modifies circular of February 19, 1887, provides (Rule 2):

Where final proof or any part thereof has not been taken on the day advertised, or within ten days thereafter under the exception and as required in Rule 1, you will direct new advertisement to be made; and if no protest or objection is then filed, the proof theretofore submitted, if in compliance with the law in other respects, may be accepted.

The final proof in question, not having been "taken within ten days following the time advertised," such proof is not therefore within the provisions of section 7 of the act of March 2, 1889, *supra*, and therefore, under Rule 2 of the circular of July 17, 1889, new advertisement was properly required by your office. Rule 9 of said circular provides under what circumstances cases may be referred to the board of equitable adjudication, as follows:

Where final proof has been accepted by the local office prior to the promulgation of said circular of February 19, 1887, if in all other respects satisfactory, except that it was not taken as advertised, the case may be submitted to the board of equitable adjudication for its consideration.



May 3, 1897, Rodolph Gordon, for himself and the other heirs of Lucretia Gordon, applied to make final proof under her entry, and after due publication of notice submitted such proof.

The contestant, Buller, appeared when the proof was taken and filed a protest against its acceptance.

The register and receiver found in favor of the contestant and recommended the rejection of Gordon's final proof and the cancellation of the entry in question.

Notice of their decision was sent by registered letter to C. Mayo, the commissioner before whom the final proof was taken and they forwarded the record to your office and reported that no appeal had been taken from their decision.

June 14, 1898, your office considered the matter and found, among other things, that there is nothing in the record to show that C. Mayo was ever authorized to represent the heirs of Lucretia Gordon, and notice to him of their decision could not be held to have been notice to said heirs. Therefore their decision had not become final as to the facts. Upon the record and evidence your office reversed the judgment of the local officers and dismissed Buller's contest.

He appeals.

The law of the State of Louisiana provides that "Bastards, adulterous or uncertain children shall not enjoy the right of inheriting the estates of their natural father or mother." Buller contends that the children of Lucretia Gordon were born of an adulterous relation and that therefore no rights under her homestead entry passed to them upon her death. Your office correctly held that the provisions of the laws of the State relating to inheritance can not affect the rights of the claimants in this case.

The homestead law does not purport nor assume in any respect to regulate the matter of heirship or to establish a line of descent or distribution for a deceased entryman's estate. It simply provides a method whereby a homestead claim, which is not property in the sense that it is or can be affected by Statelaws, may be perfected by and patented to certain persons specifically named in cases where an entryman dies before perfecting his entry.

Section 2292 of the Revised Statutes provides that—

In case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children; and the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the State in which such children, for the time being, have their domicile, sell the land for the benefit of such infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States on the payment of the office fees and sum of money above specified.

It appears that Thomas Gordon, the father of these children and with whom it is claimed that Lucretia lived in adultery, died before her

homestead entry was allowed; that the entrywoman died in 1888; and that all of her children were infants under twenty-one years of age at the date of her death.

Under these circumstances the children of Lucretia Gordon upon her death became vested with the right and fee to the land covered by her homestead entry. See *Bernier v. Bernier* (147 U. S., 242); *Curran v. Williams' Heirs* (20 L. D., 109); *id.* (26 L. D., 259); *Rooney v. Bourke's Heirs* (27 L. D., 596), and *Hensley v. Buford* (29 L. D., 275).

Your office found the proof submitted in behalf of the heirs of the entrywoman to be satisfactory, and after careful examination thereof such finding is concurred in.

The judgment appealed from is accordingly affirmed.

The decision of the Department, rendered in this case October 10, 1899, was recalled and the case has been further considered, and this decision is hereby substituted therefor.

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LEACH v. TANNAHILL.

Motion for review of departmental decision of September 18, 1899, 29 L. D., 175; denied by Secretary Hitchcock November 28, 1899.

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RAILROAD GRANT—INDEMNITY SELECTION—MINERAL LAND.

SCHRIMPF ET AL. v. NORTHERN PACIFIC R. R. CO. ET AL.

Land principally valuable for the marble and slate contained therein is mineral in character, and within the meaning of the excepting clause in the grant to the Northern Pacific, and therefore not subject to indemnity selection on account of said grant.

*Secretary Hitchcock to the Commissioner of the General Land Office*  
(W. V. D.) November 29, 1899. (G. B. G.)

At a hearing duly and regularly had upon the protest of Charles G. Schrimpf *et al.* against the patenting of certain lands to the Northern Pacific Railroad Company, upon its indemnity selection list No. 36, because of the alleged mineral character thereof, it was shown that the N.  $\frac{1}{2}$ , the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , and the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 17; the E.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , the NE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ , the S.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  and the SW.  $\frac{1}{4}$  of Sec. 19, T. 31 N., R. 39 E., Spokane, Washington, are more valuable on account of the marble and slate they contain than for agricultural purposes. September 20, 1898, your office held that said land is mineral in character and excepted from the grant to said company, and the company has appealed to the department.

It is urged on appeal that it was—

error to hold that sections 17 and 19 were either in whole or in part mineral in character, by reason of the existence thereon of any marble or slate claims, [and] error to hold that marble or slate lands are mineral in character so as to be excepted

from the grant to the Northern Pacific Railroad Company, Congress having, by the act of July 1, 1898, distinctly recognized them as being within said grant.

The correspondence between your office and the attorneys for said railroad company shows that this appeal is not intended to raise any question as to the fact that the land is more valuable for its marble and slate deposits than for agricultural purposes, but said correspondence and the appeal itself show that the only contention is that lands of such character as these have been found to be are not mineral lands within the meaning of the excepting clause of the grant to said company.

This contention is not sound. Marble and slate are mineral substances, and as such their existence on land in quantity and quality sufficient to render the land more valuable on that account than for agricultural purposes, makes such land mineral land within the meaning of the mineral laws and within the meaning of the excepting clause of the grant to the Northern Pacific Railroad Company, and therefore not subject to indemnity selection on account of said grant. See *Pacific Coast Marble Company v. Northern Pacific R. R. Co. et al.* (25 L. D., 233); *Alldritt v. Northern Pacific R. R. Co.* (Id., 349); *Hayden v. Jamison* (on review, 26 L. D., 373); *Beaudette v. Northern Pacific R. R. Co.* (29 L. D., 248).

The reference in the appeal to the act of July 1, 1898, is presumably to that portion of the act of that date found in 30 Stat., 597, 620, which relates to the adjustment of conflicting claims to land within the limits of the grant to said company. It does not appear how this act can affect the question presented in this case, nor why it is cited, unless to show that Congress was of opinion that "stone" lands are not embraced in the term mineral lands. A conclusion that such views were entertained by Congress does not necessarily follow from the language used in said act, nor does it follow that the word "stone" would necessarily include marble or slate, but however this may be, the Department is of opinion that lands more valuable for their deposits of marble or slate than for agricultural purposes were by the granting act of 1864 excepted from the grant as mineral lands.

The decision appealed from is affirmed.

#### COAL LAND ENTRY—SECOND FILING.

##### HENRY BURRELL.

A coal land entry based on a second filing may be permitted to stand, where the first filing was abandoned on account of the worthless character of the claim, and the good faith of the entryman is apparent.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *November 29, 1899.* (C. J. W.)

On May 12, 1898, Henry Burrell and John Herford made coal entry, No. 69, for the SE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$ , Sec. 29, S.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , Sec.

28, NE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ , Sec. 32, and NW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$ , Sec. 33, T. 4 S., R. 22 E., at Bozeman, Montana.

By your decision of July 23, 1898, Henry Burrell was required to furnish evidence as to whether or not he was the same Henry Burrell who filed coal declaratory statement for lots 1 and 2, and S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ , Sec. 3, T. 18 N., R. 6 E., in Helena land district, Montana, on June 4, 1892.

In response the said Henry Burrell filed an affidavit in which he states that he is the same person who filed in the Helena land office the coal declaratory statement referred to and that he was informed and fully believed when said coal entry No. 69, was made that his previous filing was no bar to his making said entry or its preceding declaratory statement, and that he made said entry in good faith. That at the time of making said first declaratory statement at Helena, it was supposed from the location development that the coal would prove good and merchantable, but that after he made it, the coal proved so poor that he had to abandon the claim. That in his efforts to find good coal he expended over two thousand dollars before abandoning it, and that care was used and expenditure made before locating the claim. He further alleges that he was benefited in no way by said filing and that he received nothing from any one for abandoning the claim and has thus had no benefit under the coal land law from said filing.

On September 2, 1898, your office, passing upon the showing made by Burrell, held—

Said claimant having made a previous filing under the coal land law, it must be held that he was debarred thereby from making a second filing and entry. 10 L. D., 539; 11 L. D., 351. The name of Henry Barrell will therefore have to be canceled from the entry.

The entry as it now stands is for two hundred and eighty acres. John Herford in his individual capacity is entitled to enter only one hundred and sixty acres. He may be allowed however sixty days in which to elect which one hundred and sixty acres he will retain provided the tracts selected are contiguous, and the entry for the remainder will be canceled.

Herford appears to have elected to exercise his right to select one hundred and sixty acres for himself, as provided in your decision, and has not appealed.

Burrell has appealed from your office decision, alleging that it was error to hold his interest in said entry for cancellation. It is alleged, *inter alia*, that he was permitted to join in the declaratory statement upon which the entry in question was made, and that he has expended much money and time in developing the claim and has acted in good faith and that there is no adverse claimant for any part of said land, and that no person would be wronged or injured by the reversal of your office decision. He files also an additional affidavit in which he sets forth the circumstances under which he joined in said entry and payment for the land, in which it is stated that the officer before whom the last coal declaratory statement was made assured him of his right to make it, notwithstanding the previous coal land statement to which

reference has been made. He asks that his title be confirmed to the remainder of the land covered by the entry, not selected by Herford, to wit: the S.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , Sec. 28, and NE.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  of Sec. 33, aggregating one hundred and twenty acres. Your office held the entry in question for cancellation as to Burrell, for the reason that under section 2350, Revised Statutes, but one entry can be made under the preceding sections, by the same person or association of persons, and under paragraph 9 of the coal circular, the same person can have the benefit of but one entry or filing. In support of this construction the cases of Albert Eismann (10 L. D., 539), and Walter Dearden (11 L. D., 351), are cited, in each of which it was held that a second coal declaratory statement could not be filed in the absence of a valid reason for failure to perfect title under the first. The reasonable interpretation of these decisions is that a second filing may be allowed where a valid reason is shown for failing to perfect title under the first. The case of Eismann, *supra*, is distinguished from the case of John McMillan (7 L. D., 181), where he was allowed to make a second filing upon his showing of good faith, and the expenditure of a large sum in developing and improving the land, and that there was no adverse claim to the land covered by his second filing. In the case of Eismann the general rule was deduced, that a second coal land filing can not be allowed in the absence of some valid excuse (such as was shown in the McMillan case, *supra*), for abandoning the first. Burrell offers an excuse or reason for abandoning his first filing and making a second, and the main question would appear to be, whether the reason or excuse offered is valid. As in the McMillan case, it is alleged that there is no adverse claim to the land covered by the second filing. The statute itself prevents a second entry by the same person or association of persons, but not in express terms a second filing.

The regulation prohibiting a second filing appears to have been made chiefly for the purpose of preventing the extensive mining and sale of coal under mere filings, without paying for the land, so that in a case where it appears that benefits have accrued to the party under the first filing, this would be within the evil intended to be remedied by the regulation, and a second filing could not be allowed.

No such evil is here apparent. Burrell swears, and the fact is not controverted, that he was deceived in the character of the land covered by his first filing, the coal upon which turned out to be too poor to be merchantable, and that after the expenditure of a large sum of money in trying to develop merchantable coal, he was compelled to abandon it and that he derived no profit or benefit in any way from his first filing. It appears also that the fact of the first filing was known at the local office when the second filing was allowed, and that it was made in good faith. Conceding the facts to be as stated by Burrell in his affidavits, it would appear that he had a valid reason for abandoning his first filing. His sworn statements, however, require corrobora-

tion. Your office is directed to give him notice of this requirement, and to allow him reasonable time to furnish such corroborative proof. In the event such proof is furnished, your office decision will be reversed and the joint entry of Henry Burrell and John Herford will stand intact for patent in its order, but on failure to furnish it, your office decision will stand affirmed. Your office decision is modified to conform hereto.

## INDIAN LANDS—RELIGIOUS SOCIETY.

## ST. FRANCIS MISSION.

The amount of land that may be acquired by a religious society under section 18, act of March 2, 1889, is limited to one hundred and sixty acres at any one point.

*Assistant Attorney General Van Devanter to the Secretary of the Interior,  
November 29, 1899. (W. C. P.)*

The application of St. Francis Mission to purchase a certain tract of land upon the Rosebud Indian reservation, in South Dakota, has been referred to me for opinion.

The act of March 2, 1889 (25 Stat., 888), provides for the establishment of a number of smaller reservations within the boundaries of the Great Sioux Indian reservation, the cession of the lands not included in such smaller reservations, the disposal of the lands so ceded, and the allotment to the individual Indians. Section 18 of said act is as follows:

That if any land in said Great Sioux reservation is now occupied and used by any religious society, for the purpose of missionary or educational work among said Indians whether situate outside of or within the lines of any reservation constituted by this act, or if any such land is so occupied upon the Santee Sioux reservation, in Nebraska, the exclusive occupation and use of said land, not exceeding one hundred and sixty acres in any one tract, is hereby, with the approval of the Secretary of the Interior, granted to any such society so long as the same shall be occupied and used by such society for educational and missionary work among said Indians; and the Secretary of the Interior is hereby authorized and directed to give to such religious society patent of such tract of land to the legal effect aforesaid; and for the purpose of such educational or missionary work any such society may purchase, upon any of the reservations herein created, any land not exceeding in any one tract one hundred and sixty acres, not interfering with the title in severalty of any Indian, and with the approval of and upon such terms, not exceeding one dollar and twenty-five cents an acre, as shall be prescribed by the Secretary of the Interior.

It seems that in 1885 there was set aside for the use of the St. Francis Mission one hundred and sixty acres of land upon the Rosebud reservation, which was occupied by said mission for educational and missionary purposes at the date of said act of 1889. In 1892 the mission asked to be allowed to purchase an additional one hundred and sixty acres under the provisions of section 18 of said act of 1889, *supra*. The Indian Office reported that the purchase could not then be allowed,

because the land was not surveyed, but recommended that the Indian Agent

be given authority to set apart for temporary use and occupation by said Catholic Mission Boarding School (St. Francis Mission School) the 160-acre tract requested, in order that the proper authorities of the society having said school in charge may have the opportunity to purchase the same when the lands shall have been surveyed and can be described by legal subdivisions.

This recommendation was approved by this Department July 8, 1892, and instructions given to carry it out. One hundred and sixty acres were set apart adjoining the other land occupied by the mission and has been occupied since then.

Subsequently, it seems, some doubt arose as to the proper construction of section 18 of said act of 1889, and certain questions propounded by the Commissioner of Indian Affairs were submitted to this office for an opinion. In his opinion of January 29, 1894, Assistant Attorney General Hall (18 L. D., 188) said:

I do not believe it was the intention of Congress to give the society one hundred and sixty acres of the public lands so long as the same might be used for educational and missionary work, and also to give such society the right to buy one hundred and sixty acres of land, and get the fee simple thereto from the government; but in my opinion the intention was to give to such society the right to elect between what might be called a temporary title and right to occupy the land, and a fee simple title by purchasing the land at the government price.

In conclusion, he advised that the Commissioner of Indian Affairs be answered as follows:

A religious society that occupied land at the date of the passage of the act of March 2, 1889, could have the land, to the extent of one hundred and sixty acres, granted to it so long as the same shall be used for educational and missionary work; or in lieu thereof, such society can purchase one hundred and sixty acres of land at the price prescribed in the statute and get the fee simple title thereto. But such society could not have one hundred and sixty acres granted to it under the first provision of section 18, and then, in addition thereto, purchase one hundred and sixty acres as provided in the second provision of the same section.

This opinion was sent to the Indian Office with approval of this Department. The Commissioner of Indian Affairs having some doubts as to one portion of said opinion, asked

whether it is intended to limit the quantity of land any society may have on any reservation to one hundred and sixty acres, notwithstanding they may have been in occupancy of land with possibly valuable improvements thereon at more than one place on the same reservation?

In this connection the Commissioner called attention to the fact that the language of the general allotment act of February 8, 1887 (24 Stat., 388), upon this point, is the same as that of the act of 1889, *supra*, and that the construction theretofore given that language by his office "would be incompatible with that held by the Assistant Attorney-General, if his decision is intended to limit the amount of land to one hundred and sixty acres which any society can have on any one reser-

vation." In an opinion of March 7, 1894 (18 L. D., 209), Judge Hall referring to his former opinion, said:

That opinion is not intended to deny the right of a religious society to have the use of lands to the extent they may occupy the same so that the amount does not exceed one hundred and sixty acres in any one tract.

Then, after quoting the language of the allotment act of 1887, he said:

I construe this language to mean that all the lands occupied by a religious society or other organization at the date of the passage of said act may be held by such society, provided it is limited to not more than one hundred and sixty acres in any one tract.

This opinion was approved by Secretary Smith as follows:

Approved, with the proviso, each separate tract must have been in *actual* use for religious or educational work among the Indians at the time of the passage of said act.

If the conclusion then reached is to be adhered to, this application to purchase can not be allowed, because the society holds one hundred and sixty acres under the first provision of section 18 of said act of 1889, and also because it was not in possession of the land now sought to be purchased at the date of said act.

Without now concurring in all that has been said upon this matter by Assistant Attorney General Hall and Secretary Smith, it seems to me to have been the design of this legislation to limit the amount of land to be acquired by any such society under said act to one hundred and sixty acres at any one point. To allow this purchase would defeat that design by giving this society three hundred and twenty acres at one point. I am therefore of opinion that it can not be allowed.

Approved, November 29, 1899:

E. A. HITCHCOCK, *Secretary.*

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MINING CLAIM—SURVEYOR GENERAL—DEPUTY MINERAL SURVEYOR.

ALFRED BALTZELL ET AL.

Under the prohibitive provisions of section 452 R. S., surveyors-general and deputy mineral surveyors are disqualified as applicants for mineral land.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *December 1, 1899.* (J. L. McC.)

Your office, on October 3, 1898, rendered a decision in the case of mineral entry No. 377, made June 28, 1898, by Alfred Baltzell and others, for the California Consolidated Iron Mine, Redding land district, California. Said decision directed the local officers to notify Alfred Baltzell and J. M. Gleaves, two of said entrymen, that they would be allowed sixty days within which to show cause why their names should not be stricken from the entry and omitted from the patent.

The records of your office show that said Baltzell was appointed a

deputy mineral surveyor in 1894, and has continued to occupy that position ever since. Gleaves was appointed deputy mineral surveyor in 1894, and remained such until he became surveyor-general for the State of California—to which position he was appointed February 19, entering upon the duties of the office April 1, 1898. At the date of the mineral entry in question (June 28, 1898, *supra*), therefore, Baltzell was a deputy mineral surveyor, and Gleaves was surveyor-general for the State of California.

The decision of your office held, in substance, that because of their occupying these official positions at the date of entry, their names should be stricken from the entry.

Notice to show cause was served upon the parties named, who in due time filed a reply, contending in substance that the departmental decision in the case of the Lock Lode (6 L. D., 105), holding that "the mineral entry of a deputy mineral surveyor within the district for which he is appointed is not in violation of any statute or departmental regulation," was correct, and was improperly overruled by the Department in the case of Floyd *et al. v. Montgomery et al.* (26 L. D., 122); and that, in any event, your office erred in giving to the rule laid down in said Floyd-Montgomery case a retroactive effect.

Your office, on December 28, 1898, adhered to its previous ruling. The mineral applicants have appealed to the Department, specifying in substance the same errors that were alleged in their answer to the rule laid upon them to show cause.

It will not be necessary to consider the allegations of error seriatim.

The departmental circular of September 15, 1890 (11 L. D., 348), after referring to the departmental decision in the case of Herbert McMicken *et al.* (10 L. D., 97; 11 L. D., 96), concluded as follows:

In accordance with said decision, all officers, clerks and employes in the offices of the surveyors-general, the local land offices, and the General Land Office, or any persons, wherever located, employed under the supervision of the Commissioner of the General Land Office, are, during such employment, prohibited from entering, or becoming interested, directly or indirectly in any of the public lands of the United States.

In the case of Frank A. Maxwell (29 L. D., 76), the Department held that the above quoted prohibition applied to deputy mineral surveyors.

In the case of John S. M. Neill (24 L. D., 393), the Department, speaking of the circular of September 15, 1890, said:

It was clearly intended that the surveyors-general themselves should come within the prohibition declared by said circular. The reasons which bring the clerks and employes of the surveyors-general under such prohibition operate with stronger force to include the surveyors-general. For demonstration see sections 2223 to 2234, inclusive, and section 2325, Revised Statutes.

Baltzell having been a deputy surveyor, and Gleaves a surveyor-general, at the date of the entry in the case now under consideration, the decision of your office directing that their names be stricken from the entry is correct, and is hereby affirmed.

## OKLAHOMA TOWNSITE—COURT HOUSE SITE.

W. F. HATFIELD ET AL.

The Secretary of the Interior is without authority to grant permission to the citizens of Alva, Oklahoma, to erect a post office building on lands set apart for a "court house site" in pursuance of the President's proclamation.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior, December 2, 1899.* (W. M. W.)

On November 16, 1899, W. F. Hatfield and other business men of Alva, Oklahoma Territory, filed in the Department a petition asking permission

to erect a building . . . in the plat reserved by proclamation for a court house, as shown in the enclosed plat of the town of Alva; said building to be used for no other purpose than for the Alva post office.

Said petition was referred by Acting Secretary Davis to the Commissioner of the General Land Office for report and recommendation.

November 20, 1899, the Commissioner, after acknowledging the receipt of the reference, reported as follows:

In reply I will say that this office has held in a kindred application from the town of Pawnee, that these lands had, under the law, been dedicated to the county and that therefore this Department was without power to grant the request.

By your reference of November 27, 1899, I am asked for an opinion "on the question presented in the Commissioner's letter."

Section 10 of the act of March 3, 1893 (27 Stat., 612-642), among other things, provides for the opening of lands embraced in the Cherokee Outlet to settlement by proclamation of the President, and after referring to certain lands reserved by executive order dated July 12, 1884, and continuing such reservation until the further action of Congress, specifically provides that—

the President of the United States, in any order or proclamation which he shall make for the opening of the lands for settlement, may make such other reservations of lands for public purposes as he may deem wise and desirable.

August 19, 1893, pursuant to section 10 of the act of March 3, 1893, *supra*, the President issued his proclamation opening the lands in the Cherokee Outlet to settlement (29 Stat., 1222, 1226). Said proclamation recites, among other things, that the lands in question had been divided into counties as required by law,

and lands have been reserved for county seat purposes to be entered under sections twenty-three hundred and eighty-seven and twenty-three hundred and eighty-eight of the Revised Statutes of the United States, as therein required, as follows, to wit:

For county M, the south half of the northeast quarter and the north half of the southeast quarter of section twenty-three, and the south half of the northwest quarter and the north half of the southwest quarter of section twenty-four, township twenty-seven north, range fourteen west of the Indian Meridian, excepting one acre reserved for government use for the site of a land office, and four acres to be reserved for the

site of a court house, which tracts are to be contiguous and to be designated by lot and block upon the official plat of survey of said reservation for county seat purposes, hereafter to be issued by the Commissioner of the General Land Office; said reservations to be additional to the reservations for parks, schools, and other public purposes required to be made by section 22 of the act of May 2, 1890.

The townsite of Alva, Oklakoма, covering the land embraced in the President's proclamation, was surveyed under the directions and instructions of the Commissioner of the General Land Office and a plat thereof accompanies the petition of Hatfield *et al.* By said plat the townsite of Alva is divided into lots and blocks, except block forty, which contains 172,240 square feet and is designated "Court House Site." The land reserved for a land office adjoins this block on the east.

Under the language used in the act of 1893, hereinbefore quoted, there is no room for doubting the authority and power of the President to make the reservation "for county seat purposes," as made in his proclamation of August 19, 1893. His authority was ample, full and complete to make such reservations of lands as he might deem wise and desirable "for public purposes." The term "public purposes" clearly covers a court house site, and when the townsite survey was made and the plat thereof approved the reservation attached to the specific tract designated as a "court house site," and under the proclamation the county at once became entitled to a patent therefor.

In view of the foregoing I am of opinion that the Secretary of the Interior is without the power to grant permission to citizens of Alva to erect a building to be used as a post-office upon the land embraced in block forty of said town as a court house site, and so advise.

Approved, December 2, 1899:

E. A. HITCHCOCK,

*Secretary.*

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

HOFF ET AL. v. MCNUFT.

A timber culture entry of a tract made by a bona fide purchaser thereof under section 4, act of March 3, 1887, cannot be held as an abandonment of his claim under said act; it appearing that such entry was only intended to be utilized in the event of failure to secure title through his purchase.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *December 4, 1899.* (L. L. B.)

By your office decision of March 8, 1899, the right to patent for the SE.  $\frac{1}{4}$  of Sec. 15, T. 96 N., R. 42 E., Des Moines, Iowa, was awarded to Porter S. McNuff, under the 4th section of the act of March 3, 1887 (24 Stat., 556), in virtue of his purchase of the same from the Sioux City and St. Paul Railroad Company, March 17, 1887, while the title to said land was held by the State of Iowa in trust for the use and benefit of

said company, and the homestead applications of Juliet R. Kelly and H. P. Hoff for the same tract were rejected.

Kelly and Hoff have appealed.

The errors charged in the appeals are for the most part such as were decided adversely to their contentions in the case of *Schneider v. Linkswiller et al.*, 26 L. D., 407, which need not be here noted; but there is another objection to the claim of McNutt which deserves consideration.

It appears that in November, 1890, after having paid on his contract with the company more than a thousand dollars and made quite extensive improvements, McNutt was allowed by the local office to make timber culture entry for the land so purchased.

Counsel for appellants insist that such action on his part was an abandonment of his claim under the act of March 3, 1887, and that thereafter he could not be considered as a purchaser from the company, and so is not entitled to the remedy provided in said act.

This contention cannot be sustained. The record indicates no disposition on his part to abandon his claim arising from his purchase. When he applied to make this timber culture entry, there was some doubt as to the title of the railroad company to this land. Shortly prior to that time suit had been instituted in the United States circuit court, the purpose of which was to declare the title to this and other lands in the United States, and public and legal opinions were divided as to where the title belonged. He had purchased the land and made large payments thereon in the full belief that the equitable title to the tract was in the company. He must have known that if the title was declared not to be in the company, it, of necessity, vested in the United States, as it was afterwards adjudged to be. His action, then, in applying to the government for title was only a precautionary measure, intended to be utilized only in the event of failure of title in his grantor, and in the further event that his consequent rights under the act of March 3, 1887, might also fail. His attitude in law is similar in some respects to that of the grantee of an estate, who, in order to strengthen his title, purchases a claim or color of title asserted by a third party. Such action cannot be considered as an abandonment of claim under his original conveyance.

Your office decision is affirmed.

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WARREN v. GIBSON.

Motion for review of departmental decision of September 25, 1899, 29 L. D., 197, denied by Secretary Hitchcock, December 4, 1899.

## RAILROAD RIGHT OF WAY—ADDITIONAL STATION GROUNDS.

## MISSOURI, KANSAS AND TEXAS RY. CO.

The necessity for additional station grounds, claimed under the act of July 25, 1866, must be shown before a plat thereof will be approved.

The acts of April 25, 1896, and March 2, 1899, do not divest or impair rights theretofore acquired under previous right-of-way legislation, but place limitations upon the extent to which the Secretary of the Interior may thereafter grant or authorize the use of grounds, for station and other purposes, by companies operating railroads in Indian Territory, and regulate the procedure whereby such grant or authority may be obtained.

*Secretary Hitchcock to the Commissioner of Indian Affairs, December 5, (W. V. D.) 1899.*

The Department has considered the communication of your office, dated September 9, 1899, and also the motion enclosed therein, wherein the Missouri, Kansas and Texas Railway Company seek a review of departmental ruling of July 13, 1899, declining to approve a plat of grounds claimed by said company to be used and occupied by it for reservoir and stock-yards purposes, adjacent to the regular station grounds of the company, at Muscogee, Creek Nation.

Without now specially considering the reasons given in the decision of July 13, 1899, for the refusal to approve the plat presented by said company, the Department is clearly of opinion that the plat should not be approved.

The acts of Congress which bear upon this matter are those of July 25, 1866 (14 Stat., 236), April 25, 1896 (29 Stat., 109), and March 2, 1899 (30 Stat., 990). This railroad secured its right of way through the Indian Territory under the act of July 25, 1866, which in section 8 provides:

And the right of way through the Indian Territory wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company to the same extent as granted by the sixth section of this act through the public lands.

The extent of the right of way granted by the sixth section, to which reference is thus made, is as follows:

Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road where it may pass through the public domain; also all necessary ground for station buildings, workshops, depots, machine-shops, switches, side-tracks, turn-tables, and water stations.

It appears that under this act the company, on January 30, 1872, secured departmental approval of a plat showing the grounds then desired by it for station and other purposes at Muscogee, said grounds so approved to it being four hundred feet wide—two hundred feet on each side of the center of the track—and 2980 feet long.

The act of April 25, 1896, entitled "An act to grant to railroad com-

panies in Indian Territory additional powers to secure depot grounds," provides in section one—

That any railroad company operating a railroad in the Indian Territory may acquire the right to use such additional ground as may be necessary for railway purposes at stations now existing, or for the establishment of new stations or depots by making it appear to the Secretary of the Interior that such additional ground is necessary for railway purposes, and that the convenience of the public and the public interests will be promoted thereby: *Provided*, That the lands so acquired shall be subject to all the conditions and limitations as to use as are the lands for right of way and station purposes, as contained in the original acts, respectively, granting the companies rights of way through the Indian Territory.

The act of March 2, 1899, grants rights of way for railway, telegraph and telephone lines through Indian reservations and through lands held by Indian tribes or nations in the Indian Territory, and in section two provides:

That such right of way shall not exceed fifty feet in width on each side of the entire line of the road, except where there are heavy cuts and fills, when it shall not exceed one hundred feet in width on each side of the road, and may include ground adjacent thereto for station buildings, depots, and machine-shops, side-tracks, turn-outs, and water-stations, not to exceed one hundred feet in width by a length of two thousand feet, and not more than one station to be located within any one continuous length of ten miles of road: *Provided*, That this section shall apply to all rights of way heretofore granted to railroads in the Indian Territory where no provisions defining the width of the rights of way are set out in the act granting the same.

The company claims that under the act of July 25, 1866, it was entitled to take and use the lands in question for reservoir and stock-yards purposes under the provision granting "all necessary ground for station buildings . . . depots . . . and water-stations"; that under this provision it did enter upon, occupy and use the lands in question for reservoir and stock-yards purposes and thus obtained a vested right therein; and that the acts of April 25, 1896, and March 2, 1899, are without application to the right of way granted to said company by the act of July 25, 1866. The present application and plat are not presented under and do not conform to the act of July 25, 1896, or that of March 2, 1899.

The ground claimed for reservoir purposes is 15.6 acres in extent, and adjoins the lands heretofore approved for station and other purposes. It is stated that this 15.6 acres in its entire extent is actually required by the company for a reservoir in the operation of its railway, and that it has been occupied and used for that purpose since 1874. How or why the necessity for the use of this ground as a reservoir arises is not stated, but upon inquiry among the officers of this Department acquainted with the location of the reservoir it appears that it is a depression, aided by an embankment upon one side, in which water accumulates by reason of surface drainage so as to constitute a large but shallow pool, which dries up at some seasons of the year. The pool is not fenced and is not exclusively used by the railway company, but is used as a watering place by animals in that vicinity and as a

place from which the railway company draws water for its engines. There is no showing that this is the only or most feasible means of obtaining water to be used in the operation of the railway. It is at best very doubtful whether this constitutes a "water station" within the meaning of the statute, and it is equally doubtful whether any necessity therefor can be shown. Since the company, although asserting a use and occupation of the land for a period of twenty-five years, did not present any plat thereof to the Department for approval until the present year, it is believed that their present application for the approval thereof is not entitled to favorable consideration.

The grounds claimed to be used for stock-yards are 4.4 acres in extent and adjoin the grounds heretofore approved for station and other purposes, and it is said that it "has been in the possession of such railway company for several years and has been used by said company for that purpose continuously and is now being so used." When the stock-yards were located—whether before or after the act of April 25, 1896—is not shown, and while it is stated that the ground claimed for this purpose in its entire extent is actually required, the facts and circumstances from which the necessity arises are not stated. Without considering whether stock-yards constitute "station buildings" or "depots" within the meaning of the statute, it does not appear that the present application therefor is well grounded.

While the acts of 1896 and 1899 do not divest or injuriously affect any vested rights theretofore acquired under the act of 1866, they do contain limitations upon the extent to which the Secretary of the Interior may grant or authorize the use of grounds for station and other purposes by railroad companies operating railroads in Indian Territory, and they also provide the method and procedure whereby such grant or authority may be obtained. The showing made with respect to the stock-yards does not indicate that any vested right therein was acquired by this company prior to the act of April 25, 1896, and, as before stated, the present application and plat do not conform to either the act of 1896 or that of 1899.

The motion for review is accordingly denied.

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#### OKLAHOMA LANDS—GREER COUNTY.

##### TINA G. HENDERSON.

Where a bona fide occupant of lands in Greer county, as the head of a family, has taken the full amount of land to which he is entitled under the act of January 18, 1897, a member of his family, over the age of twenty-one, other than husband or wife, may take, under said act, additional or "excess" lands, not to exceed one hundred and sixty acres.

If the head of the family fails to exercise his rights within the time accorded him by said act, any duly qualified member of his family, other than husband or wife, may succeed to his rights for three months longer, with the limitation that such member can take only one hundred and sixty acres.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *December 9, 1899.* (W. A. E.)

March 21, 1898, Tina G. Henderson filed application to make homestead entry for the NE.  $\frac{1}{4}$  of Sec. 17, T. 3 N., R. 20 W., I. M., Mangum, Oklahoma, land district, claiming the same as a member of the family of a *bona fide* occupant entitled to a preference right under the first section of the act of January 18, 1897 (29 Stat., 490).

This application was rejected by the local officers for the reasons that the land in question is covered by the homestead entry of Herral A. Marchbanks, made January 26, 1898, and that a member of the family of a preference right settler who has exercised his right is not entitled to any preference right of entry.

On appeal your office, by letter of August 30, 1898, affirmed the action of the local officers, whereupon further appeal was taken to the Department.

Section one of the act of January 18, 1897, reads, in part, as follows:

That every person qualified under the homestead laws of the United States, who, on March sixteenth, eighteen hundred and ninety-six, was a *bona fide* occupant of land within the territory established as Greer county, Oklahoma, shall be entitled to continue his occupation of such land with improvements thereon, not exceeding one hundred and sixty acres, and shall be allowed six months preference right from the passage of this act within which to initiate his claim thereto, and shall be entitled to perfect title thereto under the provisions of the homestead law, upon payment of land office fees only, at the expiration of five years from the date of entry, except that such person shall receive credit for all time during which he or those under whom he claims shall have continuously occupied the same prior to March sixteenth, eighteen hundred and ninety-six. Every such person shall also have the right, for six months prior to all other persons, to purchase at one dollar an acre, in five equal annual payments, any additional land of which he was in actual possession on March sixteenth, eighteen hundred and ninety-six, not exceeding one hundred and sixty acres, which, prior to said date, shall have been cultivated, purchased, or improved by him. When any person entitled to a homestead or additional land, as above provided, is the head of a family, and though still living, shall not take such homestead or additional land, within six months from the passage of this act, any member of such family over the age of twenty-one years, other than husband or wife, shall succeed to the right to take such homestead or additional land, for three months longer, and any such member of the family shall also have the right to take, as before provided, any excess of additional land actually cultivated or improved prior to March sixteenth, eighteen hundred and ninety-six above the amount to which such head of the family is entitled, not to exceed one hundred and sixty acres to any one person thus taking as a member of such family.

By act approved June 23, 1897 (30 Stat., 105), the time for the exercise of the preference right of entry given by said act of January 18, 1897, to *bona fide* occupants of public lands in Greer county was extended to January 1, 1898. This extension necessarily carried with it an extension of the time within which a member of the family of such a *bona fide* occupant might exercise whatever preference right he or she might have, as such member, under the section just quoted from the act of January 18, 1897:

The record shows that James A. Henderson, the father of the present applicant, was, on March 16, 1896, a *bona fide* occupant of land in Greer county, and that on December 20, 1897, he exercised his rights under the act of January 18, 1897, by making homestead entry for the NE.  $\frac{1}{4}$  of Sec. 21, T. 3 N., R. 20 W., and cash entry for the NW.  $\frac{1}{4}$  of the same section.

Tina G. Henderson files an affidavit showing that she is a member of the family of said James A. Henderson, and is over twenty-one years of age, and that the said James A. Henderson had, prior to March 16, 1896, improved and cultivated the land she seeks to enter, in excess of the three hundred and twenty acres to which he was entitled.

Where a *bona fide* occupant of lands in Greer county is the head of a family and has taken the full amount of land to which he is entitled under the act of January 18, 1897, has a member of his family, over the age of twenty-one, other than husband or wife, any right to take additional or excess lands under that act. This is the question presented by the present case.

An examination of the condition of affairs existing in Greer county at the date of the passage of the act may throw some light on the matter and aid in the solution of the question.

Prior to March 16, 1896, Greer county was generally supposed to be a part of the State of Texas. The laws of Texas were administered there and parties claiming portions of the public lands looked to the State for title. For several years prior to March 16, 1896, the public lands in Greer county were in a state of reservation, pending further legislation and executive action, but under the general laws of the State applicable to these lands the amount of land that one person could reasonably expect to acquire from the State when the reservation was removed was one full section, or, if the land was purely grazing land without any permanent water supply thereon, four sections. A large majority of the *bona fide* occupants of lands in Greer county, with whose relief the first section of the act of January 18, 1897, is concerned, had taken up and were claiming a section of land each and in many instances improvements had been made on all or the greater part of the section. It is to be presumed that Congress knew of this condition of affairs at the date of the passage of the act of January 18, 1897. With that knowledge before it, Congress, in the first section of the act in question, limited the right of these *bona fide* occupants to three hundred and twenty acres each, thus, in many cases, depriving the *bona fide* occupant himself of a portion of his improvements. Then arose the question as to what should be done with the land so excluded which had been improved or cultivated by the *bona fide* occupant in excess of the amount to which he was entitled under said act. Was it to be thrown open to entry by the first qualified applicant?

The view taken by the Department is that Congress made provision for such cases in the latter part of the section above quoted by giving

to any qualified member of the family of such *bona fide* occupant, other than husband or wife, an additional preference right for three months longer in which to take this excess land, limiting, however, the amount which any one member of the family could take to one hundred and sixty acres. The additional preference right given to a qualified member of the family of a *bona fide* occupant is thus a separate and distinct grant. It cannot be exercised until after the expiration of the time accorded the *bona fide* occupant himself in which to make his selection nor is it operative if there is no qualified member of the family of such *bona fide* occupant, other than husband or wife, to exercise the right, or there is no excess of additional land actually cultivated or improved by the *bona fide* occupant prior to March 16, 1896, above the amount which the *bona fide* occupant himself has taken, but it is not dependent upon the question as to whether or not the head of the family has taken the amount to which he is entitled.

Where, as in the present case, the head of the family has exercised his rights, the question arises as to whether there is any excess of additional land actually cultivated or improved by the *bona fide* occupant prior to March 16, 1896, above the amount which the head of the family has taken. If there is any such excess land, then any qualified member of the family, other than husband or wife, has three months from the expiration of the time accorded the *bona fide* occupant himself, in which to take such excess land, not exceeding one hundred and sixty acres to any one person thus taking as a member of such family.

Where the head of the family fails to exercise his rights within the time accorded him, any duly qualified member of his family, other than husband or wife, may succeed to his rights for three months longer, with the limitation, however, that such member can take only one hundred and sixty acres, instead of the three hundred and twenty acres to which the head of the family might have been entitled. In such a case there is no question of excess land, so far as this particular member, who succeeds to the rights of the head of the family, is concerned, but, if there be any other duly qualified members of the family, the question arises as to whether there is any excess of additional land actually cultivated or improved by the *bona fide* occupant prior to March 16, 1896, above the amount which the representative member of the family has taken. If there be any such excess land, then any duly qualified member or members of the family may take this excess land, not exceeding one hundred and sixty acres to any one such member.

Miss Henderson's homestead application was filed within three months from the first of January, 1898, and on the showing made by her she is entitled to make entry for the land applied for.

Your office decision rejecting her application is accordingly reversed, and you are directed to notify the local officers to call upon Herrald A. Marchbanks to show cause why his entry should not be canceled and the application of Miss Henderson allowed.

## WAGON ROAD GRANT—RIGHT OF SELECTION—ACT OF JULY 5, 1866.

## WILLAMETTE VALLEY AND CASCADE MOUNTAIN WAGON ROAD CO.

Within the prescribed limits on each side of the road, as constructed under the wagon-road grant of July 5, 1866, the company has the unqualified right of selection from any of the sections designated by odd numbers, save such as had been reserved to the United States before the passage of the granting act; and such right of selection is in no wise determined or terminated by the subsequent inclusion of said lands within the limits of a forest reservation established by executive order.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) December 9, 1899. (F. W. C.)

The Willamette Valley and Cascade Mountain Wagon Road Company has appealed from the decision of your office dated September 7, 1898, wherein certain selections made by said company under the grant made by the act of July 5, 1866 (14 Stat., 89), are held for cancellation because the lands had been, prior to the presentation of the selection lists at the local land office, included in the Cascade forest reservation established by executive order of September 28, 1893, under section 24 of the act approved March 3, 1891 (26 Stat., 1095).

The question being an important one, oral argument was permitted, and the matter has also been presented by brief.

As authority for the decision of your office, reference is made to the decisions of this Department in the following cases: Northern Pacific R. R. Co. *v.* Martin (6 L. D., 657), and *ex parte* Northern Pacific R. R. Co. (20 L. D., 332, and 26 L. D., 422). These decisions treated only upon the effect of the withdrawal made by the sixth section of the Northern Pacific granting act of July 2, 1864 (13 Stat., 356), upon the filing of the map of general route of said railroad as required by said section. Said granting act also provided for the filing of a map of definite location, which was to identify the lands granted, and upon the filing of this map the grant attached to the odd-numbered sections within the prescribed limits of the grant to which—

the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office.

The decisions so cited by your office held that the legislative withdrawal following the designation of the general route of said road, did not debar, within its limits, the Executive from the exercise of his ordinary authority in the matter of establishing military or Indian reservations, and that lands so reserved at the time of the filing of the map of definite location are excepted from the operation of the Northern Pacific grant. The filing of the map of general route did not fix any rights in the railroad company, it merely prevented others from acquiring title to the lands along such general route in advance of the ascertainment by

the definite location of the road, of the lands which would pass to the company under the grant. The Northern Pacific grant also made provision for indemnifying the company for the lands sold, reserved, or otherwise disposed of prior to the definite location of the road, by permitting selections to be made of lands in amounts equal to those so sold, reserved or disposed of, from a secondary or indemnity belt of lands adjoining the granted lands. The difference between the lands within the primary limits and those within this secondary or indemnity belt, has been so often defined by the courts that it is deemed unnecessary to enlarge thereon at this time, a mere reference to some of the cases being deemed sufficient: *Ryan v. R. R. Co.* (99 U. S., 382); *Grinnell v. R. R. Co.* (103 U. S., 739); *Cedar Rapids, etc. R. R. v. Herring* (110 U. S., 27); *St. Paul and Sioux City R. R. Co. v. Winona and St. Peter R. R. Co.* (112 U. S., 720); *Kansas Pacific R. R. Co. v. Atchison, Topeka and Santa Fe Ry. Co.* (112 U. S., 414); *Wisconsin Central R. R. Co. v. Price Co.* (113 U. S., 496). By these decisions it is established that the indemnity grant is a contingent grant, and that no title passes until selection is made in the manner prescribed. Neither the decisions as to the effect of the withdrawal upon the designation of the general route, nor those bearing upon the question as to the rights of the grantee claimant within the secondary or indemnity belt, are controlling upon the question as to the rights of appellant under the act of July 5, 1866, for no provision is made by said act either for the filing of a map of general route or for the establishment of an indemnity belt.

The grant made by the act of July 5, 1866, *supra*, under which appellants claim is *sui generis*. The language of the granting clause is "that there be and hereby is granted to the State of Oregon." This language, where not accompanied by words indicating an intention to the contrary, has been uniformly held to pass a present title. It is necessary, however, to identify the lands granted. Generally, they are identified or fixed by the filing of a map, upon which is delineated the line of location, and by the public surveys which distinguish the odd-numbered from the even-numbered sections and establish the boundaries thereof. This act makes no provision for the filing of such a map, the mode of identification being by selection from alternate sections designated by odd-numbers within six miles of the road. The six mile limits are fixed by the construction of the road. The only limitation upon the grant is—

That any and all lands heretofore reserved to the United States by act of Congress or other competent authority be, and the same are, reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way is granted subject to the approval of the United States.

In the case of the *United States v. Willamette Valley and Cascade Mt. Wagon Road Co.* (55 Fed. Rep., 711), the circuit court of appeals for the ninth circuit, in construing this grant, held it to be a grant *in praesenti*, notwithstanding the lands were by the terms of the grant, to

be selected. This grant is not like an indemnity grant, contingent upon the happening of an event before which no grant can be said to exist, but, upon the identification of the lands by a selection, the title thereto relates back as of the date of the act making the grant.

How far is this right of selection controlled by the Secretary of the Interior? In the case of *Willamette Valley and Cascade Mt. Wagon Road Co. v. Bruner* (on review, 26 L. D., 356), this matter was carefully and thoroughly considered and therein it was held that—

The right of selection conferred by the granting act can not be restricted or limited by the Secretary of the Interior. It is his duty to supervise the administration of this grant but his authority does not permit him to revise or limit the laws of Congress. He is as much bound by the provisions of the granting act as is either of the claimants in this case. It is the duty of the Secretary to see that the selections made in satisfaction of the grant are confined to lands described in the granting act, which, according to its language, are—"alternate sections of public lands designated by odd numbers, three sections per mile, to be selected within six miles of said road," excluding "any and all lands heretofore reserved to the United States by act of Congress or other competent authority;" but as between different sections equally subject to selection under the granting act and the order of withdrawal, the Secretary of the Interior can not say which shall be selected or which shall not be selected, for in doing this he would be denying the right of the State, or its grantee, to make the selection. The supervisory authority of the Secretary is not unlimited and can not be exercised arbitrarily for the purpose of conferring rights upon one person to the detriment of the acknowledged rights of others. *Cornelius v. Kessel* (128 U. S., 456).

It follows that within the prescribed limits on each side of the road, as constructed, the wagon-road company has the unqualified right of selection from any of the lands designated by odd numbers, save such as had been reserved to the United States before the passage of the act making the grant. It is doubtful whether any lands so situated could have been disposed of after the passage of the act making the grant, except subject to the right of selection in the wagon-road company. Surely, after the limits were fixed by the construction of the road, the lands from which the grant was to be satisfied were not of the class generally known as "public lands." They were encumbered by this right of selection which when exercised would complete the identification of the land to which a present title passed at the date of the granting act.

By the construction of the road all right of forfeiture was at an end, and it may be questioned whether thereafter and prior to the satisfaction of the grant, Congress could have made other disposition of the sections from which selection was to be made. However, the act under which the forest reserve in question was established, manifests no purpose to limit or restrict the grant. It merely authorizes the President to set apart and reserve "public land" wholly or in part covered with timber or undergrowth. In the case of *Bardon v. Northern Pacific R. R. Co.* (145 U. S., 535), the supreme court defines public lands as lands "open to sale or other disposition under general laws."

In addition to the fact that the construction of the road fixed the

character of these lands as within the limits from which the grant was to be satisfied, your office, following the construction of the road, defined the limits of the grant upon maps or diagrams, copies of which were furnished to the local officers, with directions that all the odd-numbered sections therein be withheld from other disposition to await selection by the company of the lands granted.

Although empowered under the act to make the selection of the granted lands, partially identified by the construction of the road, it was necessary that the particular land be further identified as part of an odd-numbered section by the government survey, before this right of selection could be exercised.

The progress of the public surveys within the limits of this grant was very slow, and it was not until after the passage of the act of August 20, 1894 (28 Stat., 423), that the company was authorized to make deposit of sufficient sum and secure the survey of any lands within the limits of its grant upon which it desired to exercise its right of selection. In the Hagan case (20 L. D., 259), the company was required to secure, before November 1, 1895, a survey of the land desired to be selected and to complete its selections within ninety days thereafter, when it was stated that the executive withdrawal would be revoked. May 22, 1895, the company made application for the survey of the townships in which the lands in question lie, and your office, with full knowledge that these townships were within the limits of the Cascade forest reservation, established as aforesaid September 28, 1893, accepted the required deposit and granted the application for the survey, which was accordingly made. The selections in question followed, and in the decision in the case of Wagon-road company v. Bruner (on review), before referred to, the executive withdrawal was ordered revoked, and the lands not included in pending selections opened to entry with the assent of the company. The supposition that its previous selections would be recognized undoubtedly influenced the company in interposing no objection to the revocation of the withdrawal.

From a consideration of the entire matter, it must be held that the right of selection under the grant of July 5, 1866, from the odd-numbered sections within the prescribed limits of the grant was in nowise determined or terminated by the inclusion of such lands within the limits of the Cascade forest reservation, and the decision of your office is accordingly reversed.

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#### SALE OF ISOLATED TRACTS—DISCRETIONARY AUTHORITY.

CHARLES S. STEVENS.

The law with respect to the sale of isolated tracts does not require that the Commissioner *shall* order such lands to be sold, but clothes him with discretion to place them upon the market when in his judgment it would be proper so to do; and the refusal of the Commissioner to make such an order will not be disturbed, where no abuse of his discretion appears.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
 (W. V. D.) *December 9, 1899.* (A. S. T.)

On October 26, 1898, Charles S. Stevens filed his petition praying that the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 36, T. 50 N., R. 5 W., 4th p. m., Ashland, Wisconsin, land district, be ordered into market under the provisions of section 2455 of the Revised Statutes, as amended by the act of February 26, 1895 (28 Stat., 687).

Said petition is duly sworn to and corroborated by the affidavit of two other persons, and states that said land—

is and for more than three years has been an isolated tract of public land.

That said land is not of sufficient value to warrant its entry under the timber and stone act of June 3, 1878 and August 4, 1892, but is worth the minimum price for which lands may be sold under section 2455, R. S.

On November 29, 1898, your office rejected said application and on January 6, 1899, Stevens filed his motion for a review of your said decision of November 29, 1898, accompanied by his affidavit wherein he alleges that—

he is the applicant above named; that the land described in his said application is not of sufficient value or suitable to be entered under the homestead law; that it is not of sufficient value to warrant a person paying two dollars and a half an acre therefore and entering under the timber and stone act of June 3, 1878 as amended; that the land is worth and that he would bid and pay therefor one dollar and a quarter an acre if it were offered at public auction; that the lands adjoining on the north and west that is, sections 25 and 35 of said township, have been cut and that the timber to the south is being cut this winter; that it is extremely probable that the forest fires which annually run through the choppings or slashings where logging operations have been carried on in this country will run over and kill the timber on the land described in his application during the coming summer; that unless said timber is removed during the first part of this year, it is probable that the same will be killed by fire and rendered totally valueless; that unless said tract is offered at public auction under his application, in his opinion the timber which constitutes its almost exclusive value, will be destroyed and that no revenue will be derived from this tract by the government or by any individual but that the land will remain for an indefinite period public lands unsought by any one; that for reasons and facts above stated the applicant urges that his petition be granted.

On February 3, 1899, a decision was rendered by your office denying said motion for review and adhering to said former decision, and from that decision Stevens has appealed to this Department.

By section 2455 of the Revised Statutes, it is provided that—

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. But public notice of at least thirty days shall be given by the land-officers of the district in which such lands may be situated, pursuant to the directions of the Commissioner.

By the act of Congress approved February 26, 1895 (28 Stat., 687), amending said section, it is provided that—

It shall be lawful for the Commissioner of the General Land Office to order into market and sell for not less than one dollar and twenty-five cents per acre any iso-



The circular approved March 18, 1897, but never promulgated, provides upon this point as follows:

The act applies to the State of Colorado, Nevada, Montana, Idaho, Wyoming, North Dakota, South Dakota and Utah, and the Territories of New Mexico and Arizona, and all other mineral districts of the United States.

You propose to substitute for this paragraph the following:

The operation of the act does not extend beyond the states and territories specifically named therein, viz: the states of Colorado, Nevada, Montana, Idaho, Wyoming, North Dakota, South Dakota, and Utah, and the territories of New Mexico and Arizona, since the phrase "other mineral districts of the United States," used in the act, having no definite signification, is incapable of local application; and, consequently, fails to have any effect for want of certainty.

In regard to this change, and referring to the construction given by the former circular, you say:

While the wording of the act is, doubtless, susceptible of this construction, the result of expanding the operation of the act beyond the states and territories specifically named therein on the strength of so vague and altogether undefined phrase as "mineral districts," will be to render it *practically impossible to administer* the law in those states and territories in which it becomes operative under this term, since it will be impossible to distinguish as to which lands in such states and territories are to be recognized as constituting "mineral districts." In the opinion of this office, this phrase is incapable of definite local application.

To adopt your recommendation would be to say that the words "and all other mineral districts of the United States" are surplusage and of no effect. Such action would be obnoxious to the well-settled rules of construction, which require that effect shall be given to every word of a statute, if possible. As said by you, the words in question are susceptible of the construction given them in the former circular.

Furthermore, the fact that difficulty may be met with in practically administering a law is not usually safe ground for ignoring a provision thereof.

The second section of said act indicates that effect was intended to be given said phrase, and at the same time points out with some degree of clearness, that all mineral lands are to be considered as within the purview of said act. Said section contains the following:

That it shall be the duty of the register and receiver of any local land office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective districts.

Accepting this provision as explaining and defining the term, "other mineral districts," it materially lessens if it does not entirely obviate the difficulties referred to in your letter.

I agree with you that it is not necessary to include in this circular a reference to the act of March 3, 1891 (26 Stat., 1093), providing for permits to cut timber on the public timber lands in certain States. That act has a well-defined purpose and scope of its own, and it was not intended by this circular to affect its operation therein.

It does not seem necessary to go into a fuller discussion of the ques-

tions involved, as they were all quite fully gone into by my predecessor, when first submitted (24 L. D., 167).

I concur in the conclusion then reached, and am of opinion that the circular approved March 18, 1897, is correct. You will, therefore, make such modifications, as to the date when it shall take effect, as may be necessary to give due notice thereof, and as so modified it will be approved preparatory to its promulgation.

PRACTICE—MOTION TO DISMISS.

BAR *v.* ALDRICH.

A motion to dismiss a contest for the want of a sufficient charge, in a case where the evidence is taken before a commissioner, is in due time, if made before the local office on the day set for the hearing.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *December 14, 1899.* (A. S. T.)

On August 2, 1889, Alfred A. Aldrich made timber-culture entry No. 6852, for the E.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 28, T. 122, R. 74, Aberdeen, South Dakota.

On December 22, 1897, Jacob Bar filed an affidavit of contest against said entry, alleging that the defendant—

has failed to plant tree seeds, trees, or cuttings on five acres, ten acres or any part thereof or cause the same to be done during the 5th, 6th, 7th and 8th years after entry to date, and that said failure still exists.

Notice was issued and served and the testimony was ordered to be taken before a notary public, and on the day set for taking the testimony both parties appeared with their attorneys and offered testimony.

On the day fixed for the hearing before the officers of the local land office, the defendant filed his motion to dismiss the contest. Said motion is as follows:

[United States Land Office, Aberdeen, South Dakota. Jakob Bar, *vs.* Alfred Aldrich.  
Contest T. C. No. 6852.]

And now comes the claimant and moves to dismiss this contest for the reason that no allegation of the affidavit or complaint or notice of hearing alleges any failure to comply with the timber culture law.

The allegations are that no tree seeds, trees or cuttings were planted during the fifth and succeeding years, after date of entry.

This motion is made at the final hearing of the case when the papers were returned to the Land Office for final hearing.

ALFRED A. ALDRICH,  
By J. H. HAUM, *His Attorney.*

Said motion was allowed and the contest dismissed by the local officers and the contestant appealed to your office where, on November 18, 1898, a decision was rendered reversing the action of the local officers, and holding the entry for cancellation on the evidence taken before

said notary public and submitted before the register and receiver of the local office, and from that decision Aldrich has appealed to this Department.

The affidavit does not allege sufficient grounds of contest, and the only question to be considered is whether or not the motion to dismiss came too late to warrant the action taken by the local officers.

In your decision you say—

If the affidavit and notice be defective in not setting forth a sufficient charge, such defect should have been taken advantage of by defendant at the trial and before the testimony was introduced. The question not having been raised at that time, such defect, if any in fact existed, must be considered as having been waived—and in support of this holding you refer to the case of *Paxton v. Owen* (18 L. D., 540), and cases therein cited. These cases hold that such objection to the sufficiency of an affidavit of contest must be made at the hearing and comes too late when made for the first time on appeal. The construction placed upon said ruling by your office seems to be that the objection is required to be made at or before the time when the testimony is taken, and is too late if made after proof has been taken. Such construction is erroneous in that it does not distinguish between the time of taking the proof and the time of the submission of the proof and hearing by the local officers.

In the case of *Heartley v. Ruberson* (11 L. D., 575), it is held that a motion to dismiss a contest should not be filed before an officer designated to take the testimony, and in the case of *McClellan v. Crane et al.* (13 L. D., 258), it is held (syllabus):

An objection to the sufficiency of an affidavit of contest can only be raised by the defendant, and not by him prior to the day set for the hearing.

The motion to dismiss this contest was made before the local officers on the day set for the hearing and was therefore made in proper time. Your said decision to the contrary is therefore reversed and said contest is dismissed and said entry held intact.

#### GRADUATION ENTRY—ACT OF JANUARY 30, 1897.

##### COBB ET AL. v. ROBINSON.

The pendency of an application to enter lands embraced within a suspended graduation entry, at the date of the confirmatory act of January 30, 1897, constitutes no bar to the operation of the act.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) December 14, 1899. (E. J. H.)

On August 3, 1859, James J. Robinson made graduation cash entry for the SE.  $\frac{1}{4}$ , the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  and the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 20, T. 4 S., R. 16 E., T. M., under the act of August 4, 1854 (10 Stat., 574), Gainesville, Florida, land district (Newnansville series).

It seems that this entry was suspended in your office, because the entryman failed to furnish the proof of settlement, etc., as required by circular

of April 7, 1856 (1 Lester, 475). Subsequently, by the act of February 17, 1873 (17 Stat., 464), entries of this class were confirmed, where the affidavit was filed according to instructions, and the money paid or tendered at the date of purchase, though the proof of settlement required was not furnished.

The affidavit was so filed and the money paid in this case. This removed the cause of suspension so far as that ground was concerned.

But another cause of suspension was because the land was not legally subject to graduation entry at the time Robinson made entry thereof, not having been in the market for ordinary private entry for the period of ten years or more. For this reason Robinson's entry still remained suspended.

On October 16, 1893, James Cobb made application at the local office for homestead entry for the SW.  $\frac{1}{4}$  of Sec. 20, T. 4 S., R. 16 E., which was rejected for conflict, as to the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  and the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$ , with the graduation entry of Robinson; and on the same day Benjamin Cobb made like application for the SE.  $\frac{1}{4}$  of the same section, which was rejected for the same reason. From the action of the local officers in rejecting said respective homestead applications, each party appealed to your office.

It was stated in the appeal of James Cobb that the south half of said section was unoccupied until some years ago, when the Cobb brothers bought the land from a party claiming to be able to give good title, each paying \$300; that the party from whom they had purchased, finding he could not give good title, left the country to avoid refunding the money; that they continued to reside upon and cultivate said lands, expecting said party would return and make the matter all right; and that affiant, James Cobb, had a good house, stable, well, fencing and other improvements upon the said SW.  $\frac{1}{4}$ , amounting in value to over \$450.

Benjamin Cobb, in his appeal, swears to the same state of facts, putting the value of his own house, stable, well, fencing and other improvements upon the SE.  $\frac{1}{4}$  at \$384. Each of said affidavits was duly corroborated by two witnesses.

On April 5, 1898, your office rendered decision in the case of James Cobb, sustaining the action of the local officers in rejecting his homestead application for conflict with the entry of Robinson, and on May 13, 1898, a similar decision was rendered in your office in the case of Benjamin Cobb. In said decisions it was held that—

Robinson's entry, which appears to have been made in good faith, falls within the category of unoffered lands, is confirmed under act of January 30, 1897 (29 Stat., 507).

On January 11, 1899, your office took up the case of the suspended entry of Robinson, and after reciting the facts relating to its suspension, and the confirmation acts of February 17, 1873, and January 30, 1897, said entry was relieved from suspension and approved for patenting.

From your office decisions rejecting the applications of James and Benjamin Cobb, said parties appealed to the Department.

It seems that your office considered these applications, as well as the entry of Robinson, with which they are in conflict, separately, rendering three decisions therein, and treated each as an *ex parte* case. The papers therein have, however, all been brought together in one case, and there would seem to be no good reason why all three of said claims should not be acted upon together.

The Department concurs in your decisions rejecting the homestead applications of James and Benjamin Cobb, so far as the same relate to the land covered by the entry of Robinson. That entry, though suspended, had not been finally acted upon, and was a bar to the allowance of said applications, as there can not properly be two entries at the same time on the same land. (*Russell v. Gerold*, 10 L. D., 18.) It was also held in the case of *Henry Cliff*, 3 L. D., 216, that an entry—though suspended temporarily, is nevertheless an entry, and withdraws the land embraced therein from market until such time as the same may be finally acted upon.

With reference to your office decision of January 11, 1899, holding that the entry of Robinson was confirmed by the act of January 30, 1897, it will be noted that said act provides that "all entries of the public lands" made under the graduation act of 1854—

which are illegal and invalid because of the fact that the lands covered thereby had never been offered for sale, be, and the same are hereby, confirmed.

The language of this confirmatory statute is broad and covers all existing "illegal and invalid" entries of the class referred to therein, to the land covered by which there was no prior and valid adverse right.

While the applications of James and Benjamin Cobb were pending on appeal from the decision of the local officers rejecting the same, at the time of the passage of said act, the lands involved were nevertheless subject to disposition by Congress, and were thereby confirmed to the graduation cash entryman.

No objection would seem to exist to the allowance of James Cobb's application upon the NW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of said section, if he so desires.

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O'BRIEN *v.* CHAMBERLIN.

Motion for review of departmental decision of October 10, 1899; 29 L. D., 218, denied by Secretary Hitchcock, December 14, 1899.

## DESERT LAND ENTRY—PROOF OF ASSIGNMENT—ANNUAL PROOF.

ARTHUR F. HOGSETT.

There is no authority for the acceptance of the proof of the assignment of a desert land entry, and of annual expenditure, executed before a clerk of a court of record outside of the land district and State in which the land is situated.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) December 14, 1899. (A. S. T.)

On August 2, 1895, Mathew Harless made desert land entry No. 2673, for the S.  $\frac{1}{2}$  of Sec. 30, T. 2 N., R. 1 W., Tucson, Arizona, land district, and on August 7, 1895, he submitted satisfactory proof of annual expenditure for the first year.

On January 23, 1898, one Aarthur F. Hogsett, as assignee of said Harless, filed in the local office proof of annual expenditure on said entry for the second year, and furnished a certified copy of an assignment by the entryman, dated August 9, 1896, in which the first name of the assignor is written both "Matthew," and "Mathew," and that of the assignee is written "Arthur." In said annual proof the assignee signs his first name "Aarthur," and that of the entryman is written "Matthew."

The affidavit (form 4-074 a) required of assignees of original entrymen was executed by Aarthur F. Hogsett on July 25, 1897, before T. J. Penn, clerk of the circuit court of Scott county, Kentucky, as was also the affidavit of the assignee (form 4-074 b) constituting part of his said proof of annual expenditure. The depositions of his two witnesses as to said annual expenditure (form 4-074 c) were taken on January 24, 1898, before the clerk of the district court of Maricopa county, Arizona, that being the county in which the land is situated.

Because of the discrepancies in said names and because said affidavits of the assignee were sworn to before said clerk in the State of Kentucky, the local officers declined to accept said proof of annual expenditure, and so notified J. K. Doolittle, attorney for Hogsett. Said attorney filed written exceptions to the action of the local officers, and on May 23, 1898, he addressed a letter to the local officers enclosing a certified copy of said assignment and wrote as follows:

Please find enclosed certified copy of assignment with clerical error in writing name of assignor corrected. In assignee's affidavit and annual proof, you or either of you are hereby authorized and requested to strike out one of the letter "A's" in the signature, and also one of the "t's" in the christian name of assignor.

The copy of the assignment accompanying said letter gives the assignee's first name as "Arthur."

The papers in the case were duly transmitted to your office by the local officers with a recommendation of adverse action upon said proof of assignment and of annual expenditure.

Your office, on October 15, 1898, without passing upon the discrepan-

cies in said names, rejected said proof of assignment and of annual expenditure, for the reason that it was taken before an officer in the State of Kentucky. Högsett has appealed from your said decision to this Department.

It is insisted that under the act of Congress approved May 26, 1890 (26 Stat., 121), proof of said assignment and of said annual expenditure might properly be made before the clerk of a court of record in the State of Kentucky. Said statute provides that—

SECTION 2294. In any case in which the applicant for the benefit of the homestead, pre-emption, timber culture, or desert land law is prevented, by reason of distance, bodily infirmity, or other good cause, from personal attendance at the district land office, he or she may make the affidavit required by law before any commissioner of the United States circuit court or the clerk of a court of record for the county in which the land is situated, and transmit the same, with the fee and commissions to the register and receiver.

That the proof of settlement, residence, occupation, cultivation, irrigation, or reclamation, the affidavit of non-alienation, the oath of allegiance, and all other affidavits required to be made under the homestead, pre-emption, timber culture, and desert land laws, may be made before any commissioner of the United States circuit court, or before the judge or clerk of any court of record of the county or parish in which the lands are situated; and the proof, affidavit, and oath, when so made and duly subscribed, shall have the same force and effect as if made before the register and receiver, when transmitted to them, with the fee and commissions allowed and required by law.

Previous to the passage of this statute, affidavits and proof in desert land cases were required to be made and taken before the register and receiver of the district land office in the district in which the lands were situated, or before the judge or clerk of a court of record of the county in which the lands are situated, and there seems to be nothing in the statute authorizing such affidavits and proof to be made outside of the land district in which the lands are situated. The object and purpose of the statute being to provide for making such affidavits, etc., before certain officers not theretofore authorized to take such proof, and when taken before the judge or clerk of a State court the statute expressly requires that he shall be the "judge or clerk of a court of record of the county or parish in which the lands are situated."

In the case of Edward Bowker (11 L. D., 361), construing the statute now under consideration, after reviewing at considerable length the history of this legislation, it is said:

From this history of the act I conclude that the purpose of this enactment was simply to designate an additional or 'new officer' before whom such proofs could be taken, and not to change in any manner the provisions defining the place for taking such proofs.

This holding has been followed by this Department in various other cases. (John W. Burns, 24 L. D., 443; James C. Morris, 27 L. D., 577).

Under the law and the rules and regulations of the Department there is no authority for taking the proof of said assignment and of said annual expenditure, before the clerk of a court of record in Kentucky,

and therefore your decision rejecting said proof for the reason given is correct and is affirmed.

Hogsett will be allowed sixty days from service of notice of this decision in which to file proper proof of said assignment and of said annual expenditure, in default of which said assignment will be treated as if never made.

Pending this appeal said Hogsett has filed his affidavit showing that his correct name is Arthur F. Hogsett and no further proof will be required as to the orthography of said name.

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TOWNSITE ENTRY IN ALASKA—TOWN LOT.

LEWIS ET AL. v. CAMPBELL.

The right to a deed for a town lot, in the case of a townsite entry in Alaska, made under the act of March 3, 1891, depends upon the claim and occupancy existing at the date of the townsite entry.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) December 14, 1899. (L. L. B.)

By your office decision of August 1, 1899, affirming the action of the trustee for the townsite of Juneau, in Alaska, the right to a deed for lots 7 and 8 in fractional block "F" in said town of Juneau was awarded to Richard F. Lewis and Hannah L. Anthony, each having been adjudged to be entitled to an undivided one-half interest in said lots, they having jointly applied for a deed thereto. Their right to lot 7 was not disputed, but Malcolm Campbell was an applicant for a deed to lot 8, and Benjamin F. Wallace was also an applicant for a small portion of said lot 8 which bordered on the inlet. The appeal of the two last named claimants brings the case here.

As to the claims of Campbell and Wallace it is sufficient to say that the record shows that neither of them was occupying or otherwise claiming the lot in controversy on October 13, 1893, on which day the townsite of Juneau was entered by the trustee for the benefit of the inhabitants and occupants of the land embraced in said entry. See *Coffield v. McClelland*, 16 Wallace, 331, 334.

This leaves for consideration only the right of the appellees Lewis and Anthony to a deed from the trustee. The facts in relation to their claim are correctly set out in your office decision, and, summarized, are as follows:

November 3, 1881, one Stillman Lewis filed a location notice covering substantially what is now lot 7, in said block "F." About five months later he executed and had recorded a transfer of all his rights under said location, and on the same day filed another location notice for a piece of land west of and adjoining his first location. This second location, filed April 1, 1882, covered what is now lot 8, and extended some

distance—perhaps twenty feet—beyond the western boundary of said lot to “low water mark” on an inlet of the ocean known as Gastineaux channel. The evidence shows that he built a log house on lot 7 and erected a fence on two sides of the ground embraced in his two locations, the other two sides reaching to an abrupt bluff washed by the inlet or channel. He lived in the house for some time, exactly how long not appearing. He seems to have been an enterprising business man, for at the time of his death, in 1890, he was the owner of the water-works that supplied the town, and had an interest in a number of mines and owned other personal and real property, the value of which is not stated in the record. He died intestate, leaving as his sole heirs a brother in Boston, Massachusetts, and a sister in Cincinnati, Ohio. The sister is Mrs. Anthony, one of the claimants herein. Richard F. Lewis, her co-claimant, is the son of John V. Lewis, the brother of the intestate and heir to one-half of his estate. The claim of his son arises from a deed from his father, granting for one dollar all his interest in his brother's estate in Juneau, Alaska. Richard F. Lewis is prosecuting the claim in virtue of his title so derived and a power of attorney from his aunt, Mrs. Anthony, the other heir of said Stillman Lewis.

The record shows conclusively that there was no claimant for either of these lots at the date of the townsite entry, *except the heirs of Stillman Lewis.*

It is true that the improvements upon lot 8 were very meagre, but, in the absence of an adverse claimant, they are believed to be sufficient to entitle the heirs to a deed from the trustee.

It is not explained in the record how Stillman Lewis came to exercise control and assert and maintain possession of lot 7 after the transfer of his location right in 1881, but the presumption is that the sale thereof was not fully consummated, or rather the terms of the contract of sale were not complied with by the transferee. The consideration in said transfer was \$310, one hundred dollars in cash, an order for \$175, and fifteen hundred feet of lumber to be paid, “if demanded,” within a month from date of transfer. It was further stipulated that Lewis was to retain possession of the house for six months after the transfer. The transferee is described as the “A., T. & L. Co.”

The record shows that the “A., T. & L. Co.” has never been in possession of said lot, nor exercised any control of the same, but, on the contrary, the same, together with the other land embraced in the enclosure, has been under the control of Lewis up to his death and of his administrator, and heirs ever since, until some time in May, 1896, when Malcolm Campbell, in the night time or very early in the morning, moved a small shack on to lot 8, since which time he has asserted and maintained possession of lot 8, although it appears that there is a suit pending in the United States district court, brought by Lewis and Anthony, to oust him from the premises.

Although it is clearly shown that the decedent Lewis was in the pos-

session of these lots as early as 1881, and was asserting such possession May 17, 1884, when the act relating to the district of Alaska was passed (23 Stat., 24), it is not deemed necessary to invoke that act in order to extend the relief here sought to his heirs.

The 11th section of the act of March 3, 1891 (26 Stat., 1095), is as follows:

That until otherwise ordered by Congress lands in Alaska may be entered for town-site purposes, for the several use and benefit of the occupants of such town-sites, by such trustee or trustees as may be named by the Secretary of the Interior for that purpose, such entries to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be; and when such entries shall have been made the Secretary of the Interior shall provide by regulation for the proper execution of the trust in favor of the inhabitants of the town-site, including the survey of the land into lots, according to the spirit and intent of said section twenty-three hundred and eighty-seven of the Revised Statutes, whereby the same results would be reached as though the entry had been made by a county judge and the disposal of the lots in such town site and the proceeds of the sale thereof had been prescribed by the legislative authority of a State or Territory: *Provided*, That no more than six hundred and forty acres shall be embraced in one townsite entry.

The regulations issued under said act direct that lots unclaimed at date of entry shall be sold at public outcry and the proceeds expended under direction of the Secretary of the Interior for the benefit of the town. See General Land Office Circular, 1899, page 134. These lots, then, must be awarded to Lewis and Anthony, or sold for the benefit of the town.

As shown by the record, there was no one except the heirs of Lewis claiming this land at date of the townsite entry, and while their improvements were meagre, they were sufficient to designate their occupancy and claim in the absence of an adverse claimant, and the townsite trustee, as well as your office, has so held, and it is believed that Lewis' heirs have brought themselves within the provisions of the general townsite act which was incorporated so far as practicable in the said act of March 3, 1891.

The decision of your office, in so far as it awarded the right to a deed to the land in controversy, is affirmed.

#### MINING CLAIM MINERAL LAND—APPLICATION.

##### COLEMAN ET AL *v.* MCKENZIE ET AL.

A failure to do the required annual assessment work on a mining claim can not be taken advantage of by a claimant under the agricultural land laws, but only by a mineral claimant who, after such failure and before resumption of work, relocates the land according to the mining laws.

By the failure to prosecute a mineral application to completion within a reasonable period after publication, the right to the mining claim is not lost, but the right to the assumption declared by section 2325, R. S., that no adverse claim exists and that the applicant is entitled to a patent upon payment for the land.

The case of *Cain et al. v. Addenda Mining Co.*, 29 L. D., 62, cited and distinguished.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *December 14, 1899.* (W. A. E.)

John D. McKenzie *et al.* have filed a second motion for review in the case of James V. Coleman *et al. v. John D. McKenzie et al.*, involving lands in townships 8 and 9 south and ranges 1 east and 1 west, M. D. M., San Francisco, California land district.

This case was decided by the Department May 4, 1899 (28 L. D., 348), and motion for review of said decision was denied October 18, 1899.

As ground for the present motion it is urged that the decision of May 4, 1899, herein, holding that a patent is not essential to the enjoyment of a mining claim, and that the failure of the Santa Clara Mining Association and its successors in interest, Coleman *et al.*, to prosecute said association's application for a mining patent during the period intervening between departmental decision of August 24, 1885, in Santa Clara Mining Association *v. Scorsur et al.* (4 L. D., 104) and the times when McKenzie *et al.* attempted to initiate claims to the land under the agricultural land laws, is in conflict with departmental decision of July 25, 1899, in Cain *et al. v. Addenda Mining Company* (29 L. D., 62), wherein it is held that the mining laws contemplate that proceedings under an application for a mining patent should be prosecuted to completion within a reasonable period after the required publication, or after the termination of proceedings on adverse claims, if any are filed, and failure to do so constitutes a waiver of rights secured under the application.

There is no conflict between these decisions. An application for patent is not essential to the acquisition or maintenance of a mining claim. The location and maintenance of a mining claim according to law carry the right to possess the land within its boundaries and to extract the minerals found therein, but they do not give any right to the fee. An application for patent is the proceeding whereby one having a mining claim seeks also to acquire the fee or paramount title of the United States. An application for patent not being essential to the acquisition or maintenance of a mining claim, it follows that the abandonment of such an application leaves the title to the land and the right to possess the same and to extract the minerals therefrom just where they would have been if no application for patent had been made. If the land be agricultural in character, it is not subject to location under the mining laws, and if it be mineral in character, no claim thereto can be acquired under the homestead or other agricultural land laws. The mining laws (Section 2324 Revised Statutes) require that—

On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but

where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.

Thus, while a stated amount of expenditure in labor or improvements is required to be made annually upon each mining claim, a failure to conform to this requirement will not result in a forfeiture of the claim if the original locators, their heirs, assigns or legal representatives, resume work upon the claim after such failure and before relocation thereof by another. A failure to do the required annual assessment work does not change the character of the land, and make that agricultural which was mineral before, nor does it make mineral land subject to disposition under the agricultural land laws. Therefore a failure to do the required annual assessment work can not be taken advantage of by a homestead or other claimant under the agricultural land laws, but can be asserted only by a mineral claimant who, after the failure and before resumption of work by the first locator, relocates the land according to the mining laws.

In *Cain et al. v. Addenda Mining Company* the facts were that the company had made application for a mining patent, notice of which was duly posted and published for the required period. The mining laws (Section 2325 Revised Statutes) provide that—

if no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of five dollars per acre and that no adverse claim exists.

The company did not make payment for the land or take any other proceeding upon its application for patent until several years after the expiration of the period of publication and after the termination of proceedings upon the only adverse claim filed against its application, when it asserted a right, under its application and publication, to make payment for and entry of the mining claim. Protests against the allowance of this entry were filed, alleging that the company had failed to do the required annual assessment work during a part of such intervening time, and that after such failure and before any resumption of work by the company, the protestants relocated the ground according to the mining laws. The company insisted that it was entitled, because of its application for patent and the published notice thereof, to the assumption declared in section 2325, but it was held, as before stated, that the mining laws contemplate that proceedings under an application for patent should be prosecuted to completion within a reasonable period after the required publication or after the termination of proceedings upon adverse claims, if any are filed, and that failure to do so constitutes a waiver of all rights secured under the application. In other words, that which was held to have been waived or lost, by the

failure to reasonably prosecute the application for patent, was not the mining claim, but the right to the assumption declared by section 2325 that no adverse claim existed and that the company was entitled to a patent upon payment for the land. The Department did not in that case undertake to say that the company had lost its mining claim by its failure to prosecute the application for patent, but rather that it had thereby lost the advantage theretofore obtained by its application for patent and by publication of notice thereof, and that if the company desired to obtain the fee or paramount title of the United States, it was necessary for it to again make application for patent and give notice thereof, which would afford the protestants, who claimed to have relocated the ground (not because the company failed to prosecute its application for patent, but because it failed to do the required annual assessment work), an opportunity to adverse the new application and to obtain, as contemplated by the mining laws, a judicial determination of the conflicting rights of possession asserted by the company and the protestants. That decision does not even tend to sustain the contention of the agricultural claimants in the case at bar.

It is true that they claim that Coleman *et al.*, the mineral claimants, have failed to do the required annual assessment work, but if this be true, it would not operate to the advantage of any one other than a locator under the mining laws, whose location was made after such failure and before resumption of work of the first locators. It may be that the mineral claimants and their grantors have held and worked the mining claim for a period equal to the time prescribed by the statute of limitations of California for mining claims and that the mineral claimants assert that by reason thereof further assessment work and expenditure upon the claim are dispensed with by section 2332 of the Revised Statutes, but however that may be, as a question either of fact or law, it is of no moment in a contest between mining claimants and agricultural claimants for land which is otherwise shown to be mineral in character.

The second motion for review is denied.

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SETTLEMENT RIGHT--UNLAWFUL ENCLOSURE.

THOMPSON *v.* HOLROYD.

An unlawful enclosure of the public lands is no bar to the acquisition of a valid adverse settlement right.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) December 14, 1899. (H. G.)

John N. Thompson appeals from the decision of your office of October 1, 1898, holding for cancellation his desert land entry made July 22, 1896, for the NE  $\frac{1}{4}$  of the NE  $\frac{1}{4}$  of Sec. 9, and the N  $\frac{1}{2}$  of the NW  $\frac{1}{4}$  of Sec. 10, T. 45 N., R. 4 W., Gunnison, Colorado, land district.

Samuel Holroyd made pre-emption filing for the said tract and an adjoining forty acre tract not involved in this controversy on June 26, 1896, and on November 26, 1897, submitted proof in support of his claim.

Prior thereto, Thompson filed his contest affidavit against Holroyd's pre-emption filing, asserting a prior possessory right to the tract in controversy and valuable improvements thereon, existing at the time of Holroyd's filing, and alleging that said filing was fraudulent and void as against him and the government.

It is unnecessary to pass upon other matters involved outside of the merits of the case, as they were properly disposed of by your office in accordance with the decisions of this Department, and are not questioned here.

It is insisted that the pre-emption filing was void as having been made by Holroyd, in collusion with his son, who was the tenant of Thompson, holding possession of the tract in dispute under a lease. But Thompson held the premises by nothing more than naked possession. He had ample time to make entry, as he took possession of the premises, claiming the same under the desert land act, in the spring of 1894, two years before Holroyd made entry, but he did not attempt to file his application for entry until after Holroyd made his pre-emption filing.

But for that filing, Thompson might have continued to unlawfully appropriate this land, without assertion of claim thereto by a proper proceeding in the land office. He had constructed a fence in such a manner that, with it and natural barriers, this tract and other lands, most of which were public lands, to the extent of about one thousand acres, were practically enclosed. He had also a cabin on the tract and had constructed an irrigating ditch which served to reclaim about thirty acres, which he had seeded and which produced hay.

While the younger Holroyd was occupying the disputed premises, as the tenant of Thompson, the elder Holroyd made the pre-emption filing, but there is no evidence sustaining the allegation that such filing was made for the benefit of the son, or for the mutual use of the Holroyds, but, on the contrary, both of the Holroyds deny that charge.

The pre-emptor undoubtedly knew the circumstances of the improvement of the tract by Thompson, and that the latter had leased the premises to the son of Holroyd, but this knowledge did not vitiate the pre-emption filing. Holroyd made his entry in a peaceable manner, and although he maintained his possession thereof, with a show of force, he was arrested on that charge, and no one appearing against him, the case was dismissed. The unlawful enclosure of the public land did not prevent the pre-emptor from making a settlement upon the lands preceding his filing, even if such settlement caused the removal of the unlawful fence erected and maintained by Thompson in violation of law. The enclosure of the premises in dispute, with other

public lands, was unlawful, under the act of February 25, 1885 (23 Stat., 321), as Thompson did not hold the said lands for which entry had not been made, under claim or color of title, but was a mere trespasser thereon. Such an enclosure can not be considered as an appropriation of public land, as it was maintained in violation of law, and conferred no right upon Thompson that can be recognized. (*Camfield v. United States*, 167 U. S., 518, 527; *Jones v. Kirby*, 13 L. D., 702, 705.) It did not take the land out of the class of lands subject to homestead entry, and the right to improvements placed thereon without authority of law is not determined by a judgment of the Department, and, therefore, it can not be said that such an entry is made for the purpose of securing such improvements (*Wheeler v. Rodgers*, 28 L. D., 250). The same rule applies to the pre-emption filing of Holroyd upon lands in Colorado of the Ute series, where such filings are yet permitted. Whatever improvements were made upon the tract in controversy were placed there without authority of law and at the peril of the party making them. The doctrine of the case of *Atherton v. Fowler* (96 U. S., 513) does not extend to the present case.

The allegations of the affidavit of contest that the entry of Samuel Holroyd was wholly or partly in favor of his son, the tenant of Thompson, is not supported by the evidence. The evidence upon the other grounds of the contest shows that whatever invasion there was upon the premises occupied by Thompson through his tenant was but an entry made upon the unlawful possession of another, with a view to initiating a pre-emption claim thereto, the land being vacant public land subject to pre-emption.

The decision of your office is affirmed.

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#### SCHOOL LANDS—FOREST RESERVE—LEASE OF SCHOOL LANDS.

##### TERRITORY OF NEW MEXICO.

By the act of June 21, 1898, a grant, *in presenti*, of school lands is made to the Territory of New Mexico; and under the provisions of section 2275 R. S., as amended by the act of February 28, 1891, said Territory may relinquish its claim to such school sections as it may be entitled, that are included within the limits of a forest reserve, and select other lands in lieu thereof.

In a lease of school lands the intention of the parties as to the time from which the agreement shall become operative should control, if such intent is apparent by the terms of the lease.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,*  
December 15, 1899. (G. B. G.)

By the act of June 21, 1898 (30 Stat., 484), sections numbered sixteen and thirty-six in every township of the Territory of New Mexico, and, where such sections or any parts thereof are mineral, or have been sold or otherwise disposed of by or under the authority of any act of Congress, other non-mineral lands equivalent thereto, in legal subdivisions

of not less than one quarter-section, and as contiguous as may be to the section in lieu of which the same is taken, were granted in terms of present grant to said Territory for the support of common schools. Section ten of the same act provides that all or any part of the lands thereby granted may, subject to the approval of the Secretary of the Interior, be leased under such laws and regulations as might be thereafter prescribed by the legislative assembly of said Territory, provided that no lease be made for a longer period than five years; and by an act of said legislative assembly, approved March 16, 1899; the governor, solicitor-general and commissioner of public lands of the Territory are constituted a board of public lands for the leasing, sale, general management and control of all public lands granted to said Territory, and further by section twelve of said last named act it is provided that any portion of said lands shall be subject to lease at an annual rental of not less than two cents per acre and for a period not exceeding five years, and—

That rentals must be paid semi-annually in advance, but part of an annual rental may be deferred until the first of October of the then current year, provided said deferred payment is secured in a manner satisfactory to the board.

October 20, 1899, the commissioner of public lands for said State transmitted for your approval fifty-seven leases of the same number of sections sixteen and thirty-six in said Territory; all of which leases were executed September 21, 1899, except one, which was executed September 30, 1899, and all of which are for the term ending on the first day of October, 1904, unless sooner terminated on the admission of said Territory as a State, and each lessee paid and agreed to pay a stated annual rental of not less than two cents per acre annually in advance, the deferred payments to fall due on the first day of October, in the years 1900, 1901, 1902 and 1903, which deferred payments on each contract are evidenced by four several promissory notes due and payable at said dates respectively.

November 3, 1899, these leases were referred to the Commissioner of the General Land Office for consideration and report, and November 16, 1899, the Commissioner's office reported thereon, that the records of that office do not show any adverse right existing at the date of the grant to said Territory to any of the leased lands, except that lease No. 20 to William J. Jones and lease No. 43 to Jos. A. Armstrong are for lands in the Gila River forest reserve; that lease No. 15 to Baldwin G. Stegman is for land subject to the right of way of the Pecos Valley Railway Company, and leases No. 1 to Pablo Crespín, No. 34 to A. M. Adler, No. 71 to Miguel A. Lopez, No. 76 to Saturnino Pinard, conflict with patented entries; that lease No. 56 to Charles Sumner is within the limits of the unconfirmed Jose Sutton grant; that lease No. 65 to J. Rafael Aguilar is for unsurveyed land, and that part of the section embraced in said lease is covered by a desert land entry; that lease No. 66 to Frank Carpenter is unsurveyed and within the limits of the confirmed Pablo Montoya grant, and that lease No. 85 to J. W.

Prude is for land in a township returned as mineral, and that all agricultural entries in said township have been suspended.

November 22, 1899, the matter was referred to me for an opinion whether the period of five years for which the law authorizes the leasing of school lands in said Territory begins to run from the date of the lease, or from the date of the approval thereof, whether the leases under consideration are in proper form to warrant their approval, and as to the tracts within the Gila River forest reserve whether the Territory may select other lands in lieu thereof.

The Gila River reserve was created by executive order of March 2, 1899, and the said leased sections included in the reservation were at the date of the reservation surveyed lands and had theretofore passed to the Territory under its school grant. The reservation did not therefore affect the right or title of the Territory thereto. I do not understand that the reference in regard to these lands questions the title of the Territory thereto, or asks for an opinion as to the title, but because, as a matter of policy, it is desirable to satisfy and get rid of these rights adverse to the government in forest reservations, an opinion is desired whether the Territory of New Mexico may relinquish said lands with the consent of the United States and take other lands in lieu thereof.

Section 2275 of the Revised Statutes as amended by the act of February 28, 1891 (26 Stat., 796), provides that where any State is entitled to sections sixteen and thirty-six under its school grant, or where said sections are reserved to any Territory for the use of schools and may be embraced within any Indian military or other reservation, the selection by such State or Territory of other lands in lieu thereof, appropriated and granted by said section 2275 as amended, shall be a waiver of its right to such sections. Construing this legislation, the Department, in the case of the State of California (on review), 28 L. D., 57, held that where a forest reservation includes within its limits a school section surveyed prior to the establishment of the reservation, the State may be allowed to waive its right to such section and select other lands in lieu thereof. The statute applies with the same force to a Territory as to a State, but even if this were questionable in the case of a Territory for which a *reservation* only of said section had been made for the use of schools in the State or States to be thereafter erected out of the same—and the policy of Congress in the appropriation of lands for the use of common schools in the Territories has usually been manifested in this way—still, in the case of the Territory of New Mexico, the said act of June 21, 1898, is a grant *in praesenti* to the Territory of sections sixteen and thirty-six, and I have no doubt that said Territory may relinquish its claim to such lands as it is entitled to under its grant in the Gila River forest reserve and select other lands in lieu thereof.

Upon the question of when the five years' period upon these leases

begins to run, I am of opinion that in the absence of any different provision in the lease, the date of its execution by the Territorial authorities will control, your approval relating back to that date; but that it is competent for the parties to specify in the lease the date when it will become effective. Such date is not in terms stated in these leases, but enough is stated to show the intention of the parties in this regard. The leases are "for the term ending on the first day of October, 1904," and this term is divided into five periods by the stipulation as to the time of payments of the rent money, and each payment is for an amount the same as each other payment, the first one being cash in hand paid, the receipt whereof is acknowledged at the date of the execution of the lease, and the four deferred payments falling due upon a first day of October in the years 1900, 1901, 1902 and 1903, thus showing that it was intended that each payment should cover a period of one year. The manifest intention of the parties to these contracts was to lease said lands for the term of five years next preceding the first day of October, 1904, and I am of opinion that effect should be given to this intention. (See 12 Asst. Atty. Genl.'s Opinions, p. 204.)

These leases are in proper form to warrant your approval. The act of July 21, 1898, *supra*, which authorizes their execution, does not provide how or when the rentals may be paid, and although the Department, in a letter to the Commissioner of the General Land Office, August 18, 1899 (Misc. No. 398, p. 440), suggested, and although the Territorial Legislature of New Mexico by the act of March 16, 1899, has enacted, that rentals must be paid semi-annually in advance, these contracts have been entered into upon better terms as to time of payment than was either suggested by the Department or provided by said act, and the validity of said leases is not affected thereby. Besides, the Territorial act, *supra*, provides that part of an annual rental may be deferred until the first of October of the then current year, thus showing that the board of land commissioners of said Territory should have a discretion in this matter.

I advise that the leases submitted be approved, except lease No. 1 to Pablo Crespin, No. 34 to A. M. Adler, No. 71 to Miguel A. Lopez, No. 76 to Saturnio Pinard, No. 56 to Charles Sumner, No. 65 to J. Rafael Aguilar, No. 66 to Frank Carpenter, which should be rejected on account of claims and rights adverse to the title of the Territory under its school grant, that lease No. 15 to Baldwin G. Stegman be approved subject to the right of way of the Pecos Valley Railway Company, and that your approval of lease No. 20 to William J. Jones, and lease No. 43 to Jos. A. Armstrong, for lands in the Gila River forest reserve, be for the present withheld, and the proper officer of the Territory notified of its right to relinquish these last-named lands to the United States and select other lands in lieu thereof.

Approved, December 15, 1899.

E. A. HITCHCOCK,

*Secretary.*

## MINING CLAIM—PLACER ENTRY—SURVEY.

## HOLMES PLACER.

An official survey of a placer mining claim must be furnished, if the description of the lands, for which patent is asked, cannot be made to conform to legal subdivisions of the public land surveys.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) December 15, 1899. (A. B. P.)

November 6, 1899, the Department referred to your office for report in duplicate, a communication received on that date from Ben. C. Currier, one of the applicants for patent for the Holmes placer mining claim, whereof entry was made December 28, 1895, Sacramento land district, California, embracing lot 5, the W.  $\frac{1}{2}$  of lot 1, the W.  $\frac{1}{2}$  of the E.  $\frac{1}{2}$  of lot 1, the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  and the W.  $\frac{1}{2}$  of the E.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 3, T. 12 N., R. 10 E., M. D. M.

The Department is now in receipt of your report, under date of November 14, 1899, upon the matters presented in said communication.

The history of said Holmes placer claim and of the proceedings had upon the application for patent therefor is fully set forth in departmental decision therein of May 13, 1898 (26 L. D., 650), and need not be repeated here.

By that decision the Department affirmed the decision of your office of September 4, 1896, which required the mineral claimants to cause an official survey to be made of that part of the claim described in the entry as the W.  $\frac{1}{2}$  of lot 1 and the W.  $\frac{1}{2}$  of the E.  $\frac{1}{2}$  of lot 1, in order that an accurate description thereof might be obtained with the view to passing the entry as a whole to patent.

In the communication of said Currier it is averred, in substance and effect, that the claim has already been surveyed by a competent surveyor whose survey was received and acted upon by the local officers in allowing the entry; and it is asked that unless there is some other objection to the entry the same be passed to patent as made. In your said report it is recommended that the previous action requiring the survey be adhered to.

If any survey of the designated parts of said lot 1, claimed under the entry, was ever made, as alleged, it must necessarily have been simply a private survey, as the record discloses no official survey of any part of the claim. Such private survey can have no place among the official records as a part thereof and could not therefore be accepted as a basis for patent.

Section 2331 of the Revised Statutes provides that all placer mining claims located after May 10, 1872, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys; but it is further provided in said section that when placer claims can not be conformed to legal subdivisions, survey and plat shall be made as of unsurveyed lands.



The seventh section of the act of July 23, 1866, under which Jacks claims the right of purchase is as follows:

That where persons in good faith, and for a valuable consideration, have purchased lands of Mexican grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant, and have used, improved, and continued in the actual possession of the same as according to the lines of their original purchase, and where no valid adverse right or title (except of the United States) exists, such purchasers may purchase the same, after having such lands surveyed under existing laws, at the minimum price established by law, upon first making proof of the facts as required in this section, under regulations to be provided by the commissioner of the general land office, joint entries being admissible by coterminous proprietors to such an extent as will enable them to adjust their respective boundaries.

This section was designed for the relief of persons who had, in good faith and for a valuable consideration, purchased lands of Mexican grantees or assigns, where the title failed, by allowing such persons to purchase at the minimum price established by law, the lands which they have used, improved and continued in the actual possession of, according to the lines of their original purchase, and where no valid adverse right or title (except of the United States) exists.

Whether such invalidity were on account of some defects in the proceeding which resulted in a defective grant or whether it existed by reason of an inability to prove an actual grant was not material, so long as the claim of title actually rested upon what was in good faith supposed to have been a valid claim under the government of Mexico, and so long as there was no valid adverse right or title other than that of the United States. *Beley v. Naphtaly* (169 U. S., 353, 359).

The purpose of the act—

was to remedy (by purchase of the land from the United States at the lowest rate) a defect in a title supposed to have been derived from the Mexican government, where the claimant had in good faith and for a valuable consideration purchased from one who claimed to be a Mexican grantee, or from his assigns (*ib.*, 361),

or, where the lands purchased were supposed to be within the limits of a Mexican grant and were afterwards excluded upon final survey. *Hosmer v. Wallace* (97 U. S., 575).

But the right of purchase can only extend to such lands as the purchasers have used, improved and continued in possession of "according to the lines of their original purchase," and can not extend to any lands that are not actually within those limits. The purpose of the act was to remedy a defect in a title, which the Mexican grantee attempted to convey, by allowing the purchase of the lands from the United States.

It is contended by appellants that Jacks has received patent from the United States of all the lands purchased by him, or his assignors, and that the relief afforded by the act can only extend to lands which he actually purchased and not to lands which he supposed he purchased.

The claim of Jacks rests upon his purchase of the grant of the Pueblo of Monterey, the extent of which was determined by the final survey made in conformity with the decision of the Department of October 4, 1887 (6 L. D., 179), which excluded the lands in controversy. It was a grant of a tract of land with defined boundaries. The petition

asking for confirmation described the boundaries and the board of commissioners, January 22, 1856, confirmed the grant as petitioned for. The boundaries of the grant, as confirmed, were described in the decree as follows:

From the mouth of the river Monterey in the sea to the Pilarcitos; thence running along the canada to the Laguna Seca, which is the high road to the Presidio, thence running along the highest ridge of the mountains of San Carlos unto Point Cypress further to the north; and from said point following all the coast unto said mouth of the river of Monterey, excepting and reserving therefrom such portions thereof as are held by individual owners by right or title derived from competent authority other than said pueblo or city.

After the grant was confirmed the city of Monterey, by deed dated February 9, 1859, conveyed to D. R. Ashley and David Jacks, certain lands described as follows:

The lands belonging to the city of Monterey, granted by the Mexican government to, or set apart by the former authorities of California for, the Pueblo of Monterey, and confirmed by the United States land commissioners for California to said city, including and comprising all the right, title and interest which said city has or may have, whether in possession or in expectancy, in and to the lands, and every part and portion thereof, bounded as follows: Commencing at the mouth of the Salinas or Monterey River and running up that stream to the site of Pilarcitos; thence through the canon to the Laguna Seco; thence following the summit of the hills and the city line between Monterey and Carmelo to Point Cypress; and thence following the Pacific Ocean to the place of beginning, and containing all the lands by the authorities of the United States confirmed to said City of Monterey.

Subsequently Ashley conveyed to Jacks his interest.

After the grant was purchased from the city of Monterey it was surveyed under authority of the act of March 3, 1851 (9 Stat., 637), and on January 5, 1869, the surveyor-general forwarded to your office the field notes and plat of said survey, known as the Wagner survey, which included the lands embraced in Jacks's application. The action of the land department upon this survey is fully set forth in the decision of October 4, 1887 (6 L. D., 179), which held that said survey did not follow the calls of the decree of confirmation and that the Department had no authority to establish a different line agreed to by coterminous owners. The Wagner survey was rejected and a new survey was made in accordance with the views set forth in said decision, which was finally approved and Jacks received patent for the land embraced in said survey. See also 12 L. D., 364.

At the date of the purchase no survey of the grant had been made and hence the particular lands that would be included within the described boundaries could not then be identified. The mere fact that Jacks supposed certain lands would be included within such boundaries or that it was the general belief that those lands were included in the grant would give no right of purchase under the act because the limits of his purchase are the boundaries described in his deed which follows the decree, and he took by such purchase all the lands which might be ascertained upon final survey of the grant to be included within said

limits, whether they were more or less than he supposed would be included within said boundaries. Had it been determined that the survey of 1869 diminished instead of enlarging the grant, Jacks would have taken all the lands within the limits of the final survey, although it might have included lands that he did not suppose he had purchased.

The purpose of the act was to remedy, by purchase from the United States, a defect in a title supposed to have been derived from the Mexican grantee, or his assigns. There was no defect in this title. It was confirmed according to the boundaries described in the grant and as set forth in the petition for confirmation. The purchasers received patent for the full quantity "according to the lines of their original purchase," and the provisions of the act can not be extended to allow a purchase of lands outside of those limits merely because the purchasers supposed that such lands would be included within those limits.

Your decision is reversed and the application of Jacks will be rejected. The papers are returned to your office for proper action upon the respective claims of the homestead applicants.

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#### OKLAHOMA LANDS—SECOND HOMESTEAD ENTRY.

##### FREDERICK HUSTER.

The right to make a second homestead entry conferred by the act of March 2, 1889, upon persons "who having attempted to, but for any cause failed to secure a title in fee to a homestead under existing law," is applicable to entries in the Cherokee Outlet, and is determined by the status of the applicant at the date of his application.

*Secretary Hitchcock to the Commissioner of the General Land Office, December 16, 1899.* (W. V. D.) (G. B. G.)

March 15, 1895, Frederick Huster made homestead entry for the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  and lot 1 of Sec. 26, T. 29 N., R. 3 E., Perry, Oklahoma, land district, and relinquished the same under circumstances which do not authorize an imputation of bad faith, either in making the entry or in executing the relinquishment. November 12, 1897, he filed in the land office at Perry, Oklahoma, his application to make homestead entry for the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 23, T. 27 N., R. 3 E., in the same land district, which application was denied by your office, September 7, 1898, on the ground that he had made a previous entry and voluntarily relinquished the same, and he has appealed to the Department.

The land applied for is a portion of the Cherokee Outlet, which was opened to settlement September 16, 1893, by virtue of the President's proclamation of August 19, 1893 (28 Stat., 1222, 1227), made pursuant to the act of March 3, 1893 (27 Stat., 612, 642), which act provided that said land should be opened to settlement "in the manner provided in section thirteen of the act of Congress approved March 2, 1889."

The said section 13 of the act of March 2, 1889 (25 Stat., 980, 1005), provides that:

Any person having attempted to, but for any cause failed to secure a title in fee to a homestead under existing law, or who made entry under what is known as the commuted provision of the homestead law, shall be qualified to make a homestead entry upon said lands,

and this statute is applicable to the lands in the Cherokee Outlet in determining the qualifications of claimants therefor. *Walton et al. v. Monahan*, 29 L. D., 108.

In the case of James W. Lowry, 26 L. D., 448, it was held, in reference to the application of Lowry to make a second entry under the act above quoted, he having subsequently to the passage of said act commuted a homestead entry to cash, that said application should be allowed, and that the words "having attempted to, but for any cause failed to secure a title in fee to a homestead under existing law," have reference to the status of the applicant at the time of making his application, and not at the time of the passage of said act.

Inasmuch as Huster had at the date of his application to make a second entry theretofore attempted and failed to secure a title in fee to a homestead, the only question left for consideration in this case is whether such attempt was under "existing law" within the meaning of the act above quoted. It is not necessary to inquire whether by existing law is meant law existing at the date of the entry under which the attempt to secure title was made, law existing at the date of the passage of the said act of March 2, 1889, or law existing at the date of the application to make a second entry. Huster's application and the entry allowed thereon for the land subsequently relinquished were under section 2289 of the Revised Statutes, and this law was in existence at each and all of said dates. It results that he is a person who has attempted to, but failed to secure a title in fee to a homestead under existing law, and that his pending application should be allowed.

The decision appealed from is reversed, and a decision of the department rendered herein September 1, 1899, is hereby recalled, and this decision substituted therefor.

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MINING CLAIM—ENTRY—ADVERSE RIGHTS.

*MCCORMACK v. NIGHT HAWK AND NIGHTINGALE GOLD MINING CO.*

On the payment of the purchase price of a tract of mineral land and the allowance of a mineral entry therefor, the right of the applicant to receive a patent corresponding to his entry is complete, and precludes the acquisition of any adverse right while said entry remains of record.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) December 16, 1899. (C. J. W.)

The record shows that on the 27th of July, 1891, M. Helmer and T. H. Burnham located the claim known as the Night Hawk lode, in Cripple Creek mining district, El Paso county, Colorado.

By mesne conveyances the title of the locators of said claim became vested in the Consolidated Night Hawk and Nightingale Gold Mining Company (a corporation), which made an amended location of the claim on July 5, 1892. Said company thereafter applied for patent, taking the necessary steps to comply with the requirements of the law in that respect.

Before the expiration of the period of publication of notice, certain persons, alleged owners of the claim known as the Ramona lode, on February 1, 1893, filed an adverse claim. Suit on said adverse claim was duly commenced in the proper court, but was thereafter, on March 15, 1893, dismissed. Prior to such dismissal, to wit, on March 11, 1893, the said Consolidated Night Hawk and Nightingale Gold Mining Company, by its attorney in fact, T. H. Shepherd, executed a relinquishment to the United States for a part of the conflict between the Night Hawk lode claim, survey No. 7594, and the Ramona lode claim, survey No. 8002, the relinquished portion being described by metes and bounds as follows:

Beginning at Cor. No. 3, survey No. 7594, Night Hawk lode; thence N. 63° 31' W. 289.67 feet; thence S. 26° 22' W. 143.21 feet; thence S. 63° 31' E. 289.67 feet; thence N. 26° 22' E. 143.21 feet, to the place of beginning.

On August 8, 1893, said company, having complied with the requirements of the law in matters of proof and payment, was permitted to make mineral entry No. 340 for said Night Hawk claim, excluding, however, the above described part of the Ramona claim No. 8002, relinquished by said Night Hawk Company, the Night Hawk claim as so entered embracing 8,797 acres, for which final certificate issued. When said entry was taken up for consideration by your office, it would appear that it was erroneously assumed that the portion of the claim in conflict, relinquished by the Consolidated Night Hawk and Nightingale Gold Mining Company, embraced the entire Ramona-Night Hawk conflict, and the United States surveyor-general was accordingly directed to amend said survey so as to exclude the land located by the Ramona claimants, and an amended survey was made in accordance with such instructions. After the survey was amended the entry was approved for patenting and the patent appears to have followed the amended survey, rather than the entry, thus omitting from the patent a portion of the premises owned and entered by the Night Hawk claimant and still embraced in its entry. The amended survey is said by the surveyor-general, in his certificate appended to the field notes, to have been made in compliance with instructions from your office, contained in letter "N" of October 28, 1893. After the error in the patent was discovered and brought to the attention of your office, you held, by decision of March 19, 1897, that:

Upon examination of patent record Vol. 248, p. 229, it is ascertained that the entire conflict with the Ramona lode is excluded, whereas the record of the case shows that claimants were entitled to a portion of said conflicting ground and that entry was duly made therefor.

It thus appears that the patent is erroneously issued and upon surrender of the same with the accompanying evidence mentioned in claimant's request, said patent will be canceled under the rules and a new patent be issued in lieu thereof.

The Consolidated Night Hawk and Nightingale Gold Mining Company did not avail itself at once of the suggestions made in said decision, but, while the same were under consideration and consultation between the Ramona and Night Hawk claimants, on May 28, 1898, one Alexander McCormack filed a protest against said entry, the grounds of which are as follows:

First. Because The Night Hawk and Nightingale Consolidated Gold Mining Company, by an amended survey made on the 1st day of January, 1894, excluded all territory not embraced in said amended survey, and, therefore, the premises in controversy after said date were relinquished and abandoned by said company.

Second. Because Sylvester Johnson *et al.*, the owners of the Ramona lode claim, by an amended survey, dated the 23rd day of June, 1896, excluded all territory not embraced in said amended survey, and, therefore, the premises in controversy, after said date, were relinquished and abandoned by said Johnson *et al.*, the owners of the Ramona lode claim.

Third. Because the Twilight lode mining claim was located by C. C. Steese, the grantor of this protestant, on the 21st day of February, 1896, and ever since thereto has been and now is a valid subsisting lode mining claim. That the grantor of your protestant discovered and disclosed in the discovery shaft of the said Twilight lode claim a vein of mineral in rock in place, and marked the boundaries of said claim, and filed a location certificate thereof, and in every detail complied with the laws of the State of Colorado and of the United States in reference to the location of lode mining claims upon the unappropriated public mineral domain, and your protestant is therefore the owner of said premises. That said discovery shaft of said Twilight lode mining claim is located upon a valuable vein of ore, the apex of which runs through the end lines of said Twilight lode claim, and there has been expended upon said Twilight lode claim by your protestant and his grantors more than five thousand dollars (\$5000) in development work. That ever since the location of said Twilight lode mining claim your protestant and grantors have been in the actual occupation and possession of said lode claim, and for the greater portion of the time have been mining and extracting ore therefrom.

Fourth. That both the surveys of the Night Hawk lode claim, Sur. No. 7594, amended, and the Ramona lode mining claim, Sur. 8002, amended, shows said premises in controversy to have been abandoned.

Fifth. That the stakes and monuments placed upon the ground by the owners of said Night Hawk and Ramona lode claims shows said premises in controversy to have been excluded from each of said amended applications.

Sixth. That no work or labor has been performed or improvements made upon any part or portion of the premises in controversy by the Night Hawk and Nightingale Consolidated Gold Mining Company at any time since the patent was issued on the Night Hawk lode mining claim, or since the time of the entry of the said Night Hawk lode mining claim, to wit, the 8th day of August, 1893.

Seventh. That all the work performed and developments made by your protestant was performed and done with full knowledge and acquiescence on the part of the owners of the Night Hawk lode claim, and without any objection thereto.

Eighth. Because H. H. Brown, President of The Night Hawk and Nightingale Consolidated Gold Mining Company, after the exclusion of the premises in controversy from the amended application for patent of the Night Hawk lode claim, survey No. 7594, amended, and the consequent abandonment of said premises, located the Twilight lode in the name of C. C. Steese, who at all times since the location thereof, and until the disposition of the same to the grantor of your protestant, held the said Twilight lode claim in trust for the said H. H. Brown and others.

Ninth. That the receiver's receipt and patent for said Night Hawk lode claim were fraudulently obtained in this: That there was no vein of mineral or rock in place, or otherwise, disclosed in said discovery shaft on said Night Hawk lode mining claim at any time previous to its application for patent.

Tenth. For other good and valuable reasons appearing in the affidavits hereto attached.

Meantime, Sylvester Johnson *et al.*, on June 21, 1898, filed application for patent for the Ramona No. 2 lode claim, embracing the ground in controversy.

Upon consideration of said protest and the application papers of the Ramona No. 2 lode claim, which was forwarded by the local officers as pertaining to the land in dispute, your office, on July 22, 1898, held that the Consolidated Night Hawk and Nightingale Gold Mining Company was guilty of laches in not availing itself of the privilege granted by decision of March 19, 1897, and you withdrew and revoked that action.

The papers in the Ramona No. 2, application for patent, were returned to the local office, with direction that the application be received and given consecutive number, and that publication thereof be made subject to the filing of adverse claims by the Twilight lode claimant and others.

The Consolidated Night Hawk and Nightingale Gold Mining Company have appealed from your office decision of July 22, 1898, and assigned the following specifications of error:

I. Error in attributing laches to the Night Hawk owner when in fact no time was specified within which the company owner might avail itself of the permission granted by the General Land Office, to wit, to reconvey a patent in the issuance of which the Land Department admits having made error, such action resulting in the lasting injury of said Night Hawk owner and its grantees.

II. Error in charging laches in the face of the fact that the Night Hawk claimant has never been advised of the action of the Land Office, allowing reconveyance, in the manner specifically pointed out in the rules of practice.

III. Error to have given any weight to the protest of said Alexander McCormack, and in ignoring the fact that said McCormack's location of the Twilight lode covering a portion of the said Night Hawk lode, was made at a time when the land was embraced in a *subsisting mineral land entry*, allowed upon proof of due compliance with law, which land is *still* embraced in an uncanceled valid subsisting entry.

IV. Error in not rejecting the protest of said McCormack because of his utter lack of right in the premises, and because the location of said Twilight lode was absolutely null and void, covering as it did, land embraced in an entry which had never been rejected.

V. Error not to have issued a supplemental patent covering the ground erroneously omitted from the Night Hawk patent heretofore issued.

VI. On behalf of the Night Hawk claim especially error is alleged in insisting on the surrender of the outstanding patent, which surrender would jeopardize the interests of appellant, when the error made by the Land Department in issuing said patent may be easily corrected (in a perfectly regular manner) by the issuance of a supplemental patent.

*In re* application for patent for the Ramona No. 2 lode claim, the parties named have filed the following statement in reference thereto:

Now comes Sylvester Johnson *et al.*, claimants above named, and hereby declare that they do not wish to hinder or delay the said company from obtaining patent to

the ground in conflict between the Night Hawk and Ramona lodes, and ask that their application be held in abeyance until decision in regard to protest above named.

The above statement indicates that the claimants of the Ramona No. 2 lode claim have no controversy with the Consolidated Night Hawk and Nightingale Gold Mining Company for the ground embraced in its entry No. 340, and omitted through mistake from its patent. This would appear to leave the controversy between the Consolidated Night Hawk and Nightingale Gold Mining Company and Alexander McCormack, protestant, as the only matter to be considered by way of objection to the issuance of patent to said company so as to embrace all the land covered by its said entry.

It is not necessary to a clear understanding of the rights of the parties that all of the specifications of error should be discussed.

The record shows clearly that a portion of the ground embraced in the entry of the Consolidated Night Hawk and Nightingale Gold Mining Company was by mistake of your office omitted from the patent issued to said company on said entry. It can not be questioned that said company has a subsisting entry for the ground in controversy, which has never been canceled. McCormack could, therefore, acquire no right to ground embraced in such entry by a location to which it was not subject. The entry of the ground in question by the Night Hawk claimant appearing from the record, as does also the fact of the payment of the purchase price for it to the United States by the purchaser, the right of the company to obtain patent, corresponding to the entry, is complete, and precludes the acquisition of any adverse right while said entry remains of record.

The legal effect of purchase and entry under the mining laws of the United States was considered in the case of Benson Mining and Smelting Company *v.* Alta Mining and Smelting Company (145 U. S., 428), in which case three classes of title are recognized as springing out of the mining laws: 1. Title in fee simple. 2. Title by possession. 3. Complete equitable title. After defining the first and second classes, the court said as to the third:

The equitable title accrues immediately upon purchase, for the entry entitles the purchaser to a patent, and the right to a patent once vested is equivalent to a patent issued.

This definition of complete equitable title based on an entry under the mining laws, the court substantially adopted from certain previous decisions of the land department referred to in its opinion. The principle was also applied in the case of Hamilton *v.* Southern Nev. Gold and Silver Mining Company (33 Fed. Rep., 562), where it was held by the United States circuit court for the district of Nevada, in substance, that a party who pays the purchase money for a mining claim and receives the certificate of purchase is the owner of the land.

In the case of Aurora Hill Con. Mining Company *v.* 85 Mining Company *et al.* (34 Fed. Rep., 515), the same court held, in substance and

effect, that an applicant for a patent to a mining claim who has made final entry, paid the purchase money for the land and obtained his certificate of purchase, is not obliged to continue the annual expenditure upon the claim required by section 2324 of the Revised Statutes; and that such entry and certificate of purchase, as long as they remain uncanceled, are equivalent to a patent, so far as the rights of third parties are concerned.

In the recent case of *Morgan et al. v. Antlers-Park-Regent Consolidated Mining Company* (29 L. D., 114), the same principle was recognized. In that case the Department held:

That an application for patent under the mining laws for land embraced in an existing mineral entry should not be accepted or entertained.

The charge that the entry company abandoned the ground in controversy after entry and payment, and that it has performed no labor upon it since, constitutes no ground of complaint against the entry, in view of the principle announced in the authorities cited.

As to the ninth paragraph of said protest, which vaguely charges want of discovery sufficient to support the location of the Night Hawk lode claim, it is sufficient to say that such charge is too indefinite to justify affirmative action by the Department at this late day, especially in view of the fact that there is no denial that the land is mineral, and therefore properly subject to location, purchase and entry under the mining laws, and the further fact that the protest itself alleges the mineral character of the land.

It was therefore error on the part of your office to have considered the protest of McCormack as presenting a sufficient showing to justify the withholding of patent from the entry company for the land in controversy.

Your office decision is accordingly reversed. The protest of McCormack is dismissed, and your office is directed to issue a supplemental patent to said Consolidated Night Hawk and Nightingale Gold Mining Company, so as to properly convey to it the lands to which it is entitled under its said entry and not embraced in the former patent issued on said entry.

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SALE OF ISOLATED TRACTS—ACT OF FEBRUARY 26, 1895.

HENRY D. ROSS.

The statutory authority conferred upon the Commissioner of the General Land Office, in the matter of ordering into market isolated or disconnected tracts of public land, is limited to tracts that amount to less than one quarter section as described by the public land surveys, without regard to the fact that such quarter section may contain less than one hundred and sixty acres.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) December 18, 1899. (C. W. P.)

Henry D. Ross has appealed from the decision of your office of November 10, 1898.

The lands involved are situated in the Prescott land district, Arizona Territory, and are described as follows: The NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  and the SW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 30, T. 21 N., R. 3 W.; the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$ , the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  and the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 34, T. 21 N., R. 3 E.

By letter of February 1, 1898, at the instance of Patrick Johnston, your office authorized the local officers to offer at public sale the tracts aforesaid, as isolated, at not less than two dollars and fifty cents per acre, in accordance with instructions contained in [the general] circular of October 30, 1895, page 5.

The two tracts together contain 319.41 acres, and were sold on April 12, 1898, to Henry D. Ross, at the rate of two dollars and fifty cents per acre, and cash certificate No. 597 issued therefor on the same day.

On September 29, 1898, your office called the attention of the local officers to the second proviso to the act of February 26, 1895 (28 Stat., 687), amending section 2455 of the United States Revised Statutes, which is as follows: "*Provided*, That not more than one hundred and sixty acres shall be sold to any one person," and that the instructions contained in circular of October 30, 1895, call attention thereto, and directed them to inform Mr. Ross that he is allowed thirty days within which to show cause why his entry should not be canceled as to the tract in Sec. 30 which contains 159.41 acres, or relinquish one of the tracts, so that the purchase will not exceed one hundred and sixty acres.

On October 20, 1898, Mr. Ross filed in the local office a motion for a review of your office decision of September 29, 1898, in which he insists:

1. That your office erred in holding that not more than one hundred and sixty acres shall be sold to any one person under the provisions of the isolated tract land law.

2. That your office erred in holding that the entryman would be required to relinquish one of the tracts so that his entry would not embrace more than one hundred and sixty acres.

3. That your office erred in rendering said decision, for the reason that said decision is contrary to law and the rulings of the Interior Department of the United States. And in his brief which accompanied his motion for a review he cited the case of Charles H. Boyle, 20 L. D., 255.

Upon said motion for review your office, on November 10, 1898, said:

Departmental decision in the case of Charles H. Boyle, cited by Mr. Ross, was based on the decisions of this office of June 21, and November 6, 1893, and prior to the amendatory act of February 26, 1895, and no reference therein is made to said act, but is based on the acts of August 30, 1890, and March 3, 1891, and under its ruling affidavit, form 4-102b, is not required in public sale entries. Applicant's contention that the Hon. Secretary "must necessarily have construed the proviso to act of February 26, 1895," in the Boyle decision, cannot, therefore, be sustained;

and adhered to your office decision of September 29, 1898.

The act of February 26, 1895, *supra*, provides that:

It shall be lawful for the Commissioner of the General Land Office to order into market and sell for not less than one dollar and twenty-five cents per acre any

isolated or disconnected tract or parcel of the public domain less than one quarter section which in his judgment it would be proper to expose to sale after at least thirty days' notice by the land officers of the district in which such lands may be situated: *Provided*, That lands shall not become so isolated or disconnected until the same have been subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon, or sold by the government; *Provided*, That not more than one hundred and sixty acres shall be sold to any one person.

The authority conferred upon the Commissioner of the General Land Office by this act is limited to the sale of an isolated tract, "less than one quarter section." For the purpose of disposal the public lands are divided into sections, quarter sections, and quarter-quarter sections, and each section is supposed to contain exactly six hundred and forty acres, each quarter section thereof one hundred and sixty acres and each quarter quarter section forty acres, and it seems to be clear that it is to subdivisions of the public lands described in accordance with the public land system of surveys that the act refers when it limits the sale of isolated tracts to less than a quarter section and that it matters not that the quarter section contains less than one hundred and sixty acres; if it amounts to a quarter section, according to the survey, it is not within the authority conferred upon the Commissioner of the General Land Office. It is said in the recent case of *Mason v. Cromwell* (on review), 26 L. D., 369:

For the purposes of the disposal of the public lands the law makes the surveyor-general's return as to the quantity of land in a legal subdivision conclusive. See sections 2395 and 2396 Revised Statutes, especially paragraphs 5 and 3 respectively. Whether a section returned as a full section contains more or less than six hundred and forty acres of public land, according to actual computation from the field notes of survey, it must, under the provisions of the sections last above cited, be disposed of by the land department as containing just six hundred and forty acres, and each quarter thereof as containing one hundred and sixty acres. These provisions of law were enacted to facilitate the disposal of public land. Under their operation such a quarter section always contains, for the purposes of such disposition, exactly one hundred and sixty acres. In *fact* it rarely ever contains just that quantity, but usually contains either more or less.

In the case under consideration the record shows that the tract in section 30 contains a fraction less than one hundred and sixty acres, but that the four quarter sections, of which it is composed, amount to a quarter section of the public lands and according to the above construction of the act, the sale of that tract, as well as the sale of the tract in section 34, is not within the authority given to the Commissioner of the General Land Office to sell an isolated tract "less than a quarter section."

It follows that neither tract falling within the authority conferred upon the Commissioner of the General Land Office to sell an isolated tract, the sale of the land in neither section was within the scope of his authority, and the sale must be set aside.

Mr. Ross's entry will be canceled.

Your office decision is modified accordingly.

## HAROLD BORUP.

Motion for review of departmental decision of August 25, 1899, 29 L. D., 132, denied by Acting Secretary Ryan December 20, 1899.

## HOMESTEAD ENTRY—MARRIED WOMAN.

BROWN *v.* CAGLE.

A married woman, not the head of a family, is disqualified to make homestead entry.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) December 20, 1899. (F. W. C.)

With your office letter of the 5th instant, is submitted a petition, filed on behalf of Laura Donelly, *nee* Cagle, invoking the exercise of the supervisory power of this Department in her behalf to the end that the order for a hearing contained in departmental decision of June 6th last (28 L. D., 480), be revoked.

The tract in controversy is the NE.  $\frac{1}{4}$  of Sec. 22, T. 23 N., R. 1 W., Perry land district, Oklahoma, and has been the subject of several decisions by this Department, under the title of Noble *et al. v.* Roberts.

On September 19, 1893, Walter C. Roberts was permitted by the local officers to make homestead entry of this land. On November 6, following, Laura Cagle filed an application to contest said entry upon the ground that she was the prior settler and that her settlement antedated the allowance of Roberts's entry. Similar contests, alleging prior settlement, were filed by Charles E. Noble and Morris Brown, against the entry of Roberts. The several contests were consolidated, the hearing thereon taking place after several continuances between April 16, and October 2, 1895. On the last-named date Walter C. Roberts relinquished his homestead entry. This left the controversy between the several contestants, each alleging prior settlement upon the land.

It is unnecessary to detail the subsequent proceedings had, as they have been carefully set out in the previous decision of this Department; suffice it to say, that the right to make entry of this land was awarded to Laura Cagle on the ground that she was shown to be the prior settler.

Brown petitioned for a rehearing, alleging that if it be admitted that Miss Cagle was the prior settler she had lost the rights gained by such settlement by her failure to maintain a residence upon the land. It was upon this latter phase of the case that this Department held in its decision of June 6th last, *supra*, that—

If it be true that Miss Cagle abandoned the land as alleged in the affidavits, copies of which are appended to the present motion, her return to the land prior to the filing of such affidavit would not relieve her from the effect of such abandonment in the presence of an adverse settlement right.

A hearing was therefore directed, as applied for, and it is with a view

of having said order set aside that the petition under consideration was filed. In this connection a matter arises for consideration which was not mentioned in the decision of the Department ordering the hearing, namely, before Laura Cagle made entry of this land November 16, 1898, in pursuance of the decision holding her to be the prior settler, she had become a married woman and her entry was made in the name of Laura Donelly. Is this entry a legal one under the homestead laws?

It has been uniformly ruled by this Department since the enactment of the homestead law that, in the absence of proof of desertion or other circumstances making her in reality the head of a family, a married woman is not authorized to make a homestead entry (Rachel M. McKee, 2 L. D., 112). The order for a hearing upon the petition and affidavits filed by Brown was, therefore, unnecessary, the prior settler having become disqualified from claiming or receiving the benefit of the homestead law before the making of her entry. Brown was also a settler upon this land, and, as before stated, one of the original contestants against the entry by Roberts. His claim then asserted has been since maintained and upon the record as made was subject only to the claim of Cagle, who was found to be the prior settler. In view of the disqualification of such prior settler, there would seem therefore to be no objection to granting Brown the right of entry, the other contestant, Noble, having dropped out of the case.

The order for a hearing is therefore recalled and you are directed to call upon Mrs. Donelly to show cause why her entry should not be canceled, and in the event of the cancellation of her entry, Brown will be permitted to make entry of the land, within a time thereafter to be fixed by your office.

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FOREST RESERVE—SALE OF TIMBER—RESIDENTS OF TOWNS.

OPINION.

The regulations heretofore adopted for carrying into effect the provisions of the act of June 4, 1897, with respect to the sale of timber on forest reservations, do not contemplate the subsequent sale, without further notice, of any timber for which a satisfactory bid is not received within the time designated in the published notice; but the adoption of regulations permitting such a sale, in a manner to be stated in the notice, is competent under said act.

Residents of towns near a forest reserve are within the purview of the provisions of said act of 1897, with respect to the free use of timber and stone found upon such reservations.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,*  
December 21, 1899. (S.V.P.)

I am in receipt of a communication from the Commissioner of the General Land Office relative to the sale of timber in forest reservations, under the act of June 4, 1897 (30 Stat., 34, 36), which has been referred to me for an opinion upon the following questions:

(1) as to whether timber, in a forest reserve, notice of the sale of which has been published as required by the act of June 4, 1897 (30 Stat., 34, 36), and for which no

bid has been received, or for a part of which only bids have been received, within the time required in the published notice, may nevertheless be sold in whole or in part as the case may be, for not less than the appraised value, without a new or further notice by publication of such sale; and (2) do residents of towns near a forest reserve come within the purview of the following provisions of the act of June 4, 1897, *supra*?

"The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors of minerals, for fire-wood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located."

The provision of the act to which the first question relates is as follows:

For the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, the Secretary of the Interior, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such forest reservations as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each purchaser as he shall prescribe, to be used in the State or Territory in which such timber reservation may be situated, respectively, but not for export therefrom. Before such sale shall take place, notice thereof shall be given by the Commissioner of the General Land Office, for not less than sixty days, by publication in a newspaper of general circulation, published in the county in which the timber is situated, if any is therein published, and if not, then in a newspaper of general circulation published nearest to the reservation, and also in a newspaper of general circulation published at the capital of the State or Territory where such reservation exists.

The regulations adopted June 30, 1897 (24 L. D., 589, 593), for carrying this statute into effect, make no provision for a subsequent sale of any timber for which a satisfactory bid is not received within the time designated in the published notice. The question submitted implies that the published notice or notices to which reference is had in terms prescribed a limited time within which bids would be received. Assuming that this was the character of the notice or notices to which reference is had, and considering the terms of the regulations adopted under said act, I am of opinion that no sale should, after the time designated, be attempted to be made of timber for which no bid was received during the time prescribed, unless a new or further published notice be given. I am also of opinion that it would be competent under the act to adopt regulations whereby timber for which no bid is received within the time fixed in the notice for the reception of competitive bids may thereafter, and in a manner to be stated in the notice, be sold without the giving of further notice, for not less than the appraised value.

The second question upon which my opinion is requested arises under another paragraph of the same act, as cited in the reference.

By this paragraph, the free use, under regulations to be prescribed by the Secretary of the Interior, of timber and stone found upon forest



by the same parties, the Allen Thurman, February 16, 1892, and the Crystal Hill, two days later; and for the greater length thereof are parallel to each other. The Crystal Hill overlaps the Allen Thurman to the extent of about 208.30 feet of its width and 1359.24 feet of its length. The discovery shaft of the Allen Thurman location is situated near the south end line thereof, and outside the overlapping limits of the Crystal Hill. The discovery shaft of the Crystal Hill location is situated upon ground originally embraced in the Allen Thurman, but excluded from that claim by the official survey thereof, which survey also excludes all ground in conflict with the junior location of the Crystal Hill, except a small strip twenty-five feet in width at the northerly end of the Allen Thurman.

May 12, 1898, your office, considering said entry, held, in substance, that inasmuch as the Crystal Hill location is based upon the discovery of a vein or lode parallel with, within the limits of, and therefore belonging to the Allen Thurman, the said Crystal Hill location was and is for that reason illegal and void. Notwithstanding this holding, however, your office, for the stated reasons that inasmuch as the two claims had been located by the same parties and were embraced in the same application and entry, directed that the mineral claimant company be allowed to elect within sixty days what portions of the claims it would retain, stating further, that should it elect to retain all of the Crystal Hill claim, it would be limited to that portion of the Allen Thurman lying south of the south end line of the Crystal Hill, but in case it should elect to retain all of the Allen Thurman, it would be necessary to show discovery of mineral on the portion of the Crystal Hill lying north of the north end line of the Allen Thurman, in order to procure patent for that portion of the Crystal Hill. An amended survey was required to accord with the election when made and for the further purpose of properly describing certain exclusions from the entry in favor of surveys Nos. 8266, 10680, and 10736.

The mineral claimant has appealed.

If the holding of your office to the effect that the Crystal Hill location was void from its inception for the reason that it was based upon a discovery within the limits of the prior location of the Allen Thurman of a vein or lode belonging to the owners of that claim, is correct, it must be apparent that there could be no reasonable ground for allowing the mineral claimant to elect which of the claims, or what portions thereof, it would retain, for the simple reason that it could not lawfully elect to claim under the void location of the Crystal Hill, and must therefore take only under the Allen Thurman. This would leave no room for the exercise of any right of election.

The material question presented by the record is: Was the Crystal Hill a void location from its inception for the reasons stated by your office?

The law provides that "no location of a mining claim shall be made

until the discovery of the vein or lode within the limits of the claim located" (Sec. 2320 Revised Statutes), and the rule is well settled that a location based upon the discovery of a vein or lode within the limits of a prior existing valid location is void. (1 Lindley on Mines, Sec. 337; *Branagan v. Dulaney*, 2 L. D., 744; *Little Pittsburg Consolidated Mining Company v. Amie Mining Company*, 17 Fed. Rep., 57.) The reason of the rule has its basis, in part at least, in the provision of the statute to the effect that the owners of such prior valid location, as long as they comply with the requirements of the law governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of such location, and also, "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" (Sec. 2322 Revised Statutes).

Third parties having no interest in an existing valid location of a mining claim, can predicate no claim or right whatever to veins or lodes the tops or apexes of which lie within the lines of such existing location, either by discovery or by location, for the all-sufficient reason that such veins or lodes are already, whether previously explored or not, subject to the claim of the owners of the existing prior location. Manifestly, therefore, no discovery of mineral within the lines of an existing valid location can form the basis of another and subsequent location adverse thereto.

This rule, however, does not appear to be applicable to the present case. Here the location of the Crystal Hill, though based upon a discovery within the lines of the prior apparently valid location of the Allen Thurman, was not made by parties claiming adversely to the Allen Thurman, but by the same parties who had located and still owned that claim. Apparently two lodes or veins lying in most part parallel to each other were discovered and located by the same parties, at different dates and as separate claims, the later location overlapping the former, as shown, but without conflict of interest because of such overlap, for the reason that the parties being the same, there could be no such conflict.

It is true that said locators and their successors in interest, under and by virtue of the prior Allen Thurman location, could have claimed and held the Crystal Hill vein or lode throughout its entire depth, to the extent that the top or apex thereof lay within the original surface lines of the Allen Thurman extended downward vertically, and to that extent there would seem to have been no necessity for the location of the Crystal Hill vein or lode. The fact remains, however, that a part of the Crystal Hill as located and entered, lies north of the northerly end line of the Allen Thurman and to that extent it could not have claimed and held under the Allen Thurman locations. Presumably this was the reason for the separate location of the Crystal Hill vein or lode.

Whether this be true or not, however, there does not appear to be any good reason why, treating the location of the Crystal Hill as an abandonment by the parties of their prior location of the Allen Thurman to the extent of the overlap, the two claims as finally surveyed, applied for, and entered, may not be sustained. There seems to be no difficulty in ascribing validity to the discovery and location of the Crystal Hill on the theory that the parties, by their acts in making such discovery and location, and by the subsequent proceedings had relative thereto and to the Allen Thurman, to the extent of the overlap of the two claims, intended to abandon and did abandon their rights under their prior location of the Allen Thurman. It is in entire harmony with the record to hold that such was the intention of the parties. Indeed, it is the most reasonable interpretation that can be placed upon their conduct in the premises throughout. They are not claiming the overlap by virtue of the Allen Thurman location, but by the official survey of that claim they caused the overlap to be expressly excluded therefrom (except the very small and insignificant portion hereinbefore mentioned) and are now claiming the same under the Crystal Hill location, and by their entry thereof as a part of that claim.

It is therefore held that the entry of the two claims may stand as made, and to the extent that your office decision holds to the contrary the same is reversed.

Upon the required amendment of the survey being made, showing specifically the exclusions on account of said surveys Nos. 8266, 10680 and 10736, the entry will be passed to patent, unless other objection appears.

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#### RAILROAD GRANT—SUCCESSOR IN INTEREST.

##### NORTHERN PACIFIC RY. CO.

Directions given for the recognition of the Northern Pacific Railway Company as the successor in interest of the Northern Pacific Railroad Company, in the approval of lists and issuance of patents on account of the grant to the latter company.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *December 26, 1899.* (F. W. C.)

Request has been made on behalf of the Northern Pacific Railway Company that patents to be hereafter issued for lands inuring under the grant of July 2, 1864 (13 Stat., 365), and subsequent legislation relating thereto, may issue in the name of the Northern Pacific Railway Company, as successor to the Northern Pacific Railroad Company, complete proof of such successorship having been previously filed by the Northern Pacific Railway Company.

By departmental decision of November 21, 1899 (29 L. D., 316), in the matter of certain relinquishments executed by the Northern Pacific Railway Company under the act of July 1, 1898 (30 Stat., 597, 620), of

lands within the limits of the grant to the Northern Pacific Railroad Company in the State of Minnesota, the circular of February 14, last (28 L. D., 103), was modified so as to recognize the Northern Pacific Railway Company as the lawful successor in interest to said Northern Pacific Railroad Company, as to all the lands coming within the grant made to said Northern Pacific Railroad Company, by the act of July 2, 1864, *supra*, and all subsequent legislation.

The request is therefore granted and it is directed that all lists submitted for the approval of this Department on account of the grant to the Northern Pacific Railroad Company, as well as the patents to be issued thereon, be in the name of the Northern Pacific Railway Company, as successor to the Northern Pacific Railroad Company.

The letter containing the request is herewith enclosed for the files of your office relating to said grant.

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MINING CLAIM—ADVERSE CLAIMANTS—JUDICIAL ACTION.

BARNEY CONWAY.

The determination of questions with respect to the right of possession as between adverse mineral claimants rests solely with the courts; and the manner in which a court ascertains the facts, whether by stipulation or otherwise, upon which it renders judgment, is a matter that in no degree affects the conclusive and binding force of such judgment upon the parties to the suit and the Land Department.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *December 29, 1899.* (C. J. W.)

Barney Conway made mineral entry No. 1644, survey No. 11,354, Monte Christo lode claim, at Pueblo, Colorado, Cripple Creek mining district, embracing 0.801 acres, on March 3, 1898.

July 22, 1898, your office examined the papers pertaining to said entry, and by decision of that date, for reasons therein stated, directed that the mineral claimant be called upon to show cause, within sixty days, why his entry should not be canceled, failing which, the entry would be canceled without further notice. Thereupon Conway appealed.

The principal contention of the appeal is against the action of your office in disregarding the judgment of the district court in an adverse suit involving the land in question.

It appears—

1. That on December 11, 1896, Conway filed his application for patent claiming 1.103 acres exclusive of the ground embraced in conflicts with other mineral surveys.
2. That during the period of publication, to wit, on February 17, 1897, an adverse claim was filed by the owner of the Buster lode claim

(unsurveyed) for certain ground in conflict between the two claims, on which adverse claim suit was timely instituted.

3. That on February 21, 1898, the court rendered judgment in the case, and awarded to the adverse claimant all the land in conflict except a tract ten by ten feet, supposed to include the Monte Christo discovery shaft, which latter tract was awarded to the Monte Christo claimant and entry was made to correspond therewith.

4. That the judgment shows it was rendered on a stipulation by the contending parties.

5. That on August 21, 1897, one P. L. Thomas, claiming ownership of the conflicting Lenore and Defender lode claims, filed a corroborated protest against the Monte Christo application, which, on December 28, 1897, he formally withdrew, since which time the application has proceeded *ex parte*.

The judgment of the court, awarding a part of the conflict, including the discovery shaft of the Monte Christo lode claimant, to said claimant, and the remainder of the conflict to the Buster lode claimant, operated to establish the right of the Monte Christo claimant to that part of the ground awarded to said claimant, as against every one except the government.

The Buster lode claimant was the only adverse claimant for the ground located by the Monte Christo claimant, who asserted an adverse right during the period of publication, and thus the controversy as to the right of possession of the ground in conflict was confined to these rival claimants. If any other claimants existed, their rights were waived by failure to assert them during the period of publication. The Buster lode claimant, having instituted suit in due time on his adverse claim, was in position to waive his right to any part of the conflict or assert his right to all of it.

Your office decision contains the intimation that a judgment of the court based on a stipulation, is less a judgment than it would have been if based upon the testimony of witnesses regularly introduced, and that the correctness of such judgment, for that reason, may be inquired into by the Department. The adverse action of your office upon the entry in question rests largely, if not wholly, upon the theory that the judgment of the court in the case was erroneous and therefore not conclusive. In reference to that matter it may be said that the court's manner of ascertaining the facts upon which the judgment was rendered can in no measure affect the credit to be given such judgment when attacked collaterally. What powers may be exercised by the courts in this class of cases does not depend upon departmental regulations or decisions, but upon statutory provisions. Section 2326 of the Revised Statutes provides:

Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication

of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. 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 to do so shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land-office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land-Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from a decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land-Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights.

It would appear that questions growing out of rival and adverse claims to the right of possession of mineral lands belong in a special sense to courts of competent jurisdiction, to try and determine them. It is apparent from the language of the statute that the court is not bound to award all the land in conflict to one party, but may, in proper cases, of which it is to be the judge, award portions of the land in conflict to different claimants. The fact that the judgment of the court has the effect in any case of dividing the land in conflict, equally or otherwise, between adverse claimants, does not impeach the authority or validity of the judgment, or authorize the Department to go behind the judgment to inquire into the facts upon which it was rendered. The conclusive and binding force of such judgments, as to matters which by statute are exclusively within the jurisdiction of the courts, have been frequently recognized by the Department both in early and recent decisions, as in *Silver King Lode* (14 L. D., 308); *Newman v. Barnes* (23 L. D., 257); *Stranger Lode* (28 L. D., 320).

The courts of competent jurisdiction are the tribunals under section 2326 of the Revised Statutes into which adverse claimants of mining lands are invited for the settlement of their conflicting rights. If, after instituting suit, the litigants are able to agree as to all or any part of their rights, no good reason appears why they should not be permitted to do so, and it is the common practice of the courts to allow them to do so. Your office objects to the entry under consideration, on the ground that the effect of the judgment of the court is to give to the Monte Christo lode claimant the benefits which attach to the first locator, when, in fact, as between him and the Buster lode claimant, he is the junior locator. A similar proposition was passed upon by the

Department in the case of Stranger Lode (28 L. D., 321), where it was held (syllabus):

That a judicial award to the junior locator made in adverse proceedings, of a small part of the ground in conflict, is none the less binding upon the parties and the Land Department, because made in pursuance of a stipulation between the parties.

For the reasons stated, your office decision is reversed in so far as it holds the judgment of the court awarding to the Monte Christo lode claimant ten by ten feet of the ground in conflict between him and the Buster lode claimant, to be of no effect. Without now considering the right of the Monte Christo claimant to other portions of ground embraced in his entry, the case is remanded to your office for readjudication, in accordance with the views herein expressed, your attention being specially called to the supplemental evidence on behalf of the entryman filed pending the appeal here.

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FOREST RESERVES.—LIEU LAND SELECTIONS, ACT JUNE 4, 1897 (30 STAT., 36).

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,

Washington, D. C., December 18, 1899.

*Registers and Receivers, United States Land Offices.*

GENTLEMEN: Your attention is called to a decision by the Honorable Secretary of the Interior, dated April 26, 1899 (28 L. D., 328), addressed to this office, which reads as follows, to wit:

The Department is in receipt of your communications of December 7, and 13, 1898, relative to applications now pending in your office to exchange lands within the limits of public forest reservations for public lands outside such reservations, under the following provisions of the act of June 4, 1897 (30 Stat., 11, 36.)

"That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."

Calling attention to a circular addressed to registers and receivers, issued August 11, 1898, by your office, without the approval of the Secretary of the Interior, and also referring to page 89 of your annual report for the year ending June 30, 1898, you ask (1) whether lands within the limits of forest reservations must be agricultural in character in order to be made basis for lieu selections under the foregoing provision of the act, (2) whether the claim or title thereto must have been initiated or acquired under the settlement laws of the United States, and (3) whether timber land acquired by purchase under the act of June 3, 1878 (20 Stat., 89), but since denuded

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<sup>1</sup> See circular of June 30, 1897, 24 L. D., 589, paragraphs 14 to 18, inclusive.

of its timber, and land acquired under a grant made to a State or a railroad company by act of Congress can be made basis for such lieu selections.

As to the first question, if by agricultural lands you mean lands, the claim or patent to which is not based upon the mining laws of the United States, the question is answered in the affirmative. That the statute does not contemplate and therefore does not authorize the relinquishment or surrender of mineral lands as basis for the making of lieu selections, is shown by the provisions therein that:

"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 reservation.

\* \* \* \* \*

And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained."

All other lands included within the limits of a public forest reservation are subject to relinquishment as basis for lieu selections, if claimed or owned as stated in the statute.

As to the second question, if by settlement laws you mean such laws as make personal settlement and residence upon the tract sought to be acquired a necessary condition to obtaining title, as in the case of the preemption and homestead laws, the question is answered in the negative. That which may be relinquished is described as "a tract covered by an unperfected bona fide claim or by a patent," and is believed to include any tract covered by any unperfected bona fide claim under any of the general land laws (except the mining laws) of the United States, or to which the full legal title has passed out of the government and beyond the control of the land department by any means which is the full legal equivalent of a patent. The thing which was objectionable to the forest reservation policy was the presence within the limits of a forest reservation of lands held and controlled by individual claimants or owners. Whether the claim or ownership was initiated or acquired under the homestead statute, which is a settlement law, or under the timber land purchase act, which is not a settlement law, its presence is equally an obstacle to the attainment of the purpose for which the forest reservation was established. In both cases the reservation of the surrounding lands is equally prejudicial to the interests of the claimant or owner.

As to the third question, the answer is in the affirmative, subject to the qualifications that where the land is claimed under a grant made to a State or a railroad company by an act of Congress, the full legal title must have passed out of the government and beyond the control of the land department by a patent, or by some means which is the full legal equivalent thereof. Where under the timber land purchase act, or indeed under any other statute, one has acquired land having valuable timber thereon and has removed the timber, in pursuance of a lawful right so to do, the removal of the timber does not affect his ownership of the land, and if it be included within the limits of a public forest reservation does not deprive him or the government from receiving the benefit incident to a relinquishment of that land, and a selection of other land outside the limits of the forest reservation in lieu thereof. The statute does not make it a condition to the exchange therein authorized that the tract within the forest reservation should have retained its original and natural condition.

You will please formulate and submit to the Department circular instructions to the local land officers revoking the circular issued by your office August 11, 1898, and also embodying the views expressed herein, and in the decisions of the Department in the cases of *F. A. Hyde et al.* (28 L. D., 284), and *Emil S. Wangenheim* (28 L. D., 291). Action upon all applications for lieu lands under said act will be withheld until the circular instructions are adopted.

The decision in the case of *Hyde et al.*, *supra*, holds that—

Where an exchange of land is sought under the act of June 4, 1897, the relinquishment and selection can be made only by the claimant or owner of the land within the limits of the forest reservation.

Unsurveyed as well as surveyed land, which is vacant and open to settlement may be selected under said act.

The words "tract covered . . . by a patent," as used in said act, embrace and include a tract to which the full legal title has passed out of the government and beyond the control of the land department by any means which is the full legal equivalent of a patent.

Before a selection under said act can be approved, the United States must be re-invested with all the right and title to the tract relinquished, with which it had previously parted.

The decision in the case of *Wangenheim*, *supra*, holds that—

In an exchange of lands under the act of June 4, 1897, where title to the land relinquished has passed out of the government, or where certificate for patent thereto has issued, the selection may embrace contiguous or non-contiguous tracts, if in the same land district; but if the land relinquished is covered by an unperfected claim, to which certificate for patent has not been issued, and the law under which said claim was initiated requires that land taken thereunder must be in one body, the same requirement must be observed in making the lieu selection.

Every selection of unsurveyed land must designate the same according to the description by which it will be known when surveyed, if that be practicable, or, if not practicable, must give, with as much precision as possible, the locality of the tract with reference to known landmarks, so as to admit of its being readily identified when the lines of public survey come to be extended; and the selection must be made to conform to such survey within thirty days from notice, by the local office, to the party making the selection, of the receipt at the local land office of the approved plat of the survey of the township embracing such tract.

Selections of unsurveyed lands will in no event be passed to patent until after the lands have been surveyed, nor until after the expiration of four months from the date of receipt at the local land office of the approved plat of survey of the township embracing the lands selected; and selections of surveyed lands will not be passed to patent until after the expiration of four months from the date of selection.

The purpose of the preceding paragraph is, in all instances, to give settlers or other claimants, if any there be, at the time of selection, ample opportunity to lawfully assert their claims or file their protests in the local office and to afford time for the local officers to advise the Commissioner of the General Land Office of such adverse claims before the time arrives for issuing patent under the selection.

In selections of surveyed land which has been returned as mineral, or which is within six miles of any mining claim, and in all selections of unsurveyed land, notice of the selection, commencing within twenty days thereafter, must be given, for a period of thirty days, by posting upon the land and in the local land office, and by publication at the

cost of the applicant in a newspaper designated by the register as of general circulation in the vicinity of the land and published nearest thereto. Where the selection embraces non-contiguous tracts the notice must be posted upon each tract; but such notice will not be required in any case where the selection is in lieu of "a tract covered by an unperfected *bona fide* claim," viz: A tract the title to which has not passed out of the United States or for which patent certificate has not issued. Notice under this paragraph will not be required in any case of selections in States wherein the United States mining laws are not operative.

In all cases relinquishments made in pursuance of said act must be executed, acknowledged and recorded in the same manner as conveyances of real property are required to be executed, acknowledged and recorded by the laws of the State or Territory in which the land is situated. Where the legal title to the land has passed out of the United States, there must also be filed with the relinquishment a duly certified abstract of title showing that at the time the relinquishment was filed for record the legal title was in the party making the relinquishment and that the land was free from liability for taxes and from other incumbrance. In case the land relinquished is covered by an unperfected *bona fide* claim, to which certificate for patent has not issued, there must be filed a certificate by 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 incumber the title to the land or any part thereof is on file or of record in his office, or if any such instrument or instruments be on file or of record therein, the certificate must show the facts; and in case certificate for patent to such land has been issued there must also be filed the certificate of the receiver of taxes for the proper county showing that the land is free from all liability for taxes.

Relinquishments by individuals of lands to which the legal title has passed out of the United States or to which certificate for patent has issued, must also be executed by the wife of the claimant, if he have one, in such manner as will effectually bar any dower, homestead or other interest on her part in or to the lands relinquished.

The forms of application (4-634 and 4-643), should be used in the classes of cases to which they respectively apply. Other forms will be prepared and furnished you by this office as occasion may seem to require.

The circulars of August 11, 1898, May 9, 1899 (28 L. D., 521), and November 15, 1899 (unreported), under said act are hereby revoked and this is substituted in their stead.

Very respectfully,

BINGER HERMANN,  
*Commissioner.*

Approved, December 18, 1899.

THOS. RYAN, *Acting Secretary.*

## MINING CLAIM—ALASKAN TIDE LANDS.

JAMES W. LOGAN.

The tide lands of Alaska are not public lands belonging to the United States within the meaning of the mining laws; and no rights whatever, with respect to such lands, can be acquired by exploration, occupation, location or otherwise, under said laws.

*Secretary Hitchcock to the Commissioner of the General Land Office, January 3, 1900.* (W. V. D.) (A. B. P.)

November 28, 1899, the Department referred to your office for report, a certain communication received from James W. Logan, of Oakland Mills, Maryland, under date of November 27, 1899, relative to certain alleged mining claims situate at or near Cape Nome in the District of Alaska.

The Department is now in receipt of your report, under date of December 12, 1899, upon the matters presented in said communication.

It appears that Mr. Logan and a number of other persons associated together in mining have attempted to make certain placer mining locations upon the beach of Behring Sea off the coast of Alaska, in the Cape Nome mining district, embracing in part lands lying below the line of ordinary high tide, or, in other words, tide lands, the stated object of so embracing such lands being to work the ground under the water. The main purpose of Mr. Logan's communication seems to be to obtain some sort of concession from the government in respect to the matter, if necessary to the accomplishment of the end in view.

You express the opinion that tide lands in the District of Alaska are not public lands of the character subject to disposal under the land laws of the United States, and that the land department is without authority to make any concession in the premises.

Under the laws of the United States relating to mineral lands and mining claims (which, by the act of May 17, 1884, 23 Stat., 24, 26, were extended to the District of Alaska, and have been since that date in full force and effect in said District), only mineral lands belonging to the United States are open to exploration, occupation, location, and purchase. (Sections 2318, 2319 etc., Revised Statutes; 1 Lindley on Mines, Sections 112, 322.)

As to that part of Mr. Logan's communication which relates to lands lying on the beach above the line of ordinary high tide, there would be no doubt that such lands are public lands of the United States and if mineral in character can be located, occupied and held under the mining laws as extended to Alaska, the same as any other public mineral lands in said District, if it were not for the provision in section 10 of the act of May 14, 1898 (30 Stat., 409, 413), which declares that "a roadway sixty feet in width parallel to the shore line as near as may be practicable shall be reserved for the use of the public as a highway." The effect of this provision has not been sufficiently considered by the Department to justify an expression of any opinion thereon at this time.<sup>1</sup>

<sup>1</sup> See departmental letter of February 5, 1900, relating to this paragraph.

The remaining question presented is: Are the tide lands in the District of Alaska, public lands belonging to the United States, within the meaning of the mining laws?

In the case of *Shively v. Bowlby* (152 U. S., 1-58) the supreme court had under consideration the question of the title to certain tide lands in the State of Oregon. In its decision of the case, the court, after an elaborate and exhaustive review and discussion of the whole general subject of the ownership and control of the tide lands in the various States and Territories of the United States, summed up its conclusions as follows:

Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and the control of them are vested in the sovereign for the benefit of the whole people.

At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the constitution to the United States.

Upon the acquisition of a Territory by the United States, whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the Territory.

The new States admitted into the Union since the adoption of the constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution.

The United States, while they hold the country as a Territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the Territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the States, respectively, when organized and admitted into the Union.

Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future State when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the constitution in the United States.

In view of the law as thus declared, and of the stated policy theretofore prevailing with respect to tide lands, in the absence of specific legislation by the Congress in relation to the tide lands of the District of Alaska at variance with said policy, there can be no doubt that such

tide lands are not public lands belonging to the United States, within the meaning of the mining laws, and that no rights whatever can be acquired with respect thereto by exploration, occupation, location, or otherwise, under said laws.

It is proper in this connection to also refer to the act of May 14, 1898 (30 Stat., 409), entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes," wherein it is provided:

That nothing in this act contained shall be construed as impairing in any degree the title of any State that may hereafter be erected out of said district, or any part thereof, to tide lands and beds of any of its navigable waters, or the right of such State to regulate the use thereof, nor the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said district. The term 'navigable water,' as herein used, shall be held to include all tidal waters up to the line of ordinary high tide and all nontidal waters navigable in fact up to the line of ordinary high-water mark.

This legislative declaration is in entire harmony with the law as it had been previously announced by the supreme court in the case above cited, and is indicative of a purpose on the part of the Congress, in dealing with the District of Alaska, to adhere to the policy theretofore existing with respect to the tide lands.

In view of all the foregoing it is perfectly clear that the mining locations in question, so far as it is attempted by them to embrace lands lying below the line of ordinary high tide, are without authority of law and therefore void, and that the land department is without authority to grant any concessions whatever with reference to the desired occupancy or working of said tide lands for mining purposes, or otherwise. The views expressed by your office in this respect are accordingly approved and you will so notify Mr. Logan, furnishing him with a copy of this opinion.

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RECONVEYANCE OF LAND WRONGFULLY PATENTED.

SAN FRANCISCO MINING CO.

In a case where the United States could successfully maintain a suit for the vacation of a patent wrongfully obtained, a voluntary reconveyance of the land so patented may be accepted.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *January 5, 1900.* (G. B. G.)

May 26, 1884, Daniel Wagner and William Plaskett located the Rittershoffen lode mining claim, situated in sections 9 and 10, township 3 south, range 16 east, Coulterville mining district, Mariposa county, California.

November 23, 1886, Carlo Garbarino made homestead entry for certain lands in said section 9, which entry conflicted with the said mining

location to the extent of 4.63 acres. Final proof upon this entry was submitted and final certificate issued March 8, 1892, and patent issued June 21, 1892.

The title acquired by said mining location having by sundry mesne conveyances and court proceedings passed to and vested in the San Francisco Mining Company, and the title acquired by said homestead entry and patent to the ground in conflict with said mining claim having by sundry mesne conveyances passed to and vested in the same company, and said company having on May 19, 1897, by quit-claim deed, conveyed to the United States of America the tract or parcel of land so in conflict, which deed was recorded May 29, 1897, the company on August 26, 1897, made its application for patent for said mining claim as located, officially surveyed and platted, and December 29, 1897, after due notice by posting and publication, as required by law, and no adverse claim being filed, entry of said lode claim, including the portion thereof in conflict with the patented homestead, was allowed by the local officers.

May 13, 1898, your office held the mineral entry for cancellation as to the ground in conflict with the patented homestead because of a believed lack of authority in the officers of the land department to issue a second patent embracing said ground, and held the mineral entry for cancellation as to certain ground not in conflict with the patented homestead, for reasons not clearly stated, but seemingly because the exclusion of the patented ground from the mineral entry divides the lode into two incontiguous parts, upon one of which no discovery of mineral has been made.

December 1, 1898, your office, at the request of the mineral claimant, again considered said application, and again denied the application for patent, and said that, in order to reinvest the land department with jurisdiction, the homestead patent must be surrendered and canceled.

The applicant company has appealed here.

The appeal is well taken. When Garbarino made his homestead entry, and when he submitted final proof thereon, in connection with both of which he represented that the land embraced therein was non-mineral and contained no mining claim or known lode or vein bearing valuable mineral deposits, the ground in conflict was known to be mineral land and was not subject to homestead entry. Under these circumstances, the United States could successfully maintain a suit to vacate the patent to the extent of the ground in conflict, and where such a suit can be maintained, it is believed that the United States may accept a reconveyance of the ground for which a patent was thus wrongfully obtained, thus accomplishing by the voluntary act of the parties all that would be accomplished by a suit in court. Such a reconveyance having been made, the officers of the land department are authorized to issue a patent to the mineral claimant for said ground.

The decision appealed from is reversed, with directions to pass the entry to patent, unless other objection appears.

## SCHOOL LANDS—WAIVER OF RIGHT—LIEU SELECTION.

## TERRITORY OF NEW MEXICO.

Where the title to school sections has vested in the Territory of New Mexico under the grant of June 21, 1898, and such sections are subsequently embraced within a reservation created by executive order, the Territory may, under the provisions of section 2275 R. S., as amended by the act of February 28, 1891, waive its right to such sections and select other lands in lieu thereof.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,*  
*January 8, 1900.* (G. B. G.)

By the act of June 21, 1898 (30 Stat., 484), sections numbered sixteen and thirty-six in every township of the Territory of New Mexico, and, where such sections or any parts thereof are mineral, or have been sold or disposed of by or under the authority of any act of Congress, other non-mineral lands equivalent thereto, in legal subdivisions of not less than one quarter-section, and as contiguous as may be to the section in lieu of which the same is taken, were granted in terms of present grant to said Territory for the support of common schools.

By executive order of November 1, 1899, certain lands in said Territory, among which were lots 1 and 2 of section 36, T. 9 S., R. 14 E., and the N. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 16, T. 10 N., R. 14 E., were reserved and set apart for the use of the Marine Hospital service.

By reference of December 8, 1899, I am asked for an opinion whether the status of these specifically-described tracts of land is such that the Territory may select other lands in lieu thereof.

At the date of the grant to the Territory these lands had been surveyed, and they being of the class of lands granted by said act of June 21, 1898, and not having at that time been sold or otherwise disposed of by or under the authority of any act of Congress, and the grant being one *in presenti*, the title to said lands, if non-mineral, passed to and vested in the Territory at the date of the grant.

Section 2275 of the Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796), provides that where any State is entitled to sections sixteen and thirty six under its school grant, or where such sections are reserved to any Territory for the use of schools and may be embraced within any Indian, military or other reservation, the selection by such State or Territory of other lands in lieu thereof, appropriated and granted by said section 2275 as amended, shall be a waiver of its right to such sections.

In an opinion of December 15, 1899 (29 L. D., 364), I expressed the view that said section as amended gave to the Territory of New Mexico the right to waive its right to sections sixteen and thirty-six in a forest reservation and select other lands in lieu thereof, and there would not seem to be any difference in the status of land in a forest reservation and land within a reservation for the use of the Marine Hospital

service. I am, therefore, of opinion that the Territory may waive its right to the above-described land, and select other land in lieu thereof, and that the proper officer of the State should be so notified.

Approved, January 8, 1900,

E. A. HITCHCOCK,

*Secretary.*

REPAYMENT—RESERVOIR DECLARATORY STATEMENT.

CHRISTIAN MAIER.

Repayment of the filing fee paid on a canceled reservoir declaratory statement can not be allowed if such declaratory statement was not erroneously received, even if such filing be considered an "entry" within the meaning of the act of June 16, 1880.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *January 8, 1900.* (C. J. G.)

The Department is in receipt of your office letter of November 24, 1899, submitting the case of Christian Maier who applies for repayment of the fees paid by him on reservoir declaratory statement No. 146, for the SE.  $\frac{1}{4}$  Sec. 26, T. 14 N., R. 53 W., Sidney, Nebraska, land district.

The said declaratory statement was filed under the act approved January 13, 1897 (29 Stat., 484), entitled "An act providing for the location and purchase of public lands for reservoir sites." This title indicates that lands are to be sold for reservoir sites but there is no provision in the act itself for the sale of any lands. Any person, live-stock company, or corporation engaged in breeding, grazing, driving, or transporting live-stock, in order to avail themselves of the provisions of said act, must file a declaratory statement in the United States land office in the district where the land is situated. The act directs that after the approval of a map showing the location of the reservoir, the land shown to be necessary for the proper use of such reservoir be reserved from other disposition so long as the same is maintained and water kept therein for the purposes named in the act. The said act was to be administered under regulations prescribed by the Secretary of the Interior.

Paragraph 35 of the original regulations issued under the act in question was amended by circular of June 23, 1899 (28 L. D., 552). Rules 4 and 8 of said paragraph, as amended, are as follows:

4th. No reservation shall be made within one-half mile of the boundaries of a group of one hundred and sixty acres of adjoining or cornering tracts already reserved under this act.

8th. All declaratory statements filed before this circular is received at the local land office must, by an amended or supplemental statement, be made to conform to these regulations, and if after receiving notice to that effect the applicant makes default for sixty days his declaratory statement will be rejected.

Maier's declaratory statement was filed June 23, 1899, before the amended regulations were received at the local office. The land described therein was "within one-half mile of the boundaries of a group of one hundred and sixty acres of adjoining or cornering tracts already reserved under this act," and, upon the receipt by the local officers of the amended regulations, he was accordingly notified of the requirements thereof. On September 9, 1899, he relinquished all his right, title and interest in and to the land described, stating that he did not desire to amend his declaratory statement. At the same time he made application for repayment of the fees (two dollars) paid by him on the filing of his said declaratory statement.

There is nothing in the act of June 13, 1897, nor was there anything in the regulation in force when Maier's filing was made (27 L. D., 200, 210), forbidding the making of a reservation "within one-half mile of the boundaries of a group of one hundred and sixty acres of adjoining or cornering tracts already reserved under this act." His declaratory statement was therefore not erroneously received, and hence, even if it were considered an entry within the meaning of the act of June 16, 1880 (21 Stat., 287), repayment of the fees could not be allowed.

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NICHOLS *v.* PRIEST.

Motion for review of departmental decision of October 24, 1899, 29 L. D., 260, denied January 8, 1900, by Secretary Hitchcock.

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MINING CLAIM—EXPENDITURE—APPLICATION—SECTION 2332 R. S.

BARKLAGE ET AL. *v.* RUSSELL.

Questions concerning the requisite annual expenditure upon mining claims, and of alleged relocations thereof on account of failure to make such expenditure, go only to the right of possession as between adverse mineral claimants for the land involved, and the determination of that right is committed to the courts alone. Failure to prosecute an application for mineral patent to completion within a reasonable time after the expiration of the period of publication, or the termination of adverse proceedings in the courts, constitutes a waiver of all rights obtained by the earlier proceedings under the application.

Section 2332 R. S., is not intended to be a wholly separate and independent provision for the patenting of a mining claim, but should be construed with section 2325, and other sections of the Revised Statutes upon the same subject, and when so construed held to mean that evidence of the possession and working of a mining claim for a period equal to the time prescribed by the local statute of limitations for mining claims shall be considered as sufficiently establishing the location of the claim and the applicant's right thereunder, "in the absence of any adverse claim," but that whatever else said section was intended to dispense with in the proceedings for procuring a patent, it does not dispense with the requirements of section 2325, whereby the existence of an adverse claim is made known to the Land Department, and due protection accorded to adverse claimants.

The case of *Stewart et al. v. Rees et al.*, 21 L. D., 446, overruled.



to mineral lands and go only to the right of possession of the land involved. The determination of that right, between such claimants, however, or whenever the adverse claim may be alleged to have had its origin, is committed by the mining laws to the courts alone (*Cain et al v. Addenda Mining Co.*, on review, 29 L. D., 62, 66; and *Wolenberg et al*, id., 302). The land department is charged, however, with the duty of administering the provisions of section 2325 of the Revised Statutes, which relate to proceedings for obtaining patents to public mineral lands. As appears from the facts already stated nearly twenty-four years elapsed between the dismissal of the only adverse proceedings instituted during the period of publication and which justified and required, while they were pending, a stay in the prosecution of the application for patent, and the securing of the entry in 1899. Upon the dismissal of those proceedings it became at once the duty of the applicants for patent, or their successors in interest, to prosecute the application with diligence to a final determination in the land department. Instead of so doing, it was allowed to lie dormant for the long period stated above, within which, as protestants charge, the right of possession to the land was forfeited to them by reason of non-compliance with the law as to annual expenditure, and of their relocation of the claim.

In *Cain et al v. Addenda Mining Company*, *supra*, the Department said:

The difficulty here arises from the fact that the Addenda company filed its application for patent in the local land office in 1879, made due posting and publication thereof and upon the termination of certain adverse proceedings in 1882 became entitled, upon paying the purchase price, to make entry of all the ground embraced in its application and notices which had not been awarded to others in such adverse proceedings. Instead of exercising this right the company took no further proceedings under its said application until in 1894 after the lapse of twelve years, and after the institution of the suit by the protestants to quiet title in themselves to the portion of the ground here in controversy. The mining laws contemplate that proceedings under an application for patent should be prosecuted to completion within a reasonable time after the required publication, or after the termination of proceedings on adverse claims, if any are filed; otherwise by making application for patent and giving notice thereof, but without making payment of the purchase price, one would become entitled to project indefinitely into the future the assumption of section 2325 "that no adverse claim exists" notwithstanding the requirement of section 2324 that an expenditure of one hundred dollars in labor or improvements shall be made upon a mining claim during each year until entry is allowed.

The Addenda company permitted its application to lie dormant so many years without making payment of the purchase price that it must be held to have waived the rights obtained by the earlier proceedings upon the application. Its entry in 1894, therefore, ought not to be allowed, and for that reason must be canceled.

In the more recent case of *Wolenberg et al.*, *supra*, the Department followed and applied the rule announced in the Addenda case that failure to prosecute an application for patent to completion within a reasonable time after the expiration of the period of publication or the termination of adverse proceedings in the courts constitutes a waiver

of all rights obtained by the earlier proceedings upon the application, and in further explanation of the reason for the rule said:

In this case nearly two years elapsed after the required publication before any effort was made to carry the application to completion, and in the meantime there may have been, as claimed, a legal relocation of the claim, based upon a failure by the claimants to make the annual expenditure in labor or improvements which is necessary to the continued maintenance of their possessory right as against subsequent locators. The assumption, declared in section 2325 of the Revised Statutes, that no adverse claim exists in those instances where no adverse claim is filed in the local office during the period of publication, relates to the time of the expiration of the period of publication and to adverse claims which might have been made known at the local office before that time. It has nothing to do with adverse claims which are initiated subsequent to that time and which could not therefore have been made known at the local office during the period of publication. The statutory declaration does not compel any assumption in this instance to the effect that no adverse claim intervened between the earlier proceedings upon the application for patent, which ended February 3, 1897, and the making of the entry on December 21, 1898. In the presence of the claimed relocation of the Mascot after the expiration of the period of publication, the applicants for patent are not in a position to ask or urge that their laches or delay be disregarded. It follows that the entry must be canceled.

It follows from the doctrine declared and the action directed to be taken in the cases just cited that the entry in the case at bar must be canceled, unless, as held by the decision of your office, a right to patent to the land embraced in the entry is established, notwithstanding, in said Russell, under section 2332 of the Revised Statutes by the holding and working of the claim by himself and his grantors for a period equal to the time prescribed by the statute of limitations for mining claims in California, which period is five years, and regardless of the laches shown and of the adverse claim alleged to have been initiated since the period of publication.

The said section 2332 reads:

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

The Department is of opinion that this provision of the mining laws has no such application to the present case as is accorded it in the decision of your office. It was considered by the Department in the Addenda case, *supra*, also involving mineral lands in California, and in which the only noteworthy dissimilarity of facts from those of the present case is that in the former the protestants had resorted to the courts and obtained a decree awarding to them the possession of the land in controversy. In that case the Department held, in effect, that the section was not applicable, and for the reason already stated

directed the cancellation of the entry. The difference between the cases is not material upon the question of the application thereto of the said section. In each case laches in the prosecution of the application for patent and the assertion of an adverse claim alleged to have originated subsequent to the period of publication were present, and these are enough to bring them within the same rule. In the earlier case, as in this, furthermore, the application for patent was not based upon a claimed right thereto by reason of possession and working of the land in accordance with the provisions of the said section, but upon a location made within eighteen months prior to the application. No foundation existed for claiming anything under section 2332 in either case when the application was filed, or notice thereof was given.

This provision of the mining laws under consideration was originally enacted as section 13 of the act of July 9, 1870 (16 Stat., 217), commonly known as "the placer act," and was brought forward into the Revised Statutes without any material change of language. The existing official regulations under the section (28 L. D., 577, 607) are as follows:

76. The provisions of section 2332, Revised Statutes, will greatly lessen the burden of proof, more especially in the case of old claims located many years since, the records of which, in many cases, have been destroyed by fire, or lost in other ways during the lapse of time, but concerning the possessory right to which all controversy or litigation has long been settled.

77. When an applicant desires to make his proof of possessory right in accordance with this provision of law, he will not be required to produce evidence of location, copies of conveyances, or abstracts of title, as in other cases, but will be required to furnish a duly certified copy of the statute of limitations of mining claims for the State or Territory, together with his sworn statement giving a clear and succinct narration of the facts as to the origin of his title, and likewise as to the continuation of his possession of the mining ground covered by his application; the area thereof; the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, or litigation with regard to his claim and, if so, when the same ceased; whether such cessation was caused by compromise or by judicial decree, and any additional facts within the claimant's knowledge having a direct bearing upon his possession and bona fides which he may desire to submit in support of his claim.

78. There should likewise be filed a certificate, under seal of the court having jurisdiction of mining cases within the judicial district embracing the claim, that no suit or action of any character whatever involving the right of possession to any portion of the claim applied for is pending, and that there has been no litigation before said court affecting the title to said claim or any part thereof for a period equal to the time fixed by the statute of limitations for mining claims in the State or Territory as aforesaid, other than that which has been finally decided in favor of the claimant.

79. The claimant should support his narrative of facts relative to his possession, occupancy, and improvements by corroborative testimony of any disinterested person or persons of credibility who may be cognizant of the facts in the case and are capable of testifying understandingly in the premises.

One purpose of section 2332, as indicated in paragraph 76 of the foregoing regulations, and clearly shown in the history of the proceedings

in Congress attending its consideration and passage there, was to lessen the burden of proving the location and transfers of old claims concerning which the possessory right was not controverted but the record title to which had in many instances been destroyed by fire or otherwise lost because of the insecurity and difficulty necessarily attending its preservation during the early days of mining operations upon the Pacific coast and vicinity. As originally enacted, the section was intended, primarily, if not solely, to apply to placer claims, for the patenting of which there had previously been no provision, and to which class all, or nearly all, of the earlier claims belonged, the establishment of record title to which under the original locations and through successive transfers was especially difficult and oftentimes impossible for the reasons just stated.

The section was not intended as enacted, nor as now found in the Revised Statutes, to be a wholly separate and independent provision for the patenting of a mining claim. As carried forward into the Revised Statutes it relates to both lode and placer claims, and being *in pari materia* with the other sections of the Revision concerning such claims is to be construed together with them, and so as, if possible, that they may all stand together, forming a harmonious body of mining law. Section 2325 points out with some detail the steps necessary to secure patent, requiring, among other things, an application under oath, notice thereof, proof of the expenditure of \$500 upon the claim by the claimant or his grantors, and payment for the land. None of these requirements is mentioned in section 2332, but it by no means follows, upon the simple filing by a claimant of the proof indicated in the latter section, without compliance with any of the requirements of section 2325, that patent must be issued to him. Properly construed with section 2325 and other sections of the Revised Statutes upon the same subject, it is believed that the main purpose of section 2332 was to declare that evidence of the holding and working of a mining claim for a period equal to the time prescribed by the local statute of limitations for mining claims shall be considered as sufficiently establishing the location of the claim and the applicant's right thereunder "in the absence of any adverse claim." This section does not, in itself, prescribe any method for ascertaining whether an adverse claim exists. Adequate provision for bringing adverse claims to the attention of the land department is found in the provisions of section 2325, which require notice of the application for patent to be posted and published, and declare that if no such claim be filed in the local land office during the period of publication it shall be assumed that none exists. Whatever else section 2332 was intended to dispense with in the proceedings for procuring a patent to a mining claim, it was certainly not intended to dispense with the requirements of section 2325, whereby the existence of an adverse claim is made known to the land department, and due protection is accorded to adverse rights.

The decision of your office is reversed, and the decision of the Department in *Stewart et al. v. Rees et al.* overruled so far as the same is in conflict with the views herein expressed. The entry of the Spring Canon claim will be cancelled. The claimant will be at liberty to renew proceedings for patent and if this is done protestants will be afforded an opportunity to have their alleged adverse claim determined by the proper tribunal.

This decision is substituted for the departmental decision of December 9, 1899, herein, which was recalled for further consideration.

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TIMBER CULTURE ENTRY—FRACTIONAL SECTION.

GEORGE M. SIMPSON.

A timber culture entry is limited in acreage to one fourth of the land embraced in the section except where such entry is of a technical quarter section.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *January 11, 1900.* (J. L. McC.)

George M. Simpson, on December 16, 1887, made timber-culture entry for lots 1, 3, 4, 5, and 6, of Sec. 15, T. 16 N., R. 43 W., Sidney land district, Nebraska.

March 26, 1898, he made final proof before the clerk of the district court of Deuel county, Nebraska; and final certificate issued there March 28, 1898.

Said section 15 is cut in two by the Platte river, which covers more than three-fourths of its area. On the north side of the river are lot 1, containing 29.10 acres, and lot 2, containing three acres. On the south side are lots 3, 4, 5, and 6, containing in the aggregate 112.50 acres. The total area, exclusive of that covered by the Platte river, is therefore 141.60 acres.

The papers were duly transmitted to your office, which, by letter of October 14, 1898, refused to issue patent for the land claimed, on the ground, first that it embraced non-contiguous tracts; second, that under the timber-culture law Simpson could not be permitted to make entry of more than one-fourth of the land in said section 15—to wit, 36.15 acres—or as near that amount as can be approximated by adding together the areas of different (contiguous) lots. The area of the land covered by his filing is 141.60 acres.

Simpson has appealed to the Department. Accompanying his appeal is a relinquishment of all his claim to lot 1 (north of the Platte river). This obviates the objection raised by your office on the ground of non-contiguity of the different tracts; but the remaining four lots embrace an area of 112.50 acres. He contends that he is entitled to make entry of one-fourth the entire area of the section—including that covered by the Platte river.

In the case of John W. Snode (13 L. D., 53), the Department said: "I think it is plain from the language of the act that it was the intention of Congress to allow one-quarter (approximately) of the number of acres in any one section to be appropriated under the act." In the case of Weaver v. Price (16 L. D., 522), the Department ruled that if a timber-culture entry embraced "a technical quarter-section" it would not be disturbed, even though the entire section contained less than six hundred and forty acres. This ruling, however, would not inure to the benefit of Simpson, for his entry is not of a "technical quarter-section," but is made up of several different lots. In the case of Elbert S. Lamson (20 L. D., 337, syllabus), it was again held: "A timber-culture entry is limited to one-fourth of the land embraced in the section, except where such entry is of a technical quarter-section." In said Lamson case the timber-culture entry embraced the entire fractional section (which contained only 27.20 acres). In none of the cases above cited, nor in any other reported case decided by the Department, does it appear that the deficiency in the area of the section involved was caused by a portion thereof being covered by water, as in the case at bar (which, the appellant contends, should render this an exceptional case,); but it does not appear that the fact that a section is made fractional by such cause should render it an exception to the general rule that only (approximately) one-fourth of the *land* contained in a given section can be entered under the timber-culture law.

The decision of your office is correct, and is hereby affirmed.

#### INDIAN LANDS—CHIPPEWA RESERVATION—ALLOTMENT.

##### NELLIE LYDICK ET AL.

The lands known as the "White Oak Point reservation" were added to the general Chippewa reservation by executive order of October 29, 1873, and Indians residing at White Oak Point should therefore be regarded as residing on said general reservation, and entitled to remain thereon and take allotments of agricultural lands anywhere upon said reservation, under the proviso to section 3, act of January 14, 1889.

The right to select any particular tract for an allotment under the act of January 14, 1889, or under the provisions of the general allotment act relating to reservation Indians, does not depend upon prior settlement and improvement.

*Secretary Hitchcock to the Commissioner of Indian Affairs, January 18,*  
(W. V. D.) 1900. (W. C. P.)

Nellie Lydick, a Chippewa Indian, applied to the Chippewa commissioner for allotment of land for herself and four minor children on the Chippewa reservation in Minnesota, under the provisions of the act of January 14, 1889 (25 Stat., 642). These applications were rejected by said commissioner and upon appeal therefrom your office submitted the matter to this Department.

It was held by departmental letter of August 22, 1899 (29 L. D., 119), that the lands applied for in behalf of two of the children, James Lydick the N  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$ , Sec. 15, and Charles Lydick the W.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$ , Sec. 15, T. 145 N., R. 31 W., having been classed as pine lands, under said act of 1889, were not subject to allotment and the Chippewa commissioner's action rejecting the applications for those tracts was approved.

It was held that the lands applied for by Mrs. Lydick for herself, the E.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , Sec. 16, and for two children, Henry Lydick, the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , Sec. 16, and Ruth Lydick, the E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 16, having been classed as "agricultural lands" under the provisions of said act are of the class subject to allotments. It was found that "the facts have not, however, been sufficiently developed to justify a decision as to the right of Mrs. Lydick and her children thereto" and the matter was returned to your office for a further investigation. You have returned the papers without, however, expressing any opinion upon the questions involved, as requested.

The act of January 14, 1889 (25 Stat., 642), provided for a commission to negotiate with the Chippewa Indians of Minnesota for the cession of all their rights and interests in all their reservations in Minnesota, except the White Earth and Red Lake reservations. It was directed that as soon as the census provided for should be taken and the cession obtained, all the Indians, except those on Red Lake reservation should be removed to White Earth reservation and thereupon be given allotments in conformity with the act of February 8, 1887 (24 Stat., 588), with a proviso, however, as follows:

That any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives at the time of the removal herein provided is effected, instead of being removed to and taking such allotment on White Earth reservation.

The census was taken and cessions obtained and the commission prosecuted the work of removing the Indians to White Earth reservation until your office, on January 19, 1895, by direction of this Department instructed the commission to suspend the work of removals. After that, the commission engaged in the work of making allotments to the members of the various tribes or bands who had not been removed to the White Earth reservation.

Your office stated in the letter of May 20, 1899, submitting the case here, that the annuity rolls show that Nellie Lydick has drawn pay with the White Oak Point band of Chippewa Indians, that her children have also drawn pay since the dates of their births, respectively, and that allotments to the White Oak Point band of Chippewa Indians both on the White Oak Point and Chippewa reservations, were completed prior to August 1, 1898. The application for these allotments in behalf of Mrs. Lydick and her children were made under date of September 10, 1898.

It is clear that Nellie Lydick is a Chippewa Indian and as such entitled to an allotment on some one of the reservations of said Indians. Her children have been recognized as members of the tribe or band to which their mother belongs, and properly so in view of the provisions of the act of June 7, 1897 (30 Stat., 62, 90)—

That all children of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time or was at the time of her death, recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe and no prior act of Congress shall be construed as to debar such child of such right.

The applicant's statement as to her place of residence is set out in the former decision, *supra*, and need not be repeated here. She states that she was born at White Oak Point but does not state specifically where she has resided since her marriage. The place known as White Oak Point was outside the boundaries of any Indian reservation at the time of Mrs. Lydick's birth but within the boundaries of a tract of land which was by executive order of October 29, 1873,

withdrawn from sale, entry or other disposition, as an addition to the reservation provided for by the first article of the treaty with the Chippewas of the Mississippi concluded March 19, 1867 (Stat. at Large, Vol. 16, p. 719), for the use of said Indians.

She explains that she understood that White Oak Point was in the general Chippewa reservation and that each time she referred to the Indian reservation she had in mind and meant the general Chippewa reservation. She further says she has always claimed the general reservation as her residence and never considered that her place of residence was confined to White Oak Point. The special agent submits with his report a large number of affidavits made by Indians and whites who have lived on the reservation and have known this applicant for many years. They all state that she lived with her mother upon the reservation until she was sent away to school; that upon her return she continued to live with her mother until she was married to Lydick, and that she has resided upon the reservation most of the time since her marriage and as much as nine-tenths of the Indians have. Some of the points mentioned as places where she resided at different times are within the boundaries of the original reservation while others are within the boundaries of the addition made thereto in 1873, which addition has in common usage come to be spoken of as the "White Oak Point reservation." It seems the Indians have regarded both the original and the addition as one and the same reservation paying no attention to any dividing line. They seemed to have been justified in this because the executive order of 1873 distinctly adds to the original reservation a certain tract of land, thus making it a part thereof. In the article of session signed by

the White Oak Point Band of Chippewas of the Mississippi occupying and belonging to the reservation established by executive order of October 29, 1873, as an

addition to the reservation provided for by the first article of the treaty with the Chippewas of the Mississippi, proclaimed April 18, 1867,

the lands ceded are described in part as

the lands reserved by us and described in the first article (ending with the words 'to the place of beginning') of the treaty with the Chippewas of the Mississippi, proclaimed April 18, 1867 (16 Stat., p. 719), and also to the aforesaid executive addition thereto, made and described in an executive order dated October 19 [29] 1873.

Not only was this tract of land made a part of the general reservation by the executive order but it was still recognized as such at the time of the cession although it had before that time come to be spoken of as "the White Oak Point reservation." The Indians residing at White Oak Point were residing upon the general or Mississippi reservation and entitled to remain and take allotments of "agricultural lands" anywhere upon the reservation under the proviso to the third section of the act of 1889, *supra*. In fact, it appears that many members of the White Oak Point band have been allowed allotments upon this reservation outside the boundaries of the addition.

The facts elicited in connection with this application sustain the applicant's claim of a residence upon this reservation. She was not removed to the White Earth reservation and became entitled under the law to take an allotment upon this reservation where she resided from the time of her birth until now, which would cover the date at which the removals provided for by the act of 1889 were effected. The fact that she was not removed to White Earth and did not apply for such removal, may be taken as evidence of her election to remain upon the reservation where she was then residing.

It was intended that each member of the tribes interested in these lands should have an individual allotment given him and should share in the proceeds of the land remaining after the making of such allotments. There can be no question as to the authority of this Department to add to the rolls any name which should be there, even after the commission had reported the work of making allotments completed. The names of Mrs. Lydick and her children will be added to the list of those entitled to allotments and it only remains to determine whether they are entitled to the land now applied for.

Mrs. Lydick settled on this land about September 1, 1898. At that time there were no other settlers there, but a railroad had been located and the right of way cleared through this section. Within a few days after her settlement, a town had sprung up on these sections—15 and 16. She claims to have made improvements on the land of the value of more than one thousand dollars, but states that the dwelling house is on the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ , Sec. 15, one of the tracts selected for her son Charles and held by the former departmental decision not subject to selection as an allotment. She was at the time of her statement, living in this house and therefore not upon the land described in any of the applications now under consideration. The right to select any

particular tract as and for an allotment under this act of January 14, 1889, or under those provisions of the act of February 8, 1887, *supra*, relating to reservation Indians, does not depend upon prior settlement and improvements.

It may be that these particular tracts were selected upon the supposition that a town would be located in this immediate neighborhood, but that does not preclude the allowance of such applications. The Indians as a tribe would derive no greater benefit from the disposal of these tracts under the provisions of said act relating to "agricultural lands" than they would from any other tracts of that character that might be selected by these parties, if the present applications shall be denied, and hence no injustice would be done the tribe by allowing those lands to be taken.

For the reasons given herein these applications would be approved were it not that other developments in connection with the Chippewa lands in Minnesota seem to render such action at this time inadvisable.

The State of Minnesota claims all sections numbered sixteen within the Chippewa reservations in that State under the grant of lands for school purposes. A suit has been instituted in the supreme court of the United States to determine the State's claim under said grant to certain land in the Red Lake reservation. While the lands applied for by Mrs. Lydick are not directly involved in those proceedings yet the result thereof may possibly affect the question as to the status of those lands. The propriety of approving these applications for allotments under these circumstances may well be doubted. If these applications are approved now and the decision of the supreme court in the case now pending shall be such as to establish the claim of the State to the lands thus allotted, the allottees would be placed in an exceedingly unfortunate position. They would have gained nothing by the allotment but might have lost the opportunity of making other advantageous selections.

Taking these things into consideration it is deemed advisable to postpone final action upon these applications until after the determination of the suit now pending in the supreme court.

The applicants having, however, been found entitled to allotments and to take land in this reservation, should not be compelled to adhere to selections heretofore made. You will advise Mrs. Lydick of the conclusion reached as to her rights and of the reasons for postponement of final action upon these applications. And further that she will be allowed to relinquish all claims under these applications and to make other selections for herself and children, of lands subject thereto.

## MINING CLAIM—ADVERSE—FILING FEE.

BLAKE ET AL. *v.* TOLL ET AL.

Upon the acceptance of an adverse claim by the local officers they become chargeable with the fees required by law to be paid, but the time of the actual payment thereof to said officers is not necessarily material as affecting the question of the validity of the filing of said claim.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *January 18, 1900.* (C. J. W.)

May 7, 1898, Charles H. Toll *et al.* filed their application (No. 78) for patent for the South Side lode claim, survey No. 1017, Santa Fe, New Mexico. Notice of said application was duly published, the first publication being on the 20th day of May, 1898.

July 18, 1898, George A. Blake *et al.*, claimants of the Albuquerque lode claim, forwarded to the local officers their adverse claim for a part of the ground applied for by Toll and others, and the same was received at the local office the 19th day of July, 1898. The same day the local officers addressed the following letter to the attorney who forwarded the adverse claim:

UNITED STATES LAND OFFICE,  
*Santa Fe, N. M., July 19, 1898.*

F. W. CLANCY, Esq.,  
*Albuquerque, New Mexico.*

SIR: We are in receipt of the adverse claims of George A. Blake *et al.* against the application for patent of Charles H. Toll *et al.* for the South Side and Smuggler lode mining claims Nos. 78 and 79, respectively, but you failed to remit the fees required by law, which amount to \$10.00 in each case. Until the amount is forwarded, the claims can not be entered of record.

Very respectfully,

MANUEL R. OGERO, *Register,*  
E. F. HOBART, *Receiver.*

This letter was received by Clancy July 20, 1898, and on the same day the fees were paid to the local officers by means of a telegraphic money order. It appears that the adverse claim of Blake *et al.* was thereupon marked as filed in the office of the register on the 20th of July, 1898, although in fact received on the 19th.

July 22, 1898, the register and receiver issued official notice to the attorney of Toll *et al.*, of the filing of said adverse claim. July 29, 1898, Toll *et al.*, filed their motion in the local office to dismiss said adverse claim, substantially upon the ground that the same was not filed within the time required by the law and regulations of the Department.

August 8, 1898, the local officers overruled the motion to dismiss, and the South Side lode claimants appealed.

September 29, 1898, upon consideration of the premises, your office reversed the decision of the local officers and dismissed the adverse

See letter "H", Apl. 9/13, Helena 07251.

claim. George A. Blake *et al.*, claimants of the Albuquerque lode claim, thereupon moved for review of your office decision, which motion was denied, January 7, 1899. Said claimants have appealed to the Department.

It is not questioned that the sixtieth day of the publication of notice of the application of the South Side claimants expired on the 19th of July, 1898, but it is contended that, as the adverse claim was received by the local officers on the 19th of July, the fact that the fee of ten dollars due said officers, was not received by them until the 20th of July, did not affect the validity of the filing with them of the adverse claim on the 19th, and that it should have been placed of record as of the date the same was received at the local office.

In overruling the motion to dismiss the adverse claim, the local officers gave as a reason for the action taken by them that the adverse claim was filed in time—that is to say, that the filing of record should have been as of the 19th of July.

Your office decisions rest upon the proposition that the adverse claim was not filed during the period of publication, but after its expiration; and upon the theory that the local officers rejected the adverse claim when offered for filing, and could not therefore accept the filing fees after the expiration of the period of publication and make a record of the filing, because of the departmental regulation requiring the fees to be paid at the time of filing the adverse claim.

It appears to have been assumed by your office that the language used by the local officers, in their letter calling the attention of the attorney to his omission to forward the fees due the register and receiver, with the adverse claim, was a rejection of the same, which left the claimant no right but that of appeal.

The Department does not concur in this view, but construes the acts and words of the local officers touching the reception of the adverse claim as the equivalent of a statement by them that the same was received in due time, and would be placed of record upon payment of the fees, which construction is in harmony with their subsequent treatment of the case.

Eliminating, then, the element of fact from the premise laid by your office for the support of the conclusion reached, it remains to inquire, whether the requirement as to the payment of fees at the time of filing the adverse claim should be held to prevent the prompt correction of a mere mistake or oversight in failing to send the official fees with the adverse claim, when such correction has been allowed by the local officers.

The statutory provision in reference to the fees of registers and receivers in mining cases is found in paragraph 9 of section 2238 of the Revised Statutes, and is as follows:

A fee of five dollars for filing and acting upon each application for patent or adverse claim filed for mineral lands, to be paid by the respective parties.

Paragraph 97 of the mining regulations based upon said statute provides as follows:

The fees payable to the register and receiver for filing and acting upon applications for mineral-land patents are five dollars to each officer, to be paid by the applicant for patent at the time of filing, and the like sum of five dollars is payable to each officer by an adverse claimant at the time of filing his adverse claim. (Sec. 2238, R. S., paragraph 9.)

Section 2240 of the Revised Statutes, and the provisions of the acts of August 4, 1886 and March 3, 1887 (24 Stat., 239, 526) limit the compensation of registers and receivers each to \$3000, per annum, including salary, fees, and commissions, and require that all fees collected by them which would increase their compensation beyond that amount shall be covered into the Treasury, except the necessary cost of clerical services in contested cases, etc.

It would appear therefore that upon the acceptance of an adverse claim by the local officers, they become chargeable with the fees required by law to be paid, and that the time of the actual payment thereof to said officers is not necessarily material as touching the question of the validity of the filing of such adverse claim.

It is apparent that there is nothing mandatory in the statute as to the particular time at which the official fees are to be paid, and that the law is satisfied in respect thereto if they are paid. The departmental regulations requiring the payment of the official fees at the time of filing the adverse claim is not mandatory in the sense that there can be no valid filing of such claim unless the fees are paid at the time of filing, but is intended for the protection of the register and receiver.

In the case under consideration, the local officers could undoubtedly have declined to receive the adverse claim for filing, and have rejected it, but, instead of doing so, they retained the same for their files, and invited the correction of the omission to send in the fees with it, which omission was promptly remedied by the attorney, who forwarded the claim. The fees were paid by telegraphic money order and accepted by said officers. Notice of the filing of the adverse claim was duly issued.

Under the facts presented in the record, it is held that the adverse claim was filed in time, within the meaning of the law, and as it appears that suit was timely instituted on said claim, and is pending in the district court of Bernalillo county, New Mexico, your office decisions of September 29, 1898, and January 7, 1899, are reversed, and all further proceedings in the case are stayed until the controversy involved in said suit has been settled or decided by the court.

## ALASKAN LANDS—ACT OF MAY 14, 1898.

## GLAZIER FISHING AND MINING CO.

The right of purchase accorded by section 12, act of March 3, 1891, is limited to cases where the land is used for purposes of "trade or manufactures," and does not extend to the mere occupancy of land as a fishing place.

An application to purchase under said section can not be perfected under the proviso to section 10, act of May 14, 1898, if the claim so presented was not authorized by the act of 1891.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *January 19, 1900.* (E. F. B.)

The Department has considered the appeal of the Glazier Fishing and Mining Company, from the decision of your office of December 7, 1898, rejecting the survey of a tract of land at the mouth of Krichak river, Alaska, being survey No. 72, executed by Clinton Gurnee, jr., upon the application of said Glazier Fishing and Mining Company, transferee of Charles Branderman, made under section 13 of the act of March 3, 1891 (26 Stat., 1095).

Your office rejected said survey upon the ground that the deputy's returns fail to show that the claimant has made the improvements necessary or that they use the lands claimed for the purposes for which provision is made by the statute.

The returns of the deputy surveyor show that the improvements consist of a fisherman's hut, nets and fishing gear, used in the fishing business.

The applicant has appealed from said decision assigning the following grounds of error:

1. In considering the question as to the use of the improvements on this land, in a matter affecting only the correctness of the survey under the act of March 3, 1891.
2. In not holding that the survey is in full and substantial accord with the requirements of the act of March 3, 1891, and in not, for that reason, accepting the same.
3. In holding that the amount of improvements and the use to which they were put rendered the rejection of this survey necessary.
4. If the subject were a proper one for consideration now, it was error not to have held that the use to which this land is put is strictly within "trade, manufacture, or other productive industry," and entitles the party to make entry of the land covered by said survey.
5. It was error for any reason to have rejected the company's survey.

Under the act of March 3, 1891, *supra*, the record claim was initiated by an application to the surveyor-general for a survey of the tract used and occupied.

There is no authority for the survey, except as a step toward a purchase, and, therefore, to obtain the survey the application therefor should make *prima facie* showing of a right to purchase. Alfred Paekennen (26 L. D., 232, 234).

The instructions issued by the Department (12 L. D., 583), for carrying into effect the provisions of said act require the deputy surveyor

to give a general description of the tract and the extent and character of the improvements of the claimant. He was also required to note particularly all facts relating to the occupancy of the land. Such information is required to be given in the application in order that the surveyor-general

might primarily determine whether the land sought to be surveyed was subject to purchase under the act and whether there was any occasion or authority for the survey thereof. Alfred Packennen (26 L. D., 232, 234).

The returns of the deputy surveyor should therefore show at least a *prima facie* right to purchase the tract under the provisions of the act and if such *prima facie* showing is not made the survey should be finally rejected, unless the return of the deputy surveyor is controverted. It was not contemplated that the report of the deputy surveyor should be accepted as conclusively determining the extent and character of the occupancy of and improvements upon the tract (South Olga Fishing station, 24 L. D., 314), but when such report shows that the occupancy and use of the tract is not for the purpose contemplated by the act and the facts shown by such report are not denied, no practical purpose can be subserved by withholding action upon the survey until an application to purchase is filed and final proof submitted thereon as provided for by the regulations.

It is contended that the use to which this land is put is strictly within "trade, manufacture or other productive industry," and entitles the party to make entry of the land covered by said survey. This claim was made under the act of March 3, 1891, *supra*, which limited the right of purchase to lands occupied and used for the purpose of "trade or manufactures." The use of lands as a fishing place, or as the home for the fishermen employed, is not an occupation of such land for the purpose of trade or manufacture within the intent and meaning of the act of March 3, 1891. G. P. Hanson (26 L. D., 568); on review (27 L. D., 335); White Star Olga Fishing Station (28 L. D., 437). The words "other productive industry" were added by the act of May 14, 1898 (30 Stat., 409), which enlarged the provision of the act of March 3, 1891, by extending the right of purchase to lands occupied "for the purposes of trade, manufacture, or other productive industry," with the following proviso:

That all claims substantially square in form and lawfully initiated, prior to January twenty-first, eighteen hundred and ninety-eight, by survey or otherwise, under sections twelve and thirteen of the act approved March third, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, chapter five hundred and sixty-one), may be perfected and patented upon compliance with the provisions of said act, but subject to the requirements and provisions of this act, except as to area, but in no case shall such entry extend along the water front for more than one hundred and sixty rods.

In the case of G. P. Hansen, *supra*, it was shown by the returns of the deputy surveyor, that the only business engaged in by the applicant

consisted in catching fish in the waters of that vicinity and that the land was occupied for domiciliary purposes and for the storage of nets, seines, etc., used in said business. The survey was rejected for the reason that such occupancy and use of the land is not occupancy of the land for the purposes of "trade or manufacture" within the meaning of the act of March 3, 1891. In a motion for review of said decision, error was assigned in not holding that the application is brought within the terms of the act of May 14, 1898, by the addition of the words "other productive industry." In passing upon this alleged ground of error the Department said:

In disposing of this motion, it is unnecessary to determine what business or pursuit would come within the term "or other productive industry," since the claim can not be perfected under the proviso to the 10th section of the act of May 14, 1898, for the reason that it was not a claim *lawfully* initiated prior to January 21, 1898.

The proviso refers to claims which were authorized by the act of March 3, 1891, and which had not been completed at the date of the act of May 14, 1898, but it was not intended to validate any claim not authorized by the act of March 3, 1891.

See also *White Star Olga Fishing Station* (28 L. D., 437).

The case at bar comes within the rule announced in these cases and must be controlled thereby.

The decision of your office is affirmed.

#### SCHOOL LANDS—ABANDONED MILITARY RESERVATION.

##### STATE OF UTAH.

The acts of July 5, 1884, and August 23, 1894, relative to the method in which lands in abandoned military reservations should be disposed of, did not in themselves amount to a disposition of said lands, and hence bring them within the exception of lands "sold or otherwise disposed of" contained in the grant of school lands to the State of Utah.

The instructions of January 28, 1898, 26 L. D., 87, recalled and vacated.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *January 19, 1900.* (F. W. C.)

The State of Utah has moved a review of the instructions of January 28, 1898 (26 L. D., 87), relating to the right of the State, under the school grant, to lands within the abandoned Fort Cameron military reservation in said State, which embraces more than five thousand acres. These lands were placed under the control of the Secretary of the Interior July 2, 1885, for disposition under the act of July 5, 1884 (23 Stat., 103), and were surveyed before the admission of the State into the Union (29 Stat., 876), but had not at the time of the admission of the State been sold or entered under the act of July 5, 1884, or that of August 23, 1894 (28 Stat., 491), or under any other act.

Instructions of March 22, 1897 (24 L. D., 269), governing the disposition of lands within the limits of this former reservation, held that the

sections therein of the specific numbers granted to the State for the support of common schools by the act of July 16, 1894 (28 Stat., 107), passed to the State upon its admission and were not subject to settlement, entry or disposition under the provisions of the act of August 23, 1894. By your office letter of November 18, 1897, certain questions were submitted relating to the right of the State to lands within this former reservation, and it was upon said letter that the instructions of March 22, 1897, were reconsidered, and it was held that the provisions of the act of July 5, 1884, and August 23, 1894, amounted to a congressional disposition of the lands within this abandoned military reservation and took them out of the operation of the school grant to the State.

It is for a review of said holding that the motion under consideration is filed, the claim of the State being, in effect, that whatever the restrictions which were placed upon the entry of lands within this abandoned military reservation by the acts of July 5, 1884, and August 23, 1894, they did not amount to a disposition of such lands as against the grant to the State for school purposes.

We will look first to the terms of this grant found in the sixth section of the act of July 16, 1894 (28 Stat., 107), viz:

That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any act of Congress other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject 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 part of the public domain.

By section 10 of said act it is provided:

That the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools, and such lands shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be surveyed for school purposes only.

In the construction of the grants made to the several States for the support of common schools, it has been uniformly held that where, at the time of the admission of the State, the lands have been surveyed and the specific sections granted are thus identified, the right of the State attaches immediately, unless prior to that time the lands have been sold or otherwise disposed of by or under the authority of an act of Congress. (*Ham v. Missouri*, 18 How., 126; *Cooper v. Roberts*, id., 173; *Beecher v. Wetherby*, 95 U. S., 517.)

Excepting that the number of sections granted are larger than those usually granted to a State, the grant to the State of Utah is in the same general terms as the grant made to the other States for the support of common schools, and like those grants contains a provision for indemnity "where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any act of Congress."

It is clear that unless the legislation relating to the lands in question in itself amounted to a disposition thereof the title of the State became complete when Utah was admitted into the Union.

What is this legislation?

The act of July 5, 1884, directed that whenever, in the opinion of the President, any lands within any military reservation had or should become useless for military purposes he should cause the same to be placed under the control of the Secretary of the Interior "for disposition" as therein provided, and authorized the Secretary of the Interior to cause such lands to be surveyed as therein provided, and appraised and "to be sold at public sale to the highest bidder for cash at not less than the appraised value thereof, nor less than one dollar and twenty-five cents per acre." If after being publicly offered a second time any such lands were not sold for want of bidders they could be sold at private sale. The act contained a provision for the benefit of certain settlers upon lands in such abandoned reservations, whereby each settler would "be entitled to enter" under the homestead law the lands occupied by him not exceeding one hundred and sixty acres. The act of August 23, 1894, read:

That all lands not already disposed included within the limits of any abandoned military reservation heretofore placed under the control of the Secretary of the Interior for disposition under the act approved July fifth, eighteen hundred and eighty-four, the disposal of which has not been provided for by a subsequent act of Congress, where the area exceeds five thousand acres, except such legal subdivisions as have government improvements thereon, except also such other parts as are now or may be reserved for some public use, are hereby opened to settlement under the public land laws of the United States, and a preference right of entry for a period of six months from the date of this act shall be given all bona fide settlers who are now residing upon any agricultural lands in said reservations, and for a period of six months from the date of settlement when that shall occur after the date of this act: *Provided*, That persons who enter under the homestead law shall pay for such lands not less than the value heretofore or hereafter determined by appraisement, nor less than the price of the land at the time of the entry, and such payment may, at the option of the purchaser, be made in five equal installments, at times and at rates of interest to be fixed by the Secretary of the Interior.

SEC. 2. That nothing contained in this act shall be construed to suspend or to interfere with the operation of the said act approved July fifth, eighteen hundred and eighty-four, as to all lands included in abandoned military reservations hereafter placed under the control of the Secretary of the Interior for disposal, and all appraisements required by the first section of this act shall be in accordance with the provisions of said act of July fifth, eighteen hundred and eighty-four.

Before considering these acts it should be stated that the lands in this abandoned military reservation were not charged with any trust,

as is sometimes the case with Indian lands which are ceded to the United States in trust that they may be sold and the proceeds held for the benefit of the Indians, but, upon the extinguishment of the military reservation, and in the absence of specific legislation providing a particular means or mode for disposing of them, the lands would have been opened to general disposition under the laws applicable to lands of their character.

Originally the controlling purpose in disposing of the public lands was the obtaining of public revenue. Under the proclamation of the President, and after appropriate notice, lands were offered at public sale to the highest bidder, and those not sold at the offering were thereafter subject to private entry for cash, the minimum price being one dollar and twenty-five cents per acre. This was the principal means of acquiring title to public lands at the time the expression, "sold or otherwise disposed of," was first employed in a grant for the support of the common schools. But the mere fact that lands were subject to sale was never considered as amounting to a disposal of them.

The homestead feature was introduced in 1862, whereby a person might secure public land for a home without the payment of cash; and later, as an encouragement to the culture of timber, lands could be secured by the planting and cultivation of a certain number of trees; and still later, to encourage the reclamation of the desert or arid lands, provision was made for their acquisition under the desert land acts. But it is doubtful if it was ever contended, certainly it was never held, that these acts prescribing how title to the public lands might be acquired constituted in and of themselves a disposition of the lands.

The acts of July 5, 1884, and August 23, 1894, do not purport to make a disposition of the lands to which they apply, but rather to prescribe a method which shall guide and control the land department in the future disposition of such lands. The two acts present a combination of the features of the homestead law and the early law authorizing sales of the public lands; but the combination surely amounts to no more than would have resulted from opening the lands to sale or homestead. An entire new scheme might have been applied to these lands to the exclusion of all features of the old laws, but, in the absence of some uniform policy of Congress amounting to an exception of a specific class of lands from the grant to the State, as in the instance of mineral lands (*Mining Co. v. Consolidated Mining Co.*, 102 U. S., 167), no matter what the form of the authorized disposition or the conditions upon which it was to be allowed, if at the time of the admission of the State into the Union it remained a mere unexecuted provision for their future sale or disposition, they were not "sold or otherwise disposed of by or under the authority of any act of Congress" within the meaning of the school grant and hence the title passed to the State and no subsequent proceeding in the land department could divest that title. There has been no uniform policy of Congress respecting the disposition of lands within

abandoned military reservations and certainly none such as amounts to a specific exception of that class of lands from a grant to a State for school purposes such as is here under consideration.

The view here taken is in harmony with the construction placed upon the expression "otherwise disposed of" as employed in the grants made to the several States for the support of common schools.

In the case of *Ham v. State of Missouri*, *supra*, in construing the school grant to the State of Missouri, which is practically the same as that found in the grant to the State of Utah, it is said:

Sale, necessarily signifying a legal sale by a competent authority, is a disposition, final and irrevocable, of the land. The phrase "or otherwise disposed of" must signify some disposition of the property equally efficient, and equally incompatible with any right in the State, present or potential, as deducible from the act of 1820, and the ordinance of the same year.

A similar construction of the phrase "otherwise disposed of" was made by the court in the case of *Cooper v. Roberts* (id., 173), involving a construction of a school grant to the State of Michigan. The construction thus made of this phrase has stood unchallenged as far as the Department is able to find.

In the consideration of this matter in the instructions now under review, it seems that these lands were considered as still in reservation at the time the grant to the State attached. Without considering or determining what effect a reservation for military purposes in force at the time the grant attached would have upon the grant to the State, it is sufficient to say that the lands in question were not in reservation at the date of the State's admission.

Upon further consideration of the question as to the right of the State of Utah to the sections in the abandoned Fort Cameron military reservation, of the numbers prescribed in the act making the grant in question, the Department adheres to the instructions approved March 22, 1897, governing the disposition of lands within the limits of the former reservation at Fort Cameron, and holds that the acts of July 5, 1884, and August 23, 1894, even if recognized as prescribing an exclusive method or methods for the disposition of the lands to which they apply did not in themselves amount to a disposition of the lands.

The facts in the case of *Heydenfelt v. Daney Gold and Silver Mining Company* (93 U. S., 634), to which reference is made in the instructions under review, are clearly distinguishable from those in the matter under consideration. There the lands were unsurveyed and unidentified at the date of the admission of the State, and prior to their survey and identification a disposition was actually made of them in accordance with an act of Congress, and the act making the grant of school lands under consideration in that case (13 Stat., 30) did not contain, as does the grant to the State of Utah, the provision that

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

It does not appear from the papers now before this Department that at the date of the admission of the State into the Union there was, upon any of the sections within the limits of this former reservation of the specific numbers granted to the State, any settlement claim of the character described in the act of July 5, 1884, the act of August 23, 1894, or the act of February 15, 1895 (28 Stat., 664), for the protection of which a preference right of entry was granted, but if there was such a claim, a question might arise whether, upon perfection thereof, the right thereunder would relate back to the date of the act recognizing the settlement claim and giving the settler a preference right of entry so that the land claimed would be considered as disposed of from that date. It is not intended to now determine the right of any such claimant, but rather to leave the question for future consideration should a case arise.

The instructions of January 28, 1898, *supra*, are recalled and vacated.

It appears from your office letter of November 18, 1897, that a question has also arisen as to whether the State can exercise its right to select lands within the limits of this former reservation as indemnity for school lands in place which were sold or otherwise disposed of within the meaning of the grant. This question is likewise involved in a case pending before the Department on appeal from a decision of your office, and will be determined in the consideration of that appeal.

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

HENRY *v.* PEVOTO.

A proceeding against an entry, instituted by the General Land Office many years prior to the passage of the act of March 3, 1891, but of which the entryman was never notified, must be held to have been abandoned and to have abated, and hence constitutes no bar to the confirmation of the entry under section 7 of said act.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *January 19, 1900.* (G. C. R.)

January 18, 1871, Charles F. Irwin made homestead entry for lot 67, or fractional Sec. 35, T. 15 S., R. 13 W., New Orleans, Louisiana.

April 23, 1875, he commuted his entry under the 8th section of the act of May 20, 1862 (section 2301 of the Revised Statutes). He tendered, in payment for the land, warrant No. 97,467, act of March 3, 1855 (10 Stat., 701), which was accepted by the register.

A certified abstract of title, dated June 8, 1886, shows that subsequent to Irwin's purchase he conveyed the land for the consideration of \$350 to Robert J. Looney, and that by mesne conveyances the right or title so conveyed has for a valuable consideration passed to S. P. Henry, who now claims title to the land through Irwin.

In reporting the sales for the month of April, 1875, the register

erroneously included Irwin's commutation purchase in the cash series, instead of in the warrant series.

The warrant was not sent to your office with the commutation proof, and, under date December 18, 1876, your office directed that diligent search be made for it; that if found, Irwin be informed of the result of the search, and the condition of his entry. In response to this request the register, January 19, 1877, reported that he could not find said warrant; that one Percy Baker had on that day called on him (the register) and stated that he had acted for Irwin in the matter of his commutation proof, and that he had at that time filed the warrant with register, but before it was transmitted to Washington, it was discovered that the warrant was irregular, in that it had not been properly assigned to Irwin; that he (Baker) thereupon requested that the proof be retained and nothing further done until he could communicate with Irwin, who, upon being seen, concluded to withdraw the warrant and return it to the party from whom it was bought, and wait until the expiration of the five years and prove up under the homestead act.

January 30, 1877, your office directed that Irwin be permitted to take the course suggested, and that a note be made in the cash abstract for April, 1875, to the effect that the commutation number (4079) had been dropped.

The record further shows that March 10, 1877, Irwin submitted final homestead proof on his original entry of January 18, 1871, and that on the same day final homestead entry was allowed and receiver's receipt No. 497 was issued to Irwin.

September 6, 1877, your office directed M. A. Carter, special agent, to investigate several entries in the New Orleans land district, Louisiana, among which was that made by Irwin, as just stated. November 21, 1877, Agent Carter submitted the report of Daniel H. Reese, who had been appointed by him to investigate Irwin's entry. Reese reported that Irwin had never resided upon the land, and that his "homestead papers" were fraudulent.

April 6, 1878, your office directed the register and receiver to notify Irwin that he would be allowed thirty days in which to show cause why his homestead entry should not be canceled.

As late as April 8, 1895, there was no evidence that Irwin had been notified of the action taken, other than a note made on your said office letter of April 6, 1878, in these words: "Notified them at Leesburg, Cameron Parish, La., April 15, 1878." How this notification was effected is not stated, but since the customary method of giving notice in such a case was by registered mail, and since Leesburg is not the post-office address given by Irwin and is not shown to have ever been his post-office address, this notation cannot be accepted as any proof of the service of notice. The register and receiver have since reported that the records of their office showed that Johnson's Bayou was Irwin's post-office address.

June, 13, 1895, the register and receiver mailed notice to Irwin, by registered letter, addressed to him at Johnson's Bayou, Louisiana. This letter was returned unclaimed.

December 27, 1895, your office canceled said entry.

January 11, 1896, Calvit F. Pevoto made homestead entry of the land.

February 13, 1897, S. P. Henry filed a motion for the cancellation of Pevoto's entry and the reinstatement of the entry of Irwin, claiming that Irwin's entry is confirmed under the provisions of section 7 of the act of March 3, 1891 (26 Stat., 1095).

February 27, 1897, your office allowed said motion, and Pevoto was given thirty days to show cause why his entry should not be canceled. Pevoto appealed, but your office considered his appeal as an attempt to show cause, etc., and held it insufficient. He then filed his motion for review.

Your office, October 22, 1897, set aside said decision of February 27, 1897, and held Irwin's entry was not confirmed by the said act of 1891, and that the same was properly canceled, December 27, 1895. You also held Pevoto's entry intact. From that decision Henry has appealed to this department.

The proviso to section 7 of the act of 1891 (*supra*) 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.

From the above recitals, it appears that, April 6, 1878, your office directed that Irwin be notified that he would be allowed thirty days in which to show cause why his entry should not be canceled. There is nothing to show that he was ever notified of that action or of any contest, protest or proceeding against his final homestead entry, or that any proper effort was ever made to notify him thereof earlier than April 8, 1895, over seventeen years from the date of the order directing such notification. The proceeding begun in November, 1877, must, on account of this great lapse of time, be held to have been abandoned and to have abated long before the passage of the act of 1891. Thus there was no pending contest or protest against the validity of the entry, either at the time of the passage of the confirmatory act, or at any time before the lapse of two years thereafter. The entry is therefore held to have been confirmed, and patent must issue thereon.

The decision appealed from is reversed.

## MINING CLAIM—ACTS OF JULY 26, 1866, AND MAY 10, 1872.

BRADY'S MORTGAGEE *v.* HARRIS ET AL.

(ON REVIEW.)

The act of May 10, 1872, prescribes the only method by which a patent can be secured for a mining claim located prior to its passage, and for which an application for patent was not pending at said date, and also the only method by which the owner of such claim can prevent an adverse but junior claimant from obtaining a patent therefor.

The case of *Barklage et al. v. Russell*, 29 L. D., 401, involving the construction of section 2332 R. S., cited and followed.

In controversies between parties claiming public lands under the townsite and mining laws respectively, the phrases "lands known to be valuable for minerals," or "for mineral deposits," and "known mines," or "land containing known mines," are equivalent in meaning, and no title to such lands will pass under a townsite entry if they are known to be of that character when the townsite entry is made.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) January 22, 1900. (A. B. P.)

Emma J. Harris, executrix of the estate of Emma J. Harris, deceased, claimant of the Puzzle lode mining claim, has filed a motion for review of the decision of the Department of August 12, 1899, in the case of *Brady's Mortgagee v. Harris' Executrix et al* (29 L. D., 89), whereby her protest against the issue of patent to the Parole and Morning Star lode mining claims, survey No. 4849, of which William Brady made mineral entry No. 3624, December 12, 1889, (then Central City, now) Denver, Colorado, was dismissed.

It is alleged that the Puzzle claim was located August 10, 1870, and that the Parole and Morning Star claims, each of which conflicts with the Puzzle claim, were located January 1, 1883. Application for patent for the Parole and Morning Star claims was filed in 1887. An adverse claim was duly asserted by claimants of a mining location known as the General Tom Thumb, but was subsequently withdrawn, and the application allowed to proceed to entry. No adverse claim was filed by or on behalf of the Puzzle claimant. The Parole and Morning Star claims are situated within the exterior limits of the townsites of Black Hawk and Central City, Colorado, which were entered April 11 and May 16, 1873, respectively, and the Puzzle claim is within the limits of said townsite of Black Hawk.

The protest by Harris was filed in 1897, long after the entry in question had been allowed. The allegations thereof are fully set forth in the decision complained of, as are also the further facts of the case as far as necessary to a proper understanding of the questions involved. In the course of its decision the Department said:

Protestant alleges, as already stated, that the city of Black Hawk has conveyed to her whatever surface rights it had in the ground located as the Puzzle claim.

The claimant of the Parole and Morning Star has filed a duly certified copy of a quitclaim deed, dated January 6, 1896, to said Tinsley from the city of Black Hawk by its mayor and clerk, to the ground covered by the said entry lying within the limits of that townsite. If, as would appear to be the case, the ground embraced within the Parole and Morning Star locations was known to be valuable for its mineral contents at the date of the townsite entry, no title to such ground was conveyed by the townsite patent, and as it does not appear that the city of Black Hawk acquired title otherwise, the alleged conveyance to Harris and the deed to Tinsley could not pass any title thereto. If such conveyance and deed, assuming that there was a conveyance to Harris as alleged, are of any value whatever as evidence in the case it is only to show that the city of Black Hawk does not object to the issue of patent upon the said entry, and as tending, possibly, to show that the municipal authorities thereof recognize and assent to the claim that the land is mineral and was known to be such at the time of that townsite entry.

Upon very careful consideration of the evidence the Department is well convinced that the ground embraced in the said mineral entry was known to be valuable mineral land at the date of the said townsite entries and was therefore excepted from the townsite patent.

Relative to the protest of Harris, it appears that although due notice of the application for patent to the Parole and Morning Star was given in 1887, no adverse claim was filed in behalf of the alleged Puzzle location; that the Puzzle claimant not only thereby waived all claim to the ground in conflict, but impliedly admitted the validity of the Parole and Morning Star locations including, of course, the discovery of mineral; that she is herself directly asserting the mineral character of so much of the land involved as is included in the conflict between the Puzzle location and the ground embraced in mineral entry No. 3624; and that she admits, by the affidavit of her only corroborating affiant, that a valuable vein of mineral exists in that ground outside of such conflict. It is true that affiant states that such vein is within the General Tom Thumb claim, but that fact is immaterial. By the withdrawal of their adverse claim the General Tom Thumb claimants waived whatever right they had under the mining laws to the ground embraced in their location, and left the possessory right thereto in the applicant for the Parole and Morning Star, who was thus entitled beyond question to the benefit of all discoveries made therein by himself or his grantors.

The entry in question having been made prior to July 1, 1898, it is not necessary that an expenditure of \$500 be shown to have been made upon or for the benefit of each location embraced therein, it being sufficient if proof of such expenditure is shown upon the locations taken together (R. S. Hale, 28 L. D., 524; and Mayflower Gold Mining Co., 29 L. D., 7). The allegation of the protest that \$250 worth of labor has not been expended upon the Parole claim is therefore not material, it appearing that \$500 had been duly expended upon the Parole and Morning Star claims by the applicant for patent or his grantors.

In view of these facts and of the conclusion already reached as to the known character of the land involved prior to the townsite entries, and of the evidence of discoveries of mineral within the limits of the Parole and Morning Star claims, both within and without the General Tom Thumb claim, since the townsite entries, the Department is constrained to hold that no sufficient reason is shown for the proposed hearing upon the protest of Harris, and the protest is accordingly hereby dismissed.

The Puzzle claim is alleged to have been located under the act of July 26, 1866 (14 Stat., 251), which permitted but one vein or lode to be held or patented under a single location, and it appears that the Parole and Morning Star claims were located under the act of May 10, 1872 (17 Stat., 91). By section three of the latter act (sec. 2322, Revised Statutes), there was granted to the locators of all mining locations

theretofore or thereafter made upon veins or lodes situate upon the public domain, where no adverse claim existed at the date of the act, so long as they should comply with the laws and regulations governing their possessory title—

the exclusive right of possession and enjoyment of all the surface included within the lines of their location, 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.

By section 9 of the act of 1872, sections one, two, three, four and six of the act of 1866 were, in terms, repealed, with the proviso that such repeal should not "affect existing rights," and with the further provision, or saving clause, that

applications for patents for mining claims now pending may be prosecuted to final decision in the general land office, but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this act.

By section 16 of said later act, it was declared:

That all acts and parts of acts inconsistent herewith are hereby repealed: *Provided*, That nothing contained in this act shall be construed to impair, in any way, rights, or interests in mining property acquired under existing laws.

The contention is, that the Puzzle claim was, at the date of the act of 1872, a valid subsisting location occupied and held in compliance with the provisions of the act of 1866 and not since abandoned, and that, therefore, the same was and is protected by the limitation in favor of existing adverse claims placed by section three of the act of 1872 upon the grant of enlarged rights or privileges therein made to locators of locations theretofore or thereafter made, and was and is further protected by the saving clause in section nine in favor of existing rights and by the provision in section sixteen against the impairment of rights or interests acquired under existing laws, and that these limitations or saving clauses except the Puzzle claim from all the provisions of that act respecting the assertion, prosecution and determination of adverse claims.

If as alleged the Puzzle claim was a subsisting, valid location at the date of the act of 1872, and if there was no adverse claim existing at the date of that act, it follows (1) that said claim was, by the terms of the act of 1872 protected against the repeal of the act of 1866, (2) that said claim was fully within the provisions of the act of 1872, granting to locators of mining locations theretofore or thereafter made, their heirs and assigns, so long as they should comply with the laws and regulations governing their possessory title—

the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes or ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically—

and (3) that, if the Puzzle location was maintained by compliance with the laws and regulations governing the possessory title to mining

claims, the location under the act of 1872 of the Parole and Morning Star claims did not confer upon the locator thereof, his heirs or assigns, any right to the Puzzle vein, lode or ledge, or to any of the surface included within the lines of the Puzzle location, or to any vein, lode or ledge, the top or apex of which was inside of such surface-lines extended vertically downward.

However, the infirmity in each of these conclusions is that its premise of fact can not be sustained for the reason that prior to making payment for and entry of the Parole and Morning Star claims the Parole and Morning Star claimant, in full compliance with the requirements of the act of 1872 (Secs. 2325 and 2326, Rev. Stat.), made application for patent for said claims, including the portion thereof now alleged to be in conflict with the Puzzle claim, and gave due published and posted notice of such application; that no adverse claim on behalf of the Puzzle claim was filed during the period of publication; and that section six of the act of 1872 (Sec. 2325, Rev. Stat.) declares:

If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

But to avoid the effect of this provision it is earnestly insisted, as before stated, that the Puzzle claimant was not required to adverse the application for patent of the Parole and Morning Star claimant in order to protect her claim against said application, and that the holding to the contrary in the former decision operates as an impairment of mining rights and interests acquired under the act of 1866 and preserved by the act of 1872.

It is difficult to understand how there can be any impairment of the rights in the manner suggested. In the event of an application for patent to a mining claim, whether made under the act of 1866 or that of 1872, it was indispensable that there should be some provision for ascertaining whether there were adverse claims to the mining ground sought to be patented, and for determining adverse claims when asserted.

The act of 1866 contained full regulations for the filing of applications for patent, for giving notice thereof, and for asserting or determining adverse claims, but by the act of 1872 these were repealed and new regulations prescribed, subject to the limitation that

applications for patents for mining claims now pending may be prosecuted to a final decision in the general land office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this act.

The new regulations, however, made provision for the filing of applications for patent, for giving notice thereof, and for asserting and

determining adverse claims, essentially as was done in the old ones, and no additional burden in this respect was imposed by the later act.

It is true that in the act of 1872 it was declared with respect to the provisions of section nine thereof specifically repealing sections one, two, three, four, and six of the act of 1866, that such repeal should not "affect existing rights," and it was declared with respect to the general repealing provisions of section sixteen thereof, and with respect to the act as a whole, that "rights or interests in mining property acquired under existing laws" should not be thereby, in any way, impaired, but it is also true that the possessory title to public mineral lands, acquired under the act of 1866, was, by section one of that act, expressly made "subject to such regulations as may be prescribed by law." Therefore, all possessory titles to mining property acquired under the act of 1866, and existing at the date of the act of 1872, though preserved and protected by the later act, were thereafter subject to the regulations prescribed in the later act, except as otherwise provided therein. So long as the new regulations were not given a retroactive effect and did not destroy existing mining rights or interests, or impose burdens thereon not embraced within the power of regulation expressly reserved by the act of 1866, but were reasonably calculated to preserve and protect all rights or interests acquired under that act, it can not be said that such rights or interests were impaired or injuriously affected by the repeal of the old regulations or by the adoption of the new ones. An examination of the act of 1872 shows that where it was intended that any provision of the new regulations respecting possessory rights or interests thereafter required should not apply to such rights or interests where theretofore acquired there was express provision to that effect. Thus it was provided therein that claims thereafter located, "whether by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode," and that claims theretofore 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;" and it was further provided therein that,

On each claim located after the passage of this act, and until a patent shall have been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the passage of this act, ten dollars' worth of labor shall be performed or improvements made each year for each one hundred feet in length along the vein until a patent shall have been issued therefor.

In this connection it is interesting to note that the act of 1866 contained no provision respecting the performance of labor or the making of improvements during each year and placed no limitation in that respect upon local laws, regulations, or customs.

The act of 1866, in so far as it granted possessory rights or interests in the public mineral lands, and in so far as it conferred upon the land department jurisdiction of proceedings for the acquisition of the para-

mount title of the government, and relegated to the courts the determination of controversies between adverse claimants respecting the possessory title, was repealed by the act of 1872, and a new law embracing the whole subject matter of the former statute in these matters was enacted.

In order that possessory rights and interests acquired under the old act which had not been carried into a full legal title, evidenced by a patent from the government, might not fall with the repeal of the statute under which they were acquired and held, limitations were inserted in the repealing act to the effect that such rights or interests should not be affected by the repeal or impaired by the new law. And in order that applications for patent, then pending, might not fall with the repeal of the act under which they were filed, provision was inserted in the new act for the carrying of such applications to completion and the issuance of patents in pursuance thereof under the old act or the new act, as the case might be. But claims arising under the act of 1866 and as to which no application for patent was pending at the date of the act of 1872 were either left to be governed by the provisions of the later act with respect to the obtaining of patent and the assertion, prosecution and determination of adverse claims thereto, or there was no law governing the same. That it was not intended to leave this class of claims in the latter position is evident. To hold otherwise would be to declare that Congress had legislated carelessly and incompetently upon the subject, and this is not permissible. No application for patent for the Puzzle claim having been pending at the date of the act of 1872, that act must be held to have prescribed the only method whereby a patent could be obtained for that claim, and the only method whereby its owner could prevent an adverse but junior claimant from obtaining a patent therefor.

At the date of the application for patent to the Parole and Morning Star claims, there was but one law and but one method of procedure, equally applicable to the Puzzle, Parole and Morning Star claims, under which adverse claims to this mining ground could be determined and a patent awarded to the rightful claimant conveying to him the paramount title of the government. The Puzzle claimant did not comply with this law or follow this method of procedure, and in consequence the statute declares that, "it shall be assumed that the" Parole and Morning Star "applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists," and directs that "thereafter no objection from third parties to the issuance of a patent shall be heard except it be shown that the applicant has failed to comply with the terms of this chapter." The Puzzle claimant is a third party, and it is not shown that the Parole and Morning Star applicant has failed to comply with any of the terms of the chapter named or of any other of the mining laws.

The provisions of the act of 1872 respecting applications for patent

and adverse claims are for the benefit of all mining claimants alike, whether their locations were made prior or subsequent to the date of that act, except where included in applications pending at that time. The application of these provisions to claims located under the act of 1866, as to which no proceedings to acquire patents were pending at the date of the later act, is as obvious as is their application to claims thereafter located. If they are disregarded and loss follows it is not because the act impairs any rights theretofore or thereafter acquired, but because those claiming them fail to comply with the reasonable requirements of a plain statute containing ample provision for the assertion and protection of such rights.

The Puzzle claimant has cited in support of her contention a decision of the supreme court of California, in the case of Eclipse Gold and Silver Mining Co. v. Spring *et al.* (59 Cal., 304), and a decision of the supreme court of Utah, in the case of Blake v. Butte Silver Mining Co. (2 Utah, 54). These decisions tend to support the contention made and, coming from the courts of last resort in two mining States, are entitled to great respect, but upon careful consideration the reasons assigned for the conclusions reached therein have not been found sufficiently satisfactory or convincing to overcome the views hereinbefore expressed. Paragraph 3 of the Mining Regulations of June 24, 1899 (28 L. D., 579, 594), is also cited, but its provisions are in no sense in conflict with what is here said for the obvious reason that the statute now compels the assumption that no such adverse claim as the Puzzle location existed at the time of the application for patent for the Parole and Morning Star claims.

It is further contended that under the provisions of section 2332 of the Revised Statutes

the prior right and title of the Puzzle claimants stood confirmed . . . as against the United States and all subsequent claimants

long prior to the location of the Parole and Morning Star claims and prior to the application for patent therefor. The effect to be given to that section was carefully considered by the Department in the case of Barklage *et al.* v. Russell (29 L. D., 401), where, among other things, it was said:

Properly construed with section 2325 and other sections of the Revised Statutes upon the same subject, it is believed that the main purpose of section 2332 was to declare that evidence of the holding and working of a mining claim for a period equal to the time prescribed by the local statute of limitations for mining claims shall be considered as sufficiently establishing the location of the claim and the applicant's right thereunder "in the absence of any adverse claim." This section does not, in itself, prescribe any method for ascertaining whether an adverse claim exists. Adequate provision for bringing adverse claims to the attention of the land department is found in the provisions of section 2325, which require notice of the application for patent to be posted and published, and declare that if no such claim be filed in the local land office during the period of publication it shall be assumed that none exists. Whatever else section 2332 was intended to dispense with in the

proceedings for procuring a patent to a mining claim, it was certainly not intended to dispense with the requirements of section 2325, whereby the existence of an adverse claim is made known to the land department, and due protection is accorded to adverse rights.

The views so expressed are decisive against the contention made respecting the meaning and intent of the section 2332.

The Puzzle claimant also asserts title to the land in controversy as grantee of the townsite of Black Hawk, and it is urged in the motion for review, in effect, that the title to the land passed out of the United States under the townsite patent, notwithstanding the same may have been known to be valuable mineral land at the date of the townsite entry, as held in the decision complained of, it being insisted that the statutory exclusion in such cases is only of "known mines."

In the decisions of the supreme court, in the cases of *Steel v. Smelting Co.* (106 U. S., 447, 449-50); *Deffeback v. Hawke* (115 U. S., 392, 404); *Davis' Administrator v. Weibold* (139 U. S., 507, 524); and *Dower v. Richards* (151 U. S., 658, 663); all of which cases involved controversies between parties claiming public lands under the townsite and mining laws, respectively, the court repeatedly used the terms "lands known to be valuable for minerals," or "for mineral deposits," and "known mines," or "land containing known mines," as equivalent in meaning, and held, in effect, that all such lands and mines were excluded from entry and patent under the townsite laws, and that no title to such lands could pass thereunder, if they were known to be of that character when the townsite entry was made.

In the case of the *Pacific Slope Lode v. Butte Townsite* (25 L. D., 518), and in the case of the *Gregory Lode Claim* (26 L. D., 144), which involved controversies between claimants for the same land under the townsite and mining laws, respectively, it was held by the Department that, the issuance of townsite patent for land known at the date of the townsite entry to contain a valuable lode claim, does not pass title to such claim, but leaves it in the United States, subject to the jurisdiction of the land department. These authorities furnish a sufficient answer to the contention of the Puzzle claimants upon this branch of the case.

The motion for review seeks again to raise the question of the validity of the Parole and Morning Star locations upon the charge of want of discovery to support them. Nothing new is presented on this point and no reason appears for doubting the conclusions reached in the former decision in respect thereto.

The Department is satisfied that the decision complained of is right and that the same can work no injustice to the Puzzle claimants. The motion for review is accordingly denied.

Since the filing of the said motion, there has been filed by said Harris, for herself as executrix as aforesaid, and Kate T. Wylie who, it is now alleged, owns an interest in the Puzzle claim, a further protest

against the issuance of patent to the Parole and Morning Star claims. This protest alleges nothing new, except that, "on November 10, 1887, William Brady conveyed all his interest in the ground in conflict between the Parole and Puzzle lodes to the Puzzle Mining Company, the then nominal owner of the Puzzle lode claim," and that, "Tinsley, the subsequent mortgagee of Brady, has had at all times full knowledge of their deed." This new allegation furnishes no objection to the entry. If true, it only shows that after the application for patent was filed the Puzzle Mining Company became a co-tenant with Brady as to the Parole claim. It is not shown or even alleged what became of the interest so conveyed. If it was subsequently acquired by the present protestants the issue of patent as applied for will not injuriously affect them, as the patentee or patentees will hold the title in trust for them to the extent of their interest. *Turner v. Sawyer* (150 U. S., 578). If they have not acquired the interest conveyed to the Puzzle Mining Company they are strangers to the title and it can make no difference to them in whose name patent issues. The present protest is, therefore, dismissed.

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RAILROAD LANDS—BONA FIDE PURCHASER.

HASTINGS AND DAKOTA RY. CO.

A purchaser from a railroad company of land certified on account of its indemnity grant, but in the actual possession of a settler, and embraced in his pending application to enter at the time of such certification, takes with notice of such possession and of the rights of the settler in the premises.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *January 22, 1900.* (F. W. C.)

With your office letter of the 5th instant was transmitted the answer filed on behalf of the Hastings and Dakota Railway Company to the rule issued by your office on November 10, 1899, requiring said company to show cause why proceedings should not be instituted in accordance with the provisions of the act of March 3, 1887 (24 Stat., 556), to restore to the United States the title to the NW.  $\frac{1}{4}$  of Sec. 21, T. 123 N., R. 44 W., Marshall land district, Minnesota, erroneously certified to the State for the benefit of said company in list approved March 29, 1897.

This tract is within the indemnity limits of the grant for said company, and was included in its list of selections filed October 29, 1891. On December 12, 1891, Herbert J. Northcott tendered at the local office a homestead application for this land. The same was not accompanied by any allegation of settlement prior to the tender of said application, and was therefore rejected by the local officers for conflict with the previous selection made on account of the railroad grant. This action was affirmed by your office decision of September 11, 1894, from which Northcott did not appeal, because, on April 21, 1894, he had ten-

dered another application to make homestead entry of this land, accompanying the same by his affidavit, duly corroborated, to the effect that he had established residence upon the land in the month of May, 1890, and had continued to reside thereon, making the same his home, and that he had improvements upon the land to the value of \$2,000, consisting of a house and outbuildings, a good well, and one hundred acres of breaking. This second application, together with the accompanying showing, was forwarded to your office, and was pending, undisposed of, at the time of the approval and certification of the lands on account of the railroad grant. It was because of this fact that your office held that said certification was erroneous and rule was laid upon the company to show cause, as before stated, on November 10, 1899.

In response to the rule the affidavit of the land commissioner of said company is furnished, to the effect that this tract was sold on August 25, 1898, and conveyed by a deed of that date to William H. Kelly, for the consideration of one dollar and services rendered, which services had been at that time rendered to the company by said Kelly. It is submitted that the title to the tract is confirmed in the hands of the grantee from the railway company under the provisions of the act of March 2, 1896 (29 Stat., 42). Said act extends the time for the bringing of suit by the United States to vacate and annul any patents erroneously issued under a railroad or wagon-road grant, providing that—

no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed.

If, as appears from the showing filed in support of Northcott's application, which was pending, undisposed of, at the time of the certification of this land on account of the railroad grant, he was in the actual possession of this land, the alleged purchase by Kelly was with a notice of such possession and of the rights of Northcott in the premises.

But for the improvident action of your office in submitting for the approval of this Department a list of lands on account of this grant without notice of the pending application by Northcott, upon the establishment of his claim to the land, as alleged, his right would, under the repeated decisions of this Department, have been held to be superior to that of the company under its selection. (*Vandenberg v. Hastings and Dakota Ry. Co. et al.*, 26 L. D., 390.)

In the case of *Winona and St. Peter R. R. Co. v. United States* (165 U. S., 483), considering the act of March 3, 1887, and the act of March 2, 1896, it was held by the court, in reference to the claim of the Winona and St. Peter Land Company, as purchaser of the lands therein involved from the Winona and St. Peter Railroad Company, that—

—Such a purchaser can not claim to be one in good faith if he has notice of facts outside the records of the land department disclosing a prior right. The protection goes only to matters anterior to the certification and patent. The statute was not intended to cut off the rights of parties continuing after the certification, and of

which at the time of his purchase the purchaser had notice. Only the purely technical claims of the government were waived.

Here the claimant Marshall was in possession; had been in possession for twenty years; the land was not wild and vacant land. His possession was under a recorded claim of title, and under such a claim as forbade the issue of a patent. In other words, the land was erroneously certified. There was, and continued to be, an individual claimant for the land. There was no cancellation on the records of the land department of his claim. He continued in possession, and was in possession not only when the certification was made but when the land company purchased. Its purchase, therefore, was not made in good faith, and there is nothing disclosed to stay the mandate of the statute for the adjustment of the land grant, and a suit to set aside the certificate erroneously issued.

A hearing should therefore be ordered, with notice to the purchaser from the railway company, to determine the facts in this case, to the end that suit may be instituted for the recovery of the title to this tract, if the allegations made in the affidavit filed in support of Northcott's application are sustained at such hearing.

The papers are herewith returned for action in accordance with the direction herein given, and as the time within which suit can be brought is limited, the disposition of the matter should be facilitated as far as possible.

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RAILROAD LANDS—ACT OF SEPTEMBER 29, 1890.

ANGUS CAMPBELL.

The time within which the right of purchase under section 3, act of September 29, 1890, and the acts amendatory thereof, may be exercised is fixed by statute and can not be extended by the Land Department.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *January 25, 1900.* (F. W. C.)

An appeal has been filed on behalf of Angus Campbell from your office decision of March 15, 1899, affirming the action of the local officers in rejecting his application to purchase the SW.  $\frac{1}{4}$  of Sec. 3, T. 3 N., R. 13 E., Vancouver land district, Washington, as part of the Northern Pacific railroad grant forfeited by the act of September 29, 1890 (26 Stat., 496).

The third section of the forfeiture act provides that in all cases where persons, being citizens of the United States, or who have declared their intention to become such, in accordance with the naturalization laws of the United States, are in possession of any of the lands affected by any such grant, and hereby resumed by and restored to the United States, under deed, written contract with, or license from the State or corporation to which such grant was made, or its assignees, executed prior to January first, eighteen hundred and eighty-eight, or where persons may have settled said lands with *bona fide* intent to secure title thereto by purchase from the State or corporation, when earned

by compliance with the conditions or requirements of the granting acts of Congress, they shall be entitled to purchase the same from the United States in quantities not exceeding three hundred and twenty acres to any one such person, at the rate of one dollar and twenty-five cents per acre, at any time within two years from the passage of this act, and on making said payment to receive patents therefor.

In accordance with published notice Campbell made proof in support of an application to purchase this land under said section three on January 26, 1893, before a United States circuit court commissioner. Whether this proof was at that time presented at the local office accompanied by a tender of payment, and, if so, what action, if any, was taken thereon, does not appear from the record submitted. It accompanied an application to purchase filed by Campbell on January 6, 1899, when tender of the required amount of purchase money was made.

This proof shows that Campbell was not a resident upon the land applied for, and that his improvements thereon consisted of fencing and a small house. No portion of the land was broken or cultivated, it being useful only as pasture land. He did not purchase the land of the railroad company, nor is it alleged that he had any contract or license from said company, but his claim rests upon an alleged settlement of the land with an intention to purchase it from the railroad company. As he was not an actual resident upon the land, he was not entitled to purchase under the provisions of section three of said forfeiture act as originally enacted. (James C. Daly, 17 L. D., 498, on review, 18 L. D., 571; Shafer v. Butler, 19 L. D., 486.)

By the act of January 23, 1896 (29 Stat., 4), said section three of the forfeiture act was amended by adding thereto the following:

*Provided*, That actual residence upon the lands by persons claiming the right to purchase the same shall not be required where such lands have been fenced, cultivated, or otherwise improved by such claimants, and such persons shall be permitted to purchase two or more tracts of such lands by legal subdivisions, whether contiguous or not, but not exceeding three hundred and twenty acres in the aggregate.

Under this amendment he became entitled to purchase this land within the time specified in the act of 1890 and amendments thereto.

By the original act the purchase was permitted to be made "at any time within two years from the passage of this act." Said period has been extended from time to time, the last extension being made by the act of February 18, 1897 (29 Stat., 535), which amended the act of September 29, 1890,

so as to extend the time within which persons entitled to purchase lands forfeited by said act shall be permitted to purchase the same, in the quantities and upon the terms provided in said section and the amendments thereto, at any time prior to January first, eighteen hundred and ninety-nine.

On January 7, 1899, the local officers rejected the application to purchase, "because the time in which such entries could be made expired December 31, 1898."

Upon appeal, said action was affirmed by your office, as before stated, and Campbell has further prosecuted his case by appeal to this Department, and in support thereof alleges:

That on the 23d day of December 1898 I went to The Dalles, Oregon, a distance of (14) miles to procure the money for the said purchase. That I made arrangements with the "Wasco Ware-house Co.," at The Dalles, Oregon for the necessary amount, and on the 28th day of December 1898, Mr. McInnis, clerk at said ware-house, with whom I had made the arrangements to get the money aforesaid, telephoned me that he would have the money sent to me before Saturday, (December 31, 1898), but as I learned afterwards Mr. McInnis aforesaid, was afflicted with the "la grippe" and was unable to get to his place of business before the 3d of Jan. 1899, and on that day he forwarded to me the proper sum of money to perfect said entry, and, on the said day, January 3, 1899, and as soon as I could after receiving the said money, I made my said proof and forwarded the same to the proper Land Office, at Vancouver, Wash., That the omission and failure to make final proof and payment for the said tract was not caused by any neglect on my part and would not have occurred at all, only for the unavoidable sickness of Mr. McInnis as aforesaid.

There is no power in the land department to extend the period within which the right of purchase was to be exercised, and it follows that upon the expiration of that period the right of purchase was at an end.

Your office decision rejecting the application is, therefore, affirmed.

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#### REPAYMENT—DESERT LAND ENTRY.

##### SARGENT HALL.

Repayment of the first installment on a desert land entry, paid at the time of filing the declaratory statement, must be denied, where said payment and declaratory statement are properly accepted, and the subsequent cancellation of the entry is due to the entryman's non-compliance with the requirements of the desert land law.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *January 25, 1900.* (C. J. G.)

December 2, 1899, the Auditor for the Interior Department returned the case of Sargent Hall for review and reconsideration by this Department of its action of November 6, 1899, in approving the recommendation of your office that the said Hall be repaid, under the act of June 16, 1880 (21 Stat., 287), the first instalment paid by him on his desert land entry for the N.  $\frac{1}{2}$ , Sec. 22, T. 4 S., R. 6 W., containing three hundred and twenty acres, Helena land district, Montana.

His desert land declaratory statement was filed February 4, 1878, at which time Hall paid the sum of \$80, being at the rate of twenty-five cents per acre for the land described and receipt No. 70 was issued to him. He submitted final proof and final receipt No. 76 for three hundred and twenty dollars, the additional sum required to be paid on the entry, issued to him December 23, 1880. The final proof was placed of record in your office January 25, 1881.

December 6, 1887, it being discovered that Hall's final proof was not satisfactory in that it failed to furnish sufficient evidence of water right, your office held his entry for cancellation and he was required to submit supplemental proof within sixty days from receipt of notice. He having failed to comply with this requirement or to take any action responsive thereto the entry was finally canceled by your office May 18, 1888.

June 8, 1894, the local officers transmitted an application by Hall for repayment of the purchase money paid on the entry described as per "certificate No. 76." Certificates Nos. 70 and 76 both accompanied the application.

August 29, 1894, your office submitted Hall's application for repayment to the Department with the following statement:

It appears from the records of this office that the above described entry was canceled by office letter 'C', May 18, 1888, because the entryman did not furnish evidence showing right of proprietorship of water sufficient to reclaim the land. The local officers erred in accepting the final proof upon the evidence submitted.

The amount paid on the illegal entry is \$320; and from the testimony submitted by the applicant, he appears to be entitled to the relief applied for.

September 1, 1894, the Department approved the recommendation of your office and the sum of three hundred and twenty dollars was finally paid to Hall by the Treasury Department per certificate No. 59072 of your office dated September 18, 1894, no protest being made by him as to the amount.

October 11, 1899, your office submitted to the Department, with favorable recommendation, an application filed by Hall and dated January 17, 1899, for repayment of the first instalment of twenty-five cents per acre paid by him per receipt No. 70 and amounting to \$80. In support of said application Hall cited the cases of Lois G. Wilson (20 L. D., 160) and George M. Dyer (26 L. D., 284), dated February 28, 1895 and March 2, 1898, respectively. In your office letter submitting the case it is said:

This adjustment is supplemental to that of September 8, 1894, per certificate 59072 by which the sum of \$320 purchase money was returned to the entryman.

The recommendation of your office was approved by the Department November 6, 1899, without reference to the law division, and the application for repayment referred to your office for settlement. The Auditor for the Interior Department returned the application for review and recommendation December 2, 1899, as hereinbefore stated, it being

submitted that the claim of Sargent Hall for repayment of purchase money paid on this desert land entry is *res judicata*, and that it was finally decided and closed in so far as both the administrative and accounting officers were concerned by the allowance and payment made in September, 1894, when the claim for repayment on this entry was fully before this Department with all the law, facts and evidence in the case fully submitted.

This letter of the Auditor was referred to your office for report December 9, 1899. The Department is now in receipt of such report

dated December 21, 1899, in which your office renews its recommendation that Hall's second claim under his desert land entry be allowed and paid.

The declaratory statement of Hall and payment thereunder were properly accepted in the first instance upon a showing entirely satisfactory to the local officers, the land embraced therein being of the character defined in the desert land act. The entry might have been subsequently confirmed but for the entryman's failure to comply with the requirements of law and existing regulations. The entry had to be canceled not because of any error committed in the acceptance of the declaratory statement but because the subsequent proofs showed it could not be confirmed owing to the intervening laches of the entryman. It can not be said that the entry failed on account of any error on the part of the government. The only error committed by the government was in accepting final proof and payment when it should have been rejected for failure of the entryman to comply with law and existing regulations. This error of the government was remedied by the repayment of the \$320 to the entryman. It follows that Hall is not entitled to, nor is there any authority for, the repayment of the twenty-five cents per acre originally paid by him. Without considering the question of *res judicata* raised by the Auditor, Hall's application under consideration should have been, and hereby is, denied.

The case of Lois G. Wilson, cited by the applicant, is not in point here as it has reference to a different question from that of the repayment of the first instalment paid on a desert land entry. Nor is the case of George M. Dyer regarded as decisive of the question now under consideration.

Your office will duly notify the Auditor for the Interior Department of this decision.

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#### RAILROAD GRANT—INDEMNITY SELECTION—ASSIGNMENT OF LOSS.

##### OREGON AND CALIFORNIA R. R. Co. v. CREWDSON.

Odd numbered sections within the indemnity limits of the grant made by the act of July 25, 1866, and also within the overlap with that portion of the prior grant for the Northern Pacific road, *via* the valley of the Columbia river, which was never definitely located or constructed, and the grant for which was forfeited by the act of September 29, 1890, are subject to indemnity selection under said grant of 1866, so far as any claim under the Northern Pacific grant is concerned.

An indemnity selection made without specification of loss, and prior to the departmental requirement of such specification, is entitled to recognition, where the company subsequently, and within the time accorded, assigns a basis therefor.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *January 25, 1900.* (F. W. C.)

The Oregon and California Railroad Company has appealed from your office decision of April 17, 1897, holding for cancellation its idem-

nity selection of the N. W.  $\frac{1}{4}$  of Sec. 15, T. 1 S., R. 5 E., Oregon City land district, Oregon, with a view to allowing the homestead application of Wesley B. Crewdson covering said tract.

This tract is within the indemnity limits of the grant made by the act of July 25, 1866 (14 Stat., 239), under which appellant claims, and is within the overlap with that portion of the grant for the Northern Pacific railroad *via* the valley of the Columbia river to a point at or near Portland, the line of which was never definitely located or constructed, and the grant appertaining to which was forfeited by the act of September 29, 1890 (26 Stat., 496). Lands so situated were held by this Department not to be subject to selection on account of the grant to the Oregon and California Railroad Company, the grant to the Northern Pacific Railroad Company being the prior one in point of time, (Oregon and California R. R. Co., 14 L. D., 187).

In the decision of the supreme court in the case of the United States *v.* Oregon and California Railroad Company, decided January 8th instant (not yet reported), it was adjudged that the act of July 2, 1864 (13 Stat., 365), making the grant to aid in the construction of the Northern Pacific railroad, only granted lands that were *not* reserved, sold, granted, or otherwise *appropriated*, and free from pre-emption or other claim or rights, at the time the line of that road was *definitely fixed* and a plat thereof filed in the office of the Commissioner of the General Land Office; that Congress had power to dispose of or appropriate, in its discretion, any lands within the exterior lines of the *general route* of that road by statute passed for the benefit of another company before the Northern Pacific Railroad Company filed a map of "definite location," and that such lands, if not otherwise identified at the date of the passage of the later act of July 25, 1866, than by a plat or map of "general route," were not excluded from the operation of such an act as lands previously "reserved, sold, granted, or otherwise appropriated" by the act of 1864. (See also *Wilcox v. Eastern Oregon Land Co.*, U. S., .)

Any claim on account of the grant to the Northern Pacific Railroad Company did not, therefore, prevent selection of the lands in question on account of the grant to the Oregon and California Railroad Company.

This last-named company made selection of this land June 28, 1878. This list was not accompanied by a designation of the lands lost to the grant and on account of which the selection was made. This was prior, however, to the circular of November 7, 1879, which for the first time required railroad companies, in making selection of indemnity lands, to specify the lands lost in place on account of which indemnity was claimed.

Crewdson's claim to the land rests upon an application tendered at the local office May 16, 1892, and rejected for conflict with the indemnity selection of June 28, 1878. From this action he appealed, and in your office decision of April 17, 1897, the selection by the railroad com-

pany was held for cancellation, because of the fact that the selection list of June 28, 1878, was not accompanied by a designation of lands lost in place and on account of which indemnity was claimed, and the further fact that the application by Crewdson intervened before such omission was supplied by the railroad company, its list of losses upon which said list of selections depended not having been filed until August 20, 1894. From such action the company has appealed to this Department, as before stated.

In the case of *Clancy et al. v. Hastings and Dakota Ry. Co.* (17 L. D., 592), it was held that a selection made without specification of loss, and prior to the departmental requirement of such specification, is legally made.

It was not until the order given in the decision in the case of *La Bar v. Northern Pacific R. R. Co.* (17 L. D., 406) that railroad companies having pending indemnity selections were required to revise their lists within a given time, so that a proper basis would be shown for each and all tracts claimed as indemnity, under penalty that all lands formerly claimed for which a particular basis was not assigned in the manner prescribed, within the period named, would be disposed of without regard to such previous claim.

The Oregon and California Railroad Company, on February 17, 1894, requested an extension of time for the rearrangement of its indemnity list of selections in accordance with the directions given in the case referred to, which request was considered in departmental communication of February 21, 1894 (not reported), in which your office was directed "to extend the time so that the period of six months shall begin to run from the date of this communication." Under this extension the period granted this company within which to rearrange its indemnity list of selections did not expire until August 21, 1894. As stated in your office decision, a list of losses as a basis for the selection in question was filed on August 20, 1894. It would therefore seem to be in time, and the decision of your office is therefore reversed and the rejection of Crewdson's application by the local officers is affirmed.

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#### RAILROAD GRANT—INDEMNITY—SPECIFICATION OF LOSS.

##### OREGON AND CALIFORNIA R. R. CO. *v.* JOHNSTON.

The question as to the conflict between the grants of July 2, 1864, and July 25, 1866, that was considered and decided in the preceding case (*Oregon and California R. R. Co. v. Crewdson*), is involved herein.

On the rearrangement of a list of indemnity selections a change in the basis assigned for a specific selection does not amount to a new selection of such tract, or an abandonment of the original selection thereof, where the bases used were included in the original list, and are lands actually lost to the grant.

An application to enter lands included in a valid railroad indemnity selection is properly rejected, and no rights are gained by an appeal from such rejection.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *January 25, 1900.* (F. W. C.)

The Oregon and California Railroad Company has appealed from your office decision of January 26, 1897, holding for cancellation its indemnity selection of the N. W.  $\frac{1}{4}$  of Sec. 7, T. 1 S., R. 6 E., Oregon City land district, Oregon, with a view to the allowance of the homestead application of Charles W. Johnston covering said tract.

This tract is within the indemnity limits of the grant made by the act of July 25, 1866 (14 Stat., 239), under which appellant claims, and is within the overlap with that portion of the grant for the Northern Pacific railroad *via* the valley of the Columbia river to a point at or near Portland, the line of which was never definitely located or constructed, and the grant appertaining to which was forfeited by the act of September 29, 1890 (26 Stat., 496). Lands so situated were held by this Department not to be subject to selection on account of the grant to the Oregon and California Railroad Company, the grant to the Northern Pacific Railroad Company being the prior one in point of time, (Oregon and California R. R. Co., 14 L. D., 187).

In the decision of the supreme court in the case of the United States *v.* Oregon and California Railroad Company, decided January 8th instant (not yet reported), it was adjudged that the act of July 2, 1864 (13 Stat., 365), making the grant to aid in the construction of the Northern Pacific railroad, only granted lands that were *not* reserved, sold, granted, or otherwise *appropriated*, and free from pre-emption or other claim or rights, at the time the line of that road was *definitely fixed* and a plat thereof filed in the office of the Commissioner of the General Land Office; that Congress had power to dispose of or appropriate, in its discretion, any lands within the exterior lines of the *general route* of that road by statute passed for the benefit of another company before the Northern Pacific Railroad Company filed a map of "definite location," and that such lands, if not otherwise identified at the date of the passage of the later act of July 25, 1866, than by a plat or map of "general route," were not excluded from the operation of such an act as lands previously "reserved, sold, granted, or otherwise appropriated" by the act of 1864. (See also *Wilcox v. Eastern Oregon Land Co.*, U. S.)

Any claim on account of the grant to the Northern Pacific Railroad Company did not, therefore, prevent selection of the lands in question on account of the grant to the Oregon and California Railroad Company.

The last-named company made selection of the land in question in its list No. 17, filed June 13, 1887. In this list all of section 7, T. 1 S., R. 6 E., was selected in lieu of all of Sec. 9, T. 1 S., R. 4 E. Upon inquiry at your office it is learned that said section 9, specified as a basis for the selection of section 7, was a good and sufficient basis, the lands in section 9 being within the primary limits of the grant, and having been

approved to the State January 20, 1867, under the provisions of the act of September 4, 1841 (5 Stat., 453).

Johnston's claim to this land rests upon an application to make homestead entry presented on May 18, 1892, and rejected for conflict with indemnity list of June 13, 1887, before referred to. From such rejection he appealed to your office.

Said list of June 13, 1887, covered 6000 or more acres of land, and for some reason not disclosed by the record two re-arrangements were made of the selected lands and the losses specified as bases for the selections in said list. The first re-arranged list was filed on November 18, 1892, and in this list other tracts lost to the grant were specified as bases for the selection of the N. W.  $\frac{1}{4}$  of Sec. 7, T. 1 S., R. 6 W., being the tract here in dispute. The losses so specified in said list were a part of the losses included in the original list of June 13, 1887, and like the lands originally specified as a basis for this selection on the original list, were a sufficient basis, being lands within the primary limits of the grant and actually lost thereto. On August 20, 1894, a further re-arrangement was made of said list, other tracts being specified as a basis for the selection of the tract in question, but the tracts last specified were, like the others, a portion of the bases assigned in the original list.

In your office decision appealed from it was held that—

the company's said selection of June 13, 1887, was invalidated as against the subsequent acquisition of adverse rights, by the filing of a re-arranged list 17 on November 18, 1892, wherein another and different tract of land is designated as the base for the selection of the land in controversy. Moreover, on August 20, 1894, the company filed another re-arrangement of said list 17 wherein still another base was used for the selection of said N. W.  $\frac{1}{4}$ , Sec. 7. In the case of *La Bar v. N. P. R. R. Co.* (17 L. D., 406), it was held that the substitution of an amended list of indemnity selections on a specification of losses different from that at first assigned, must be treated as an abandonment of the first. When Johnston's application was presented, it was subject only to the selection of 1887, which, having been abandoned, as aforesaid, whatever bar it created against the allowance of his application was removed.

From what has been said it will be seen that while the specific losses assigned in the original list No. 17 and re-arrangements thereof, as a basis for the selection of the tract in question, have differed, yet the bases assigned in each and all of these lists were included in the list as originally filed. There has, therefore, been no such change as amounts to a new selection of this tract or an abandonment of the original selection thereof on June 13, 1887.

It must be apparent that the rejection of Johnston's application was proper, the selection of record at the time of the tender thereof being a valid selection, and it follows as a consequence that he gained nothing by appealing from such rejection.

The decision of your office is, therefore, reversed, and the selection, if otherwise regular, will be submitted for approval, to the end that the tract may be patented on account of the grant.

WOOD *v.* BOND.

Motion for review of departmental decision of May 6, 1899, 28 L. D., 369, denied by Secretary Hitchcock, January 27, 1900.

## PRACTICE—SERVICE OF NOTICE BY PUBLICATION.

CARPENTER *v.* KOPECKY'S HEIRS.

Rule 14 of Practice (Rules of 1896) does not require, in service of notice by publication, where the suit is against the heirs of the entryman, and the post address of such heirs is unknown, that a copy of the notice should be sent to said heirs at the last known address of the entryman.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *January 27, 1900.* (W. M. W.)

March 7, 1896, John Kopecky made homestead entry for the NE.  $\frac{1}{4}$  of Sec. 29, T. 131, R. 52, Fargo, North Dakota, land district.

January 18, 1898, Laurence Carpenter filed his corroborated affidavit of contest against said entry, alleging that the entryman—

died intestate in the month of July or August, 1897. That he knew said Kopecky during his lifetime, and knows that the said John Kopecky has no heirs living in the United States, or who are citizens of the United States, or who have declared their intentions to become a citizen of the United States; and this the said contestant is ready to prove at such time and place as may be named by the register and receiver, and asks for a hearing in said case, and be allowed to prove said allegations and that said homestead entry No. 21,858 may be declared canceled and forfeited to the United States, he, the contestant, paying the expenses of such hearing.

The contestant also filed an affidavit stating: "That he is well and personally acquainted with John Kopecky, deceased," who made the entry in question;

that said John Kopecky frequently conversed with affiant in regard to his past history and frequently told affiant that he had no relatives whatever in the United States; that he was a native of Bohemia in Europe, and came from that country to the United States about four years ago, and that he had a mother living in Bohemia whose name and address affiant cannot recall. That affiant has made inquiry amongst the neighbors and friends of said deceased who would be most likely to be acquainted with his past history, viz: Richard Cooley, John Anderson and Fred Smith, all of Richland county, North Dakota, and all of whom were intimately acquainted with said deceased, and persons who would be most likely to know of the past history of said deceased, and of his relations or heirs if he had any, but affiant was unable to learn or hear of any heirs or kin of said deceased except said mother aforesaid. That by reason of the foregoing facts, personal service cannot be made upon any one claiming to be the heirs of said deceased. And affiant therefore prays that service be made by publication and posting according to the usual course of process in the Land Department.

Upon this showing the register ordered that notice of the contest be published once a week for four consecutive weeks in a newspaper published in the county in which the tract involved is situated. Said notice was published in the newspaper designated for five consecutive

weeks; a copy of it was posted in the local office and remained posted during the period of publication; a copy of the notice was posted on the land involved; and it appears, from an affidavit of counsel for contestant, that on February 28, 1898, he mailed a copy of the notice by registered letter to Frantisek Kopecky, Okres, Bohemia, Europe, she being the only known heir of the said John Kopecky, and Okres being her last known address. The notice fixed the 20th day of April, 1898, as the time for the hearing, at which time the contestant appeared and upon his motion the case was continued to the 28th day of May, 1898, and the testimony was directed to be taken before a notary public in the vicinity of the land on May 21, 1898, at which time the contestant appeared and submitted his evidence. There was no appearance by or for the heirs of the entryman.

From the evidence the local officers found that the land embraced in Kopecky's entry

has not been cultivated since the death of the entryman. From the testimony submitted we are of the opinion that the entryman has no heirs residing in the United States.

The record was transmitted to your office, and January 7, 1899, the case was considered. It was found that the testimony shows

that Kopecky died intestate in August or September, 1897; that he never had any relatives living in the United States; that Kopecky was a native of Bohemia, Europe; that his only relatives resided in Bohemia, and he had lived in the United States about four years prior to his death; that he had about thirty acres of the homestead under cultivation at the time of his death; and that there has been no cultivation of the land by any person since Kopecky died.

Your office further held that the service of the notice of contest was not complete; that such notice should have been sent "to the heirs of John Kopecky, deceased, at his last known post office address." And thereupon the decision of the local officers was set aside and the case was remanded, with directions to notify Carpenter that he would be allowed thirty days within which to have new contest notices issued; failing in this, his contest was to be dismissed by the local officers.

Carpenter filed a motion for review of your office decision, and March 11, 1899, it was denied, and he appeals.

The sole question presented for determination is, whether it was necessary that a copy of the contest affidavit should have been sent to the heirs of the deceased entryman at his last known post office address, in order to authorize the local officers to decide the case.

It is well settled that in order to gain jurisdiction of the parties where notice is served by publication, it is necessary to follow the requirements of the Rules of Practice. (See *Popp v. Doty*, 24 L. D., 350.)

Rules 11 and 14 of the Rules of Practice, as they stood at the time this contest was initiated, provided as follows:

Rule 11. Notice may be given by publication alone only when it is shown by affidavit of the contestant, and by such other evidence as the register and receiver may

require, that due diligence has been used and that personal service can not be made. The party will be required to state what effort has been made to get personal service.

Rule 14. Where notice is given by publication, a copy of the notice shall be mailed by registered letter to the last known address of each person to be notified thirty days before date of hearing, and a like copy shall be posted in the register's office during the period of publication, and also in a conspicuous place on the land, for at least two weeks prior to the day set for hearing.

(See Revised Edition of the Rules of Practice, approved December 23, 1896, pp. 10 and 11.)

There is no doubt but what the showing made in the affidavit for publication of notice was sufficient; the contest was against the heirs of the entryman and they were the persons to be notified; the address of only one of them was known to the contestant, and a copy of the notice of contest was mailed by registered letter to her address thirty days before the date of hearing, and a like copy was posted in the register's office, also upon the land, as required by Rule 14, *supra*. Said rule did not, in terms nor by implication, in a case like this, require that a copy of the notice of contest should be sent to the last known address of the deceased entryman; it only required notice to be mailed by registered letter to the last known address of "each person to be notified," and in case the address of some or all of the persons to be served was unknown, then the publication in the newspaper, posting in the local office and upon the land, were all that was necessary to complete and perfect the service as to all such persons.

It follows that your office erred in the decision appealed from in requiring the contestant to have new contest notices issued, and said decision is accordingly reversed.

Rules 11 and 14 of the Rules of Practice were amended May 26, 1898, to take effect on the first day of July, 1898, and be applied to all cases initiated after that date. See 26 L. D., 710.

#### ALASKAN LANDS—RIGHT OF WAY—ACT OF MAY 14, 1898.

##### NOME TRANSPORTATION COMPANY.

The phrase "line of mean high tide" used in an application for a right of way for a tramroad in Alaska, under section 6, act of May 14, 1898, must be regarded by the Department, in its action on such application, as meaning that part of the shore of the sea to which the waves ordinarily reach when the tide is at its highest.

An application for a right of way for a tramroad, under said section, should not be granted, if the construction of said road would operate to destroy or seriously impair the water front privileges reserved to the public by other provisions of said act.

The right to levy and collect freight and passenger charges by a company operating a tramway, under the terms of said act, is subject to the supervision of the Secretary of the Interior.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior, January 30, 1900.* (A. B. P.)

By your reference of January 12, 1900, I am in receipt of a communication, with accompanying papers, addressed to you by the Commis-

sioner of the General Land Office, under date of January 11, 1900, submitting for departmental action the application of the Nome Transportation Company for the issuance of a permit, by instrument in writing, for a right of way over the public domain of the United States in the District of Alaska, not to exceed forty feet in width, and ground for station and other necessary purposes, for the construction of a tramway, along the northern shore of Norton Sound, from a point at or near Safety Harbor to the east bank of Snake River, a distance of about twenty-two miles, and the privilege of taking all necessary material from the public domain in said District for the construction of said tramway, together with the right, subject to the supervision of and at rates to be approved by the Secretary of the Interior, to levy and collect toll or freight and passenger charges, on passengers, animals, freight, or vehicles passing over said tramway for the period of five years, and also for the purchase of terminal grounds at the eastern terminus of the proposed tramway, according to the provisions of section six of the act of May 14, 1898 (30 Stat., 409), and in accordance with the preliminary survey and plat of the proposed route of said tramway submitted with said application.

Your reference calls for an opinion as to whether the Secretary of the Interior has the legal right to grant the permit applied for, and whether, in view of contemplated and probable legislation by the present Congress, it is expedient to take any action on said application at this time.

Section six of the act referred to provides, among other things, as follows:

That the Secretary of the Interior is hereby authorized to issue a permit, by instrument in writing, in conformity with and subject to the restrictions herein contained, unto any responsible person, company, or corporation, for a right of way over the public domain in said District, not to exceed one hundred feet in width, and ground for station and other necessary purposes, not to exceed five acres for each station for each five miles of road, to construct wagon roads and wire rope, aerial, or other tramways, and the privilege of taking all necessary material from the public domain in said District for the construction of said wagon roads or tramways, together with the right, subject to supervision and at rates to be approved by said Secretary, to levy and collect toll or freight and passenger charges on passengers, animals, freight, or vehicles passing over the same for a period not exceeding twenty years, and said Secretary is also authorized to sell to the owner or owners of any such wagon road or tramway, upon the completion thereof, not to exceed twenty acres of public land at each terminus at one dollar and twenty-five cents per acre, such lands when located at or near tide water not to extend more than forty rods in width along the shore line and the title thereto to be upon such expressed conditions as in his judgment may be necessary to protect the public interest, and all minerals, including coal, in such right of way or station grounds shall be reserved to the United States: *Provided*, That such lands may be located concurrently with the line of such road or tramway, and the plat of preliminary survey and the map of definite location shall be filed as in the case of railroads and subject to the same conditions and limitations: *Provided further*, That such rights of way and privileges shall only be enjoyed by or granted to citizens of the United States or companies or corporations organized under the laws of a State or Territory; and such rights and privileges shall be held subject to the right of Congress to alter,

amend, repeal, or grant equal rights to others on contiguous or parallel routes. And no right to construct a wagon road on which toll may be collected shall be granted unless it shall first be made to appear to the satisfaction of the Secretary of the Interior that the public convenience requires the construction of such proposed road, and that the expense of making the same available and convenient for public travel will not be less on an average than five hundred dollars per mile: *Provided*, That if the proposed line of road in any case shall be located over any road or trail in common use for public travel, the Secretary of the Interior shall decline to grant such right of way if, in his opinion, the interests of the public would be injuriously affected thereby.

The preliminary survey and plat submitted by the applicant company shows that the line or route of the proposed tramway, throughout its entire length, is located along the northern shore of Norton Sound "parallel to and eighty feet from the line of mean high tide," and that the right of way for which a permit is asked embraces twenty feet on each side of the line of said survey. It would thus appear that the southern line of the right of way, should the permit be issued as applied for, would be situated at an uniform distance of sixty feet from the *line of mean high tide*, along the northern shore of Norton Sound for the full length of the proposed tramway.

The statute authorizes the issuance of a permit for a right of way only "over the public domain." Tide lands are not a part of the "public domain" within the meaning of that term as used in the statute (*Shively v Bowlby*, 152 U. S., 1-58; *In re James W. Logan*, 29 L. D., 395). The term "line of mean high tide," as used in the application and accompanying survey and plat, may be of uncertain meaning. It is not the term usually employed to denote the inner boundary of tide lands. "Lands under tide waters," or "below high water mark of tide waters," "lands flowed by the tide," and other expressions of like import, are usually employed in defining what are tide lands (*Shively v Bowlby*, *supra*). If by the words, "line of mean high tide," is meant "high water mark," or "that part of the shore of the sea to which the waves ordinarily reach when the tide is at its highest," or the line which is marked "by the periodical flow of the tide, excluding the advance of waters above this mark by winds and storms and by freshets or floods," or "the line of ordinary high tide between the springs and neaps," there is no uncertainty in the description or designation of the lateral lines of the right of way applied for. I am of opinion that the words named were employed as the equivalent of the expressions quoted, but to avoid possible uncertainty in that respect it should be stated in any permit granted for this right of way that it is given upon the theory such words refer to that part of the shore of the sea to which the waves ordinarily reach when the tide is at its highest. If such words are otherwise employed in the application the proposed right of way may or may not embrace tide lands, depending upon the meaning intended.

By the tenth section of said act of May 14, 1898, "a roadway sixty feet in width parallel to the shore line, as near as may be practicable,"

of the public lands abutting on navigable waters in the District of Alaska is "reserved for the use of the public as a highway." The term "shore line," as used in said section, has been construed by the Department to mean "high water line" (27 L. D., 248, 263-4). In order, therefore, that this reservation of a highway for the benefit of the public may not be interfered with, it is necessary that the right of way in question should not, at any point, approach nearer the shore than the distance of sixty feet from the high-water line thereof.

Again, by said act of May 14, 1898, in providing for the disposition of the public lands in the District of Alaska under the homestead laws (section one), and for the purchase of such lands by occupants thereof for purpose of trade, manufacture, or other productive industry (section ten), Congress has specially provided that no entry shall be allowed in either case of lands extending more than eighty rods along the shore of any navigable water; and, further, that there shall be reserved to the United States a space of eighty rods in width between all claims entered or sold under said act, of lands abutting on any navigable stream, inlet, gulf, bay, or sea-shore. And the Secretary of the Interior is authorized (section ten) to grant the use of such reserved lands abutting on the water front, for landings and wharves, with the provision that the public shall have access to and the proper use of such landings and wharves at reasonable rates of toll, etc.

The evident object and purpose of these several provisions of sections one and ten of the act, were and are to hold the shore of navigable waters in said District, for the benefit of the public, by reserving a public highway along the same, and by prohibiting the wholesale disposition of the public lands abutting thereon to private individuals or corporations.

Looking, therefore, to the act as a whole, and construing section six thereof in the light of the other provisions to which reference has been made, I do not think it was intended by said section to authorize the granting of a permit for the right of way for a tramway so closely hugging the shore of navigable water for so great a distance without interruption, as does the proposed route of the right of way for which a permit is asked in this case. While reasonable effect must be given to the terms of the section in question, at the same time it must be construed with reference to, and as far as practicable in harmony with, the other provisions of the act, so as not to prevent or seriously impair the effectual operation of those provisions for the purposes intended. The construction of a tramway along the route designated upon the preliminary survey and plat accompanying the application in this case would evidently tend to seriously impair, if not practically destroy, for the full length of the proposed tramway, the shore or water front privileges and benefits reserved by the statute to the public.

The terminal grounds for which application is made by said company, are described by metes and bounds and are represented by a survey and plat thereof filed with the application. By reference to such survey and

plat it will be seen that the tract applied for, as located and surveyed, is in the form of a rectangular parallelogram nine chains in width and twenty chains in length, situate at or near the narrowest part of the spit, or point of land extending into the sea, on the western side of the entrance to Safety Harbor, and reaches entirely across said spit or point, from the "line of mean high tide" on the northern shore of Norton Sound to the "line of mean high tide" on the shore of Safety Harbor; thus completely cutting off about one hundred and twenty-eight chains in length of the eastern portion of said spit or point, and considerably greater lengths of shore line or water front, on both the shores of Norton Sound and Safety Harbor.

In view of the policy manifested in the statutory reservations for the benefit of the public, as hereinbefore referred to, it is not believed that the application for the terminal grounds should be approved in its present shape. Certainly not without the express reservation of a roadway sixty feet in width parallel to and along either the shore of Norton Sound or that of Safety Harbor for the benefit of the public as a highway.

The rates of toll or freight and passenger charges proposed by the company are stated in its application. The act expressly provides that the right to levy and collect toll or freight and passenger charges shall be subject to the supervision of and at rates to be approved by the Secretary of the Interior. The matter rests, therefore, in the sound discretion of the Secretary, and there can be no doubt that he has the power and authority to make all necessary investigation as to the reasonableness of the rates proposed, through such means as may seem to him requisite and proper, to enable him to act intelligently in the premises. I do not understand that any expression of opinion by me respecting the reasonableness of the proposed rates is called for, and if it were, I am without that knowledge or information which would enable me to form an opinion in the premises. Nor am I informed as to the character of any contemplated or probable legislation by the present Congress affecting rights of way in Alaska, and am, therefore, unable to express any opinion as to the expediency of action upon said company's application in that regard at this time.

Approved, January 30, 1900:

E. A. HITCHCOCK,

*Secretary.*

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ALASKAN LANDS—RIGHT OF WAY—FOOT BRIDGE.

D. B. FITTEN.

Section 6, act of May 14, 1898, authorizes the issuance of a permit for a right of way in Alaska only for the construction of wagon roads and tramways. A foot bridge does not come within the ordinary or commonly accepted meaning of either a wagon road or a tramway.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *January 30, 1900.* (A. B. P.)

I am in receipt of your report of January 12, 1900, in response to departmental reference of January 6, 1900, in the matter of the application of D. B. Fitten, of Seattle, Washington, for a permit to construct a wire foot bridge over Snake River at Nome City, in the District of Alaska.

Mr. Fitten states that he and his partner (not named) have been granted a franchise by the city council of Nome City, for the construction of a wire foot bridge across Snake River, upon condition that the approval of such franchise by the Secretary of the Interior be first obtained.

Dr. Sheldon Jackson, United States agent for education in the District of Alaska, in his report of December 22, 1899, filed with the papers, speaks of Snake River as follows:

It is a small stream a few yards wide and unnavigable for any craft larger than steam launches or row boats, and only for row boats a mile or two from the ocean. At the mouth of the river there is a bad bar which changes after every heavy storm. Occasionally light draught steamers have been able to cross the bar and anchor in the mouth of the river, which is the only shelter in the neighborhood of Nome for the vessels drawing less than eighteen inches or two feet of water. Ocean-going vessels visiting Nome are compelled to anchor in the open roadstead, there being no harbor.

In your report it is stated that your office

knows of no objection to the granting of the permit desired by Mr. Fitten, with the restriction that the foot bridge shall be of such height above the waters of Snake river as not to interfere with navigation by such boats as may be enabled to enter the river, and, further, that no rights of miners or others claiming lands along the river banks are infringed upon.

You thereupon recommend,

That the desired permit be granted, if the granting thereof is deemed to be within the province of the Department, and that the same be made revocable whenever deemed necessary or proper by the Secretary of the Interior, the bridge to be removed at the expense of the owners in case of such revocation.

The only law of which the Department is aware, authorizing the Secretary of the Interior to grant permits to individuals or corporations for the operation of public highways or business enterprises in the District of Alaska, is that found in section six of the act of May 14, 1898 (30 Stat., 409), which, among other things, provides:

That the Secretary of the Interior is hereby authorized to issue a permit, by instrument in writing, in conformity with and subject to the restrictions herein contained, unto any responsible person, company, or corporation, for a right of way over the public domain in said District, not to exceed one hundred feet in width, and ground for station and other necessary purposes, not to exceed five acres for each station for each five miles of road, to construct wagon roads and wire rope, aerial, or other tramways, and the privilege of taking all necessary material from the public domain in said District for the construction of said wagon roads or tramways,

together with the right, subject to supervision and at rates to be approved by said Secretary, to levy and collect toll or freight and passenger charges on passengers, animals, freight, or vehicles passing over the same for a period not exceeding twenty years.

This statute authorizes the issuance of a permit for a right of way, only for the construction of wagon roads and tramways in said District. A foot bridge does not come within the ordinary or commonly accepted meaning of either a wagon road or a tramway. It is to be observed also, that the permit authorized by the statute can embrace a right of way only over the "public domain" in said District. If Snake river is a navigable stream, which would seem to be the case from the report of the agent for education hereinbefore referred to, its bed can not be considered as a part of the "public domain" within the meaning of that term as used in the statute.

The Department is, therefore, of the opinion that no authority exists for the Secretary of the Interior to grant a permit of the character of the one applied for. You will accordingly notify Mr. Fitten, furnishing him with a copy of this communication.

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DESERT LAND ENTRY—UNSURVEYED LAND—ASSIGNMENT.

SIMEON S. HOBSON.

In the case of a desert entry of unsurveyed land, where the entryman prior to survey, submits final proof, and then sells the land, such sale must be regarded as an assignment of the entry, proof of which should be furnished as required in other cases of assignment.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *January 30, 1900.* (A. S. T.)

On December 2, 1890, James B. Fetzer made desert land entry No. 15, for the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 27, T. 15 N., R. 13, E., Lewistown, Montana, land district.

Final proof was regularly made on said entry by said Fetzer on June 21, 1892.

On October 2, 1898, Fetzer notified your office that he desired to relinquish said entry, having, as he alleged, found that the land "will not conform to the survey in that it is entirely above, and contains a large spring which was supposed to be above the claim."

On October 13, 1898, said entry was canceled and on October 19, 1898, Simeon S. Hobson filed his application for the reinstatement of said entry, supported by his affidavit wherein he alleges that he has been well acquainted with said land for the last fifteen years; that it is to all intents and purposes dry, arid land within the meaning of the desert land laws of the United States; that said Fetzer made final proof on said entry on June 21, 1892, and on October 22, 1892, sold and conveyed said land to him (said Hobson) for a valuable consideration,

by his duly executed instrument in writing, a duly certified copy of which is filed as an exhibit to said affidavit; that said Fetzer has no interest in said land and has had no such interest since said 22d day of October, 1892; that said Fetzer is now an inmate of the Montana State penitentiary, serving a sentence of perjury and for frauds against the bounty laws of the State of Montana, and is one of the most dangerous men in the State; wherefore said Hobson asks that said relinquishment be rejected, said entry reinstated, and that he be substituted as the real party in interest.

With said application Hobson files a copy of said conveyance duly certified by a notary public of Fergus county, Montana, showing that Fetzer conveyed the land to Hobson for the consideration of \$425, paid in hand.

In transmitting said application to your office the local officers reported that the allegations in said affidavit relative to the character of Fetzer were known to them to be true, he being one of the worst characters Montana has ever had to deal with, and that Hobson had refused to sign a petition for Fetzer's pardon and that this relinquishment was an attempt on his part to "get even."

On November 25, 1898, your office rendered a decision to the effect that the transaction between Fetzer and Hobson was in the nature of an assignment of the entry by Fetzer to Hobson, Fetzer not having title to the land, and, therefore, not being in a condition to convey the same, and you directed that the local office require Hobson to furnish an affidavit of assignment (form 4-074a), as prescribed by circular of October 30, 1895, and sixty days were allowed in which to comply with that requirement. Hobson appealed from said decision to this Department, where, on December 16, 1899, a decision was rendered affirming said decision of your office. The case has now been recalled for further consideration by this Department.

It has been repeatedly held by this Department that a relinquishment executed by an entryman who after final proof has assigned his interest in the land to another, will not be accepted to the prejudice of the rights of the assignee or transferee (*Falconer v. Hunt et al.*, 6 L. D., 512; *Daniel R. McIntosh*, 8 L. D., 641; *Geo. T. Jones*, 9 L. D., 97; *Patrick H. McDonald*, 13 L. D., 37; *Paul v. Wiseman*, 21 L. D., 12).

But before a relinquishment of a desert-land entry can be so treated because of a previous assignment by the entryman, proof of the assignment must be made as required by law and the regulations of the Department.

It is insisted that your office erred in holding that the transaction between Fetzer and Hobson was in the nature of an assignment of the entry by Fetzer to Hobson, and the fact is cited in support of this contention, that Fetzer had made his final proof before executing the deed to Hobson. The transaction, if it had any legal effect, was either an assignment of the entry or a conveyance of the land; if the former,

then it must be regularly proven in the prescribed manner; if the latter, it is sufficiently proven by the deed.

If the entryman had done all required by the law to be done by him before the issuance of patent, then the transaction would be held to have been a sale of the land and proof of an assignment would not be required, but the case does not appear to be in that attitude; at least one very important thing remains to be done by the entryman or his assignee, viz., to pay for the land and until this is done no patent can issue nor can the land be sold.

An investigation discloses the fact that this land is still unsurveyed, and therefore nothing further can be done toward completing the entry till the land is surveyed.

By General Land Office circular issued April 20, 1891, addressed to registers and receivers of United States land offices (12 L. D., 376), the following instructions were given:

When final proof has been submitted on an entry upon unsurveyed land, if no objections exist in your office, you will approve the same and forward it to this office without collecting the purchase money, and without issuing the final papers.

When the land shall have been surveyed, you will require the party to make proof in the form of an affidavit, corroborated, showing the legal subdivisions of his claim.

When this has been done, you will correct your records to make them describe the land by legal subdivisions, and, if the proof submitted to this office has been found satisfactory, and if no objection exists in your office, you will issue final papers upon payment of the amounts due.

These instructions were evidently being followed in this case, the land being unsurveyed when the final proof was made, said proof was forwarded to your office, and nothing further can be done toward completing the entry till it is surveyed, when, if the proof is found satisfactory, and payment is made as required by law, a patent may issue for the land.

The entry, therefore, not being completed at the time of the transaction between Fetzer and Hobson, said transaction was, at most, only an assignment of the entry, and being such must be proven as required by law.

Your said decision is therefore affirmed, and sixty days will be allowed Hobson from notice of this decision within which to comply with the requirements of your said decision, in default of which compliance said entry will remain canceled.

Said departmental decision of December 16, 1899, is hereby recalled and this decision is substituted in lieu thereof.

## MINING CLAIM—UNCOMPAGHGRE UTE LANDS.

HIGH MEEKS.<sup>1898</sup>

Lands containing gilsonite, asphaltum, elaterite, and like substances, situated in the Uncompahgre Ute reservation, have been, since the date of the executive order creating said reservation, and still are, excepted from the operation of the mining laws.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 3, 1900.* (C. J. W.)

September 15, 1898, High Meeks applied to the United States surveyor-general at Salt Lake City, Utah, for an official survey of a mining claim known as the Dixie mine, situate in Uinta county, Utah, and admitted to be within the exterior limits of the Uncompahgre Indian reservation, and to embrace a vein of gilsonite and asphaltum.

This application was rejected by the surveyor-general of Utah, and Meeks appealed to your office, where, November 17, 1898, the matter was considered and the appeal dismissed.

From the action taken by your office Meeks has appealed to the Department.

By the act of June 15, 1880 (21 Stat., 199-205), provision was made for the ratification of the agreement submitted by the chiefs and headmen of the confederated bands of Ute Indians, authorizing the sale to the United States of their reservation in the State of Colorado, and stipulating for the removal of said bands of Indians, among whom was the band known as the Uncompahgre Utes, to certain other lands to be set apart for them as prescribed in said agreement. Provision was also made for the survey and allotment, in severalty, to said Indians of the lands to which they agreed to remove, and for their protection until such allotments were made.

The land in dispute is a part of the reservation established in pursuance of said act for the Uncompahgre Utes, in the Territory (now State) of Utah, by the following executive order:

EXECUTIVE MANSION, *January 5, 1882.*

It is hereby ordered that the following tract of country in the Territory of Utah be, and the same is hereby withheld from sale and set apart as a reservation for the Uncompahgre Utes, viz.: Beginning at the southeast corner of township 6 south, range 25 east, Salt Lake meridian, thence west to the southwest corner of township 6 south, range 24 east; thence north along the range line to the northwest corner of said township 6 south, range 24 east; thence west along the first standard parallel south of the Salt Lake base line to a point where said standard parallel will, when extended, intersect the eastern boundary of the Uintah Indian reservation, as established by C. L. Dubois, U. S. deputy surveyor, under his contract, dated 1875; thence along said boundary southeasterly to the Green river; thence down the west bank of Green river to the point where the southern boundary of said Uintah reservation, as surveyed by Dubois, intersect said river; thence northwesterly within the southern boundary of said reservation to the point where the line between ranges 16 and 17 east of the Salt Lake meridian will, when surveyed, intersect said southern boundary; thence south between said ranges 16 and 17 east,

Salt Lake meridian, to the third standard parallel south; thence east along the said third standard parallel to the eastern boundary of Utah Territory; thence north along said boundary to a point due east of the place of beginning; thence due west to the place of beginning.

(Signed)

CHESTER A. ARTHUR.

Allotments to the Uncompahgre Indians located on the reservation in Utah, not having been completed under said act of June 15, 1880, Congress made further provision as to them, first, in the act of August 15, 1894 (28 Stat., 286, 337), and later, in the act of June 7, 1897 (30 Stat., 62, 87).

The surveyor-general in reporting to your office the reasons for declining to issue an order for the survey of Meeks's claim states that:

The decision of this office was based upon the fact that inasmuch as the claim in question was located upon land set aside by the government for reservation, said land was not at the time of location subject to the public land laws and said location was therefore invalid, and the relocation although made after said reservation was thrown open was upon land expressly reserved by said act of 1897 as it was valuable for "gilsonite, etc.," consequently the relocation was also invalid. Said location and relocation being invalid could not be the basis for an order of survey from this office.

Your office, in the decision appealed from, affirmed the action of the surveyor-general.

Meeks denies the soundness of the propositions stated and insists that the executive order creating the Uncompahgre reservation is illegal, in so far as it includes mineral lands within its limits, and that the act of June 7, 1897, in so far as it undertakes to reserve lands containing asphaltum, gilsonite, or like substances, does not repeal the act of August 15, 1894, which, it is contended, authorized the opening of the lands in said reservation to disposition under the homestead and mineral laws.

He also alleges that he is a qualified citizen of the United States, and that, August 20, 1888, he discovered and duly located a mineral vein or deposit, bearing albertite and gilsonite, and called the same "The Dixie Mine;" that after properly marking the boundaries, he recorded his notice of location and commenced work on the claim, and expended in its development over five hundred dollars; that he was prevented from the further prosecution of development work by notice that the claim was within the boundaries of the Uncompahgre Indian reservation, which fact he learned after the discovery and location aforesaid; that after the passage of the acts of Congress of August 15, 1894, and June 7, 1897, to wit, April 2, 1898, he again located the same ground, his location notice that he reserved all rights acquired by virtue of his original discovery and location.

The purpose of the act of August 15, 1894, *supra*, was to provide for carrying to completion the treaty obligations of the United States with the confederated bands of Ute Indians in Colorado, in pursuance of the act of June 15, 1880.

Section 20 of said act of August 15, 1894, provides for the appointment of three commissioners to allot agricultural lands in severalty to said Uncompahgre Ute Indians within their said reservation, and to report to the Secretary of the Interior what portions of said reservation are unsuited, or will not be required for allotments, which portions so reported were by proclamation to be restored to the public domain.

Section 21 of said act provides, *inter alia*:

That the remainder of the lands on said reservation shall upon the approval of the allotments by the Secretary of the Interior be immediately open to entry under the homestead and mineral laws of the United States: *Provided*, That no person shall be entitled to locate more than two claims, neither to exceed ten acres, on any lands containing asphaltum, gilsonite or like substances.

It is to be observed that said act recognizes not only the existence of the Uncompahgre reservation, but leaves it intact until the purpose for which it was made has been accomplished, to wit, until the Uncompahgre Ute Indians have been provided with allotted homes and the allotments have been approved by the Secretary of the Interior.

After the happening of this contingency, the remainder of the lands were to be opened to entry under the homestead and mineral laws, which was equivalent to saying that until such contingency did happen, neither the homestead nor mineral laws of the United States should be operative within the boundaries of said reservation. The contemplated contingency had not happened up to June 7, 1897, and the reservation remained intact, with the homestead and mineral laws inoperative therein, so that up to that time no mineral right to land inside said reservation could have accrued under the act of August 15, 1894, for that act had not yet gone into effect as to mineral lands.

The act of June 7, 1897, again recognized the validity of the aforesaid reservation, and the fact that contemplated allotments had not up to that time been completed, but fixed upon a day upon which said reservation should cease, as will appear from the following provisions:

The Secretary of the Interior is hereby directed to allot agricultural lands in severalty to the Uncompahgre Ute Indians, now located upon or belonging to the Uncompahgre Indian reservation, in the State of Utah, said allotments to be upon the Uncompahgre and Uintah reservations or elsewhere in said State. And all the lands of said Uncompahgre reservation not theretofore allotted in severalty to said Uncompahgre Utes shall, on the first day of April, eighteen hundred and ninety-eight, be open for location and entry under all the land laws of the United States; excepting, however, therefrom all lands containing gilsonite, asphalt, elaterite, or other like substances. And the title to all of the said lands containing gilsonite, asphaltum, elaterite, or other like substances, is reserved to the United States.

Looking to the previous legislation relating to said reservation, and construing the same together with the reserving clause of the act of June 7, 1897, it is manifest that lands containing gilsonite, asphaltum, elaterite, or other like substances, situate in said Uncompahgre Ute Indian reservation, have been since the date of the executive order creating the same, and still are, excepted from the operation of the

mineral laws. It is alleged that said reserving clause of the act of 1897 is inconsistent with certain provisions of the act of 1894.

The discussion as to whether or not the act of 1897 repealed the act of 1894 is deemed immaterial, and does not aid in ascertaining the meaning and purpose of the reservation in question. No formal repeal of the act of 1894 was necessary to enable Congress to reserve lands containing gilsonite, asphaltum, elaterite, or other like substances, because said act had never become operative upon these excepted lands.

The two acts are *in pari materia*, so far as they relate to a future disposition of the lands containing gilsonite, asphaltum, elaterite, or other like substances, and in determining what disposition Congress intended to be made of this class of lands, the two acts are to be construed together, under which rule the latest expression on the subject would be controlling.

The latest legislative declaration on the subject closes thus:

And the title to all of said lands containing gilsonite, asphaltum, elaterite, or other like substances, is reserved to the United States.

This language is so clear, direct, and unambiguous, as to require no legal skill to interpret it. Congress had the power to reserve this class of lands from sale, and it is clear that it did so reserve them.

Counsel for Meeks lays great stress in his argument upon the fact that, under the treaty stipulations of 1880, said Indians were only entitled to allotments in severalty in agricultural lands within their reservation in the Territory of Utah, and deduces therefrom the conclusion that the President had no power to include lands in the reservation which could not be allotted to them, and therefore the executive order creating said reservation, so far as it embraced mineral lands, was void. It remains, therefore, to inquire into the validity of said order.

The contention that the President had no authority to make the reservation in question is believed to be without support and contrary to the practice which has obtained ever since the establishment of the land department. It cannot be questioned that the purpose for which the reservation was created was a public one. The power of the President to reserve public lands for a public purpose is recognized by the supreme court in the case of *Wolcott v. Des Moines Company* (5 Wall., 681, 688), and again in the case of *Grisar v. McDowell* (6 Wall., 363, 381). In the latter case the supreme court, in reference to the power of the President to reserve public land from sale for public purposes by executive order, said:

From an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.

This power is so generally recognized that the citation of further authorities is deemed unnecessary to support the conclusion herein

reached, that the President had the power to make the order of January 5, 1882, creating the Uncompahgre Indian reservation, including the land in dispute. That the land was so included is admitted, and this was its status when Meeks claims to have made his first discovery and location in 1888. The *status quo* continued until the act of June 7, 1897, by virtue of which this land is still in reservation. It follows that there has been no time at which, since the date of said order, Meeks could acquire any right to the land by discovery, location, or otherwise, and it is accordingly held that he has acquired none.

This being true, it is needless to consider further the specifications of error set forth in the appeal.

The application for a patent survey of the claim was properly denied, and your office decision is accordingly affirmed.

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MINING CLAIM—PROTEST—ADVERSE CLAIM.

KINNEY *v.* VON BOKERN ET AL.

A protest filed as the basis of adverse proceedings is sufficient, if it clearly and definitely notifies the mineral applicant of the nature, boundaries, and extent of the alleged adverse right.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 3, 1900.* (C. J. W.)

March 18, 1898, William Von Bokern and John J. McKinery filed application for patent No. 424, for the Lulu B. lode mining claim, survey No. 12,426, Ward mining district, Denver, Colorado. Notice of said application was duly published for sixty days, commencing March 25, 1898.

During the period of publication, Charles Kinney, for himself and co-claimants, filed an adverse claim for a part of the ground embraced in said application.

June 15, 1898, the mineral applicants moved to dismiss said adverse claim, alleging the same to be defective for the reason, among others, that the survey and plat thereof were not made by a United States deputy mineral surveyor.

July 18, 1898, the adverse claimants filed a properly authenticated certificate, showing that they had duly commenced suit on said adverse claim, June 18, 1898, in the district court of Boulder county, Colorado.

September 2, 1898, the local officers declined to sustain the motion to dismiss the adverse claim, upon the ground that the institution of suit upon said adverse claim in the district court, within the prescribed time, estopped them from taking further action pending the proceedings in said court.

The mineral applicants appealed from said action, and, December 13, 1898, your office affirmed the same. Appellants moved for review, but the motion was denied, June 3, 1899.

The mineral applicants have appealed to the Department. They adhere to their original contention that the plat submitted by the adverse claimants is fatally defective, because the survey was not made by a United States deputy mineral surveyor.

The appeal presents no question of law which has not been in substance passed upon by the department in former cases.

In the case of *McFadden et al. v. Mountain View Mining and Milling Co.* (27 L. D., 358), on review, most of the material questions presented by the appeal now under consideration were passed upon adversely to the contentions of the present appellants.

In that case the department, following the rule laid down in the case of *Anchor et al. v. Howe et al.* (50 Fed. Rep., 366), held, in substance, that the departmental regulation requiring that the plat showing the boundaries of the conflicting premises "must be made from an actual survey by a deputy United States surveyor," is not an indispensable requirement, if the protest filed as the basis of the adverse proceedings clearly and definitely notifies the mineral applicant of the nature, boundaries and extent of the alleged adverse right, as required by section 2326 of the Revised Statutes.

The cases cited are conclusive, not only as to the insufficiency of the objection made to the survey under consideration, which appears to have been made by a professional surveyor (although not a United States deputy surveyor), but as to the insufficiency of the other objections set up in the appeal.

Since the decision in the case of *McFadden et al. v. Mountain View Mining and Milling Co.*, *supra*, the departmental rules and regulations on the subject have been changed to correspond therewith (28 L. D., 579, 608).

The protest and accompanying papers filed therewith show clearly the nature, boundaries and extent of the adverse claim, and substantially comply with the requirements of the law.

Your office decision is accordingly affirmed.

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MINING CLAIM—LACHES IN PROSECUTION OF CLAIM.

REINS *v.* MONTANA COPPER CO. ET AL.

Delay in perfecting a right to a mineral patent under a judgment obtained in opposition to the application of another, as well as delay in perfecting such right under one's own application, may amount to laches such as will entail a loss of the right acquired by the prior proceedings.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) February 5, 1900. (E. B., Jr.)

It appears from the record in this case that on May 24, 1879, Charles T. Meader located the  $W\frac{1}{2}$  of the  $NE\frac{1}{4}$  of the  $SW\frac{1}{4}$  of Sec. 8 T. 3 N., R. 7 W., Helena, Montana, land district, as a placer claim, and that on May

26, 1879, George F. Marsh likewise located the  $W\frac{1}{2}$  of the  $SE\frac{1}{4}$  of the  $SW\frac{1}{4}$  of said section. On November 19, 1880, the Montana Copper Company, having in the meantime succeeded to the ownership of the two claims, filed its application for patent thereto and gave notice thereof by posting and publication, commencing November 23, 1880. No adverse claim was filed during the period of publication.

March 9, 1881, Henry C. Dahl located the Betsey Dahl lode mining claim, which crossed the northern part of the placer claim located by Marsh, the area in conflict being 7.87 acres, and on March 16, 1882, filed an application for patent to the lode claim, including the said area in conflict. May 24, 1882, during the period of publication of notice of Dahl's application, the placer applicants filed an adverse claim against the same and commenced suit in support thereof in the proper local court. Judgment therein was rendered April 10, 1884, in favor of the plaintiff, the said company, and the same was affirmed, on successive appeals, by the supreme court of Montana, January 9, 1886, (6 Montana, 131), and by the supreme court of the United States, November 25, 1889 (132 U. S., 264).

April 13, 1893, John P. Reins located under the name of the Combination lode claim the identical ground theretofore covered by the Betsey Dahl lode claim, and on February 16, 1897, filed a protest against the placer application, wherein, after alleging his location of the Combination lode claim, that the location had ever since been maintained by due compliance with law, and that the same was in conflict with the placer location of Marsh, he further alleges that the said placer application has been from the beginning "insufficient, illegal and void for the following reasons, to wit:"

## 1.

That no-discovery of a valuable mineral deposit was ever made by the said Montana Copper Co., or its predecessors in interest upon the ground sought to be acquired by said mineral application.

## 2.

That the said alleged location by George F. Marsh was void:

(1) In that at the time it was made there was no such legal subdivision as the southeast  $\frac{1}{4}$  of the southwest  $\frac{1}{4}$  of section 8, T. 3 N., R. 7 W.

(2) That the said alleged location notice did not show that any discovery of valuable mineral deposits had been made upon the ground sought to be located.

(3) That the said notice did not show that the alleged location was marked upon the ground so that its boundaries could be readily traced.

(4) That said location notice was not verified as required by law.

## 3.

That prior to said alleged mineral application five hundred dollars worth of labor and improvements had not been expended or made upon the premises sought to be patented by the said Montana Copper Co. or by its grantors, or by any one in their behalf, for developing or working the said premises as a placer mining claim, and said Montana Copper Co. has not, nor has any person or persons in their behalf, brought water upon the said premises, or done any other act, or acts or improvements whatever toward developing or working the said premises as a placer mining claim.

4.

That the pretended published notice of alleged mineral application was and is insufficient and void—

- (1) In that it did not state where the record of the claim could be found.
- (2) That the description of said premises in said published notice did not conform to the description contained in the above described alleged location notice recorded by said George F. Marsh.
- (3) That said published notice does not mention all of the adjoining claims.
- (4) That neither at the time when said alleged notice of application for patent was published, nor at any other time or at all, was there any such subdivision of the public lands of the United States as the west  $\frac{1}{2}$  of lot 6, in section 8, T. 3 N., R. 7 W. as described in said published notice.

5.

That neither the said Montana Copper Company nor any person or persons in its behalf has represented or performed the annual labor required by law upon the said alleged placer claim during either of the years ending December 31, 1892, December 31, 1893, December 31, 1894, December 31, 1895, or December 31, 1896, notwithstanding the fact that mineral entry of the said claim has never been made.

6.

That the proceedings of the said applicant to obtain a patent have been fraudulent from the beginning.

7.

That the ground sought to be obtained by said mineral application is not in fact placer mining ground.

A hearing in the premises having been thereupon had commencing April 9, and ending May 3, 1897, at which appeared the said Reins, the Boston and Montana Consolidated Copper and Silver Mining Company, claiming as successor in interest to the Montana Copper Company, and the Oregon Short Line Railroad Company claiming a right of way as grantee of the last mentioned company, the local office, upon consideration of the testimony adduced thereat, found in its decision of April 22, 1898, that no discovery of mineral had been made upon the placer claim located by Marsh; that \$500 had not been expended in the development of the said placer claims by the Montana Copper Company, its predecessors and successors in interest; that the annual expenditure had not been done thereon for any year since the locations thereof; and that the land embraced in the application was not mining land and had no value for mining purposes. The local office therefore recommended that the placer application be rejected.

Upon appeal by the Boston and Montana Consolidated Copper and Silver Mining Company your office, by its decision dated August 11, 1898, sustained the decision of the local office to the extent of finding that no placer mineral deposit has ever been discovered by anyone within the limits of the said placer claims, that "the placer claimant its grantors or grantees" have failed ever since the placer claims were located to perform the annual assessment work, and have also failed to expend thereon five hundred dollars in labor and improvements as required by law; and accordingly rejected the placer application for

patent. The last-named company has appealed from your office decision assigning numerous errors of fact and of law.

The facts in the case relative to the placer application for patent bring it clearly within the rule announced in the case of Cain *et al. v. Addenda Mining Co.*, on review (29 L. D., 62), and approved and followed in the more recent cases of P. Wolenberg *et al.* (id., 302), and William Barklage *et al. v. Jay E. Russell* (id., 401), that failure to prosecute an application for patent to completion within a reasonable time after the expiration of the period of publication or the termination of adverse proceedings in the courts constitutes a waiver of all rights obtained by the earlier proceedings upon the application. This rule is equally applicable to the failure of the placer claimant to take and complete, within a reasonable time, the proceedings necessary to obtain a patent in pursuance of the judgment rendered in the adverse proceedings against the application for patent to the Betsy Dahl lode claim. That judgment could give the placer claimant no greater or higher right to a patent than was obtained by the earlier but unperfected proceedings upon its own application for patent. More than sixteen years elapsed between the completion of the publication upon the placer application and the filing of Reins's protest, and more than seven years between the close of the said adverse proceedings and the filing of such protest. (Whether the placer claimant bases its right to a patent upon the proceedings had upon its own application or upon the judgment obtained in the proceedings adverse to the lode application, there has been such an absence of diligence in perfecting its right to patent that it must be held to have waived and lost all right to a patent acquired under its own application or under said adverse proceedings. That judgment is of no avail against subsequent laches. It is not such a judgment, but the making of a mineral entry, that relieves an applicant for patent from the obligation to perform annual expenditure. Hence the judgment in its favor afforded the placer claimant no immunity from a subsequent relocation of the claim and consequent loss of the right of possession if it failed to make thereon the requisite annual expenditure and did not resume work before such relocation. This being so, delay in perfecting a right to patent under a judgment obtained in opposition to the application of another, as well as delay in perfecting such right under one's own application, may amount to laches such as will entail a loss of the right acquired by the prior proceedings.)

It appears that on June 8, 1884, and while the papers in the matter of the placer application were on file in your office, the placer claimant filed in the local office a certified copy of the judgment of the local court in said suit, tendered a draft for sixty dollars in payment for 23.18 acres of the land embraced in the application for a placer patent, including the conflict with the lode claim, and asked to be allowed to make entry thereof. By letter of June 19, 1884, the register, calling attention to the fact that the record pertaining to his application had

been transmitted to your office, reported the tender of payment and forwarded the certified copy of the judgment and certain other papers filed at that time. It does not appear that the said draft was accepted by the local officers or forwarded to your office, or that any action was ever taken by your office upon the above request to be allowed to make entry.

It is contended by the appellant that the right of the placer claimant to patent became complete upon such tender or, by reason thereof, upon the rendition of the said judgment or the supreme court of the United States, and that it is to be regarded in the consideration of its claim for patent as having made entry on the date of such tender or such judgment.

The contention can not be sustained. The adverse proceedings against the application for a patent for the lode claim had not been settled or decided at the date of that tender and request, but were then pending before the supreme court of Montana, and hence, as to the ground in conflict, the stay of proceedings commanded by section 2326 of the Revised Statutes had not terminated. When those proceedings terminated, no renewal of such tender or request was made.

The laches shown in this case are fatal, and for the reasons here given the action of your office in dismissing the application of the placer claimant is affirmed.

It is unnecessary, in view of the foregoing, to consider the protest of Reins or any question raised in the appeal from the action of your office respecting the same. With the rejection of the placer application for patent must fall all proceedings in the land department against it.

What has just been said relative to the protest of Reins applies also to the so-called protest and adverse claim filed November 29, 1898, by the Meaderville Mining and Milling Company, as claimant of the Ella lode, located June 8, 1897, and to the protests filed the 6th ultimo by Edwin L. Mayo and James T. Finlan, and Louis Frank and Charles B. Lowensen, alleging location December 13, and November 6, 1899, respectively, of the Milred Mayo and the Cincinnati lode mining claims.

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#### MINING CLAIM—PROTEST AGAINST PLACER ENTRY.

#### MEADERVILLE MINING AND MILLING CO. *v.* RAUNHEIM ET AL.

A protest, on behalf of a lode claimant, against the issue of patent on a placer entry, should not be entertained on questions involving the placer character of the ground and the entryman's compliance with law, where the entry was regularly allowed on satisfactory proof, has been sustained in the courts, and it is not asserted that the existence of any veins or lodes claimed by the protestants was known at the time of the placer application, and the location under which the protestant claims was not made until many years after the allowance of the entry.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
 (W. V. D.) *February 5, 1900.* (E. B., Jr.)

The Department has considered the appeal of the Meaderville Mining and Milling Company from your office decisions of August 19, 1899, and September 8, 1899, dismissing the protest and supplemental protest, respectively, filed by said company on November 29, 1898, and August 28, 1899, against the issuance of patent for the placer mining claim embraced in mineral entry No. 832, made May 23, 1882, by Saly Raunheim, and covering the E $\frac{1}{2}$  of lot 6, the E $\frac{1}{2}$  of lot 9 and the S $\frac{1}{2}$  of lot 8, or the E $\frac{1}{2}$  of the E $\frac{1}{2}$  of the SW $\frac{1}{4}$  and the S $\frac{1}{2}$  of the SE $\frac{1}{4}$  of the NW $\frac{1}{4}$  of Sec. 8, T. 3 N., R. 7 W., Helena, Montana, land district. The said protest and supplemental protest taken together allege, in substance: (1) That no discovery of any valuable placer mineral deposit was ever made upon said placer mining claim and that the same never contained any valuable placer mineral deposit; (2) that when said mineral entry was made five hundred dollars in labor and improvements had not been expended upon said placer mining claim by the entryman or his grantors in developing or working the same as a placer mining claim; and (3) that said company is the owner of the Ella Quartz lode mining claim, which was located June 8, 1897, and embraces a part of the ground included in said mineral entry.

Since said appeal was transmitted to this Department Louis Frank and Charles B. Lowenson have also filed a similar protest against said mineral entry, except that these protestants claim to be the owners of the Cincinnati lode claim, which was located November 6, 1899, and embraces a part of the ground included in said mineral entry. There has likewise been filed the protest of Edwin L. Mayo and James T. Finlen, which is practically the same as the last mentioned, excepting that the protestants claim to be the owners of the Mildred Mayo lode claim which was located December 13, 1899, and conflicts with said entry.

The two protests last named were not acted upon by your office but were transmitted to the Department for consideration in connection with the appeal of the Meaderville Mining and Milling Company.

The land embraced in said mineral entry was located as a placer mining claim February 22, 1880, by Erastus A. Nichols, S. E. Nichols and George F. Marsh, and the claim was subsequently conveyed to Saly Raunheim who, on July 16, 1881, made application at the local land office for a patent therefor. Notice of such application was duly given and no adverse claim being filed during the time prescribed by law, Raunheim made payment for the land and his application was passed to entry by the local officers and patent certificate issued to him May 23, 1882. The land had been returned as mineral by the surveyor-general, and that officer had certified that six hundred and fifty dollars had been expended upon the claim in labor and improvements by the

applicant and his grantors. Other proofs made before the entry and supplemental proofs made thereafter, in January 1883, tended to show an expenditure of more than five hundred dollars in developing the claim, and that it was valuable as placer mining ground and had no special value for any other purpose. These proofs contained sufficient evidence of the character of the land, of discovery of valuable placer mineral deposits therein and of the required expenditure in the development of the claim to warrant passing the entry to patent. It is not asserted that the existence of any of the veins or lodes claimed by protestants was known at the time of the application for a placer patent in 1881, and none of the protestants claim under a lode location made prior to 1897, when the land was embraced in a subsisting mineral entry, which had been duly shown upon the records of the local land office for a period of fifteen years. This entry had also been sustained by a local court, by the supreme court of Montana (6 Mont., 167), and by the supreme court of the United States (132 U. S., 260), against the Betsy Dahl lode claim in a suit instituted in 1882 and closed in 1889. That the existence of this entry and the result of said litigation were well known throughout the community in the vicinity of the claim at the time when the lode locations under which protestants claim were made, is fully shown by the records of this Department. It also appears that the right and title of Raunheim, acquired by this entry, has long since been conveyed to others. From this statement it is manifest that the protestants are not entitled to equitable consideration, and considering the original and supplemental proofs submitted by the entryman, the litigation had respecting the entry, and the lapse of so many years since the entry was made, the Department is of opinion that the protestants should not now be permitted to call in question the character of the land or the entryman's compliance with the mining laws. (*Reins v. Raunheim*, 28 L. D., 526.)

The decisions of your office dismissing the protest and supplemental protest of the Meaderville Mining and Milling Company are affirmed, and the protests of Louis Frank and Charles B. Lowenson and of Edward L. Mayo and James T. Finlen are hereby dismissed.

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#### MINING CLAIM—ADVERSE—NOTICE OF APPLICATION.

##### GROSS ET AL *v.* HUGHES ET AL.

The statutory provisions limiting the time within which an adverse claim may be filed are mandatory, and the Land Department is without authority to extend said period.

The notice of application required to be posted on a mining claim is an integral and essential part of the notice of such application, which the statute requires to be contemporaneously posted for sixty days on the claim, and in the local land office, and to be published in a newspaper. If any one of these three notices is insufficient, they are all rendered valueless.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 5, 1900.* (E. B., Jr.)

Thomas Gross and Harry M. Lillie claimants of the Bonanza lode mining claim, survey No. 12388, have appealed from the decision of your office dated June 8, 1898, refusing to accept and file certain papers offered as an adverse claim against the application of T. W. Hughes and others for patent to the Daisy Douglas lode mining claim, survey No. 12016, Leadville, Colorado, land district.

It appears that the period of publication of notice of said application expired April 11, 1898; that on April 15, 1898, the said papers were received by mail at the local office, and that the local office refused to accept and file the same, and returned them to the Bonanza claimants, because not presented during the period of publication. Upon appeal by the Bonanza claimants the action of the local office was affirmed by your said office decision.

In an affidavit filed May 23, 1898, by one C. R. Fuller who, as attorney in fact of the Bonanza claimants, prepared and made oath to the papers offered as an adverse claim, it is stated that the same were on April 9, 1898, deposited in the Guffey, Colorado, post office, in an envelope addressed to the register of the land office at Leadville, Colorado, and duly registered, and stamped for special delivery; that they were received by the postmaster at Leadville April 10, 1898, as shown by the return registry receipt; that they were taken the same day to the local land office for delivery but as the local office was closed the package could not then be delivered and a notice that it was held at the post office awaiting delivery was placed under the door of the local office; and that on April 9, 1898, affiant also telegraphed the register that he had mailed to him the package containing the papers intended to be filed as an adverse claim.

The local officers report that they had no knowledge "except by telegraph," that said papers had been mailed to them, until April 15, 1898, when the same was delivered at their office by an employee of the Leadville post office, although they had, in the meantime, called regularly twice each day at the post-office; and that their office was closed April 10, 1898, because that day was Sunday.

The Bonanza claimants contend in their appeal to the Department that under the circumstances alleged the papers received April 15, 1898, by the local office should be allowed to be filed as an adverse claim as received within the period of publication.

There is no dispute as to the facts in this case. Assuming them therefore, to be as stated in the said affidavit and the report of the local officers, the decision of your office must be affirmed. April 11, 1898, the last day of publication upon the said application, was the last day upon which an adverse claim against the same could be filed. The Bonanza claimants having waited until within two days of the close of the period

of publication, and then choosing to entrust the said papers to the mails, took all the risk of delay and miscarriage incident to that means of delivery, within that brief time, to the local land office. As a result they were not delivered there until four days after that period had expired. The presentation of the papers there on Sunday, a day on which the office was lawfully closed availed nothing. The provisions of section 2325 and 2326 of the Revised Statutes limiting the time within which an adverse claim may be filed to the close of the period of publication are mandatory, the former section, indeed, providing that if no such claim shall have been filed in the local office at the expiration of that period, it shall be assumed that none exists. The land department is without authority to extend that period to include a single additional day. The telegram notifying the register that the papers had been mailed did not in anyway affect the case. It imposed no new duty upon the local officers, or either of them. It was in no sense an adverse claim under the statute, nor can it serve to excuse the Bonanza claimants' failure to file such a claim within the time limited by the law. Acceptance or filing of the said papers was properly refused. The decision of your office is accordingly affirmed.

May 23, 1895, the said papers and an additional affidavit by said Fuller were filed in the local office as a protest against the said application for patent, and on August 26, 1898, a further affidavit of protest by Fuller was filed there. The protest was forwarded by the local office to your office without action. It was not considered by your office, but it was said in the decision appealed from that upon final determination of the matter therein passed upon, the papers filed as a protest would be returned to the local office for appropriate action. In regular procedure the said protest would first be considered by the local office, but in view of the action already taken and to avoid unnecessary delay it will now be considered here.

The said protest is defective in that it is uncorroborated. It contains an allegation, however, which if proven would require new notice of the said application by posting and publication. The allegation referred to is that the notice of said application posted on the Daisy Douglas claim was type written and was posted thereon at least sixty days before publication of notice in a newspaper was commenced, and that by the time such publication commenced the notice so posted

was completely obliterated and could not be read by anybody and that (therefore) no notice was posted at the mine contemporaneous with the advertisement as published in the newspaper.

(The notice of application required to be posted on a mining claim is an integral and essential part of the notice of such application, which the statute, section 2325 of the Revised Statutes, requires to be contemporaneously posted for sixty days on the claim, and in the local land office, and to be published in a newspaper. If any one of these three notices is insufficient, they are all rendered valueless.) Here the

allegation made as to the notice posted on the claim, would, if true, render all the notices valueless.

You will allow the Bonanza claimants sixty days from notice hereof within which to file in your office evidence duly corroborative of the said allegation. If they shall file such evidence within the time allowed you will order a hearing to determine the facts relative to such allegation; otherwise you will dismiss the protest.

The allegation of the protest that in eight numbers of the newspaper in which the notice of said application was published a foot-note thereto erroneously gave the year as 1897, instead of 1898, is not material. The notice was actually published in the latter year. The error was therefore apparent and could not have misled any one. Such foot-note was, furthermore, no proper part of the notice. See *Draper et al. v. Wells et al.*, 25 L. D., 550.

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MINING CLAIM—REINSTATEMENT OF ENTRY—ADVERSE RIGHTS.

GAFFNEY ET AL. *v.* TURNER ET AL.

A mineral entry regularly canceled should not be reinstated in the absence of posted and published notice of the application therefor, in the same manner, and for the same time, that notice of an original application for patent is required to be given, and then only if it appears that no adverse claim exists, or, if adverse proceedings have been instituted that they terminated favorably to the applicant. The ruling announced in *Barklage et al. v. Russell*, 29 L. D., 401, as to the proper construction of section 2332 R. S., cited and followed.

A hearing should not be ordered on questions involving annual expenditure on a mining claim, and the alleged relocation thereof by reason of failure to perform such expenditure.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) February 5, 1900. (E. B., Jr.)

June 20, 1883, George B. Turrell, as trustee, by Jasper A. Viall his attorney in fact, filed application for patent to the Alice Bell lode mining claim embraced in survey No. 1223, Helena, Montana, land district, gave notice thereof by posting and publication, commencing July 11, 1883, and, on December 22, 1883, was allowed to make entry of the claim. November 12, 1885, certain evidence essential to the approval of the entry was called for by your office. November 8, 1887, the required evidence not having been furnished, your office, upon the report of the local office that claimant had been duly notified of the requirements, held the entry for cancellation, allowing claimant, however, sixty days from notice thereof within which to furnish the required evidence. Said Viall having been notified personally, and also by registered letter, of the action of November 8, 1887, and no response thereto having been made, the entry was canceled by your office February 8, 1888.

August 28, 1897, Davis C. Turner filed a petition for the reinstatement of the entry, therein alleging, among other things, that himself

and the estate of one John Viall, deceased, of which he is the administrator, are the sole owners of the said claim and have been such since October 23, 1885; that he is informed and believes that the local land office gave notice to said Jasper A. Viall, who had previously been the attorney in fact of said Turrell, trustee, of the requirements made in your office letter of November 12, 1885, but that the trusteeship of Turrell and the attorneyship in fact of said Jasper A. Viall had ceased long prior to that date; that petitioner was not informed that any additional evidence had been called for, nor that the entry had been canceled, until in June, 1897, but believed, prior to that time, that the entry was intact and that patent had issued thereunder; and that from the location of the claim in 1880, petitioner and the estate of John Viall and their grantors have been in the open, exclusive and undisturbed possession of the said claim and have been continuously working and developing the same. Petitioner also tendered therewith the additional evidence called for November 12, 1885, and prayed that the said entry be reinstated and passed to patent. Upon consideration of the said petition, and it appearing that the evidence filed therewith answered the requirements theretofore made by your office, and that no application for the land embraced in the said claim was pending, your office on October 22, 1897, reinstated the entry thereof.

February 19, 1898, there was received in your office a telegram from one John Berkin stating that a protest against the issuing of patent on said entry was then in course of preparation and requesting suspension of action until the protest should be received. February 23, 1898, William B. Gaffney for himself, John Berkin and John Lundgren, filed a protest against the issuance of a patent to the said lode claim, therein alleging, among other things, that the claimants of the said Alice Bell lode claim had failed to perform thereon the necessary annual assessment work for the year 1896 and previous years; that the same therefore became and was, on March 23, 1897, vacant and unoccupied public mineral land, and subject to location as such; and that on the last mentioned date protestants entered upon and duly relocated the same as the Sunlight lode claim and have since been in the continual occupation and possession thereof, have complied with the mining laws in respect thereto, and now are the legal and rightful owners thereof. Therewith was filed a duly certified copy of the notice of the location of the Sunlight claim on the date alleged, which recites that the same is "a relocation of Alice Bell quartz lode mining claim which was unrepresented for the year 1896 and prior years."

Thereupon your office, on March 25, 1898, ordered a hearing "to determine whether, as a fact, the Alice Bell claim was, on March 23, 1897, the date of the Sunlight location, subject to relocation as provided by section 2324 U. S. R. S." A hearing was accordingly had commencing June 4, and ending July 5, 1898, at which both parties appeared, offered testimony and submitted argument. The decision of the local office dated November 18, 1898, found for the protestants and recom-

mended the cancellation of the entry. Upon appeal by the claimants of the Alice Bell your office, on May 23, 1899, while affirming the findings by the local office that those claimants did no work upon or for the benefit of that claim during the year 1896 and had not resumed work thereon prior to the relocation of the same as the Sunlight claim in March, 1897, yet found and held that the Alice Bell claimants had been in possession of their claim and had worked the same as required by law, from the cancellation of the entry in 1888 up to and including the year 1895, and that having thus held and worked the same for a period longer than that prescribed by the statute of limitations for mining claims of the State of Montana, which period your office decision found to be five years, they had established in themselves a right to patent thereto under section 2332 of the Revised Statutes prior to the relocation of the same as the Sunlight and notwithstanding such relocation, and therefore, in effect, dismissed the said protest and held the entry intact. Appeals by both parties bring the case to the Department.

It appears that the Alice Bell lode claim was located July 7, 1880, by George Spencer; that Spencer conveyed the claim August 2, 1880, to Alice B. Viall and Davis C. Turner who, together with Jasper A. Viall, husband of Alice B. Viall, in turn conveyed it, on February 8, 1882, to said Turrell as trustee; that, on December 7, 1881, said Turrell, claiming to act as trustee, appointed Jasper A. Viall his attorney in fact "to make all such notices, proofs, publications, payments, surveys, etc., as may be necessary to obtain a patent for the Alice Bell lode mining claim."

The trust deed of February 8, 1882, or a copy thereof, is not on file, but from affidavits of said Turrell, Davis, and Jasper A. Viall, it appears that they and certain others were the beneficiaries thereunder, the purpose of the trust being to promote the development of the claim and secure patent therefor. Affidavits stating that these persons were beneficiaries under the deed of trust were filed June 20, 1883, with the application for patent. In an affidavit by Turrell, filed on that date, it is stated that the Alice Bell claim was conveyed to him in trust by Alice B. and Jasper A. Viall and Davis C. Turner on September 1, 1880. It does not appear, however, that such a conveyance was ever recorded. Although the power of attorney to Viall appears to have been given long before Turrell is shown by the record evidence on file to have had authority as trustee to make the same, yet, inasmuch as he expressly affirmed and ratified the power of attorney after he became trustee, and as it has all along been conceded by the claimants of the Alice Bell and by protestants that Viall was duly appointed, his alleged attorneyship in fact will not now be questioned.

On its face the power to him was to continue until he should obtain a patent for the Alice Bell claim. Before the land department he was the duly authorized agent of the parties interested to do all things necessary in their behalf in the procuring of a patent. The land depart-

ment dealt with him alone in that behalf and the notice of the requirements of November 12, 1885, and of the action of November 8, 1887, were properly served on him. The land department had no notice of a change in the ownership of the claim or that the title thereto was in other than Turrell, or that Vial's attorneyship in fact had terminated, between the date of entry and August 27, 1897, when the said petition of Turner was filed. Notice by the land department to Jasper A. Vial was, under these circumstances, notice to all parties interested in the claim, and the petitioner will not be heard to allege for himself or the estate of John Vial, deceased, that they, or either of them, did not have notice of the said requirements and action. The entry was therefore properly canceled under the rules and practice of the land department for failure to furnish necessary evidence. This is conceded by counsel for the petitioner. The proceedings for patent were thereby brought to an end, and all rights obtained by such proceedings were terminated. The claimants of the Alice Bell were thereby relegated to their right of possession of the claim, the maintenance of which depended thereafter, the same as if no entry of the claim had ever been made, upon compliance with the mining laws governing such right.

For more than nine years after the cancellation of the entry the right of possession of the claim depended wholly upon compliance with those laws. If, during that period, the owners of the claim failed to comply therewith for any calendar year the claim became thereby subject to relocation, unless they resumed work upon it thereafter and before such relocation. Because of the possibility of such failure and a legal relocation of the claim during the long period between the cancellation of the entry and the decision of your office reinstating the same, no reinstatement thereof should have been made or allowed in the manner here shown—certainly not in the absence of posted and published notice of the application therefor in the same manner and for the same time that notice of an original application for patent is required to be given, and then only if it appeared that no adverse claim existed, or, in the event of the institution of adverse proceedings that the same terminated favorably to the petitioner. The decision of your office reinstating the entry in the manner shown was therefore error and the same must be vacated and annulled, unless, as held by your said office decision of May 23, 1899, a right to patent to the Alice Bell claim is established, notwithstanding, in the Alice Bell claimants, under section 2332 of the Revised Statutes, and regardless of the alleged relocation thereof as the Sunlight claim by Gaffney and others during the period that the entry remained canceled of record.

The meaning and intent of the said section 2332 were carefully considered in the recent case of *Barklage et al. v. Russell* (29 L. D., 401). Speaking therein of that section the Department said:

The section was not intended as enacted, nor as now found in the Revised Statutes, to be a wholly separate and independent provision for the patenting of a mining

claim. As carried forward into the Revised Statutes it relates to both lode and placer claims and being *in pari materia* with the other sections of the Revision concerning such claims is to be construed together with them, and so as, if possible, that they may all stand together, forming a harmonious body of mining law. Section 2325 points out with some detail the steps necessary to secure patent, requiring, among other things, an application under oath, notice thereof, proof of the expenditure of \$500 upon the claim by the claimant or his grantors, and payment for the land. None of these requirements is mentioned in section 2332, but it by no means follows, upon the simple filing by a claimant of the proof indicated in the latter section, without compliance with any of the requirements of section 2325, that patent must be issued to him. Properly construed with section 2325 and other sections of the Revised Statutes upon the same subject, it is believed that the main purpose of section 2332 was to declare that evidence of the holding and working of a mining claim for a period equal to the time prescribed by the local statute of limitations for mining claims shall be considered as sufficiently establishing the location of the claim and the applicant's right thereunder "in the absence of any adverse claim." This section does not, in itself, prescribe any method for ascertaining whether an adverse claim exists. Adequate provision for bringing adverse claims to the attention of the land department is found in the provisions of section 2325, which require notice of the application for patent to be posted and published, and declare that if no such claim be filed in the local land office during the period of publication it shall be assumed that none exists. Whatever else section 2332 was intended to dispense with in the proceedings for procuring a patent to a mining claim, it was certainly not intended to dispense with the requirements of section 2325, whereby the existence of an adverse claim is made known to the land department, and due protection is accorded to adverse rights.

The views of the Department just quoted from that case are decisive against the construction of section 2332 and the application to the case at bar which are given to it by your office decision of May 23, 1899. The same reasons exist in the latter case as existed in the former for declining to construe that section as dispensing with those requirements of section 2325, stated in the above decision, "whereby the existence of an adverse claim is made known to the land department and due protection is accorded to adverse rights." Such a construction of section 2332 as is proposed in your office decision would not give to such adverse rights as are here alleged by Gaffney and others the measure of protection which the mining laws contemplate they should have.

It was not intended, however, that adverse claims to the possession of mineral lands should be litigated in the land department. The determination of the right of possession to such lands, between adverse claimants, however or whenever the adverse claim may be alleged to have had its origin, is committed by the mining laws to the courts alone. The land department has nothing to do with settling questions as to the performance of annual expenditure upon mining claims, nor of alleged relocation thereof by reason of failure to perform such expenditure, arising under section 2324 of the Revised Statutes (Cain *et al. v. Addenda Mining Co.*, on review, 29 L. D., 62; P. Wolenberg *et al.*, Id., 302; and Barklage *et al. v. Russell*, Id., 401). The ordering of a hearing by your office in this case for the purpose hereinbefore stated

between the Alice Bell and the Sunlight claimants was therefore error, and no importance attaches thereto or to any of the proceedings thereunder in the consideration of the case.

Your office decision of October 22, 1897, reinstating the said entry is hereby vacated and that of May 23, 1899, reversed, in accordance with the views herein expressed.

The claimants of the Alice Bell will be at liberty to present a new application for patent for said claim, in which event the claimants of the Sunlight will have opportunity to assert their alleged adverse claim and to have the controversy settled and decided by a court of competent jurisdiction, as contemplated by law.

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PATENT—RECONVEYANCE—MINERAL LANDS.

WALTER TRYON.

For the purpose of enabling the United States, without resort to judicial proceedings, to convey ground by mineral patent, which by mistake has been included in a homestead patent, a voluntary reconveyance of the land may be accepted by the Department.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 6, 1900.* (C. J. W.)

December 15, 1897, Walter Tryon made mineral entry No. 493, survey 3463, for the Bullion Quartz Mine, at Stockton, California, situate partly in the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 10, T. 2 N., R. 13 E., M. D. M., which had been embraced in patent issued to Frederick Costa, November 10, 1884, on his homestead final entry made April 26, 1884.

April 4, 1898, your office directed the local officers to notify the mineral claimant that he would be allowed sixty days from notice in which to show cause why his entry should not be canceled to the extent of the conflict with said homestead entry.

August 1, 1898, the local officers transmitted to your office the sworn answer of said Walter Tryon, corroborated by the affidavits of a number of persons, including one made by Frederick Costa, the homestead entryman, setting forth that at the time of final entry by Costa, and long before that time, the ground embraced in Tryon's mineral entry was known and recognized as mineral land; that Costa knew it to be mineral land, located and operated as such, and that before the submission of his final proof the said Costa, who, together with one Bruner, owned and operated an adjoining mine on the same vein, joined with Tryon and other mineral owners in employing a United States deputy surveyor (one A. B. Beauvais, since deceased,) who went upon said land and, under instructions of the surveyor-general of California, surveyed and segregated the mining lands from the agricultural lands embraced in the homestead application of said Costa, and made official return of said segregation survey to the United States surveyor-

general's office, at San Francisco, California, and made and filed in the United States land office at Stockton, California, a segregation plat and map of the mineral lands and mining claims contained within the homestead application of said Costa. This survey was made with a full understanding and agreement with Costa that his final proof on his claim was not to include said mineral land so surveyed. Relying upon this agreement and understanding, the mineral applicant was not present when Costa afterwards submitted his final proof, and did not learn of the mistake made until after patent had issued on the homestead entry.

It appears that Costa had but an imperfect knowledge of the English language, and was ignorant of the methods of procedure in the land office, and supposed that his final proof applied only to the parts of the subdivisions of the lands applied for shown by the survey to be non-mineral, and that it was unintentional and the result of mistake upon his part that his final proof embraced a portion of the mineral land of Tryon's claim, and failed to exclude all the mineral land, as shown by said segregation survey. Patent thereafter issued to Costa, including a portion of Tryon's claim, which Costa did not claim or desire to include in his entry. As soon as his attention was called to the mistake, he, by deed, promptly conveyed to the mineral claimant the land so erroneously embraced in his final entry and patent, and the said mineral claimant, Walter Tryon, thereupon conveyed the same by deed to the United States, which deeds were both duly recorded in Calaveras county, California, September 22, 1897.

The affidavit of Costa filed with the sworn answer of Tryon is an admission of every material matter set up in said answer.

On consideration of the record by your office, September 1, 1898, together with your answer and affidavits accompanying it, your office expressed the opinion that it was error upon the part of the local officers

to receive and file the application for patent for the Bullion Quartz Mine, a portion of the ground having been theretofore entered by the homestead claimant, Costa.

You further held, in substance, that a deed executed for the purpose of reinvesting the United States with title was not operative until the same was accepted by the United States, and that this would not be done unless it was shown that some interest existed demanding such reinvestment of title in the United States. The following statement is then made as the basis for declining to accept the deed:

No showing has been made that the ground in conflict with the patented homestead entry was known to be mineral at or prior to February 23, 1878, the date of the homestead final entry.

The mineral entry was thereupon held for cancellation, to the extent of the conflict.

December 29, 1898, the local office having reported service of notice on the mineral entryman of said decision of September 1, 1898, and that no action had been taken, and the time for appeal having expired, your

office canceled said mineral entry as to said conflict. From this action the mineral claimant has appealed, and, although said appeal is irregular, yet, as the case is proceeding *ex parte*, and the rights of no third party are involved, the record will be considered with a view to a proper disposition of the case on its merits, and the correction of an error in your office decision of September 1, 1898, rejecting the showing made by Tryon. Reference has been previously made to the ground on which your office held the showing insufficient.

If the premise were correct, the conclusion based thereon would be proper, but the premise in its most essential particular is erroneous, viz: in finding that Costa's final homestead entry was made February 23, 1878, when, in fact, it was made April 26, 1884, as is shown by the tract-book on file in your office, and the evidence, as well as the admission of Costa, shows that before it was made he knew all about the mineral character of the land. This error of fact doubtless resulted from taking the date of Costa's original homestead application as the date of final entry, but be that as it may, the premise is incorrect and the conclusion falls with it.

The facts presented by the record show that the ground in question was known mineral land at the time the homestead claimant made entry and obtained his final receipt under the homestead laws. It follows that patent was improperly issued upon said entry, a matter which could have been corrected through a suit by the United States for the cancellation of the patent and the recovery of title. Costa, however, is not claiming the land, but admits that the same was patented to him as the result of mistake, which he has undertaken to correct as far as he can, by conveying said ground to the mineral claimant.

Thus, by the voluntary acts of the homestead entryman and the mineral claimant, all has been accomplished that would have been, if suit had been instituted by the United States for the cancellation of the patent and recovery of title. Why, then, should the deed not be accepted? True, it would have been a shorter proceeding if Costa had conveyed directly to the United States, instead of through the mineral claimant, but it is not believed that this constitutes ground upon which to decline the acceptance of the deed.

It is made clearly to appear that the parties have acted in good faith and have attempted to reconvey title to the United States for the purpose of enabling the United States to convey ground by mineral patent which had been previously included in a homestead patent as the result of a mistake, without resort to judicial proceedings therefor. There appears to be no valid reason why the deeds reconveying the ground in question to the United States should not be accepted for the purposes aforesaid, and patent issued to the mineral claimant in accordance with his entry.

Your office decision is accordingly reversed, and the aforesaid deed of Walter Tryon, reconveying to the United States title to the ground conveyed by Costa to said Tryon, for the purpose of curing the mis-

take in including it in his (Costa's) homestead entry, will be accepted, and said mineral entry will be reinstated, so as to correspond with its original status. If no other objection to said mineral entry appears, the same will be approved for patent in its order.

RAILROAD RIGHT OF WAY—RESERVATION IN FINAL CERTIFICATE  
AND PATENT.

DENVER AND RIO GRANDE R. R. CO. *v.* CLACK.

A reservation of a railroad right of way, granted under the general act of March 3, 1875, in final certificates and patents issued for lands traversed thereby is not necessary, and should not be inserted.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 6, 1900.* (H. G.)

The register and receiver of the local land office at Montrose, Colorado, on September 12, 1895, issued to N. Ernest Clack, cash certificate No. 1004 (Ute series), under the acts of Congress providing for the sale of timber and stone lands (acts of June 3, 1878, 20 Stat., 89, and August 4, 1892, 27 Stat., 348), for the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 33, T. 4 S., R. 3 E., Ute meridian, in the said Montrose, Colorado, land district. This certificate bears upon its face the following notation made by the local office: "Subject to the right of way of the D. & R. G. Ry. Letter 'F', January 5, 1893." The letter of your office referred to enclosed map showing the location of the road of said company in the vicinity of the land described, filed under the act of Congress of March 3, 1875 (18 Stat., 482), and approved by the Secretary of the Interior, December 20, 1882.

Your office in its decision of February 16, 1897, directed that said company, the appellant here, be allowed the period of thirty days within which to show cause why the reservation or notation endorsed on the certificate should not be canceled.

The said company responded to said rule, asserting that the notation was made under the rules of this department existing at the time the said certificate was issued, which ruling was changed by the circular of November 27, 1896 (23 L. D., 458), and complaining of said ruling.

The answer to the rule was passed upon by your office in its said decision of July 10, 1897, holding that the case could not be excepted out of the provisions of said circular, and holding for cancellation the notation or endorsement on the cash certificate of the entryman.

The said company has appealed from the said decision of your office.

The entryman has acknowledged service of a copy of the answer of the company to the rule *nisi* and also of a copy of the appeal of said company.

The decision of your office is based upon the departmental decision in the case of Dunlap *v.* Shingle Springs and Placerville R. R. Co., (23

L. D., 67) which led to the amendment of the rule theretofore existing by the circular of November 27, 1896 (23 L. D., 458). The said decision is to the effect that,

A railroad right of way under the act of March 3, 1875, is fully protected by the terms of the act as against subsequent adverse rights, and a reservation of such right of way, in final certificates and patents issued for lands traversed thereby, is therefore not necessary, and should not be inserted (syllabus).

Neither the decision nor the circular includes cases where the right of way has been granted under special acts. The right of way, according to the statement in the decision appealed from, was granted under the general act of March 3, 1875, and the circular is still in force as to rights of way so granted. It was remarked in a recent departmental decision that there is room for a difference of opinion respecting the merits of the distinction made by said circular between a grant by special and by general act, but it was held that while it was in force it should be followed (*Oregon Short Line Ry. Co. v. Harkness*, 27 L. D., 430, 431).

The decisions were fully reviewed in the case of the Southern Ute Allotments (26 L. D., 77, 80) and the distinction made in the circular was followed, the appellant in this case being the company applicant here, and it was held that a clause should be inserted in the patent made to Indian allottees setting forth that the conveyance if made subject to the right of way granted to said company by the special act of June 8, 1872, which does not in terms protect the company's right, but this decision is not in point here, as the map of location here in question was filed and approved not under the special act of June 8, 1872, but under the general act of March 3, 1875.

It appears from the statement of your office that the notation upon the certificate issued to the entryman, excepting the right of way to the Denver and Rio Grande Railway Company, the predecessor in title to the appellant, was made under regulations then in force, but as under the circular now in force, modifying the former regulations in accordance with departmental decisions, no such reservation or exception can be inserted in the patent to the entryman, the notation on the cash certificate of entry was properly directed by your office to be canceled.

The decision of your office is affirmed.

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

##### BURTON ET AL. *v.* DOCKENDORF.

The right to receive a confirmatory patent under section 4, act of March 3, 1887, by one claiming under a contract of purchase with a railroad company, is not defeated by a supplemental contract between such purchaser and the company, made prior to the application for patent under said section, where the intent of said supplemental contract is merely to postpone the times for making the remaining annual payments, and to prescribe the manner of adjusting the rights and

obligations of the parties under the original contract, in the event of the failure of the company's title by reason of a decision in a suit then pending, but not commenced until after the original contract was entered into, if the adjustment so contemplated has not been made.

The decision in *Olson v. Traver et al.*, 26 L. D., 350, in so far as in conflict with the conclusion herein reached is overruled.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) February 6, 1900. (F. W. C.)

Appeals have been filed on behalf of L. S. Burton, William Carroll, L. L. Bassett and E. Riddell from your office decision of April 18, 1899, rejecting their several applications covering the SW.  $\frac{1}{4}$  of Sec. 5, T. 96 N., R. 42 W., Des Moines land district, Iowa, and awarding Alfred Dockendorf the right to complete homestead entry thereof.

The tract in question is within the primary limits of the grant to the State of Iowa made by the act of May 12, 1864 (13 Stat., 72), to aid in the construction of a railroad from Sioux City, in said State, to the south line of the State of Minnesota, which grant was by the State of Iowa conferred upon the Sioux City and St. Paul Railroad Company. The tract was patented to the State for the use and benefit of said railroad company, but was never patented to the company by the State. The tract is also opposite that portion of said line of road which was duly constructed and the completion of which, in sections of ten miles each, was duly certified to by the governor of the State, and it is a part of the lands recovered by the United States in the suit brought against the Sioux City and St. Paul Railroad Company to recover and quiet title to lands erroneously patented to the State for the use and benefit of said company. This suit was brought in the circuit court of the United States for the northern district of Iowa, in October 1889, pursuant to the act of March 3, 1887 (24 Stat., 556), and a decree was rendered therein in favor of the United States at the October, 1890, term (43 Fed. Rep., 617), which was affirmed by the supreme court October 21, 1895 (159 U. S., 349).

In the notice opening these lands to entry those claiming rights in any portion of the lands under the act of 1887, were required to come forward during the period of publication and give notice of their claims. Acting thereunder, L. L. Bassett and E. Riddell, claimants through a contract for the purchase of this tract made with said railroad company, filed in the local land office, on January 16, 1896, an application for the confirmation of their title under section four of the act of 1887, and duly published notice of their intention to offer proof in support thereof.

On February 27, 1896, the day set for the opening of these lands, applications to make entry of this tract under the homestead law were made by a number of persons, among them being Burton and Carroll, two of the appellants. On March 8th following, Dockendorf also made application to make homestead entry of this tract. On the day set for

the offering of proof under the application for confirmation of Bassett and Riddell, all the homestead applicants defaulted excepting Burton, Carroll and Dockendorf, and the hearing proceeded.

From the evidence then taken it appears that on November 12, 1887, Rachel B. Callvert entered into a written contract with said railroad company for the purchase of this tract at the stipulated price of \$2820, to be paid with interest in ten annual installments, the contract also containing the following stipulation:

And it being mutually understood, that the above premises are sold to said second party for improvement and cultivation, the said second party hereby further agrees and obligates herself & her heirs and assigns, that all improvements placed upon said premises shall remain thereon, and shall not be removed or destroyed until final payment for said lands. And further, that she will punctually pay said sums of money above specified, as each of the same becomes due; and that she will regularly and seasonably pay all such taxes and assessments as may be lawfully imposed upon said premises.

By two subsequent assignments the contract was transferred to L. L. Bassett and E. Riddell. They and their predecessors in interest have paid \$1977.56 to the railroad company upon the purchase price for the land and have paid the taxes thereon, and have cultivated and improved between one hundred and thirty-five and one hundred and forty acres thereof.

Upon this record the local land officers sustained Bassett and Riddell's application for confirmation and rejected the homestead application.

Carroll and Dockendorf appealed, and by your office decision of April 18, 1899, the decision of the local officers was reversed, upon the ground that Bassett and Riddell had entered into a supplementary agreement with the railroad company identical with that considered by this Department in the case of *Olson v. Traver et al.* (26 L. D., 350), and therefore were not at the time of their application for confirmation purchasers within the purview of section four of the act of 1887. Your said office decision then determined the rights of the several applicants under the homestead law and awarded the right of entry to Dockendorf because he was a settler upon this tract at the time of the opening, while the other parties rest alone upon the tender of applications to enter on the day of the opening.

In the case of *Olson v. Traver et al.* it was held by this Department that a confirmatory patent under section four of the act of 1887 can not be given to a purchaser of railroad lands whose contract of purchase has been abrogated at the time of the application for confirmation, and that the supplementary contract made by Olson was an abrogation of his original contract of purchase.

The supplementary contract here in question contains the following stipulations:

Witnesseth, that the parties hereto do hereby mutually agree that the said agreement hereinbefore referred to, be, and the same is, hereby modified as follows:

The time for payment of the several installments of principal and interest mentioned in said agreement now remaining unpaid is hereby extended to the expiration

of ninety days from and after the date of filing in the office of the clerk of the supreme court of the United States of a decision in that court in the cause hereinbefore referred to, provided that such extension shall not exceed five years from and after January 1, 1893; and provided further, that the installments of principal and interest mentioned in said original agreement, the time of payment of which is hereby extended, shall bear interest from the times the same became or shall become due under said original agreement until paid, at the rate of six per cent per annum.

The party of the second part shall and does hereby agree, on or before October first in each year, during the existence of said original agreement, and this modification thereof, and as the same shall become due, to pay or cause to be paid all taxes and assessments imposed upon said premises.

That in the event of a decision in the above entitled action in the United States supreme court adverse to said Sioux City and Saint Paul Railroad Company as to the title to the said land above described, the said parties of the second part will within ninety days thereafter surrender said original agreement and this modification thereof to the parties of the first part, at St. Paul, Minnesota, and receive therefor from the said parties of the first part, or either thereof, the amount which has then been paid on said agreement on account of principal and interest mentioned in said original agreement, the same to be received and accepted by said second parties in full settlement of all their rights under said original agreement and this modification thereof, and as a release of any and all claims suffered by said parties of the second part, their heirs, executors, administrators or assigns, by reason of the failure of the title of said parties of the first part to said land.

That except as herein stated, all the terms and conditions of said original agreement shall continue and remain in full force.

In the decision in the Olson case it was said :

The supplementary contract clearly provided for the annulling and surrender of the original contract and an abandonment of Olson's rights thereunder, on the happening of a stated contingency, and for the payment to him of a liquidated sum for said surrender and abandonment. After the supreme court on October 21, 1895, decided that the company had no title to the land, under the terms of the supplementary contract and within the time fixed therein, in contemplation of law, the abrogation and annulment of the first contract, and the abandonment of Olson's rights thereunder, became fixed, determined and complete. In lieu thereof he had only the supplementary agreement with the company, which does not evidence a purchase by him from the company, but an annulment of a claim of purchase.

The first question therefore for determination is the effect of the supplementary contract entered into between Bassett and Riddell and the railroad company March 23, 1893, which is identical with that in the Olson case, although not so fully set forth in the decision in that case as it is here. If that decision is adhered to, the decision of your office must necessarily be affirmed, so far as it denies Bassett and Riddell's application for confirmation. The question is an important one, and has been fully and exhaustively presented in oral argument and by brief. After most careful consideration thereof, the Department is of opinion that the decision in the Olson case is wrong in respect to this matter.

The error in that decision was in holding that the supplemental contract worked, either directly or indirectly, an abrogation and annulment of the original contract and an abandonment of the purchaser's rights thereunder. Apart from the provision postponing the times for making the remaining annual payments upon the original contract, the

supplementary contract amounted only to a stipulation that, if the supreme court, in the suit then pending, should decide against the right of the company to retain these lands under its grant, the purchasers would, within a stipulated time, accept a fixed sum of money in satisfaction of all claim for damages suffered by them by reason of the failure of the company's title. Evidently its purpose was to postpone the times for the remaining annual payments, and to liquidate the damages which the purchasers might exact from the company in the event of a failure of its title, and to permit the original contract to stand as thus supplemented. The two contracts should be construed together as constituting one transaction, and when so considered. Bassett and Riddell are as much purchasers as though the supplementary agreement had not been made. The provisions contained in the latter might have been inserted in the original contract without in anywise taking from it the character of an agreement for the sale of the land.

Bassett and Riddell have a contract with the company for the sale of this tract which has not been fulfilled and on account of which they have a subsisting claim for damages against the company. That is just what they would have if the original contract had not been modified. The rule for measuring the damages may have been somewhat changed by the supplementary contract, but it did not, either directly or indirectly, work an abrogation, annulment or abandonment of the original contract. The latter continued to be the principal contract, while the supplementary agreement was secondary in its nature, and prescribed the manner of adjusting the obligations and rights of the parties under the principal contract in the event that the decision of the supreme court should render the company's performance of its obligations thereunder impossible. That adjustment has not been made. While the original contract can not be performed, it has not for that reason ceased to have any force or effect. That the parties did not intend that it should be altogether superseded by the supplementary contract is clearly shown by the provision in the latter "that except as herein stated, all the terms and conditions of said original agreement shall continue and remain in full force."

In the case of *Linkswiller v. Schneider*, in the circuit court of the United States for the northern district of Iowa (95 Fed. Rep., 203, 207), Judge Shiras, in passing upon the effect of one of these supplementary contracts, said:

But it is further contended on behalf of the complainant that because Schneider, after he had made the contract of purchase, entered into a contract with the railway company to the effect that if the supreme court should finally decide adversely to the right of the railway company to hold the lands under the grant, then Schneider would surrender his contract of purchase to the company upon payment to him by the company of all money received from him, this must be held to prove the bad faith of Schneider in originally entering into the contract of purchase. The assertion of such a contention surely shows the straits to which complainant is driven in his effort to make out this charge of bad faith on part of Schneider. This agreement, if it had been fully carried out and performed (which is not charged in

the bill), would only have had the effect to settle the question of damages as between the railway company and Schneider, but it would not in any way affect the right of the latter to secure the title of the land from the United States under the provisions of the acts of 1887 and 1896.

The *bona fides* of the purchase from the railroad company is assailed upon the ground that the purchasers were charged with notice of the infirmity in the company's title. A like contention was made in the case of *Schneider v. Liukswiller et al.* (26 L. D., 407), when it was before this Department, but after a careful examination thereof and of the proceedings of the legislative and executive branches of the State government relating to this railroad grant, the contention was held not to be well taken. Upon further consideration that view is adhered to.

When the Schneider case was afterwards before the circuit court, as before cited, Judge Shiras said upon this point:

To charge Schneider with being a purchaser in bad faith, it is necessary to hold that, when he made his purchase from the railway company, he ought to have foreseen the outcome of litigation between the United States and the railway company, which had not then been commenced, and which resulted in a decision which holds, not that the company did not earn the lands in question, and would not be entitled to them by a strict legal construction of the act of Congress making the grant, but that as the company did not build the entire line of road contemplated in the grant, and as it had in fact received the full number of acres it had earned, a court of equity would not permit the company to show that, as a matter of law, it had become entitled to the lands in O'Brien county.

From a review of the whole matter it is held that Bassett and Riddell are *bona fide* purchasers within the meaning of section four of the act of 1887, and the decision of your office is therefore reversed. The homestead applications of the other claimants will stand rejected.

#### HOMESTEAD CONTEST—ACT OF JUNE 16, 1898.

##### BURNS *v.* LANDER.

The provision in the act of June 16, 1898, requiring in case of a contest initiated against a settler, on the ground of abandonment at a time when the United States is engaged in war, an allegation in the affidavit of contest that the alleged absence of the settler was not due to his employment in the army, navy, or marine corps of the United States, is mandatory, and non-compliance therewith can not be cured by amendment after service of process in a contest to which the statute applies, and in which no appearance is made by the defendant.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) February 10, 1900. (A. S. T.)

On April 17, 1895, Frank Lander made homestead entry, No. 7761, for the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 9, T. 17 S., R. 2 E., Los Angeles, California, land district.

On July 6, 1898, Edward E. Burns filed his affidavit of contest against said entry alleging that Lander had wholly abandoned said

land and changed his residence therefrom for over two years, and that said tract is not settled upon and cultivated by said party as required by law.

After various attempts to get personal service of notice on Lander, Burns filed his affidavit alleging that Lander was a resident of South Dakota and asked for a new notice and an order of publication, which were duly issued, and service was had by publication, citing the parties to appear before a United States commissioner at San Diego, California, on January 6, 1899, and naming January 13, 1899, for the hearing before the register and receiver of the local office.

On the day fixed for the hearing the contestant appeared and submitted his testimony. The defendant made default.

The local officers recommended that Lander's entry be canceled. Notice of the action of the local officers was sent by registered mail, to Lander at Jamuel, California, his post-office address of record, but was returned unclaimed. No appeal was taken from the action of the local officers.

On September 21, 1899, your office rendered a decision remanding the case to the local office to the end that the contestant might amend his contest affidavit so as to make it conform to the requirements of the act of Congress approved June 16, 1898 (30 Stat., 473), and the circular of July 8, 1898 (27 L. D., 146), and Burns has appealed from that decision to this Department.

The act of June 16, 1898, provides—

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 a 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 hereafter 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.

This contest was initiated after the date of that act, and is based on an allegation of abandonment. The act clearly inhibits the initiation of a contest on the ground of abandonment at a time when the United States was engaged in a war, unless it be alleged in the preliminary affidavit or affidavits of contest that the settler's alleged absence from the land was not due to his employment in the army, navy, or marine corps of the United States. The statute is mandatory and compliance therewith cannot be dispensed with by the land department, nor can non-compliance therewith be cured by amendment after the service of process in a contest to which the statute applies and in which no appearance is made by the defendant. The United States was engaged in a war, within the meaning of this act, during a part at

least of the alleged period of abandonment, but the affidavit does not allege that the entryman's absence from the land was not due to his employment in the army, navy or marine corps of the United States. The affidavit was not sufficient. Notice of the contest was not given by personal service, and the defendant made no appearance. Without deciding whether there may be instances in which the affidavit may be amended, it is clear that it cannot be amended in this respect in cases like this.

The decision of your office, in so far as it holds that said allegation is a necessary prerequisite to the initiation of such a contest, is correct; but it was error to direct that the contestant be allowed to amend the contest affidavit and to use the evidence theretofore taken.

The decision of your office is therefore reversed, and said contest dismissed.

ISOLATED TRACT—ACT OF FEBRUARY 26, 1895.

AARON HARRIS.

If a tract of land becomes isolated by remaining unappropriated for three years after the surrounding land has been "entered, filed upon, or sold by the government," and entry is then made of said tract, it thereupon loses its status as an isolated tract; and if the entry is thereafter canceled said tract will not again become isolated until the expiration of three years from the date of cancellation.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 10, 1900.* (G. J. H.)

Aaron Harris has appealed from your office decision of May 13, 1899, denying his application to have the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 18, T. 21 N., R. 40 E., Spokane land district, Washington, offered at public sale, as an isolated tract, under section 2455 of the Revised Statutes, as amended by the act of February 26, 1895 (28 Stat., 687).

It appears that on April 20, 1899, Harris filed in the local office his application to have the above-described tract offered at public sale as an isolated tract, upon which the local officers, on April 26th following, reported that—

Hd. entry No. 9854 made June 5, 1895 by Vivian H. Hopson, for the SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  of Sec. 18, Tp. 21 N., R. 40 E., W. M., was this day canceled by relinquishment in this office.

We have compared the application with the records of this office, and as the tract applied for appears to come within the provisions of the act, we therefore respectfully recommend the allowance of Mr. Harris's application.

Your office, on May 13, 1899, as before stated, denied this application, for the reason that—

It is shown by the tract book that the said SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  Sec. 18, is surrounded by land which has been appropriated for more than three years last past, but the tract applied for could not be considered isolated or disconnected in the meaning of the statute until three years from date of the cancellation of H. E. No. 9854.

Section 2455 of the Revised Statutes, as amended by the act of February 26, 1895, under which Harris makes his application, provides as follows:

It shall be lawful for the Commissioner of the General Land Office to order into market and sell for not less than one dollar and twenty-five cents per acre any isolated or disconnected tract or parcel of the public domain less than one quarter section which in his judgment it would be proper to expose to sale after at least thirty days' notice by the land officers of the district in which such lands may be situated: *Provided*, That lands shall not become so isolated or disconnected until the same have been subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon, or sold by the government: *Provided*, That not more than one hundred and sixty acres shall be sold to any one person.

An examination of the records of your office shows, as stated in your office decision, that all of the tracts surrounding the forty acres in question have been "entered, filed upon, or sold by the government," the last two, the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 19, and the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 17, adjoining the tract applied for on the south and east, respectively, having been selected by the Northern Pacific Railroad Company on June 27, 1888, and patented to said company on May 17, 1894.

It is contended in the appeal that as the entryman who made homestead entry No. 9854, above mentioned, for the tract in question, had never complied with the homestead law as to residence and improvement, the land applied for should be considered an isolated tract notwithstanding the homestead entry of record. This matter has been several times considered by this Department, and it has been held that while land is covered by an unanceled homestead entry, it is not "subject to homestead entry," within the meaning of the first proviso to section 2455. (G. W. Allen, 26 L. D., 607; *Hand v. De Reiner*, id., 676.)

The last of the tracts surrounding the land in question were selected by the railroad company, as before stated, on June 27, 1888, and the homestead entry for this land was not made until June 5, 1895. It appears, therefore, that the tract applied for remained vacant, unappropriated public land for nearly seven years after the surrounding land had been "entered, filed upon, or sold by the government," and clearly became an isolated tract within the meaning of section 2455. The question therefore arises, If a tract of land once becomes an isolated tract, does it always therefore remain an isolated tract, notwithstanding an entry is made thereof which is subsequently canceled; or will the making of such entry take the land out of the class of isolated tracts, so that after the cancellation thereof three years will have to elapse before the tract again becomes isolated?

In the case of *John P. Shank* (24 L. D., 296) it was held that, although—

other entries had been allowed and filings made from time to time covering a period greater than that required by the statute, nevertheless the true meaning of the section contemplated that no tract became isolated within the meaning of the law unless at the time of the application to have it sold, such tract was surrounded by

entries or filings, or land already sold, which entries or filings or sale had been made at least three years prior thereto.

From this decision of the Department it appears that a piece of land does not become an isolated tract, under section 2455, until, for a period of at least three years *immediately preceding* the application to have said tract sold, it has been surrounded by lands which have been "entered, filed upon, or sold by the government." Under this ruling, if all the surrounding tracts have at any time been covered by entries for a period of three years or more, thus making the land inclosed an isolated tract, and if one of the surrounding entries then be canceled and the tract previously covered thereby again becomes vacant public land, the tract which had been surrounded immediately loses its status as an isolated tract. If, then, another entry should be made of the same tract which had been previously embraced within the canceled entry, the former isolated tract would not again become an isolated tract until the expiration of three years from the date of such second entry of the adjoining tract. If including the surrounding lands within entries which remain of record for a period of three years or more will thus give to the inclosed land the status of an isolated tract, and the cancellation of any of the surrounding entries will again remove such inclosed land from the class of isolated tracts, it would seem that the same rule is applicable to the inclosed tract which is thus affected; that is, if a tract once becomes an isolated tract, by remaining unappropriated for three years after the surrounding land has been "entered, filed upon, or sold by the government," and entry is then made of that tract, it immediately loses its character as an isolated tract, and if the said entry is subsequently canceled, it will not again become an isolated tract until the expiration of three years from the date of such cancellation.

Your office decision denying Harris's application is in harmony with the views herein expressed, and it is hereby affirmed.

#### MINING CLAIM—LACHES IN THE PROSECUTION OF APPLICATION.

##### P. WOLENBERG ET AL. (ON REVIEW).

A mineral applicant by failure to prosecute his application to completion, within a reasonable time after the expiration of the period of publication of the notice thereof, waives all rights secured by the earlier proceedings on his application; and in a case, arising on the protest of one claiming under an alleged adverse right acquired after the expiration of the period of publication, where this rule has been applied by the Department, the subsequent withdrawal of the protest will not operate to relieve the applicant from the consequences of his laches.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 10, 1900.* (A. B. P.)

By decision of November 13, 1899, in the case of P. Wolenberg *et al.* (29 L. D., 302), the Department directed the cancellation of mineral

entry No. 1842, made December 21, 1898, upon the application filed December 2, 1896, by said P. Wolenberg *et al.*, for patent to the Mascot and Pennsylvania lode mining claims, survey No. 10825, Crippled Creek mining district, Pueblo, Colorado, on the ground that said entry was not made until the lapse of nearly two years after the expiration of the period of publication of notice of said application for patent, no reason for the delay having been shown. This action was taken upon a protest against said entry filed by Robert A. Christy, in which it was alleged, among other things, that the applicants for patent had failed to make an expenditure of \$100, in labor or improvements, upon the Mascot claim during the year 1896, or at any time thereafter, and that by reason of such failure protestant had relocated said Mascot claim March 23, 1897, as the Riverside lode.

The mineral entrymen have filed what is denominated a motion for review of said departmental decision, whereby, and by the brief of counsel and other papers accompanying the same, it is alleged and shown that by a compromise between the parties since said decision was rendered, Robert A. Christy "has wholly merged his interests, acquired by the relocation, with those of Wolenberg *et al.*," and in view thereof has withdrawn his said protest and "no longer asserts any relocation rights upon the premises in question." It is thereupon asked that the former decision be revoked and the mineral entry allowed to stand, upon the suggested theory that by reason of the merging of the interests of the parties, and the withdrawal of protest by Christy, the question of the delay in making said entry has become a matter solely between the government and the mineral claimants.

As the motion relates only to matters which have occurred since the former decision was rendered, it cannot be considered as a motion for review. Looking to the substance rather than form, however, and treating the motion as a petition asking supervisory action, it is not believed that sufficient grounds have been shown for entertaining it.

By the former decision it was held that the failure of the applicants for patent to prosecute their application to completion within a reasonable time after the expiration of the period of publication of the notice thereof, no reason for the delay being shown, constituted a waiver of all rights obtained by the earlier proceedings upon their application.

This ruling rests upon the principle, as clearly stated in said decision, that the assumption declared in section 2325 of the Revised Statutes, that no adverse claims exist in those cases where no adverse claim is filed in the local land office during the period of publication, relates to the time of the expiration of the period of publication and to adverse claims which might have been made known at the local office prior to that time, and does not relate to, or have anything to do with, adverse claims which may be initiated after that time by reason of failure by the applicants to comply with the law or otherwise.

In this case the protestant asserted an adverse claim by reason of relocation after the expiration of the period of publication of notice of

the application for patent, based upon the alleged failure of the original claimants to make the annual expenditure in labor or improvements necessary to the continued maintenance of their possessory title as against subsequent locators. The fact that since the former decision was rendered, the protestant has, by compromise with the applicants, merged his interests, acquired by the relocation, with those of the applicants, and withdrawn his protest, does not materially change the situation as affecting the application of the principle announced in that decision.

It is practically conceded by the petitioners that in the face of the protest the ruling of the Department was correct, but it is contended that since the withdrawal of the protest there is no longer any reason for the ruling, and it should, therefore, be revoked. This contention is not believed to be tenable. The effect of the former decision was that the applicants for patent, by reason of their laches, had waived all rights obtained by the earlier proceedings upon their application. Having thus waived their previously acquired rights as applicants for patent, they could not be reinstated in those rights simply by securing the withdrawal of the protest which furnished the occasion for the departmental action. The withdrawal of that protest does not re-entitle them to the benefit of the statutory assumption that no adverse claim exists. The benefit of that assumption can only be obtained, or re-established, in the manner prescribed by the statute. That must be done before the land department is authorized to pass the claims to entry and patent.

It was stated in the former decision that in the presence of the asserted relocation of the Mascot claim, the applicants for patent were not in a position to urge that their laches or delay be disregarded. The subsequent compromise with the protestant, whereby the withdrawal of his protest was secured, does not place them in such a position in this respect as requires the Department now to disregard their laches and delay. It is not believed that the facts of this case would justify such a course, or that good administration would be promoted thereby. Before the entry of the Mascot and Pennsylvania claims others than Christy may have made relocations of all or portions thereof on account of the alleged failure of Wolenberg *et al.* to do the required annual assessment work, and the only method prescribed for giving notice to and protecting the rights of any such relocater is that set forth in sections 2325 and 2326 of the Revised Statutes. *Barklage et al. v. Russell*, 29 L. D., 401; *Brady's Mortgagee v. Harris et al.*, *Ibid*, 426.

The petition is accordingly denied.

## MINING CLAIM—EXPENDITURE—RELOCATION—NOTICE.

NIELSON *v.* CHAMPAGNE MINING AND MILLING CO.

Where a mineral application embraces several locations held in common, and by protests and adverse claims it is prevented from passing to entry prior to July 1, 1898, an expenditure of five hundred dollars upon the group is sufficient, under amended rule 53 of mining regulations.

A certificate of the surveyor-general showing the statutory expenditure of five hundred dollars within the period of publication, may be accepted, though not filed until after the expiration of such period.

A relocation of the land embraced within a subsisting mineral entry, based upon a default in the performance of annual assessment work prior to the allowance of the entry, can not be made.

A published notice of application for mineral patent is sufficient, in the matter of describing the claim, if the notice, taken as a whole, designates the situation of the applicant's claim on the ground with substantial accuracy.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 12, 1900.* (C. J. W.)

It appears that in April, 1896, the Champagne Mining and Milling Company filed application for patent No. 1611, for the Deadwood Nos. 1, 2, 3 and 4 lode mining claims, survey No. 9998, Cripple Creek mining district, Pueblo, Colorado, and proceeded to publish and post notice of said application for sixty days, beginning April 25, 1896, against which application adverse claims were filed during the period of publication by the Ben Hur and Stewart lode claimants. Several protests against the application were also filed by other parties. After the suits on said adverse claims were adjudicated by the courts, and all the protests theretofore presented had been withdrawn, to wit: February 18, 1899, the said company made mineral entry No. 1958 under its application.

June 9, 1899, H. Carl Neilson filed his protest against the issuance of patent on said entry. June 16, 1899, he filed an additional protest, and June 20, 1899, an amended protest. Said protests were accompanied by a number of supporting affidavits.

June 9, 1899, the local officers informed your office of the allowance of mineral entry No. 1958, and transmitted Neilson's original protest and the affidavits filed therewith. Subsequently the additional and amended protests and affidavits were transmitted in the order in which they were filed. August 16, 1899, your office took them up, and after considering them together, held, in substance, that they did not warrant the ordering of a hearing, and dismissed them. From said decision Neilson has appealed to the Department, assigning errors as follows:

1. In not holding that the sum of five hundred dollars in labor and improvements had not been made and expended upon each of said claims, and that \$2,000 worth of work had not been done upon and for the benefit of said group.

2. In holding that it was unnecessary to expend \$2,000 for the benefit of the entire group.

3. In not holding that there had not been \$500 worth of improvements expended upon said group of claims.

4. In not holding that the said mining claims were forfeited by said Champagne M. & M. Co. because of its failure to perform the annual assessment work thereon for the years 1897, 1898 and 1899, and for its failure to resume work thereon in good faith before relocation by protestant; and in not holding that a preponderance of the proof discloses that only \$27 worth of work had been expended on said claims in 1897 and 1898.

5. In not holding that the protestants relocated the ground on May 1st, 1899, at a time when said company was in default as to the requirements of labor and improvements for the two preceding years of 1897 and 1898.

6. In holding that Neilson's relocations are void because the land was covered by a subsisting mineral entry, when as a matter of fact said entry was then invalid because of a failure to comply with the law.

7. In not holding that the surveyor-general's certificate of \$500 worth of improvements was not filed within the period of publication of notice of application as required by section 2325 R. S. U. S., and that the failure to so file said certificate defeated the right to make entry and receive patent.

8. In not holding that the published notice of application did not state the names of the adjoining claims or book and page where the record of location might be found, and in not holding that such omission was fatal to the right to make entry.

The first and second grounds of error may be properly considered together as constituting the same contention.

That contention is, in substance, that under the law, where a mineral application embraces several locations held in common, the applicant must show an expenditure for the benefit of the group equal in the aggregate to \$500 for each location. The surveyor-general certifies as to the group in question that the applicant, before the expiration of the period of publication, made improvements of the value of \$2,320. This certificate is attacked by the protestant. The case, however, appears to come within the proviso to paragraph 53 of the mining circular approved March 14, 1898 (26 L. D., 378). That proviso is as follows:

That as to all applications for patent made and passed to entry before July 1, 1898, or which are by protests or adverse claims prevented from being passed to entry before that time, where the application embraces several locations held in common, proof of an expenditure of five hundred dollars upon the group will be sufficient and an expenditure of that amount need not be shown to have been made upon, or for the benefit of, each location embraced in the application.

Though the application in question appears to have been filed April 25, 1896, protests and adverse claims were filed, which had the effect of preventing it from being passed to entry before July 1, 1898. It is therefore within the proviso above quoted, and in view thereof it was only necessary to show the expenditure of five hundred dollars upon the group.

The third ground of error simply denies that an expenditure of five hundred dollars upon the group was made. This contention is disproved

by the evidence filed by protestant himself, to say nothing of that filed by the applicant, and it need not be further considered.

The fourth, fifth and sixth specifications present the contention that said company forfeited its mining claims by a failure to make the required annual expenditure in labor and improvements thereon for the years 1897, 1898 and 1899, pending its application for patent, and that on May 1, 1899, and before the company resumed work on said claims the protestant relocated the ground. Since the company had the entire calendar year within which to do the assessment work for the year 1899, and since the protests of Neilson were filed in June, 1899, the reference to the assessment work for that year is in any event premature and for that reason disregarded.

The claimed relocation of the ground in controversy by Neilson was made on May 1, 1899, more than two months after the company had furnished the required proofs, made due payment of the purchase price, secured the allowance of its mineral entry and received a certificate of purchase for the land. The annual expenditure upon a mining claim of one hundred dollars in labor or improvements, sometimes called assessment work, required by section 2324 of the Revised Statutes, while necessary to the continued maintenance of the possessory title as against subsequent locators, is not a condition to obtaining a patent. In this respect it is essentially different from the expenditure of five hundred dollars required by section 2325, which does not affect the possessory title but is a condition to obtaining a patent, and is therefore a matter between the applicant for patent and the government (*P. Wolenberg et al.*, 29 L. D., 302). A failure to perform the annual assessment work upon a mining claim does not *ipso facto* work a forfeiture of the claim but only subjects it to relocation thereafter and before the claimant resumes work. But the necessity for the performance of such annual assessment work ceases when the purchase price is paid and mineral entry allowed. By the purchase and entry of a mining claim according to the mining laws, the equitable title immediately passes to the purchaser, his right to a patent is thereby established, and the requirement as to the performance of annual assessment work is at an end (*Benson Mining and Smelting Co. v. Alta Mining and Smelting Co.*, 145 U. S., 428; *McCormack v. Night Hawk and Nightingale Gold Mining Co.*, 29 L. D., 373). The entry of a mining claim properly allowed, therefore, as effectively terminates the right to relocate the claim because of failure to do the annual assessment work thereon, as would the resumption of work by a claimant in a case where entry had not been made. At the time of the alleged relocation by Neilson these claims were embraced in a subsisting mineral entry and no relocation thereof, based upon any default in the doing of the annual assessment work prior to the entry, could then be made.

Though more than two years elapsed between the application for patent and the entry, this delay was caused by adverse suits, and by

protests against the allowance of the entry, the latter of which were not withdrawn until January 27, 1899. The entry was made February 18, 1899. The delay therefore in carrying the application for patent to entry was not voluntary on the part of the applicant and did not work an abandonment of the application.

The seventh specification, wherein it is alleged that the certificate of the surveyor-general as to five hundred dollars worth of improvements upon each claim was not filed within the period of publication of notice of the application, is without merit, for reasons already stated, and others now to be stated. Neilson was no party to the case at the time the certificate was filed, and does not allege or show that he had any sort of right to the ground in question at the time said certificate was filed or at the time mineral entry No. 1958 was made, but if he could now be heard, the objection is insufficient.

A similar contention was considered in the case of *Draper et al. v. Wells et al.* (25 L. D., 550), wherein it was held, (syllabus) that:

The statutory requirement that proof of expenditure to the amount of five hundred dollars shall be filed during the period of publication is directory only, not mandatory, as to the time when such proof shall be made; and proof, therefore, filed after the expiration of said period, showing said expenditure made in due time, may be properly considered.

The certification to which objection is made, though filed after the expiration of publication, shows that the expenditure referred to was made within the period of publication, and is within the rule above quoted.

The eighth specification presents the contention that the omission to state in the published notice of application the names of the adjoining claims, with references to the record of location, is fatal to the entry. The objection is purely technical, there being no pretence that Neilson or any one from whom he claims had any interest in the land, or any part of it, at any time within the period of publication, or that he was in any way misled by the omission complained of. The conflicting claims are referred to in the published notice by number of the survey, instead of by the name of the claim, which is data from which the name could be readily ascertained, and is sufficient to put a prudent man upon inquiry. The effect of a similar omission was considered in the case of *Gowdy v. Connell* (on review), 28 L. D., 240, and it was held (syllabus) that:

The sufficiency of a published notice of application for mineral patent must be determined by taking the notice as a whole, and if, when so taken, the situation of the applicant's claim on the ground is designated with substantial accuracy, the notice should be held sufficient.

Under the authority *supra*, and of *Hallett and Hamburg Lodes* (27 L. D., 104), the objection insisted upon must fail.

The published notice of application contains such description of the claims as make them easy of identification, and such as would inform a



among other things, as explanatory of section 2325 of the Revised Statutes, as follows:

The claimant at the time of filing the application for patent, or at any time within the sixty days of publication, is required to file with the register, a certificate of the surveyor-general that not less than five hundred dollars' worth of labor has been expended or improvements made, by the applicant or his grantors, upon each location embraced in the application, or if the application embraces several locations held in common, that an amount equal to five hundred dollars for each location, has been so expended upon, and for the benefit of, the entire group; . . . . *Provided*, That as to all applications for patent made and passed to entry before July 1, 1898, or which are by protests or adverse claims prevented from being passed to entry before that time, where the application embraces several locations held in common, proof of an expenditure of five hundred dollars upon the group will be sufficient and an expenditure of that amount need not be shown to have been made upon, or for the benefit of, each location embraced in the application.

The appellant contends that, inasmuch as her application for patent was prosecuted to completion in every particular except as to the filing of the required certificate of the surveyor-general prior to July 1, 1898, the same is within the terms of the proviso to said rule, and that entry should have been allowed thereon upon the filing of the certificate of the surveyor-general November 22, 1898, *nunc pro tunc*, as of June 29, 1898, the date when the proofs of publication and posting were filed and payment for the land was made; that in view of the recent departmental decisions to the effect that the statutory requirements relative to the filing, during the period of publication, of the certificate of the surveyor-general showing the expenditure of five hundred dollars in labor or improvements, is directory and not mandatory (*Draper v. Wells*, 25 L. D., 550; *Floyd v. Montgomery*, 26 L. D., 122), there is no good reason why said certificate should not have been accepted when filed November 22, 1898, and entry allowed as of the date when the other proofs were submitted.

The proviso to said Rule 53 applies only to applications for patent made and passed to entry prior to July 1, 1898, or which were by protests or adverse claims prevented from being passed to entry before that time. The application in question has not yet been passed to entry, and there is no pretense that it was prevented from being passed to entry prior to July 1, 1898, by protest or adverse claim. It was not in a condition to be passed to entry at any time prior to that date. Entry could not have been allowed in the absence of the surveyor-general's certificate required by the statute to be filed, and this was not done until November 22, 1898. The statute makes it the duty of the claimant to file this certificate, and compliance with the statute in this particular was just as much a prerequisite to the allowance of entry, as was any other proceeding upon the application for patent. The doctrine announced in the cases of *Draper v. Wells* and *Floyd v. Montgomery*, *supra*, can have no application to this case.

It is further contended that the failure to sooner file the certificate of the surveyor-general was due to a misunderstanding between that

officer and the agent who had the application for patent in charge, and that it was, therefore, no fault of the applicant that the certificate was not sooner filed. There is nothing in this contention. It was no part of the duty of the local officers to look after the matter of filing said certificate. The law has specifically placed that duty upon the mineral claimant. She should have seen to it that the certificate was properly and timely filed, and she must, therefore, abide the consequences of her failure in this respect. It was in no sense the fault of the government that the certificate was not sooner filed.

Neither is there anything in the contention that the claimant should have been notified of the defects in her proofs the day the same were filed—June 29, 1898—whereas she was not so notified until July 11, 1898. It was her duty to see that the proofs were complete when filed, and having failed to do so, she cannot complain of the delay of the local officers in not taking the case up for examination until after July 1, 1898, which delay appears to have been made necessary by the press of other business requiring attention. The local officers cannot always consider and act upon the proofs in support of mineral applications the day on which they are filed. The due and orderly despatch of the business coming before them in the regular discharge of their duties requires that cases should be taken up and considered in their order, and such seems to have been the course pursued in this case.

In view of the foregoing, it is clear that the application in question is not within the terms of the proviso of said Rule 53; and as the application embraces four locations held in common, it is equally clear that the certificate of the surveyor-general was not sufficient to warrant the allowance of entry at the date of its filing.

The decision of your office is accordingly affirmed.

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HOMESTEAD ENTRY—CITIZENSHIP.

HASTINGS AND DAKOTA RY. CO. *v.* ROGNLIN.

The child of an alien, occupies under the homestead law, the status of one who has filed his declaration of intention to become a citizen, where the father, during the minority of such child, declares such intention, but does not complete his naturalization before the child attains his majority, or thereafter.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *January 15, 1900.* (E. J. H.)

The Hastings and Dakota Railway Company has appealed from your office decision of October 20, 1898, holding the company's indemnity selection list, filed on October 29, 1891, as to the S. E.  $\frac{1}{4}$  of Sec. 17, T. 122 N., R. 43 W., Marshall land district, Minnesota, for cancellation, with a view to allowing the homestead application of defendant, Rog-nlin, therefor.

The land is within the indemnity limits common to the grants to the

St. Paul, Minneapolis and Manitoba and the Hastings and Dakota Railway Companies, for which withdrawals were made, but revoked on May 22, 1891 (12 L. D., 541).

The respective claims of said companies, within such indemnity limits, were considered by the Department on October 23, 1891, in a case between said companies (13 L. D., 440). In that case the selection list of each of said companies, which included the land in controversy herein, was rejected, and the lands were held to be

subject to entry by the first legal applicant, or to selection by the company first presenting application therefor in the manner prescribed by the regulations governing such selections.

On October 29, 1891, pursuant to that decision, the Hastings and Dakota company filed a list of selections, which included the above described tract, designating a proper basis therefor.

On April 6, 1894, Christian A. Rogulin presented a homestead application for the same tract, alleging in his corroborated affidavit, filed therewith, that he settled upon the land in April, 1890, with the intention of claiming the same as a homestead, and had resided thereon continuously ever since; that he had a house, barn, granary, and 120 acres of breaking on the premises, of the value of \$1,000.

The company filed a protest against the allowance of Rogulin's application, claiming superior rights under its indemnity selection, and asked a hearing thereon, but in no wise traversing Rogulin's allegations as to settlement, residence, and improvements, or the statements of his homestead affidavit tending to show that he was qualified to make entry.

No hearing seems to have been ordered in the case, but the papers were forwarded to your office, under instructions therefrom, without action thereon by the local officers, and on October 20, 1898, your office decision held that since the company, in its protest, did not traverse the allegations of Rogulin, a hearing was not necessary to determine the rights of the parties; that he was a qualified entryman and actual settler upon the land for the purpose of securing a home when the company made its selection thereof on October 29, 1891; and that "under the ruling of the Department in the case of *Vandenberg v. Hastings and Dakota Railway Company* (26 L. D., 390), the subsequent selection of the company was incapable of defeating the prior settlement claim of the applicant," and the company's selection of the tract was held for cancellation.

The appeal of the company from the decision of your office brings the case before the Department for consideration.

An examination of the case shows that Rogulin's declaration of intention to become a citizen of the United States, made on March 26, 1894, was filed with his homestead application. Subsequently, on April 30, 1896, his affidavit was filed stating that he was born in Norway in the year 1864, and came to the United States in 1882, with his

father, Anders P. Rognlin, who, on February 28, 1883, declared his intention to become a citizen of the United States, and that his father died in the autumn of 1883.

A duly certified copy of such declaration of Anders P. Rognlin is on file in the case. It will be noted that this declaration of intention by the father was made while the son was a minor, and the applicant claims that by reason of such action on the part of his father he, the applicant, was a qualified homestead settler at the time he made settlement upon the land embraced in his application, in 1890.

In the case of *Boyd v. Thayer* (143 U. S., 135), in which the question of citizenship of the governor of Nebraska was involved, it was said that "clearly, minors acquire an inchoate status by the declaration of intention on the part of their parents." In the case of *Meriam v. Poggi* (17 L. D., 579), it was said that "this inchoate status is all that is required to qualify one to settle, and file under the pre-emption law," and that, "to all intents and purposes, the declaration of the father is that of the minor child."

In the case of *Weisner v. Clem* (26 L. D., 300), it was held, that—the minor child of an alien, who, during the minority of such child, declares his intention to become a citizen, but does not complete his naturalization before the child attains his majority, or thereafter, occupies, under the homestead law, the status of one who has filed his declaration of intention to become a citizen.

Under the foregoing decisions, the applicant, Rognlin, was qualified, as to citizenship, to make entry on October 29, 1891, the date of the company's indemnity selection of the tract involved. His status in this respect was not changed by reason of his having, subsequently, made declaration of his intention to become a citizen.

This case is similar, in all other essential respects, to the case of *Hastings and Dakota Railway Company v. Julin*, decided by the Department on October 18, 1899 (unreported). In that case the questions involved were fully considered and stated at length, and it is unnecessary to repeat them herein.

Your office decision, in favor of Rognlin, is affirmed, and upon his perfecting entry within a time to be fixed by your office, the company's selection of this tract will be canceled.

#### INDIAN LANDS—ALLOTMENT—DEATH OF ALLOTTEE.

##### OPINION.

When an Indian allottee dies before the issuance of the trust patent, without heirs, all rights under the allotment become extinct, and the allotment should be canceled.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,*  
February 15, 1900. (C. W. P.)

By reference, dated January 13, 1900, a communication from the Indian Office, dated December 22, 1899, transmitting an application to

contest the Indian allotment No. 15 of Pete Cheney, made November 27, 1895, covering the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 32, T. 18 N., R. 7 W., San Francisco, California, series, is referred to me for an opinion upon "the matters therein presented."

This contest affidavit, filed June 15, 1898, alleges—

that the said Pete Cheney is dead; that he died at the Colusa county hospital, in said Colusa county, on the — day of February, 1896; that said Pete Cheney has never been married and that he left no issue or heirs at law.

It appears from the letter of the Commissioner of Indian Affairs that the Commissioner of the General Land Office, under date of July 6, 1898, transmitted to the Indian Office said affidavit of contest, and that upon an investigation instituted by the Indian Office, it was ascertained that the said Pete Cheney, the Indian allottee of said land, was dead, that he had never been married and left no issue or heirs at law, and that John W. Cheney, the contestant in said affidavit of contest, was then living upon said land.

It is also stated by the Commissioner that the records of the Indian Office show that an Indian named Pete Cheney made application, on October 4, 1895, for an allotment of one hundred and sixty acres of land under the 4th section of the act of February 8, 1887 (24 Stat., 388), amended by the act of February 28, 1891 (26 Stat., 794), and that under said application an allotment of the land above described was made by a special allotting agent on June 7, 1897, which was duly approved by the Secretary of the Interior.

The facts, of which a brief summary is given above, are set out in detail in the communication of the Commissioner of Indian Affairs, and it appears from an inquiry in the General Land Office that a trust patent has not issued upon said allotment. No question therefore arises as to the disposition of an Indian allotment upon the death of the allottee without heirs, subsequent to the issue of the trust patent. There can be no doubt that when such allottee dies before the first or trust patent without heirs, all rights under the allotment will become extinct, and that the allotment should be canceled.

I concur with the Commissioner of Indian Affairs that John W. Cheney's application to contest the allotment to Pete Cheney should not be entertained, and am of opinion that in view of the evidence secured by the investigation made by the Indian Office, the said allotment should be canceled and so advise.

Approved, February 15, 1900.

E. A. HITCHCOCK,

*Secretary.*

## ABANDONED MILITARY RESERVATION—TOWNSITE ENTRY.

## OPINION.

Lands within an abandoned military reservation, opened to disposal under the act of August 23, 1894, are subject to townsite entry under the provisions of section 2387, R. S., the lands when so entered to be paid for at the appraised value.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,*  
*February 15, 1900.* (W. C. P.)

In response to your request for an opinion whether certain tracts in the Fort Maginnis abandoned military reservation "are subject to entry as a townsite under section 2387 R. S. and following, in view of the provisions of the act of August 23, 1894, 28 Stat., 491—under which the reservation is subject to disposal," I would respectfully submit:

The act of July 5, 1884 (23 Stat., 103), directed that whenever, in the opinion of the President, any lands in any military reservation should become useless for military purposes, he should cause them to be placed under the control of the Secretary of the Interior for disposal as therein provided. The Secretary of the Interior was authorized to cause such lands "to be regularly surveyed, or to be subdivided into tracts of less than forty acres each, and into town lots or either or both," and to cause each tract to be appraised and sold at public sale at not less than the appraised value.

The act of August 23, 1894 (28 Stat., 491), provided that all lands not then disposed of in military reservations theretofore placed under the control of the Secretary of the Interior for disposition under the act of 1884, when the area exceeds five thousand acres

except such legal subdivisions as have government improvements thereon, and except also such other parts as are now or may be reserved for some public use, are hereby opened to settlement under the public-land laws of the United States.

A preference right was given all *bona fide* settlers qualified to enter under the homestead laws and residing upon agricultural lands in said reservations, and persons entering under the homestead law were required to pay for such lands not less than the appraised value thereof. The provisions of this act were, by the act of February 15, 1895 (28 Stat., 664), extended to all military reservations placed under the control of the Secretary of the Interior under any law in force prior to the act of July 5, 1884.

A part of the land in Fort Maginnis reservation was appraised and instructions as to the disposal of such land were issued to the local officers, being approved by this Department September 22, 1897 (25 L. D., 260). In these instructions it was noted that certain tracts were included in a claimed townsite and that the appraisers had been instructed "to make no appraisal of Gilt Edge town lots until further instructed."

The Commissioner of the General Land Office has now submitted for

approval instructions for the appraisal of the land included in the claimed town site in Fort Maginnis reservation "by their legal subdivisions of forty acres" saying it is necessary to have it appraised "in order that it may be entered as a townsite under sections 2387 *et seq.*, of the Revised Statutes."

The act of 1884 made no provision for entries under the townsite law but required the sale of all lands either in tracts of forty acres or less or as town lots, in the discretion of the Secretary of the Interior. The act of 1894 declared that all lands not already disposed of in abandoned reservations theretofore placed under the control of the Secretary of the Interior, except those having government improvements on them and such as should be reserved for some public use, "are hereby opened to settlement under the public land laws of the United States."

Section 2387, Revised Statutes, provides:

Whenever any portion of the public lands have been or may be settled upon and occupied as a townsite not subject to entry under the agricultural preemption laws, 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 at the proper land office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests.

This is a public land law under which a right is acquired by settlement and the phrase "are opened to settlement under the public land laws of the United States" includes a settlement under this law unless some other provision of the act in which those words are used or some provision of some other act precludes such a construction. The act of 1894 specifically provides that one who enters land in such reservations under the homestead law shall pay for the same not less than the appraised value. A provision of this kind was necessary because the general homestead laws require no payment. The conditions are different as to townsite entries. Under the law relating to those entries payment is required "at the minimum price." If this provision is to be construed as meaning the lowest price at which the lands may be disposed of the conclusion must be that lands in those abandoned military reservations coming within the purview of the act of 1894 may be entered under the townsite laws at the appraised price. The appraised price is the minimum price of these lands because it is the lowest price at which they may be disposed of.

By the act of May 14, 1890 (26 Stat., 109), provision was made for townsite entries of lands in Oklahoma, such entries to be made under the provisions of section 2387 Revised Statutes "as near as may be" and by the joint resolution of September 1, 1893 (28 Stat., 11), the provisions of said act were made applicable to the territory known as the Cherokee Outlet. The act of March 3, 1893, (27 Stat., 612, 642), provides for the opening of the lands in the Cherokee Outlet and fixes a scale of prices therefor, ranging from two dollars and fifty cents to one dollar per acre. In the proclamation opening these lands to entry it was said

that in the case of townsite entries "the land must be paid for at the government price per acre" (17 L. D. 230, 247), and this rule has been followed. That is to say, it is held that the price at which the law says any particular body of lands are to be disposed of, is the "minimum price" contemplated by section 2387 Revised Statutes. The same reasoning is applicable to lands in abandoned military reservations and when applied, makes the appraised value the minimum price.

For the reasons given herein I am of the opinion, and so advise you, that the tracts in question are subject to entry as a townsite under section 2387 of the Revised Statutes.

Approved, February 15, 1900,

E. A. HITCHCOCK,

*Secretary.*

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#### RAILROAD GRANT—CLASSIFICATION OF LANDS.

##### INSTRUCTIONS.

The Northern Pacific, in making selections within the limits of its grant, will not be required to make a showing as to the non-mineral character of lands so classified under the act of February 26, 1895.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 15, 1900.* (F. W. C.)

The Department is in receipt of your office letter of the 2nd instant, in which you refer to the act of February 26, 1895 (28 Stat., 683), providing for the classification of the lands within the limits of the Northern Pacific land grant in the States of Montana and Idaho, and request instructions as to whether, in view of such classification, the Northern Pacific Railroad Company, in making selections, should be required to comply with the second paragraph of the circular of July 9, 1894 (19 L. D., 21), which requires the filing by railroad companies of certain affidavits regarding the character of the lands where selections are made within a mineral belt or proximate to any mining claim.

As the classification provided for in the act of February 26, 1895, is, upon its approval by the Secretary of the Interior, made final, except in case of fraud, so far as regards the adjustment of the grant to the Northern Pacific Railroad Company, you will not require of said company any showing bearing upon the character of any lands within the limits of its grant which have been classified under the act referred to.

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

## TOW v. MANLEY.

The right of a purchaser from a railroad company to a confirmatory patent under section 4, act of March 3, 1887, is not barred by the fact that at the date of his purchase the land was settled upon and occupied by another, and that such fact was known to the purchaser, where, at the time of such settlement and purchase, the land was included in an outstanding patent, issued many years prior thereto, for the use and benefit of the railroad company.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 16, 1900.* (F. W. C.)

Andrew Tow has appealed from your office decision of June 3, 1899, rejecting his claim under section four of the act of March 3, 1887 (24 Stat., 556), for confirmation of his title to the NW $\frac{1}{4}$  of Sec. 35, T. 95 N., R. 41 W., Des Moines land district, Iowa, through purchase from the Sioux City and St. Paul Railroad Company.

This tract is within the indemnity limits of the grant made by the act of May 12, 1864 (13 Stat., 72), to the State of Iowa, to aid in the construction of what was afterward known as the Sioux City and St. Paul Railroad. It is opposite that portion of the line of said road which was duly constructed and the completion of which, in sections of ten miles each, was duly certified to by the governor of the State. Said tract was patented to the State June 17, 1873, for the use or benefit of the Sioux City and St. Paul Railroad Company, upon which the State had conferred this grant. Based upon the failure of said company to construct the portion of its line located between Lemars and Sioux City, the State withheld its patent from the railroad company for a portion of the lands patented to the State for the use or benefit of the company, including the tract in question. In 1889, following the passage of the act of March 3, 1887, the United States commenced a suit in the circuit court of the United States for the northern district of Iowa to recover the title to certain of the lands patented to the State for the use or benefit of the company, including this tract, there having been an amount of lands so patented in excess of the amount to which the company had entitled itself by construction of a portion of its line of road. In that suit a decree was rendered in favor of the government at the October 1890 term (43 Fed. Rep., 617), and on appeal to the supreme court the decree was affirmed October 21, 1895 (159 U. S., 349). Thereafter the lands, the title to which was restored under said decree, were opened to entry, after due publication of notice, at the local office, on February 27, 1896. On that day several homestead applications were presented to enter the tract here in controversy.

Andrew Tow, claiming to be a purchaser in good faith from the railroad company, made application for confirmation of his title and

published notice of his intention to offer proof in support thereof on March 24, 1896, due notice of which appears to have been given the conflicting homestead applicants. By the decision of your office the claims of all the homestead applicants excepting that of Mrs. Lottie T. Manley, were rejected. That ruling seems to have been acquiesced in so that the controversy has been narrowed down to the claims of Tow and Mrs. Manley.

Your office decision holds that, but for the claim of Mrs. Manley, Tow's application for confirmation of title would be recognized

as there is nothing but the claim of Mrs. Manley to prevent Tow's claim as a purchaser in good faith from prevailing and his proof thereunder from being accepted as the result of these proceedings.

Your office decision then denies his application because it is shown that Mrs. Manley, with her husband, entered into possession of this land in July 1885, at which time they established residence thereon, which was continued until she was deserted by her husband, from whom she obtained a divorce in 1890. Following the desertion, she lived with her mother on the adjoining land but returned to the land in question, with her children, in about two years, and has since continued residing thereon. She and her husband had cultivated and improved the land prior to Tow's contract of purchase, but to what extent is not shown.

Under the decision of the supreme court which restored the title to the United States, it was not found that the title had not been earned by the company, but rather that the company otherwise received the full quantity of lands which it had earned and that it was unnecessary to inquire whether the particular lands involved in that suit should have been assigned to the company rather than other lands containing a like amount of acres, which had been patented to the company by the State and which could not be recovered by the United States because they had been disposed of by the company.

There was nothing in the status of the title to this land at the time of Tow's contract of purchase which necessarily militated against the good faith of that transaction. Such was the decision of this Department in the similar cases of *Schneider v. Linkswiller* (26 L. D., 407), and *Burton et al. v. Dockendorf* (29 L. D., 479). When this former case was in the circuit court of the United States for the northern district of Iowa (95 Fed. Rep., 203), it was held by Judge Shiras that—

to charge Schneider with being a purchaser in bad faith it is necessary to hold that, when he made his purchase from the railway company, he ought to have foreseen the outcome of litigation between the United States and the railway company, which had not then been commenced, and which resulted in a decision which holds, not that the company did not earn the lands in question, and would not be entitled to them by a strict legal construction of the act of Congress making the grant, but that as the company did not build the entire line of road contemplated in the grant,

and as it had in fact received the full number of acres it had earned, a court of equity would not permit the company to show that, as a matter of law, it had become entitled to the lands in O'Brien county.

Does the fact that the land had been settled upon and was occupied by the Manleys at the date of Tow's purchase bar the confirmation of his title under section four of the act of 1887? Said section provides:

That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the Attorney General shall cause suit or suits to be brought against such company for the said amount: *Provided*, That nothing in this act shall prevent the purchaser of lands erroneously withdrawn, certified or patented as aforesaid from recovering the purchase money therefor from the grantee company as by this act required: *And provided*, That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land-grant for conditions broken, or as authorizing an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions.

Tow entered into a contract with the railroad company to purchase the land on March 15, 1887. At that time Mrs. Manley and her husband were residing thereon and Tow had knowledge of this fact, and for that reason your office decision finds that he was charged with notice of the Manley claim and therefore his purchase from the company was not in good faith.

Said section four grants to any person purchasing in good faith lands erroneously certified or patented to or for the use or benefit of any company claiming through or under a grant from the United States to aid in the construction of a railroad, upon making proof of the fact of such purchase at the proper land office, the right to receive a confirmatory patent from the United States which "shall relate back to the date of the original certification or patenting." In the case of the Winona and St. Peter R. R. Co. v. United States (165 U. S., 483), a claim for confirmation of title had been made on behalf of the Winona and St. Peter Land Company, as purchaser from the Winona and St. Peter Railroad Company, to certain land excepted from the railroad grant, because of the subsisting pre-emption declaratory statement of Thomas Marshall, Jr., covering the land in controversy, of record in the local land office at the time of the attachment of rights under the railroad grant. Marshall's filing was superior to the grant and he was still in possession of

the land at the time of the purchase thereof by the Winona and St. Peter Land Company. In considering the claim of the purchaser the court, in said decision, held that—

Such a purchaser can not claim to be one in good faith if he has notice of facts outside the records of the land department disclosing a prior right. The protection goes only to matters anterior to the certification and patent. The statute was not intended to cut off the rights of parties continuing after the certification, and of which at the time of his purchase the purchaser had notice. Only the purely technical claims of the government were waived.

Here the claimant Marshall was in possession; had been in possession twenty years; the land was not wild and vacant land. His possession was under a recorded claim of title, and under such a claim as forbade the issue of a patent. In other words, the land was erroneously certified. There was, and continued to be, an individual claimant for the land. There was no cancellation on the records of the land department of his claim. He continued in possession, and was in possession not only when the certification was made but when the land company purchased. Its purchase, therefore, was not made in good faith, and there is nothing disclosed to stay the mandate of the statute for the adjustment of the land grant, and a suit to set aside the certificate erroneously issued.

When the land here in controversy was patented to the State for the use or benefit of the railroad company June 17, 1873, neither of the Manley's was asserting any claim or right thereto, so that no claim or right of theirs was infringed upon by the issuance of that patent. Their settlement upon and improvement of the land was not a matter anterior to the patenting. The patent had been outstanding twelve years when they went upon the land, and nineteen years when Mrs. Manley, after two years absence therefrom, following Mr. Manley's desertion of her and the subsequent divorce, resumed residence thereon. No claim was initiated or right acquired by settling upon or tendering an application to enter land in that condition. While Tow's knowledge of their presence upon the land at the time of his purchase, charged him with notice of their claim, the notice so imputed to him was of a claim which had been initiated subsequently to the patenting of the land by the United States on account of the railroad grant. Their settlement in 1885 upon land so patented in 1873 did not affect the validity of the patent, and consequently Tow's knowledge of their presence upon the land at the time of his purchase was not notice of any invalidity in that patent and did not affect the *bona fides* of his purchase.

A careful examination of the act of 1887 shows that the question now under consideration must be answered in the negative. The first section directs the Secretary of the Interior to adjust all railroad land grants in accordance with the decisions of the supreme court, and the second commands that upon such adjustment the Attorney General shall commence and prosecute the necessary proceedings to cancel all patents, certifications or other evidence of title theretofore erroneously issued on account of such grants, and to restore to the United States the title so erroneously conveyed. Section three declares that if in

such adjustment it appears that the homestead or pre-emption entry of any *bona fide* settler has been erroneously canceled on account of any railroad land grant or the withdrawal of public lands from market in aid thereof, the settler, upon application, shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws, if he has not located another claim or made an entry in lieu of the one so erroneously canceled, and has not voluntarily abandoned the canceled entry. It further directs that if any such settlers do not make application for such reinstatement of their entries within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws "with priority of right given to *bona fide* purchasers of such unclaimed lands, if any, and if there be no such purchasers then to *bona fide* settlers residing thereon." This section thus gives preferences in the disposition of the lands to which it relates in the following order: (1) To those whose entries thereof have been erroneously canceled on account of a railroad land grant or the withdrawal of public lands from the market in aid thereof, and who have not surrendered or voluntarily abandoned the entries canceled. (2) To *bona fide* purchasers. (3) To *bona fide* settlers residing upon the land. Such entries could have been erroneously canceled only in the event that they were made, or predicated upon some right initiated, before the attachment of rights under the railroad land grant, or before the withdrawal in aid thereof. As was well known at the date of the act of 1887, no lands were ever patented or certified on account of a railroad land grant, until after the rights of the grantee thereunder had attached by definite location of the line of its road or by other identification of the limit of the grant. The class of persons to whom a preference, over *bona fide* purchasers of patented or certified lands, is given by this section is therefore confined to those whose rights were initiated prior to the erroneous patenting or certification, and does not include those who may have settled upon the lands thereafter at a time when the legal title had passed out of the United States and when no entry could have been rightfully allowed by the land department. If at the time of the attachment of rights under a railroad land grant lands were embraced in a subsisting valid homestead or pre-emption entry which was subsequently erroneously canceled on account of the grant, or a withdrawal in aid thereof, and the lands then erroneously patented under the grant, one who makes a *bona fide* purchase of such lands from the company on the faith of the patent is, under the plain language of this section, clearly given a preference over all settlers other than the one whose entry was so erroneously canceled. This being true, it is difficult to conceive of any reason why, where there was no such claim anterior to the patenting or certification, one who makes a *bona fide* purchase from the company on the faith of the patent should not be equally preferred. The fourth section prescribes the manner in which purchasers in good

faith of lands so erroneously certified or patented may obtain a confirmatory patent from the United States which "shall relate back to the date of the original certification or patenting," but contains no reference to or recognition of settlement claims. Section five relates to lands which have not been patented or certified to or for the use of the grantee company, and which are of the numbered sections prescribed in the grant and are coterminous with the constructed parts of the road, but which are for any reason excepted from the operation of the grant, and declares that *bona fide* purchasers thereof from the grantee company may obtain title thereto by making payment therefor to the United States at the ordinary government price for like lands. This section expressly excludes from its operation all lands which at the date of the sales thereof were in the *bona fide* occupation of adverse claimants under the pre-emption or homestead laws and whose claims and occupation have not since been voluntarily abandoned, and authorizes such pre-emption and homestead claimants to perfect title thereto; and it further expressly excludes from its operation all lands settled upon subsequent to December 1, 1882, by person claiming to enter the same under the settlement laws and authorizes such settlers to perfect title thereto. The sixth section gives a preference right of purchase for a period of one year from the date of the act to those who have purchased any such lands as the property of any railroad company for the State and county taxes thereon, where the grant to such company has been subsequently forfeited, but expressly excludes from its operation lands which previous to or at the time of the taking effect of the grant were in the possession of or subject to the right of any actual settler. It is thus shown that Congress has clearly defined the instances in which it was intended to give to settlers and purchasers, respectively, a preference right to the land, and that the only instance in which a settler is given a preference right over a *bona fide* purchaser from the grantee company of lands erroneously patented or certified to or for the use or benefit of said company is where the homestead or pre-emption entry of a *bona fide* settler made, or based upon a right initiated, prior to such patenting or certification has been erroneously canceled on account of the grant or a withdrawal in aid thereof, and then only where the entry has not been surrendered or voluntarily abandoned by the settler. This case is not one of that character. There was no entry of or other claim to the land at the time of the patenting thereof on the faith of which the purchase in question was made.

It follows that the fact that the land had been settled upon and was occupied by the Manley's at the date of Tow's purchase does not bar or prevent the confirmation of his title under section four of the act of 1887.

The decision of your office is accordingly reversed, and Tow's application for a confirmatory patent is sustained.

## SOLDIER'S ADDITIONAL HOMESTEAD—CERTIFICATE OF RIGHT.

## WILLIFORD JENKINS.

If a soldier, entitled to the right to make a soldier's additional homestead entry, dies without having exercised said right, leaving no widow or minor orphan children, the right to make said entry vests in his personal representative; and a duplicate certificate of said right may issue, in the name of the deceased soldier, on the application of the executor of his estate, it being satisfactorily shown that the original has been lost or destroyed.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 17, 1900.* (C. W. P.)

Williford Jenkins has appealed from your office decisions of February 14, and April 10, 1899, denying his application for the reissue of certificate of right to make soldier's additional homestead entry in the name of William W. Jenkins, and for its recertification in the name of the applicant.

The record facts necessary to be considered in determining the questions presented show that, on July 2, 1878, your office issued, under section 2306 of the Revised Statutes, a soldier's additional homestead certificate for eighty acres of land in favor of William W. Jenkins, late private of company A, 24th regiment of Missouri infantry. Said certificate was delivered to Messrs. Gilmore and Company, of the city of Washington, and it was afterwards found with the final proof submitted on Jenkins' soldier's additional homestead entry, No. 5550, which was canceled by your office, and returned to the local office at Ironton, Missouri, for delivery to Mr. Jenkins, and was transmitted to him by mail.

On July 2, 1898, Williford Jenkins made application to your office for "a re-issue of said certificate and for its re-certification" in his name. In his sworn statement he avers:—

That he is the brother of William W. Jenkins who died on the 4th day of May, 1897, and the executor of his estate.

That the said William W. Jenkins was the same person who served during the war of the rebellion as a member of Co. "A", 24th regiment, Missouri infantry, and the same person who made Ironton, Mo., original homestead entry No. 3129, for the SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , and NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 23, T. 24 N., R. 8 W., and to whom, some years thereafter, the Commissioner of the General Land Office issued a soldier's additional homestead certificate of his right to an additional 80 acres.

That his above described original entry having been canceled, the said William W. Jenkins thereupon used the said additional certificate in making Ironton, Mo., soldier's additional homestead entry No. 5550, covering the same tracts that had been embraced in the said original entry, which additional entry was subsequently canceled because of his failure to reside upon and improve said land, as required by the terms of said certificate.

That following these two ineffectual efforts to secure title to said tracts of land, the said William W. Jenkins then made Ironton, Mo., adjoining farm entry No. 11,550, of the same, which entry he afterwards commuted to cash entry No. 46,271, and under this last described entry a patent was secured by him to the said tracts of land.

That affiant is informed and believes that with his letter of January 11, 1887, holding said additional entry No. 5550 for cancellation, the Commissioner of the General Land Office returned the said additional certificate to the Ironton land office, and directed that the same be delivered to the said William W. Jenkins in the event that said entry 5550 should be finally canceled. And affiant is also informed and believes that said entry No. 5550 was canceled on May 25, 1887, and that the records of the Ironton land office appear to show that said certificate was delivered to William W. Jenkins, by mail, on May 27, 1887.

That when the foregoing facts became known to the affiant he made careful and diligent searches for said additional certificate, at various times, through all the papers, books and records left by the said William W. Jenkins and throughout the premises lately occupied by him, but that he has been unable either to find the same or any record or trace thereof, and he therefore avers that said certificate has been lost and cannot be found. And, inasmuch as said certificate required William W. Jenkins to reside upon the land located by him therewith, which he would not do, it is affiant's belief that the same was considered worthless and was destroyed by him. Furthermore, the affiant is satisfied that said certificate was never transferred by the said William W. Jenkins to any other person.

That as the executor and beneficiary of said estate, affiant has never heretofore either bargained, sold, or in any manner disposed of his interest in said certificate, or his right thereto to any one whomsoever, and, in view of all the foregoing facts, affiant hereby applies to the Commissioner of the General Land Office under Sec. 2306 of the Revised Statutes of the United States, and the act of August 18, 1894 (28 Stats., 397), and the departmental decisions thereunder, for a re-issue of said certificate and for its re-certification in the affiant's name.

On July 5, the applicant filed a certificate from the judge and *ex officio* clerk of the probate court of Howell county, Missouri, under his official seal, dated July 5, 1898, stating that the records of said court show:

(1) That by the last will and testament of William W. Jenkins, dated November 20, 1893, Williford Jenkins was appointed the sole executor, without bond, of the estate of the deceased, the said William W. Jenkins.

(2) That the said will was duly proved and probated by this court on the 29th day of May, 1897.

(3) That the said Williford Jenkins duly qualified upon the death of the said William W. Jenkins, and is now exercising the executorship of said estate.

Here it should be observed that William W. Jenkins' will is not with the papers, and it cannot be seen what particular disposition the testator made of his property.

On February 28, 1899, the applicant filed, with a motion for review of your office decision of February 14, 1899, denying his application, a certificate of the said judge and *ex officio* clerk of the probate court of Howell county, Missouri, under his official seal, dated February 25, 1899, stating that it appeared from the records and papers on file in his office that the said William W. Jenkins, who died in May, 1897, died leaving neither wife nor children; also an affidavit made by R. S. Hogan, of West Plains, Missouri, stating:

That he was formerly county clerk of Howell county, and is now the president of the West Plains bank, and that from about the year 1875 to the date of his death, the affiant was personally acquainted with the late Wm. W. Jenkins, who resided on a farm in T. 24 N., R. 8 W., in this county.

That affiant is familiar with several efforts made by the said Jenkins to acquire title to the SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  Sec. 23, T. 24 N., R. 8 W., which adjoins the farm above referred to; in connection with which efforts, affiant is informed that a soldier's additional homestead certificate for 80 acres was issued to him, in fact affiant has seen a letter signed by the officers of the Ironton, Missouri, Land Office, acknowledging the existence of such a certificate.

That, within the time above stated, the affiant was often consulted by the said Jenkins on business matters, and frequently did business for him. Among other things, affiant prepared for him the final proof upon which he commuted his adjoining farm entry of said land to a cash entry, and the affiant knows that the certificate referred to was not used in making said proof, nor was any reference made to such a certificate in that connection. Furthermore, the affiant never heard the said Wm. W. Jenkins mention or refer to such a certificate in any manner whatsoever.

That affiant is also well acquainted with Williford Jenkins, brother of Wm. W. Jenkins and his executor, and has frequently given him advice and assistance in the settlement of his brother's estate, and, for this purpose, the affiant has at various times had in his possession some of the papers and documents pertaining to said estate.

That it was through the affiant that Williford Jenkins negotiated the sale to John H. Howell, of the additional homestead certificate herein referred to, which sale was consummated in or about the month of June, 1898; and, before concluding said sale and executing the papers required by the attorney of the said Howell, both the affiant and Williford Jenkins carefully searched through all the papers then in possession of each of them, which, together, constitute all of the papers and documents left by Wm. W. Jenkins, and that said certificate was not among any of said papers. Furthermore, affiant says that he does not believe the said Wm. W. Jenkins sold or disposed of said certificate in his lifetime, as the affiant had such intimate knowledge of and connection with the said Jenkins that he has no doubt he would have knowledge of such a sale, if it had been made.

Finally, affiant says that Williford Jenkins' affidavit as to the loss of said certificate should be given full faith and credit, as he is a man whose word or oath is unquestioned in this community.

Further affiant saith not.

On February 14, 1899, your office denied Williford Jenkins's application, and on February 28, 1899, he filed a motion for review of your office decision, which was overruled by your office letter of April 10, 1899. This motion for review is founded upon the sale, for a valuable consideration, of said soldiers' additional certificate by the applicant, as executor of the said William W. Jenkins, to John H. Howell, on the same day on which he filed his application in the local office, and it is claimed that under the provisions of the act of August 18, 1894, *supra*, your office decision of February 14, 1899, should be set aside and the certificate of right re-issued in the name of William W. Jenkins, and re-certified to Mr. Howell as the purchaser from the executor.

With the motion for review, besides the papers above referred to, were filed a bill of sale of said certificate, by the executor of William W. Jenkins, to John H. Howell, for the consideration of \$25; also the affidavit of said Howell, stating that he purchased said certificate in good faith and for a valuable consideration.

In the case of Webster *v.* Luther (163 U. S., 331), the supreme court held that the right to make soldiers' additional entry was without

restriction, and therefore assignable and transferable, and that Congress intended to bestow a gratuity upon the donee, and to make it as valuable as possible. The court quotes with approval the words of Judge Sanborn, delivering the opinion of the circuit court of appeals for the eighth circuit, in the case of *Barnes v. Poirier*, 27 U. S. App., 500, that:—

The beneficiary was left free to select this additional land from any portion of the vast public domain described in the act, and free to apply it to any beneficial use that he chose. It was an unfettered gift in the nature of compensation for past services. It vested a property right in the donee.

And Judge Brewer, in the case of *Mullen v. Wine*, 26 Fed. Rep., 206, cited by the supreme court in the case of *Webster v. Luther*, held that the right to the additional land is a thing of value, is personal property, and can be exercised and enjoyed anywhere.

It must therefore be held, in accordance with the act of Congress granting the right to make soldiers' additional entry, that in case the soldier entitled to the right, but without having exercised it, dies, leaving no widow or minor orphan children, the right to entry vests in his personal representative as personal property.

It is shown that William W. Jenkins died on May 4, 1897, leaving a will, by which the applicant, Williford Jenkins, was appointed the sole executor, without bond, of the estate of the decedent; that the will was duly admitted to probate, and that Williford Jenkins duly qualified as such executor; that on July 2, 1878, a soldier's additional homestead certificate for eighty acres of land was issued to William W. Jenkins, and that said certificate was transmitted to him by the local officers at Ironton, Missouri. It does not appear that any effort has been made to locate said certificate since it was transmitted to William W. Jenkins. The applicant and Mr. Hogan, of West Plains, Missouri, who was formerly county clerk of Howell County, Missouri, and was at the time he executed his affidavit president of the West Plains bank, swear that they have carefully searched the papers left by the decedent, and that the certificate was not among said papers, and that they believe that it was either lost or destroyed. The record raises a reasonable presumption of the loss or destruction of the certificate, and entitles the executor of the deceased soldier to a duplicate certificate in the latter's name. In the case of *Henry N. Copp*, 23 L. D., 123, it is held, that an outstanding certificate is one that has been issued and has not been located, canceled or surrendered, and that the loss of the certificate can not be treated as the loss or destruction of the right thereunder.

There appears to be no reason for the denial of a duplicate certificate at the instance either of the beneficiary or his successor in interest, which includes his personal representative where the right passes to him upon the death of the beneficiary, and your office decision was erroneous in holding otherwise.

It is not shown that the executor has the right to sell the certificate (see 1 Revised Statutes of Missouri, 1889, Sec. 131, p. 147), and hence no right is shown in Howell to recertification.

It is therefore held that the said Williford Jenkins, executor, is entitled to have a duplicate soldier's certificate issued in the name of William W. Jenkins, and you are directed to issue the same and deliver it to the executor, or his lawfully authorized agent.

Your office decision is modified accordingly.

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WISE ET AL. *v.* KURE.

Motion for review of departmental decision of August 4, 1899, 29 L. D., 77, denied by Secretary Hitchcock, February 17, 1900.

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APPLICATION FOR SURVEY—CORRECTION OF SURVEY.

JOHN MCCLENNEN ET AL.

The Department has the authority, after the tracts designated by a government survey as fractional, by reason of bordering upon a body of water, have been disposed of, to examine into the correctness of such survey, and if that examination demonstrates that there was no body of water to prevent the extension of the township, section, or sub-division lines, to cause the lands thus erroneously omitted from survey to be surveyed, and disposed of as public lands of the United States.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 17, 1900.* (W. C. P.)

John McClennen and Moses L. Pruitt and Clay County, Iowa, have presented applications for the survey of certain lands in said county, amounting to about eight hundred acres, which it is alleged have never been surveyed and are represented by the government survey of lands in that vicinity and by the plats made therefrom as a lake. Protests against these applications were presented by adjacent owners and the matter was submitted to the Department by your office letter of April 7, 1899, for instructions in the premises.

The township in which it is alleged this unsurveyed land is, being T. 96 N., R. 35 W., Iowa, was surveyed in 1855 and 1856, and that survey and the map made from the field notes thereof represented parts of sections 1, 2, 11, 12, 13 and 14, as a lake. A meander line was run, indicating the extent of the alleged body of water, and the tracts rendered fractional thereby have all been disposed of by the United States. This meander line starts from a point near the half-mile corner on the east line of section 1, runs thence in a southwesterly direction to a point in section 13 near the half-mile corner on the line between sections 13 and 14, thence northwest to a point just west of the half-mile corner on the line between sections 11 and 14, and thence in a north-

easterly direction to a point just east of the half-mile corner on the north line of section 1.

The petitioners here have filed a map purporting to show the lake as it now actually is. According to this map the meander line starts at the same point as does the meander line shown upon the map of the government survey. It runs thence in a southwesterly direction to a point somewhat less than a quarter of mile almost due south of the center of section 1; thence in a northerly direction to a point just north of the center of section 1; and thence in a northeasterly direction to the point on the north line of section 1 where the meander line shown by the government survey ended. The starting points and the stopping points are the same in both cases.

The applicants, McClennen and Pruitt, allege

"that there never was a lake of water in said sections [1, 2, 11, 12, 13 and 14] and that the meander lines as set out by the government survey, and as shown by the government plats, is an absolute mistake, and that there is not now and never has been any lake or body of water on said sections of land upon which to base said meander lines;"

that there is a lake in the adjoining township which borders on the NE.  $\frac{1}{4}$  of section 1, of the lands in question; that the configuration of the shores of said lake has not materially changed since the government survey; that the meander lines of said survey are so surely wrong as to leave no doubt that a fraud was perpetrated in the making of said survey; that much of the land is high, dry and tillable land that would not have passed to the State as swamp land had it been properly surveyed; that McClennen has been residing upon and cultivating about one hundred and sixty acres of said unsurveyed land for fourteen years, and that Pruitt has been residing upon and cultivating about one hundred and twenty acres thereof for six years.

With the papers is an affidavit of J. T. Painter, who says he made a survey of these lands and prepared the map filed as "Exhibit 1." He explains the map and certain photographs filed as exhibits and says:

I further depose and say that about two hundred acres of the land between the meander lines of the original survey, as shown on plat Ex. 1 is high hilly land; that a large portion of the balance of the said unsurveyed land would be termed as gentle rolling prairie land and that the remainder of said unsurveyed land would be of a swampy character.

I further depose and say that the meander lines as made by the government surveyor, as shown in red ink on plat Ex. 1, are absolutely erroneous; that there never was a body of water upon which to base said meander line; that they are run over the tops of hills and along the sides of hills and it is my opinion that they were run on paper only and never were actually chained or surveyed.

A joint affidavit of McClennen and Pruitt sets forth that the former is residing upon and cultivating a portion of the high dry land in sections 2, 11 and 12, and that Pruitt is residing upon and cultivating unsurveyed land in section 1, and concludes as follows:

We further depose and say that all the land resided upon and cultivated can be cultivated to crops in any season; that the same is very hilly and that it is

impossible that the same was ever covered by the water from Lost Island lake, or that it was ever in a lake at all, and that its present condition is the same as it was when the original survey was made.

There are filed the affidavits of ten parties who claim to have known the land in question for from five to twenty-five years, each of whom says he has read the affidavits of Painter and McClennen and Pruitt and from his personal knowledge of the character of the lands knows the statements made therein are true.

With the petition are affidavits of five other persons who say that they were acquainted with the surveyors who made the surveys of this township and other government lands in Clay and Palo Alto counties, and that while making these surveys the men were frequently under the influence of liquor and wholly unfit to properly perform that work.

Owners of adjacent lands were notified of the filing of these petitions and some of them have filed protests against the survey of the land in question as requested. None of these protests denies the statement that there is a large body of land within the meander lines as fixed by the government survey of said township, nor alleges that said lines correctly, or approximately so, indicated any body of water as it existed at the time of said survey. They claim, as grantees of the tracts made fractional by said meander lines, the adjoining unsurveyed land.

The question is as to the authority to survey these lands as government lands, if the facts are as stated by the petitioners, and, hence, for the present these statements that the survey was erroneous and that a large portion of the space indicated thereby as water was in fact land that should have been surveyed, will be taken as true.

The petitioners rely upon the decision of the supreme court of Iowa in the case of *Grant v. Hemphill* (92 Iowa, 218), in support of their contention, while the protestants refer to the decision of the same court in *Schlosser v. Cruikshank* (96 Iowa, 414), in support of their claims. These cases both involved land in the immediate neighborhood of that here in question. In *Grant v. Hemphill* it was found that there was no body of water anywhere on the land upon which to base the meander line. The court recognized the rule that meander lines are run, in surveying the public lands, not as boundaries but for the purpose of defining the sinuosities of the body of water and as a means of determining the quantity of land in a tract made fractional by reason of bordering upon such body of water, but held that the rule did not apply in that case because there was no body of water to which the meander line could be referred.

The petitioners, in a supplemental brief, refer to the decision of the supreme court of Iowa in *Rood et al. v. Wallace et al.* (79 N. W. Rep., 449), in support of their contention. In that case a certain portion of a township was marked as Owl lake and a meander line was run to mark the extent of such body of water. Afterwards it was claimed that there was no lake but that the portion marked as such was swamp

and overflowed land and a patent was issued to the State therefor under the swamp land grant. The controversy was between grantors under this patent and the State claiming right under the rule holding the State entitled to the beds of all lakes and streams.

The owners of adjacent tracts made fractional by the meander line were not made parties to the suit. The court held:

There seems to be no doubt that the Secretary of the Interior had the right, in so far as the parties to this suit are concerned, to redetermine the question as to whether or not the land in question was a part of the lake bed, or was covered by the so-called swamp land act.

This decision sustains the petitioners to the extent of saying that the original survey is not necessarily conclusive but that a re-survey may in certain cases be made. In another part of the opinion it is said:

Purchasers of lots abutting on the meandered line, or otherwise directly interested are, it seems to us, the only persons who may object to the re-survey; and no re-survey will be permitted which will in any manner prejudice their interests.

The protestants here refer to this part of the decision as sustaining their position.

In *Schlosser v. Cruikshank*, it was found that there was at the time of the survey a body of water to which the meander line could be referred; that, therefore, the general rule applied thereto and the grantee of the government took the land between the meander line of the tract purchased and the actual water line.

The law regulating the survey of public lands is found in sections 2395, 2396 and 2397 of the Revised Statutes. It is directed that the public lands shall be divided by north and south lines and by others crossing them at right angles so as to form townships six miles square, unless where the line of an Indian reservation, or of tracts of land heretofore surveyed or patented, or the course of navigable rivers, may render it impracticable; and in that case this rule must be departed from no further than such particular circumstances require.

These townships are to be divided into sections by running through them lines each way and marking a corner on each of said lines at the end of every mile. The sections and quarter sections are to be divided by straight lines run from points marked on section lines to opposite corresponding corners, with the provision that—

in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary-lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the water course Indian boundary line, or other external boundary of such fractional township.

To ascertain the quantity of land in any section or subdivision thus made fractional, it is necessary to know the length and course of the water line or other external boundary between the points where the two straight lines intersect the same, and hence the water line or other external boundary is meandered between such points. While these mean-

der lines are in theory coincident with the water line where that is the external boundary they are not generally run for the purpose of locating or establishing such boundary but for the purpose of ascertaining the sinuosities of the banks of the body of water, the actual boundary, and as a means of determining the quantity of land in such fractional tract, subject to disposal. (*Railroad Co. v. Schurmier*, 7 Wall., 272; *Hardin v. Jordan*, 140 U. S., 371; *Horne v. Smith*, 159 U. S., 40; *La Follette et al.*, 26 L. D., 453; *Grant v. Hemphill*, 92 Iowa, 218, 60 N. W. Rep., 618; *Schlosser v. Cruikshank*, 96 Iowa, 414, 65 N. W. Rep., 344.)

The meander line and the actual water line will seldom, if ever, be exactly coincident and usually it will be found that there are small portions of land lying between these lines. Such portions are, however, regarded as passing to the purchaser of the surveyed fractional tract which they adjoin, the water line and not the meander line being held to be the true boundary.

Has this Department, after the tracts designated by the survey as fractional because of bordering upon a body of water, have been disposed of, authority to examine as to the correctness of such survey and, if such examination demonstrates that there was no body of water to prevent the extension of the township, section or subdivisonal lines and, that therefore the survey was incorrectly made, either through mistake or fraud, is there any authority to cause the lands omitted from such survey to be surveyed and disposed of as public lands?

The authority to cause a survey to be made under such circumstances has not been denied by this Department, but the decisions so far as they go, tend to assert it. In the case of *Archie G. Palmer* (26 L. D., 24), application was made for the survey of an island in the Platte river, alleged to have been in existence at the date of the survey of public lands upon the bank of the river but not shown upon the plat of such survey, and the Department said:

But if it is a fact that there was in existence, at the date of the survey, an island in the locality described, above high water mark and not subject to overflow and fit for agricultural purposes, containing about one hundred and twenty-five acres of land—more than three legal subdivisions—which was omitted from the survey of 1862, it may be that the island was omitted from the original survey through fraud or mistake, so that a survey should now be granted.

A hearing was ordered to ascertain the facts and upon consideration of the evidence adduced the application for survey was denied, it being held that there was nothing to indicate fraud or mistake. *Archie G. Palmer* (27 L. D., 380).

In the case of *W. L. Hemphill et al.* (26 L. D., 319), the allegations made in support of the petition for a survey were very similar to those made here and it was ordered that an inquiry be instituted to ascertain the facts. An employe of your office was detailed to make an investigation, who reported that the lands were erroneously returned as covered by a lake and that there was no reasonable doubt that the pre-

tended meandering of a lake was improper and almost wholly fictitious. He made a survey of the lands and with his report submitted a plat based upon that survey. This Department concurred in the recommendation of your office that such survey should be approved and the land disposed of as government lands (27 L. D., 119).

In *John J. Serry et al.* (27 L. D., 330), the application for a survey of lands between the meander line and the actual water line was refused. In that decision it was said:

These lots were bought from the government upon the faith of the statement that they had a water front and have for many years been bought and sold among individuals under the same conditions. If there be any power in this Department under such circumstances to disregard the former survey and make a new one that power would be exercised only in exceptional cases where the utmost disregard of rules and regulations and flagrant mistakes in the execution of the former survey were disclosed. No such condition is exhibited here. The land alleged to have been left between the meander line and the water was not of great extent and was of little value either present or prospective at the date of that survey.

The question presented here does not seem to have been directly involved in any decision of the supreme court of the United States, and hence no specific ruling therein is to be found.

In *Crugin v. Powell* (128 U. S., 691), the court laid down several propositions which have a bearing upon the question now under consideration. It was said:

It is a well-settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned as if such descriptive features were written out upon the face of the deed or the grant itself.

As to the power of this Department over the survey of the public lands, it was said:

The mistakes and abuses which have crept into the official surveys of the public domain form a fruitful theme of complaint in the political branches of the government. The correction of these mistakes and abuses has not been delegated to the judiciary except as provided by the act of June 14, 1860, 12 stat., 33, c. 128, in relation to Mexican land claims, which was repealed in 1864, 13 stat., 332, c. 194 sect. 8. From the earliest days matters appertaining to the survey of public or private lands have devolved upon the Commissioner of the General Land Office under the supervision of the Secretary of the Interior. Rev. Stat. 453. The Commissioner, in the exercise of his superintendence over surveyors-general, and of all subordinate officers of his bureau is clothed with large powers of control to prevent the consequences of inadvertence, mistakes, irregularity and fraud in their operations. . . . That the power to make and correct surveys of the public lands belongs to the political department of the government and that, whilst the lands are subject to the supervision of the General Land Office, the decision of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient. . . .

It is conceded that this power of supervision and correction by the Commissioner

of the General Land Office is subject to necessary and decided limitation. Nor is it denied that when the Land Department has once made and approved a governmental survey of public lands, (the plats all having been filed in the proper office,) and has sold or disposed of such lands, the courts have power to protect the private rights of a party who has purchased, in good faith, from the government against the interferences or appropriations of corrective resurveys made by that Department subsequently to such disposition or sale.

In *Hardin v. Jordan* (140 U. S., 371), it was held that the rights of an owner of land bordering upon a body of water are to be determined by the law of the State in which they lie, that meander lines are run to mark the sinuosities of the water which forms the boundary and that the purchaser from the United States of a tract shown by the survey to border on a body of water takes to the water's edge or to the center of the body of water, according to the law of the State. That case involved a narrow tongue of land which was not surveyed or shown upon the plat and as to this the court said (page 399):

As to the narrow tongue of land which, according to the finding of facts, projects into the lake from the north side, we do not think that it can have any effect upon the decision of this case. It does not appear to have extended far enough southerly, at least during high water, to be opposed to the property of the plaintiff. Besides, the plat of the lake and the land surrounding it, referred to in the patent granted to Holbrook, exhibits the various fractional sections surrounding the lake as immediately bordering upon it; and this, as shown by the authorities already cited, constitutes the lake itself the real boundary of the land, without regard to the meander line. There should be some extraordinary proof of mistake on the part of the surveyor in order to interfere with the passing of the land as riparian land.

This would seem to be a recognition of the fact that there might be a case where, because of mistake, lands adjacent to the fractional tract would not pass even though there was a body of water to which the survey lines might be referred.

In *Mitchell v. Smale* (140 U. S., 406), the court reaffirmed the ruling in *Jordan v. Hardin* as to the effect of a patent around the margins of a lake, and that the water and not the meander line is the boundary but added the following:

We do not mean to say that, in running a pretended meander line, the surveyor may not make a plain and obvious mistake, or be guilty of an obvious fraud; in which case the government would have the right to recall the survey, and have it corrected by the courts or in some other way. Cases have happened in which, by mistake, the meander line described by a surveyor in the field notes of his survey did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the government.

In *Horne v. Smith* (159 U. S., 40), the official plat of survey showed sections 23 and 26 as fractional because of bordering on Indian river a meander line being run to mark such river. As a matter of fact the survey stopped short of the river the water meandered being that of a bayou instead of the river. The court held that there was simply an

omission to make any survey of land between the bayou and the river saying:

Although it was unsurveyed it does not follow that the patent for the surveyed tract adjoining carries with it the land which perhaps ought to have been, but which was not in fact, surveyed. The patent conveys only the land which is surveyed, and when it is clear from the plat and the surveys that the tract surveyed terminated at a particular body of water, the patent carries no land beyond it.

In this connection the court cited the case of *Lammers v. Nissen* (4 Neb., 245), as somewhat in point saying:

In that case it appeared that between the meander line as run and the Missouri river was a tract of several hundred acres, and the court held that as that body of land had not been surveyed it did not pass by a patent of a lot which on the government plat extended to the meander line.

An examination of the decision in *Lammers v. Nissen* discloses that only a part of the meander line involved there was along a slough.

If a mistake of a surveyor in establishing a meander line along a slough instead of upon the body of water called for by the survey may be corrected it would seem that a mistake in laying down such a line, where there was no body of water to base it on may also be corrected. If the government is not bound in the one case there certainly is no good reason for holding it bound in the other. The theory upon which the courts and this Department have refused to interfere where there is a small body of land left between the meander line and the actual water line, is because it may be properly presumed that the purchaser took the land to secure the water front pertaining thereto and it would be an injustice to deprive him of that water front which is often the most valuable part of his purchase. This reason has, however, no applicability where there was in fact no water upon which to base a right. One purchasing a tract under such circumstances, might claim that he was misled by the representations made by the plat of survey but he could not claim that any right was taken from him if a survey should be made, after his purchase, of the land left unsurveyed, because of the mistake in the survey under which he bought. The reason for the rule having disappeared the rule itself has no force in such a case.

If the allegations made in this case are true, the lines of sections 2, 11, 12, 13 and 14 would not have intersected any body of water had they been extended to their full length. The persons who have acquired the fractional tracts in those sections would not, by a survey of the lands omitted from the former survey, be deprived of any benefits arising from a water front and ought not to be heard to complain that they would be deprived of land which they never paid for. They will still hold the full quantity of land which they bought. The same would be true as to a part of the subdivisional lines of section one, but it is impossible to determine now, the points at which such subdivisional lines would, if properly extended, intersect the body of water.

It is not necessary to search for the source of the error. The result

is the same whether such error arose from mistake, inadvertence, incompetency or fraud on the part of the men who made the former survey. A careful examination of the law, the precedents, furnished by the decisions of the courts and this Department, and the rights of both the government and its grantees, leads irresistibly to the conclusion that this Department has authority, even after the tracts designated by government survey as fractional by reason of bordering upon a body of water have been disposed of, to examine as to the correctness of such survey, and if that examination demonstrates that there was no body of water to prevent the extension of the township, section or subdivision lines to cause the lands thus erroneously omitted from survey to be surveyed and disposed of as public lands of the United States.

The facts presented in support of this petition for survey, and not disputed, clearly indicate that a serious mistake was made in the survey of this township, and a new survey should now be made. Upon an inspection of the land that mistake and the serious inaccuracy in the government survey were so obvious that no one could have been misled by the latter. The prayer of the petition is therefore granted, and you will cause the lands in said township, omitted from the former survey, to be now surveyed. The party making this survey should be instructed to ascertain all the facts possible as to the condition of the land and the extent of the lake at the time of the former survey, and report fully thereon. It is believed that, as a prevention of any injustice in this matter, the parties in interest should be given an opportunity to present any objections they may have to the approval of the survey when made, and you will afford them such opportunity before finally approving the same.

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#### MINING CLAIM—ADVERSE PROCEEDINGS—CHARACTER OF LAND.

##### RYAN *v.* GRANITE HILL MINING AND DEVELOPMENT CO.

The mining laws do not authorize or provide for adverse proceedings, against an applicant for patent to mineral land, by one claiming the same, or any part thereof, under laws providing for the disposal of non-mineral lands; and a suit of such character does not warrant a stay of proceedings on an application for a mineral patent.

In a controversy arising between one claiming under a townsite entry and patent, and another under a subsequent application for mineral patent, the question as to whether the land in conflict contained, at the date of the townsite entry, known valuable mines, or was embraced in a valid mining claim or possession, must be decided by the Land Department; a decision of that question by a court would not bind or conclude the Department, or relieve it from the duty of making its own decision in the premises.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 17, 1900.* (E. B., Jr.)

It appears from the record in this case that the W  $\frac{1}{2}$  of the NE  $\frac{1}{4}$  and the E  $\frac{1}{2}$  of the NW  $\frac{1}{4}$  of Sec. 34, T. 16 N., R. 8 E., M. D. M., Sacramento, California, land district, were entered April 1, 1872, and patented

August 20, 1875, under section 2387 of the Revised Statutes, as the townsite of South Grass Valley; that application for patent to the Granite Hill Quartz Mine claim, survey No. 3558, alleging location thereof in 1862, was filed December 24, 1898, by the Granite Hill Mining and Development Company; that said claim comprising 17.17 acres conflicts throughout nearly its entire extent with the said townsite; and that on February 20, 1899, during the period of publication of notice of the application, John J. Ryan claiming ownership, as transferee under the townsite patent, of several town lots in that part of the townsite in conflict with the said mining claim, filed a so-called adverse claim against the said application, and on March 9, 1899, within thirty days from the filing of the papers intended as an adverse claim, commenced a suit against said company in the local court to quiet title to said lots, which suit, so far as appears, is still pending.

A motion by the company to dismiss the so-called adverse claim on the ground that the mining laws do not provide for or contemplate the filing of an adverse claim by one claiming land as non-mineral, or under a patent, was overruled by the local office March 11, 1899, that office holding that the papers filed by Ryan constituted a valid adverse claim under sections 2325 and 2326 of the Revised Statutes. From this action of the local office the company duly appealed. March 25, 1899; the company asked to be allowed to make entry of the Granite Hill claim, but its request was denied, and therefrom it also appealed.

Considering the case on these appeals your office, by its decision of June 7, 1899, in effect reversed the action of the local office in part and in part affirmed it. The said decision of your office held that the papers filed by Ryan alleging ownership of said town lots under the townsite patent did not constitute an adverse claim within the meaning and intent of the mining laws, thus sustaining the contentions of the company's motion upon that point; but also held that inasmuch as the question was presented whether the ground embraced in the Granite Hill claim was known to be valuable for its mineral contents at the date of the townsite entry, that question must be determined before any further proceedings could be had upon the said application, and that such question could be determined either by the court in the said suit or by means of a hearing before the land department, and, therefore, since the matter was already pending before the court, directed a suspension of proceedings upon the application "to await the decision of the court upon said suit."

From this decision of your office both parties have appealed to the Department. The company contends that the question whether the ground embraced in said mining claim was known to be valuable for its mineral deposits at the date of the townsite entry is a question solely for the land department, and that your office should have ordered a hearing to determine that question instead of suspending proceedings to await the decision of the court in said suit. Said Ryan, on the

other hand, insists that his claim to the land as presented in the papers filed by him is an adverse claim under sections 2325 and 2326 of the Revised Statutes; also, that as the said application is for land already patented it should not have been received and should now be rejected.

The mining laws do not authorize or provide for adverse proceedings against an applicant for patent to mineral land by one claiming the same, or any part thereof, under laws providing for the disposal of non mineral lands. The provisions of section 2325 and 2326 relative to adverse claims contemplate proceedings to determine only the right of possession as between claimants of the same unpatented mineral lands; and not to decide controversies respecting the character of public lands, that is, whether they are mineral or non-mineral lands. (*Powell v. Ferguson*, 23 L. D., 173; *Snyder v. Waller*, 25 L. D., 7; *North Star Lode*, 28 L. D., 41; *Richmond Mining Company v. Rose*, 114 U. S., 576, 584; and *Iron Silver Mining Company v. Campbell*, 135 U. S., 286, 300). The townsite entry and patent under section 2387 of the Revised Statutes, under which Ryan claims, could only embrace lands not known to be mineral at the time of entry, and hence he has no standing as an adverse claimant against the company's application for patent to the Granite Hill mining claim. The fact that Ryan claims under a patent is only an additional reason for denying him the status of an adverse claimant (*North Star Lode*, *supra*, and *Iron Silver Mining Company v. Campbell*, *supra*). So much of the said decision of your office as holds that the said papers filed by Ryan do not constitute an adverse claim within the meaning of the mining laws, and in effect rejects the same, is accordingly affirmed.

It follows from what has been said that the suit to quiet title, begun by Ryan against the company, is not such a suit as is contemplated by said section 2326, and that no stay of the company's proceedings for patent to await the result of that suit is authorized. It is plain that the controlling question in that suit is the character of the land: whether or not at the date of the townsite entry the said town lots contained known valuable mines, or were known to be valuable for minerals, or were embraced in a valid mining claim or possession held under the mining laws; for if they were known then to be valuable for their mines or minerals, or were embraced in a valid mining claim or possession, title to them did not pass out of the United States under the said patent, but still remains in the United States subject to the jurisdiction of the land department and to disposal under the mining laws (*Pacific Slope Lode v. Butte Townsite*, 25 L. D., 518; *Gregory Lode*, 26 L. D., 144; and *Brady's Mortgagee v. Harris et al.*, 29 L. D., 426).

In view of the townsite entry and patent such a question is raised as to all the conflict between the townsite and the said Granite Hill mining claim by the company's proceedings for patent thereto; and this question must be decided, in those proceedings, by the land department. No authority of law exists for transferring the proceedings

from the land department to the courts for the decision of that question, and hence the decision of a court thereon can not bind or conclude the land department nor relieve it from the duty of making its own decision in the premises. How far, or under what circumstances, if at all, the land department may be guided in its determination of such a question by a decision of a court upon the same point in a controversy between the same parties, it is not necessary now to inquire.

So much of the decision appealed from as directs a suspension of the company's proceedings for patent is reversed for the reasons herein stated.

You will order a hearing upon notice to the parties herein and to the South Grass Valley townsite authorities, to determine whether at the date of the townsite entry, the land embraced in the conflict between the same and the Granite Hill mining claim, or any part thereof, contained known valuable mines, or was known to be valuable for minerals, or was embraced in a valid mining claim or possession held under then existing laws.

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

A. J. WOLF.

A proceeding against a graduation entry, instituted in 1858 by the General Land Office, but on which no subsequent action was taken until 1895, must be held to have been abandoned, and to have abated, and hence constituting no bar to the confirmation of said entry under section 7, act of March 3, 1891.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 17, 1900.* (A. S. T.)

On March 4, 1857, William W. Lewis made graduation cash entry No. 11251, for the W. fractional part of the SE.  $\frac{1}{4}$  of Sec. 10, and W. fractional part of the NE.  $\frac{1}{4}$  of Sec. 15, T. 18 N., R. 12 W., east bank of the North Fork of White River, adjoining farm SE.  $\frac{1}{4}$  of NE.  $\frac{1}{2}$ , east bank of the North Fork, and east fractional part of NW.  $\frac{1}{4}$ , west bank of North Fork, Sec. 10, T. 18 N., R. 12 W., 5 P. M., Batesville (now Harrison), Arkansas, land district.

It seems that at the time said entry was made, one William W. Lewis was register of the land office at Batesville, Arkansas, and it was assumed by your office that the said entryman and said register were identical, and by letter "C" of your office, of September 15, 1858, said entry was declared illegal, and it was stated that the entry would be canceled for the reason that the register of the land office is prohibited by law from entering lands upon application to himself; and attention was called to circular of May 25, 1831, prescribing the manner of purchasing public lands by registers of district land offices under the act of May 10, 1800 (2 Stat., 73).

There appears to have been no action taken in response to said letter of September 15, 1858.

By letter "C," of April 10, 1895, your office directed the register and

receiver of the local office at Harrison, Arkansas, to ascertain from the commissioner of lands for the State of Arkansas whether the records of his office show that Lewis applied to the surveyor-general for the State of Arkansas, in accordance with Sec. 10 of the act of May 10, 1800 (2 Stat., 73), to enter said land.

By letter of June 24, 1895, the local officers enclosed a letter from J. F. Ritchie, commissioner of State lands, for the State of Arkansas, stating that the old records are not in his office, but are in the auditor's office, and that upon a careful examination to ascertain whether or not Lewis had made an application to the surveyor-general of the State to enter said land, as required by said act, he found a note of the entry by Lewis, but no record of the application; and the local officers reported that the application and the records of their office do not show that Lewis applied to the surveyor-general to purchase said lands.

By letter "C," of July 13, 1895, your office directed the local officers to request the proper county officer to furnish them the name of the present claimant of said land.

On July 25, 1895, the local officers reported that the clerk of Baxter county, Arkansas, reported that A. J. Wolf, of Newport, Arkansas, was the present claimant of said land, as shown by his records.

By letter "C," of your office, dated April 20, 1898, addressed to the local officers, it is stated that

Lewis was register of the Batesville office from the time said entry was made up to 1861. There, therefore, seems to be no question but that he received notice of the contents of said letter C, of September 15, 1858. Said entry was illegal, and you will advise Lewis and any other known party in interest that thirty days from service of notice are allowed within which to show cause why said entry should not be canceled.

On July 7, 1898, the local officers transmitted to your office the petition of A. J. Wolf, praying that a hearing be ordered to determine whether, or not, said entry is voidable or illegal from inception.

In said petition it is stated that the title to said land is embraced in two conveyances—William W. Lewis to James A. Cleberne, and James A. Cleberne to T. P. Casey and A. J. Wolf; that some years ago Wolf instituted a suit, in the Baxter county circuit court, to perfect title to this land, and it was sold by a decree of the court and purchased by Wolf, and a copy of said decree can be produced; that said deeds of conveyance had been destroyed by fire in the Baxter county court house, but the fact that they were made can be proved. On June 3, 1899, your office rejected said petition and held said entry for cancellation, and Wolf has appealed to this Department.

The original application to purchase the land, the receiver's receipt for the price paid, and the final certificate showing the purchase and payment by Lewis, are all on file. The jurat to the affidavit accompanying the application is signed by W. W. Lewis, Register, and the name "W. W. Lewis" is partially obliterated, but whether this was done purposely, and if so, by whom, and why, does not appear. Neither

is there any evidence showing that the William W. Lewis who purchased the land and the William W. Lewis who was register were the same, except the fact that they both signed the same name.

This purchase and entry was made under the provisions of the act of Congress approved August 4, 1854 (10 Stat., 574), the first section of which graduates the price of public lands which have been on the market from ten to thirty years, according to the number of years such lands have been on the market.

The second section gives to occupants and settlers on such lands the right of pre-emption at the proper graduated price, on the same terms and conditions upon which the public lands of the United States were then subject to the right of pre-emption.

The third section provides that any person applying to enter such lands under said act shall make affidavit before the register and receiver of the proper land office, that he or she enters the same for his or her own use, and for the purpose of actual settlement and cultivation or for the use of an adjoining farm or plantation owned or occupied by him or her, thus clearly conferring the pre-emption right to purchase said lands at the graduated price upon owners of adjoining farms, where the number of acres acquired by the entryman under the provisions of said act, including the lands applied for, should not exceed three hundred and twenty.

By the act of Congress approved March 3, 1891 (26 Stat., 1095), it is *provided*, 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.

This entry was made, the receiver's receipt and the final certificate issued March 4, 1857, more than forty-two years ago. No proceeding has ever been initiated against it, except said letter of your predecessor of September 15, 1858, and that alone would not be sufficient to prevent the issuance of patent upon said entry, since it appears that no action whatever was taken upon it.

In the case of *Henry v. Pevoto* (29 L. D., 423) it is held (syllabus):

A proceeding against an entry, instituted by the general land office many years prior to the passage of the act of March 3, 1891, but of which the entryman was never notified, must be held to have been abandoned and to have abated, and hence constitutes no bar to the confirmation of the entry under section seven of that act.

Following the holding there announced, it is held in this case that the proceedings instituted by your predecessor in 1858, as to which no action was ever taken except the letter of September 15, 1858, must be considered as abandoned and abated, and as constituting no bar to the confirmation of said entry under the provisions of said act of March 3, 1891.

Your said decision is therefore reversed, and you are directed to cause a patent to issue upon said entry as provided by said act.

## OKLAHOMA TOWNSITE—ACT OF JULY 7, 1898.

## INSTRUCTIONS.

The effect of the act of July 7, 1898, abolishing townsite boards in Oklahoma, is to render operative within said Territory, and the Cherokee Outlet therein, the provisions of section 2387 R. S., permitting the corporate authorities of a town, or the judge of the county court, to enter land for townsite purposes.

*Secretary Hitchcock to the Commissioner of the General Land Office, February 19, 1900.* (W. V. D.) (G. B. G.)

By your office communication of January 5, 1900, the department is requested to rule upon the question whether townsite entries may be made in the Cherokee Outlet, in Oklahoma Territory, by probate judges, under section 2387 of the Revised Statutes and other legislation supplementary thereto, herein recited.

Section 2387 of the Revised Statutes is as follows:

Whenever any portion of the public lands have been or may be settled upon and occupied as a town-site, not subject to entry under the agricultural pre-emption laws, 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 at the proper land-office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such towns, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated.

The Cherokee Outlet was opened to settlement on September 16, 1893, under the President's proclamation of August 19, 1893 (28 Stat., 1222), by virtue of the act of March 3, 1893 (27 Stat., 642), which act provided that the lands in the Cherokee Outlet should be opened to settlement in the manner provided in section 13 of the act of Congress approved March 2, 1889 (25 Stat., 980, 1005), the act of May 2, 1890 (26 Stat., 81), and the second proviso of section 17 of the act of March 3, 1891 (16 Stat., 989, 1026). The said section 13 of the act of March 2, 1889, provided that the Secretary of the Interior might permit townsite entries under section 2387 and section 2388 of the Revised Statutes, the said act of May 2, 1890, by section 22 thereof, provided that sections 2387 and 2388 of the Revised Statutes should apply to all lands in the Territory of Oklahoma thereafter to be opened to settlement, and the said second proviso to section 17 of the act of March 3, 1891, enacted that, in addition to the jurisdiction granted to the probate courts and the judges thereof in Oklahoma Territory by legislative enactments—which enactments are ratified—the probate judges of said Territory shall have jurisdiction in townsite matters under such regulations as are provided by the laws of Kansas.

In the meantime, however, and on May 14, 1890, Congress passed an act, entitled "An act to provide for townsite entries of lands in what

is known as 'Oklahoma,' and for other purposes" (26 Stat., 109), by which it was provided that so much of the public lands in the Territory of Oklahoma, then open to settlement, might be entered as townsites, for the several use and benefit of the occupants thereof, "by three trustees to be appointed by the Secretary of the Interior for that purpose, said entry to be made under the provisions of section 2387 of the Revised Statutes, as near as may be," and by a joint resolution of Congress, approved September 1, 1893 (28 Stat., 11), the provisions of the act of May 14, 1890, were extended to the territory known as the Cherokee Outlet.

This was the status of the law when, February 14, 1894, it was held by the Department, with respect to the Cherokee Outlet (18 L. D., 122):

Under section 2387 Revised Statutes, providing for the making of townsite entries on public lands, the probate judges, or judges of the county courts, when executing the trust imposed upon them in the matter of making townsite entries, proceed under such regulations as may be prescribed under the legislative authority of the State or Territory in which the same may be situated; thus, in the present instance, the probate judges, if making townsite entries within the Cherokee Outlet, would be subject to such regulations as might be prescribed by the legislative authority of the Territory of Oklahoma.

The plan of disposal provided for in the act of May 14, 1890 (26 Stat., 109), places the discharge of the trust in trustees, under such regulations as may be prescribed by the Secretary of the Interior. The whole matter of the disposition of the lands within townsites, through the intervention of townsite trustees, is therefore under the jurisdiction and control, by regulations, of the Secretary of the Interior. This means of disposition is inconsistent with that provided for where the lands are entered by probate judges, and in some cases, were both recognized, it might result in a conflict of authority. It seems to me, therefore, that the purpose of Congress in passing the joint resolution of September 1, 1893 (*supra*), extending the provisions of the act of May 14, 1890, to the Cherokee Outlet, was to supersede any other mode of entry which might have been provided for in previous legislation relating to townsites established on these lands.

In this connection, however, see Choctaw City Townsite (16 L. D., 74).

By an act of July 7, 1898 (30 Stat., 652, 674), it is provided:

That on January first, eighteen hundred and ninety-nine, the boards of trustees for townsites, and each of them in said Territory [Oklahoma], shall cease and be abolished, and no compensation shall be allowed or paid to anyone, member, or trustee, or disbursing agent on or after January first, eighteen hundred and ninety-nine. And so much of the trust vested in said boards and heretofore initiated as shall remain unexecuted on said date shall be vested in the Commissioner of the General Land Office, who is hereby authorized and empowered to complete the same.

While provision is made in this act for the execution by the Commissioner of the General Land Office of so much of the trust, theretofore initiated by said boards, as remained unexecuted, no provision is made therein for further townsite entries of land in said Territory, and the question presented is, whether authority exists for allowing such entries under general laws.

Prior to September 16, 1893, the lands in the Cherokee Outlet were not open to settlement of any kind, and were not subject to townsite entry under any law. If the joint resolution of September 1, 1893, had not intervened before said lands were opened to settlement, they would have clearly become subject to entry under section 2387 of the Revised Statutes, but the joint resolution having intervened, it may be, as held by the department February 14, 1894, a matter not now considered, that said lands were opened to townsite entry only under the act of May 14, 1890, and said joint resolution. But said act and resolution did not repeal section 2387 of the Revised Statutes. They provided that the entry should be made by three trustees, instead of the corporate authorities of a town, or the judge of the county court, but directed that entries thereunder should be made as near as might be under the provisions of section 2387. They were applicable only to certain public lands in Oklahoma and were local, while section 2387 was a general law. The effect of said act and resolution was therefore, at most, only to except certain public lands in Oklahoma from some of the provisions of said section, and not to altogether abrogate the section or to render it entirely inapplicable to the public lands in Oklahoma to which the act of May 14, 1890, and the joint resolution had reference.

What is the effect of the act of July 7, 1898? There are no words of express repeal in it. It, however, abolishes townsite boards, and in legal effect abrogates or repeals to that extent the act of May 14, 1890, and said joint resolution. If the act of May 14, 1890, and the joint resolution had repealed section 2387 of the Revised Statutes; and the act of July 7, 1898, had repealed the act of May 14, 1890, and the joint resolution, section 2387 would not have been thereby revived (Sec. 12 Revised Statutes). But when a statute only makes an exception to or modification of a former statute, the former statute becomes inoperative or suspended to the extent of the repugnancy, only so long as the later statute is in force, and when it is abrogated or repealed by subsequent legislation, the original statute again becomes operative. See Vol. 23, pages 518, 519, American and English Encyclopedia of Law, and cases there cited.

It results that the provision of section 2387 of the Revised Statutes permitting the corporate authorities of a town, or the judge of the county court for the county in which the town is situated, to enter land for townsite purposes, is now in force in Oklahoma and in the Cherokee Outlet therein. This is the view expressed in the letter of inquiry from your office, and the Department fully concurs therein.

## FOREST RESERVATION—ACT OF JUNE 4, 1897.

## JARED WOODBRIDGE.

While lands embraced within a forest reservation may be excluded, because shown to be more valuable for agricultural than for forest purposes, until formally restored to the public domain, such lands are not subject to general disposition, and no rights can be acquired by the attempted entry thereof.

It was not intended by the act of June 4, 1897, to exclude from reservation small tracts, here and there, within the limits of a forest reservation, because of the fact that said tracts were not covered with timber.

*Secretary Hitchcock to the Commissioner of the General Land Office, February 20, 1900.* (F. W. C.)

Jared Woodbridge has appealed from your office decision of June 28, 1899, denying his application to make soldiers' additional homestead entry of the SE  $\frac{1}{4}$  of the NE  $\frac{1}{4}$  of Sec. 8, and the NW  $\frac{1}{4}$  of the NW  $\frac{1}{4}$  of Sec. 12, T. 23 N., R. 7 E., G. and S. R. M., Prescott land district, Arizona, because said tracts were, by proclamation dated August 17, 1898, (30 Stat., 1780), "reserved from entry or settlement," being within the limits of the San Francisco Mountain forest reserve.

Woodbridge claims to have settled upon this land prior to August 17, 1898, but, as he is seeking to make soldiers' additional entry thereof, which is not dependent upon and can not be aided or affected by prior settlement or residence upon the land, his claim of settlement prior to the establishment of the forest reservation is not material. Further, whatever right was initiated by such settlement was lost by his failure to make timely assertion of his claim at the local land office.

It is further urged that this land is agricultural in character, and is, by the provisions of the act of June 4, 1897 (30 Stat., 35), for that reason, excluded from forest reservation. The land included was specifically described in the proclamation of August 17, 1898, and while lands included in a forest reservation might be excluded because shown to be more valuable for agricultural than for forest purposes, until formally restored to the public domain, such lands are not subject to general disposition and no rights can be acquired by the attempted entry thereof.

Relative to the showing filed bearing upon the character of the land in question, it might be stated that it was not intended by the act of June 4, 1897, to exclude from reservation small tracts, here and there, within the limits of a forest reservation, because of the fact that such small tracts were not covered with timber.

The decision of your office rejecting the proffered application by Woodbridge to make soldiers' additional homestead entry of this land is accordingly affirmed.

## OKLAHOMA LANDS—GREER COUNTY ADDITIONAL PURCHASE.

## OLIVER P. MELTON.

The right conferred by section 1, act of January 18, 1897, to purchase lands additional to those entered under the homestead law, is not limited by any requirement that the tracts so purchased shall be contiguous.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) February 23, 1900. (W. M. W.)

January 4, 1899, Oliver P. Melton made cash entry, under section one of the act of January 18, 1897 (29 Stat., 490), for the S.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  and lot 4 of Sec. 3, T. 1 S., R. 24 W., Mangum, Oklahoma land district, Oklahoma Territory.

May 17, 1899, your office considered said entry, and found that:

The plats of this office show lot 4 to be incontiguous, with the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , said entry was therefore improperly allowed.

You will advise said Melton, using form 4-485, that he will be allowed sixty days from notice within which to elect which portion of his entry he will surrender, so as to leave his land contiguous.

Should he fail to make election or to appeal herefrom within the time specified, his entry, which is hereby held for cancellation, will be canceled without further notice to him from this office.

Melton appeals, and alleges that your office erred

"in holding that all the parts of the land embraced in a cash entry must be contiguous with each other, especially in a case, like this, where these parts are contiguous with the homestead tract of the purchaser."

The land in question is situated in Greer county, Oklahoma, and its disposition is governed by the provisions of the act of January 18, 1897, *supra*.

The first section of said act provides that every person qualified under the homestead laws of the United States, who, on March 16, 1896, was a *bona fide* occupant of land within the territory established as Greer county, Oklahoma, shall be entitled to continue his occupation of such land, with improvements thereon, not exceeding one hundred and sixty acres, and shall be allowed six months preference right to initiate his claim thereto, and shall be entitled to perfect title thereto under the provisions of the homestead law, upon payment of land office fees only. Said section further provides that:

Every such person shall also have the right, for six months prior to all other persons, to purchase at one dollar an acre, in five equal annual payments, any additional land of which he was in actual possession on March sixteenth, eighteen hundred and ninety-six, not exceeding one hundred and sixty acres, which, prior to said date, shall have been cultivated, purchased, or improved by him.

The land applied for by Melton contains 107.46 acres, as shown by the receiver's receipt. He is shown to be qualified to purchase one hundred and sixty acres of land under the act, and the only question presented for determination is whether under the law he can be allowed to purchase the tracts applied for where it is shown by the plats of your office that they are not contiguous.

The act of January 18, 1897, *supra*, is a special act; its provisions are limited to Greer county, Oklahoma. It was passed in order to meet the peculiar conditions arising out of the conflicting claims of the United States, and the State of Texas, to the land embraced in said county, which controversy was finally settled by the supreme court of the United States in favor of the United States (162 U. S., 1), and for the purpose of protecting, to the extent specified in the act, the claims of *bona fide* occupants of the land, who were qualified under the homestead laws of the United States, who on March 16, 1896, were *bona fide* occupants of lands in Greer county, Oklahoma.

The act is remedial in character and should be construed liberally, so as to effectually carry out the purpose for which it was passed. (Frank Johnson, 28 L. D., 537.)

The language used in the act conferring the right of purchase does not, in express terms nor by implication, require that the lands to be purchased shall be contiguous or "in a body," as provided by the homestead law (Sec. 2289 Revised Statutes). But, on the other hand, the right to purchase any additional land, of which the claimant was in actual possession on March 16, 1896, not exceeding one hundred and sixty acres, which, prior to said date, shall have been cultivated, purchased, or improved by him, is clearly and specifically given such claimant by the terms of the act. As Congress saw fit to confer this right to purchase any additional land without limitation or restriction as to whether the land should be contiguous or not, the land department could not rightfully or properly limit or restrict the right to such lands as may be contiguous.

It follows that the judgment of your office requiring Melton to surrender a portion of the land covered by his application to purchase was erroneous, and it is accordingly reversed.

#### OKLAHOMA LANDS—ORDERS OF RESERVATION—SALINE LANDS.

##### TERRITORY OF OKLAHOMA *v.* BROOKS.

The reservation of section 33 in each township for public buildings, contained in the President's proclamation opening the Cherokee Outlet, was in terms applicable only to lands which had not been "otherwise reserved or disposed of," and therefore did not include the lands in the "saline reserves" that were specifically withheld from disposition by a prior declaration in said proclamation. By the proclamation of July 27, 1898, the lands so reserved were restored to the public domain for disposal, subject to the policy of the government in its disposition of saline lands.

The lands thus restored to the public domain should be treated as presumptively of saline character, but should it be ascertained that any of them are not saline, disposition thereof can be made under the laws relating to public lands in the Cherokee Outlet.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 23, 1900.* (F. W. C.)

The Territory of Oklahoma has appealed from your office decision of August 28, last, upon the application of Leonard Brooks to make home-

stead entry of the SE.  $\frac{1}{4}$  of Sec. 33, T. 26 N., R. 9 W., Alva land district, Oklahoma, in which it is held that the reservation made in the proclamation of August 19, 1893 (28 Stat., 1229), of section 33 in each township, for public buildings, "which has not been otherwise reserved or disposed of," does not include this tract.

The land in question is a portion of what is known as the "Eastern Saline Reserve," within the Cherokee Outlet. The lands within this "Outlet" were acquired by the United States, under three separate agreements with the Cherokee Nation, the Tonkawa tribe of Indians, and the Pawnee tribe of Indians, which agreements were ratified by the act of March 3, 1893 (27 Stat., 612, 641). By that act Congress made special provision for the disposal of the lands in said Outlet. It was directed that the President should, by proclamation, open them to settlement and entry, except such portions thereof as were reserved for the Chilocco Indian school or were allotted to Indians, and sections 16 and 36 of each township which were reserved for the benefit of the public schools, and it was further provided that the President might "make such other reservations of lands for public purposes as he may deem wise and desirable."

Accordingly by proclamation, the President, on August 19, 1893 (28 Stat., 1222, 1229), declared that the lands ceded by the Indians should be opened to settlement and entry on September 16, 1893, on conditions prescribed, except certain described lands set apart for Indian and other purposes, and—

excepting also the saline lands covered by three leases made by the Cherokee Nation prior to March 3, 1893, known as the eastern, middle and western saline reserves under authority of the act of Congress of August 7, 1882 (22 Stat., 349), said lands being described and identified as follows:

Then follows a particular description by legal subdivisions of the lands embraced in each of said saline reserves. The proclamation then continues (p. 1129):

excepting also that section 33 in each township which has not been otherwise reserved or disposed of, is hereby reserved for public buildings.

On May 4, 1894 (28 Stat., 71), Congress passed an act confirming the reservation for public buildings of section thirty-three of each township of said lands, not otherwise disposed of.

The Indian leases of the saline lands authorized by the act of August 7, 1882, *supra*, and referred to in the proclamation of the President, not having been approved by the Secretary of the Interior, the President, by proclamation dated July 27, 1898 (30 Stat., 1779), after reciting that said lands were excepted from settlement because of said leases, declared that "all the lands in said saline reserves" as described in the former proclamation—

are hereby restored to the public domain and will be disposed of under the laws of the United States relating to public lands in said Cherokee Outlet, subject to the policy of the government in disposing of saline lands.

Whether in fact all of these lands were deemed saline in character, and were for that reason withheld from settlement and entry by the President's proclamation of August 19, 1893, in recognition of the settled policy of the government to reserve saline lands from disposition under the general land laws (*Morton v. Nebraska*, 21 Wall., 660; *A. H. Geissler*, 27 L. D., 515), or whether the sole purpose in so withholding them from settlement and entry was to protect said leases, and any possible rights thereunder, is not material in the determination of the question now under consideration, for the controlling fact is that the reservation of these lands was declared in plain and unambiguous language in that proclamation and continued in full force until abrogated by the proclamation of July 27, 1898. After reserving these lands in the manner shown, the former proclamation also reserves for public buildings section 33 in each township, where not otherwise reserved or disposed of, which reservation it was one of the purposes of the act of May 4, 1894, to confirm. The reservation of section 33 for public buildings was in terms applicable only to lands which had not been "otherwise reserved or disposed of," spoken of only as "not otherwise disposed of" in said confirmatory act. The difference in the language of the proclamation and that of the act of confirmation is not important. While the words "disposed of" are not always employed in the same sense (*State of Wyoming*, 27 L. D., 35, 39; *State of Utah*, 29 L. D., 418), it is clear from the context that the act of May 4, 1894, employs them in a sense which embraces what would be meant by the word "reserved," else there would have been no occasion to use the word "otherwise" in explanation of them. (*State of Wyoming*, *supra*.) Again, one of the purposes of the act of May 4, 1894, was to give full effect and sanction to the reservation of section 33 for public buildings as made in the President's proclamation, and if it had been intended to modify the proclamation in that respect, or to enlarge the reservation thereby made, altogether different language would have been employed. The words of the statute are such as would naturally be employed in confirming an act theretofore done, and not such as would be used in partial disaffirmance of such an act. The tract here in question having been otherwise reserved and disposed of by reason of the reservation first named, was not included in the reservation for public buildings, and hence under the proclamation of July 27, 1898, was restored to the public domain to be disposed of under the laws of the United States relating to public lands in said Cherokee Outlet, subject to the policy of the government in disposing of saline lands.

In an affidavit accompanying his application to enter this tract, Brooks states that it "does not contain any visible or known salt springs, rock salt, or other saline deposits, and is suitable for agricultural purposes." This affidavit can not be said to determine the character of the land, though it may be sufficient to justify an inquiry or examination into that matter. All of these lands should be treated

as presumptively of saline character, but should it be ascertained that any of them are not saline, disposition thereof can be made under the laws relating to public lands in the Cherokee Outlet. Where, however, it is not ascertained that the lands are not saline, no disposition of them should be made or attempted until further legislation is had by Congress. The act of January 12, 1877 (19 Stat., 221), applies only to such States and Territories as have had a grant of salines by act of Congress, and Oklahoma has had no such grant. (See case of A. H. Geissler, *supra*.)

The action of your office is affirmed.

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SOLDIERS' ADDITIONAL HOMESTEAD—WIDOW.

ANDREW FERGUS.

The widow of a soldier is not entitled to make a soldier's additional homestead entry, if the soldier, at the time of his death, had the right to make an original entry of and perfect title to the full quantity of one hundred and sixty acres.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 23, 1900.* (J. L. McC.)

Andrew Fergus, claiming as assignee of Malinda M. Youngblood, on July 25, 1898, applied to enter, under sections 2306 and 2307, Revised Statutes, the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 12, T. 17 N., R. 19 E., Lewiston land district, Montana.

Malinda M. Youngblood makes affidavit that she is the widow of Theodorick B. Youngblood, who served as captain of company K, first regiment Arkansas cavalry volunteers, from August 7, 1862, to March 10, 1863, and was honorably discharged; that he made homestead entry No. 5617, at Springfield, Missouri, on October 9, 1871, for the N.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , and the SE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 9, T. 28, R. 23; that neither her husband nor herself has ever made any other homestead entry; that neither of them has ever made application for an additional homestead entry; that no certificate of right to an additional entry has ever issued to either of them; that her said husband died on February 7, 1879; and that she has not since remarried.

Your office, by letter of May 13, 1899, denied said application for reasons set forth, as follows:

The records of this office show that Theodorick B. Youngblood made the entry as alleged, and that it was canceled by this office on July 1, 1875, for conflict with the grant to the Atlantic and Pacific Railroad Company. Youngblood neither gained nor lost any rights by making the said entry; for, under the rulings then in force, such entry was invalid, and therefore did not exhaust his homestead right. The transaction amounted merely to a nugatory attempt to make an entry, and left Youngblood in the same position he would have been had he never attempted to make the homestead entry. This being true, it necessarily follows that the entryman's widow is not entitled to the right to make entry under section 2307 Revised Statutes, as additional to the said Springfield, Missouri, entry.

Under the circumstances recited Mrs. Youngblood, upon the death of her husband, became entitled to enter and perfect title to one hundred and sixty acres of public land under sections 2304 and 2307 of the Revised Statutes, receiving the same benefits from his military service to which he was entitled, but she did not become entitled to an additional entry under section 2306, which presupposes that the beneficiary, by reason of another and prior entry, is not entitled to make an original entry of and perfect title to the full quantity of one hundred and sixty acres under section 2304.

The decision of your office is affirmed.

TIMBER CULTURE CONTEST—APPLICATION TO ENTER.

LAMB *v.* DAHL.

No rights are secured under an application to enter, accompanying a timber culture contest, filed at a time when the land is involved in a prior contest, if the proceedings had under the prior suit result in the cancellation of the entry under attack.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 23, 1900.* (F. W. C.)

Julia M. Lamb has appealed from your office decision of April 1, 1898, awarding to Gustav Dahl the right to make entry of the NW.  $\frac{1}{4}$  of Sec. 4, T. 153 N., R. 58 W., Grand Forks land district, North Dakota.

This tract was formerly embraced in the timber-culture entry of William T. Souder, made March 23, 1883. On December 17, 1896, one J. T. Baird filed a contest against said entry, alleging non-compliance with law, upon which hearing was had April 20, 1897, the defendant being in default. Upon the testimony adduced the local officers, in their decision of May 15, 1897, sustained the contest and recommended that the entry by Souder be canceled.

With their letter of February 18, 1898, the local officers forwarded the record made in said contest, reporting that the entryman, after due notice of their decision, had failed to appeal therefrom; and by your office decision of November 4, 1898, the decision of the local officers was affirmed, Souder's entry canceled, and the case closed.

The claimed rights of both Lamb and Dahl are predicated upon acts performed prior to your said office decision closing the case, and of which acts your office appears to have been in ignorance at the time of the closing of said case.

On April 3, 1897, Julia M. Lamb filed in the local office an affidavit of contest against Souder's entry, alleging failure to comply with the law, accompanying the same by her application to make entry of the land in the event of a successful termination of her contest. Said contest was held subject to that of Baird, then being proceeded with.

On November 8, 1898, being the date upon which the notice of the cancellation of Souder's entry upon Baird's contest was received at the local office, Lamb again tendered an application to make entry of this land, upon which the local officers noted, "Held to await the preference right of J. T. Baird."

On June 23, 1898, more than four months after the record in the case of Baird v. Souder had been transmitted to your office, Gustav Dahl tendered at the local office an application to make homestead entry of this land, which was rejected. October 22, 1898, he again tendered an application to make homestead entry of this land, accompanying the same with Souder's relinquishment and a withdrawal of Baird's contest, the same being signed by the attorney for Baird.

The local officers did not cancel Souder's entry upon said relinquishment, for some reason not disclosed by the record, but held the same in their office. They rejected the application of Dahl, however, for the reason that the land was "still under contest." Dahl appealed from such action on December 2, 1898, and it was upon said appeal that your office called for the papers relating to the contest by Lamb, and in the decision appealed from held that said contest never attached because of the successful prosecution of the contest by Baird; that the application filed with and dependent upon that contest fell with the contest and did not serve to reserve the land upon the cancellation of Souder's entry; that Souder's entry should have been canceled upon the relinquishment filed by Dahl on October 22, 1898, and in view of Baird's withdrawal Dahl should have been allowed to make entry as the first legal applicant.

From a careful review of the matter your office decision is affirmed.

Baird furnished satisfactory information upon which Souder's entry was canceled.

After the decision of the local officers upon said contest and the failure of Souder to appeal therefrom, it was not within the power of Baird to withdraw the contest. He might waive any right secured through the contest but the entry would have nevertheless been canceled upon the information furnished.

Lamb did not allege collusion in the matter of the bringing of Baird's contest, although it is suggested in her appeal from your office decision, nor does the record seem to justify such a charge.

Had the local officers canceled Souder's entry upon the filing of the relinquishment by Dahl and at once advised your office, as they should have done, the action taken by your office upon Baird's contest would have been unnecessary.

The relinquishment must be treated as the result of Baird's contest and his withdrawal as a waiver of his preferred right. When so viewed the action of the local officers in rejecting Dahl's application presented on October 22, 1898, was erroneous and the right secured thereby was saved by his appeal.

At this time Lamb had secured no such right as barred the acceptance of Dahl's application. She had, as before stated filed an application with her contest against Souder's entry, but no rights were secured thereby as it depended upon the action taken upon the contest which never attached.

Her second application, tendered on November 8, 1898, is clearly subordinate to Dahl's rights under his application presented on October 22, 1898.

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

AZARIAH W. COLBURN ET AL.

To defeat the confirmation of an entry under the proviso to section 7, act of March 3, 1891, it is necessary that some action should be taken against the final entry within two years from the issuance of the receiver's receipt thereon.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 24, 1900.* (E. F. B.)

June 4, 1887, Azariah W. Colburn made homestead entry for the NE.  $\frac{1}{4}$  of Sec. 31, T. 12 S., 10 W., Huntsville land district, Alabama, and on August 6, 1887, your office held said entry for cancellation on the ground that the tract covered thereby was withdrawn from entry as valuable coal land under the act of March 3, 1883 (22 Stat., 487), and that the entry was therefore invalid. No appeal appears to have been taken from this action.

March 6, 1893, notwithstanding the action of your office of August 6, 1887, holding the entry for cancellation, the local officers accepted final proof and issued final certificate thereon.

April 3, 1896, the local officers reported that the record of their office showed—

that on August 11, 1887, notice of the requirements of your letter of Aug. 6, 1887, and a copy thereof, was mailed to claimant, and your said letter was noted, "Claimant notified Aug. 12, 1887." The record does not show the notice to have been registered.

July 13, 1896, your office modified its decision of August 6, 1887, by suspending the entry, pending the offering of the land at public sale under the act of March 3, 1883, and holding that, if the land

shall not be sold upon such offering, then claimant's entry may be considered as an application to enter, of its original date, and he may be permitted to make entry thereunder,

basing its action on the decision of the Department in the case of David J. Davis (7 L. D., 560). Colburn was duly notified of this decision of your office, but no appeal was taken.

March 2, 1899, W. G. Dodd and E. W. Goss, claiming to be transferees of Colburn, filed in the local office a motion to have your office decision of July 13, 1896, set aside and the entry passed to patent

under section 7 of the act of March 3, 1891 (26 Stat., 1095), basing said motion upon the decision of the Department of December 27, 1898, in the case of William F. Gaines (not reported).

April 20, 1899, your office rendered decision denying said motion, holding that—

In the Gains case, as in the one now under consideration, the entry embraced land reported to be valuable for coal, and withdrawn from entry under the act of March 3, 1883, but no proceedings against the entry were begun within two years of the date of the final receipt, and it was held by the Department that the entry was confirmed under the 7th section of the act of March 3, 1891.

Proceedings against the entry of Colburn were begun prior to the issuance of the final receipt, and this entry does not, therefore, fall within the confirmatory provisions of the act referred to.

From this action of your office Dodd and Goss, the alleged transferees, have appealed, assigning error in your office decision, in substance, (1) in holding that the decision of August 6, 1887, is binding upon the entryman or his transferees, in view of the fact that there is no evidence that he ever received notice of said decision, and (2) in not patenting the entry to protect the transferees, who, it is claimed, innocently purchased the land for a valuable consideration and are entitled to protection under the provisions of section 7 of the act of March 3, 1891.

It is not shown by the record when the alleged transfer was made, but as no entry is confirmed under the body of the section unless the transfer was made prior to the first day of March, 1888, and after final entry, it is unnecessary to consider further the contention of appellants with reference to their rights as transferees, under said section. The final entry in the case was not made until after said date and if confirmed it must be under the proviso to said section, which is as follows:

*Provided,* 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 this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

The proviso has reference solely to entries upon which final certificate has issued. Hence, any action that was taken with reference to this entry prior to the issuance of the final certificate can not be considered as affecting the question whether the entry was or was not confirmed, as the action contemplated by the statute must be taken with reference to the final entry. No case is brought within the terms of the act until after the final certificate has issued. That fixes the period within which action must be taken to defeat confirmation under the proviso. Ira M. Bond (15 L. D., 228).

The language of the statute is "after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry" and when there shall be no pending contest or protest against the validity

of "such entry" the entryman shall be entitled to a patent. This case was not brought within the terms of the act until the issuance of the final certificate March 6, 1893. To defeat the confirmation it was necessary that some action should have been taken against *that* entry, within two years from that date.

It will be observed that the law is very specific in fixing the date of the receipt as the time when the period of two years commences to run and that no contest, protest, or inquiries into the legalities or merits of a case is provided for or permitted after a final receipt has been issued two years. Furthermore, there is no authority in said act or in any other statute, that authorizes or allows the changing or altering of the date in a final receipt for the purpose of bringing an entry under the proviso aforesaid, nor can this Department in the exercise of its supervisory powers enter into the merits of the case and permit such a proceeding. (Ira M. Bond, 15 L. D., 288.)

Notwithstanding the irregularity or invalidity of this entry, the failure to take action upon the final entry within two years after the issuance of the final receipt, brought it within the proviso to said act. James G. Harris *et al.* (28 L. D. 90).

The decision of your office is reversed.

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INDIAN LANDS—ACT OF MARCH 2, 1889.

SIMON KUSSER.

Under the provisions of section 21, act of March 2, 1889, opening to settlement and entry the Great Sioux reservation, the lands therein are not subject to disposition under the desert land laws.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 24, 1900.* (E. P.)

January 14, 1896, Simon Kusser applied to make desert land entry of the SE.  $\frac{1}{4}$  of Sec. 7, T. 109 N., R. 71 W., Huron land district, South Dakota.

March 11, 1896, the local officers transmitted Kusser's application to your office, with the statement that

this being the first application of this character in the history of this office, the papers are forwarded to your office for approval before action by this.

By letter of May 11, 1896, your office advised the local officers that, under the rulings of the Department, the land applied for was desert in character, and returned Kusser's declaration "for allowance, should no further objection appear, upon payment of the required amount."

August 12, 1896, the local officers permitted Kusser to make desert land entry of the tract, and appear to have forwarded the papers in the case to your office with their returns for August, 1896.

April 10, 1899, your office found that the land involved is within the ceded portion of the Great Sioux Indian reservation, and that, under the provisions of section 21, act of March 2, 1889 (25 Stat., 888), open-

ing said territory to settlement and entry, it was not subject to disposition under the desert land laws, and held the entry for cancellation.

From this action Kusser has appealed to the Department, alleging that if his entry is canceled he will be subjected to considerable loss, as he has placed upon the land covered thereby improvements to the value of about six hundred dollars.

Said act of March 2, 1889, in section 21, provides:

That all the lands in the Great Sioux reservation outside of the separate reservations herein described are hereby restored to the public domain, except American Island, Farm Island, and Niobrara Island, and shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law (except section two thousand three hundred and one thereof) and under the laws relating to townsites.

Kusser's desert land entry of the land involved in this case is therefore clearly illegal, and must be canceled.

Your office decision is affirmed.

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COBB ET AL. *v.* ROBINSON.

Motion for review of departmental decision of December 14, 1899, 29 L. D., 352, denied by Secretary Hitchcock, February 26, 1900.

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JACOB C. MULLIGAN.

Motion for review of departmental decision of August 7, 1899, 29 L. D., 82, denied by Secretary Hitchcock, February 26, 1900.

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MINING CLAIM—PROOF OF EXPENDITURE.

COPPER GLANCE LODGE.

Labor and improvements, within the meaning of the statute, are deemed to have been had upon a mining claim, or upon several claims held in common, when the labor is performed or the improvements are made in order to facilitate the extraction of minerals from the claim, or the claims in common, as the case may be, though such labor and improvements may in fact be outside the limits of the claim, or claims in common, or on only one of the several claims held in common.

In order that labor performed or improvements made upon one of several mining claims held in common, or upon ground outside the limits of such claims, may be accepted in satisfaction of the statute as to all the claims so held, such claims must be adjoining or contiguous, so that each claim thus associated may be benefited by the work done or improvements made.

Where expenditure in labor or improvements relied on is had on one only of several adjoining or contiguous claims held in common, it is incumbent upon the applicant for patent to the claims so held to show that such expenditure was intended to aid in the development of all the claims, and that the labor and improvements are of such a character as to redound to the benefit of all.

Where the labor and improvements are not upon the claim, or upon any of several adjoining or contiguous claims held in common, but outside thereof, it is likewise incumbent upon the applicant for patent to such claim, or claims in common, to show that the labor and improvements were intended to aid in the development of the claim, or claims in common, as the case may be, and are of a character suitable for the purposes intended.

Labor or improvements intended for the common benefit of several non-contiguous mining claims can not be apportioned to the different claims in satisfaction of the required expenditure thereon, for the reason that to do so would be to credit each claim with an expenditure made in part for the benefit of other claims not associated therewith, as claims held in common within the meaning of the law.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 26, 1900.* (A. B. P.)

By decision of November 13, 1897, your office held for cancellation mineral entry No. 458, made December 30, 1893, by the White Cloud Copper Mining Company for the Copper Glance lode mining claim, survey No. 44, White Cloud mining district, Reno, Nevada, for the reason that—

the only improvement reported as having been made for the benefit of said claim is 520 feet of a road, no portion of which is shown to be within the boundaries of said claim.

The surveyor-general of Nevada was thereupon directed to—

allow claimant sixty days from receipt of notice within which to show, by the report of a U. S. deputy mineral surveyor, that before the expiration of the sixty days of publication of notice of application for patent, the required expenditure had been made upon said claim by said company or its grantors,

and also to notify said company that in default of the required showing and in the absence of appeal, its entry would be canceled without further notice.

April 7, 1899, O. G. Jennings, the owner of said mining claim by purchase under certain foreclosure proceedings against said company, filed a motion for review of said decision.

In the meantime (October 31, 1898), there had been transmitted to your office the certificate of L. H. Taylor, United States deputy mineral surveyor, which is in the words and figures following:

GOLCONDA, Nevada, Sept. 6th, 1898.

I hereby certify that on the 3rd day of September, 1898, I made an examination of the Copper Glance lode, U. S. survey No. 44, in White Cloud mining district, Churchill county, Nevada, and of the improvements thereon, and that the value of said improvements placed thereon by the claimants and their grantors is not less than five hundred dollars (\$500.00).

Said improvements consist of one-ninth (1-9) of a road one mile long the total cost of which I estimate at \$8000.00. Value of 1-9 of road \$889.00.

One-ninth (1-9) of a smelting furnace for smelting of ores from the Copper Glance and eight other claims—total cost \$18,000.00. Value of 1-9 of furnace \$2,000.00.

I further certify that the Copper Glance lode is situated on the side of an extremely rugged and precipitous mountain and that the construction of the above mentioned road directly tended to and was necessary for the development of the said claim in that without such road the transportation of tools, machinery and supplies necessary and required for such development would have been impossible.

I also certify to the best of my knowledge and belief the above improvements have not been included in the expenditure of \$500.00 upon any other claim.

The smelting furnace above mentioned is situated at the foot of the mountains one mile westerly from the Copper Glance lode and is connected therewith by the above mentioned road.

L. H. TAYLOR,  
U. S. Deputy Mineral Surveyor.

Said certificate is accompanied by the affidavits of two persons corroborative thereof, and which show that the improvements mentioned therein were made prior to the expiration of the sixty days of publication of notice of the application for patent to said claim.

April 20, 1899, your office again considered the case in the light of the supplemental showing in support of the entry, and denied the motion for review. Jennings thereupon appealed to the Department.

The statement in the certificate of the surveyor-general relative to the character of the improvements in question, filed prior to entry, is simply that said improvements "consist of 520 feet of road."

The only question presented by the record is whether five hundred dollars' worth of labor was expended or improvements made upon the claim, by the White Cloud Copper Mining Company or its grantors, required by the statute (Sec. 2322 R. S.) as one of the conditions to obtaining a patent for a mining claim, prior to the expiration of the period of publication of notice of the application for patent. If the showing made is sufficient to satisfy the law in this respect, the entry should be sustained; if not, it must be canceled.

The certificate of the surveyor-general, upon which the local officers acted in allowing the entry, is very indefinite and unsatisfactory, while the evidence upon which said certificate appears to have been based is equally so. In order, therefore, to ascertain with any degree of accuracy, the character of said improvements and their connection with or relation to the claim in question, reference must be had to the supplemental showing filed in support of the entry, and to other parts of the record. It will thus be seen that the 520 feet of road mentioned in the certificate of the surveyor-general consists of one-ninth of a road one mile in length which it is claimed was constructed for the purpose of transporting to this and other claims, tools, machinery, and supplies, necessary to the development thereof. No part of this road is located on the claim in question. Its distance therefrom at the nearest point is about one fourth of a mile. It will also be seen from said supplemental showing that further improvements, not mentioned in the certificate of the surveyor-general, are given, consisting of one-ninth of a smelting furnace for smelting ores from the Copper Glance and eight other mining claims, situate one mile distant from the Copper Glance, the total cost of which is stated to have been \$18,000.

It is earnestly insisted that the one-ninth of the cost of each of these so-called mining improvements should be credited to the Copper Glance claim in satisfaction of the statutory requirement under consideration.

It appears that there were originally nine mineral locations or mining claims owned by said White Cloud Copper Mining Company, namely: the Stone Cabin, the Vulcan, the Carbonate, the Copper Glance (the one here in question), the Copper Ring, the Red Oxide, the Farralone, the Copper Giant, and the Copper Ingot, all situated in the same mining district but not all contiguous. Separate applications for patent were filed, and separate entries allowed for the several claims. The entries were all made on the same day—December 30, 1893. The Red Oxide, the Carbonate, the Copper Giant, and the Copper Ring entries were each patented in 1894. The Stone Cabin, the Farralone, the Copper Ingot, and the Vulcan entries have each been canceled by your office—the first three for insufficient showing as to the required expenditure of \$500 in labor or improvements, and the last, for conflict with a prior application for patent. The Copper Ingot was canceled by direction of this Department (22 L. D., 252). As originally applied for and entered, the Vulcan, the Copper Glance, the Red Oxide, and the Farralone claims, were contiguous. There was no further contiguity except as between the Copper Giant and the Copper Ingot, both of which lay a considerable distance from the nearest of the other claims. None of the patented claims are contiguous, nor is the Copper Glance contiguous to any of them except the Red Oxide.

The road hereinbefore mentioned, the one-ninth of which it is insisted should be credited to the claim in question, as labor expended or improvements made thereon, or for its benefit, is located some distance to the north of all of said claims, except the Vulcan and Carbonate, the extreme northerly corners of which are crossed by said road. The records of your office show that it was originally sought to have the one-ninth of said road credited to each of the nine claims as labor expended or improvements made thereon, or for the common benefit thereof, but that none of the entries finally passed upon have been allowed to stand except where there were expenditures or improvements on the claim sufficient in character and amount to satisfy the statute without taking into consideration any part of the said road.

The location of the smelting furnace with reference to the said several claims is not disclosed by the record except as is indicated by the statement in the supplemental showing that it "is situated at the foot of the mountains one mile westerly from the Copper Glance lode." It is not connected with the Copper Glance, however, as further stated in said supplemental showing, but, as already shown, is about a quarter of a mile distant therefrom at its nearest point.

There are two statutory requirements with respect to expenditures in labor or improvements on mining claims. One relates to annual expenditure which is necessary to the continued maintenance of the possessory title (Sec. 2324, R. S.), and is as follows:

On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all

claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim.

The other relates to proceedings upon an application for patent (Sec. 2325 R. S.), and makes the expenditure of five hundred dollars, in labor or improvements, upon the claim, by the applicant or his grantors, a condition to obtaining patent for the paramount title.

In the case of *Jupiter Mining Co. v. Bodie Consolidated Mining Co.*, decided by the U. S. circuit court for the district of California (11 Fed. Rep., 666, 682), it was held that—

Where one person or company owns several contiguous or adjoining claims capable of being advantageously worked together, one general system may be adopted to work such claims. Such system may consist of a shaft with drifts, cross-cuts, and tunnels therefrom, and such works need not be upon any of the claims in question. When such system is adopted, work in furtherance of the system is work on the claims intended to be developed by it. Work done outside of the claims, or outside of any claim, if done for the purpose and as a means of prospecting or working the claim, is as available for holding the claim as if done within the boundaries of the claim itself.

In *Smelting Co. v. Kemp* (104 U. S., 636, 655), one of the contentions was that a separate application should be filed and a separate patent issued for each of several mining claims held in common, in order to insure proof of the required expenditure in labor or improvements upon it. The supreme court, in answering this contention, said:

It is not perceived in what way this proof can be changed or the requirement affected, whether the application be for a patent for one claim or for several claims held in common. Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development, that is, to facilitate the extraction of the metals it may contain, though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the debris or waste material.

In the case of *Jackson v. Roby* (109 U. S., 440, 444-5), the supreme court, speaking generally upon this subject, said:

The contention of the plaintiff was made upon a singular misapprehension of the meaning of the act of Congress, where work or expenditure on one of several claims held in common is allowed, in place of the required expenditure on the claims separately. In such case the work or expenditure must be for the purpose of developing all the claims.

And after referring to the case of *Smelting Co. v. Kemp*, *supra*, the court further said:

It often happens that for the development of a mine upon which several claims have been located, expenditures are required exceeding the value of a single claim,

and yet without such expenditures the claim could not be successfully worked. In such cases it has always been the practice for the owners of different locations to combine and to work them as one general claim; and expenditures which may be necessary for the development of all the claims may then be made on one of them. The law does not apply to cases where several claims are held in common, and all the expenditures made are for the development of one of them without reference to the development of the others. In other words, the law permits a general system to be adopted for adjoining claims held in common, and in such case the expenditures may be made, or the labor be performed, upon any one of them.

In *Chambers v. Harrington* (111 U. S., 350, 353), the same court, after speaking of the general policy and purpose of the statutory requirement in the matter of labor and improvements upon mining claims, said:

When several claims are held in common, it is in the line of this policy to allow the necessary work to keep them all alive, to be done on one of them. But obviously on this one the expenditure of money or labor must equal in value that which would be required on all the claims if they were separate or independent. It is equally clear that in such case the claims must be contiguous, so that each claim thus associated may in some way be benefited by the work done on one of them.

In *Mt. Diablo M. & M. Co. v. Callisou* (5 Saw., 439, 457), it was held by the United States circuit court for the District of Nevada, that—

Work done outside of the claim, or outside of any claim, if done for the purpose and as a means of prospecting or developing the claim as in the case of tunnels, drifts, etc., is as available for holding the claim as if done within the boundaries of the claim itself. One general system may be formed well adapted and intended to work several contiguous claims or lodes, and when such is the case work in furtherance of the system is work on the claims intended to be developed by it.

*Gird v. California Oil Co.* (60 Fed. Rep., 541, 542) was a case decided by the circuit court for the southern district of California. Judge Ross, speaking for the court, there said:

In the case at bar none of the work done or expenditures made by the lessees of the plaintiffs relied on to sustain the claim to the Whale Oil were done or made on any claim contiguous to it. It is true that the evidence shows that, prior to the making of the leases in 1886 and 1887, Udall, from time to time, under and pursuant to the local rules of the district, did considerable work in building roads in the district, and on the road that led in the direction of the Whale Oil claim, but the local rules in so far as they conflict with the act of Congress are, of course, of no avail, and that, as has been repeatedly stated, requires the annual expenditure of \$100 in work or improvements on each claim, provided that, where the claims are held in common such expenditure may be made upon any one claim. But to come within this latter provision the claims so held in common must, as said by the supreme court in *Chambers v. Harrington*, . . . be contiguous, and the labor and improvements relied on must, as held in *Smelting Co. v. Kemp*, . . . be made for the development of the claim to which it is sought to apply them; that is, in the language of the supreme court, "to facilitate the extraction of the minerals it may contain."

See also *Justin Mining Co. v. Barclay* (82 Fed. Rep., 554, 560-1).

In the case of *Emily lode* (6 L. D., 220) it was held by the Department (syllabus) that—

Improvements, made outside the surface boundaries, may be considered in determining whether the law requiring the expenditure of \$500 on the claim has been

complied with, where it appears that such improvements were made to facilitate the extraction of ore from said claim, and are not included in improvements upon any other claim.

To the same effect see *Kirk et al. v. Clark et al.* (17 L. D., 190).

In *Hall v. Kearney* (18 Colo., 505), the supreme court of Colorado held that where work claimed as annual assessment work had not been done within the boundaries of a mining claim, but outside thereof, it was incumbent upon the party claiming the benefit of such work to show that it was in fact intended as work on the claim and was of such character as would inure to the benefit thereof.

In the case of *Clark's Pocket Quartz Mine* (27 L. D., 351-2), the Department held that—

Q Mining work done on one claim for the benefit of that and other adjoining claims constituting a group with a common ownership may be credited to the adjoining claims as well as to the claim on which the work is actually done, but the fact that such work has been done and its relation to the claim sought to be patented must be fully shown.

In the case of *Alice Edith lode* (6 L. D., 711), it was held by the Department that work done in the construction of a road leading to a mining claim could not be accepted in proof of the required annual expenditure in labor or improvements, where it appeared that the road was constructed for the joint benefit of different claims or groups of claims, for the reason that to do so would be to credit one claim with work done or improvements made in part for other claims not connected with it.

It is true that most of the cases above referred to relate chiefly to the annual expenditure in labor or improvements required by section 2324 of the Revised Statutes. Manifestly, however, in determining the character and purpose of labor and improvements had upon a mining claim, with respect to their use in the development of the claim, or in the development of several claims held in common, the same principle must apply, whether the labor was performed or the improvements were made in satisfaction of the requirement of said section 2324, for the maintenance of the possessory title, or in fulfillment of the condition to obtaining the paramount title prescribed by section 2325 of the Revised Statutes. While in the one case the annual expenditure in labor or improvements goes only to the right of possession, and is a matter between rival or adverse claimants, the determination of which is committed to the courts, and in this respect is essentially different from the expenditure of \$500 in labor or improvements required in the other case as a condition to obtaining patent, which is a matter between the applicants for patent and the government the determination of which belongs to the land department (*P. Wolenberg et al.*, 29 L. D., 302; Same case on review, *Id.*, 488), yet, in determining whether labor and improvements had upon a mining claim, or upon several claims held in common, are of such a character, and are so situated, as that they may be properly used in the development of the claim, or claims

in common, and were so intended, the same principles must necessarily govern in either case.

From the authorities cited and considerations stated, the following conclusions are fairly deducible:

1. Labor and improvements, within the meaning of the statute, are deemed to have been had upon a mining claim, or upon several claims held in common, when the labor is performed or the improvements are made in order to facilitate the extraction of minerals from the claim, or the claims in common, as the case may be, though such labor and improvements may in fact be outside the limits of the claim, or claims in common, or on only one of the several claims held in common.

2. In order that labor performed or improvements made upon one of several mining claims held in common, or upon ground outside the limits of such claims, may be accepted in satisfaction of the statute as to all the claims so held, such claims must be adjoining or contiguous, so that each claim thus associated may be benefited by the work done or improvements made.

3. Where expenditure in labor or improvements relied on is had on one only of several adjoining or contiguous claims held in common, it is incumbent upon the applicant for patent to the claims so held to show that such expenditure was intended to aid in the development of all the claims, and that the labor and improvements are of such a character as to redound to the benefit of all.

4. Where the labor and improvements are not upon the claim, or upon any of several adjoining or contiguous claims held in common, but outside thereof, it is likewise incumbent upon the applicant for patent to such claim or claims in common to show that the labor and improvements were intended to aid in the development of the claim, or claims in common, as the case may be, and are of a character suitable for the purposes intended.

5. Labor or improvements intended for the common benefit of several non-contiguous mining claims can not be apportioned to the different claims in satisfaction of the required expenditure thereon, for the reason that to do so would be to credit each claim with an expenditure made in part for the benefit of other claims not associated therewith as claims held in common within the meaning of the law.

Judged in the light of these conclusions, can it be held that the showing made in the present case is sufficient? The Department is of the opinion that this question must be answered in the negative. Although the Copper Glance, together with eight other claims mentioned, had, as originally applied for and entered, a common ownership, they did not constitute a group of adjoining or contiguous claims, and were not, therefore, within the purview of the law which allows labor to be performed or improvements to be made upon one of several adjoining or contiguous claims held in common, or upon ground outside the limits of such claims, for the benefit of the entire group. From

this it necessarily follows that neither the road nor the smelting furnace mentioned in the supplemental showing, can be considered as an improvement made upon or for the benefit of all the nine claims as originally applied for and for that reason as an improvement for the benefit of the Copper Glance as one of the nine, in satisfaction of the statutory requirement in question.

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. But aside from this consideration, in the very nature of things, such an improvement as the smelting furnace here in question—a thing useful, for the purposes intended, only as a unit—could not possibly be so apportioned.

Within the meaning of the law, in so far as the question of the expenditure of five hundred dollars in labor or improvements is concerned, the Copper Glance claim must be considered as standing by itself, separate and distinct from the other claims mentioned, and in view thereof, and of all the foregoing it is clear that the decision of your office holding the entry of said claim for cancellation for want of sufficient showing in the matter of the required expenditure in labor or improvements, is correct, and the same is accordingly affirmed.

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RAILROAD GRANT—SECTION 1, ACT OF APRIL 21, 1876.

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

The act of April 21, 1876, is *in pari materia* with the several railroad land grants, and section 1 thereof has the effect, as to all lands the right to which had not theretofore vested in the grantee company by definite location of the line of road, or other identification of the lands granted, of protecting actual settlers who, prior to the time when notice of the withdrawal of the lands was received at the local land office, made pre-emption or homestead entries thereof.

The confirmation by this section of entries so made, and otherwise regular, is not conditional or dependent upon compliance with the pre-emption or homestead laws, or the presentation of proper proofs of such compliance, but validates them as against the withdrawal and any rights of the grantee company thereunder.

Where an entry or filing is thus confirmed, as against a withdrawal on definite location, the land covered thereby is excepted from the operation of the grant.

In so far as in conflict with the ruling herein announced, the departmental decisions in the cases of the Northern Pacific R. R. Co., 20 L. D., 191; *Camplan v. Northern Pacific R. R. Co.*, 28 L. D., 118; *Northern Pacific R. R. Co. v. Sherwood*, 28 L. D., 126; are hereby overruled.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
 (W. V. D.) *February 26, 1900.* (L. L. B.)

The Oregon and California Railroad Company has appealed from your office decision of April 5, 1897, adhered to on review November 4, 1897, sustaining the homestead entry of Charles E. Jones, embracing one hundred and thirty acres as follows: the N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , the NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , the E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , and the NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 11, T. 39 S., R. 3 W., Roseburg, Oregon, land district.

The land in controversy is within the primary limits of that portion of the grant made by the act of July 25, 1866 (14 Stat., 239), of which the Oregon and California Railroad Company became the beneficiary under the designation of the legislature of the State of Oregon. The line of road opposite thereto was definitely located September 6, 1883, on account of which an executive order of withdrawal was made by letter of October 27, 1883, received at the local office November 7, 1883. October 4, 1883, nearly a month after such definite location, but before notice thereof or of the withdrawal made on account thereof was received at the local office, William R. Buck filed pre-emption declaratory statement for the land in controversy, alleging settlement thereon on the second of that month.

July 6, 1886, Buck transmuted his pre-emption filing into a homestead entry, and August 24, of the same year, relinquished said entry, whereupon Charles E. Jones made homestead entry of the land. Jones afterward submitted proof of his compliance with the homestead law, upon which final certificate issued to him December 12, 1892. December 11, 1896, your office finding that—

There is nothing in the record, or in the entryman's proof, showing said tracts to have been covered by a settlement claim at the date when the grant became effective (September 6, 1883) by the definite location of the railroad, or that the said tracts are for any other reason excepted from the grant—

directed the local officers to call upon Jones to show cause, within sixty days from notice, why his entry should not be canceled for conflict with the railroad grant.

Before this direction was executed your office, on April 5, 1897, revoked the same and sustained the entry of Jones under the second section of the act of April 21, 1876 (19 Stat., 35). It is this action of your office which is complained of in the appeal of the railroad company.

Under the view of the matter taken by the Department it will not be necessary to consider the second section of the act of April 21, 1876. The first section of that act is as follows:

That all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land-grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land-office of the district in

which such lands are situated, or after their restoration to market by order of the General Land Office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto.

The act was passed before the line of said road opposite the land in controversy was definitely located, and therefore before any right of the railroad company thereto attached or became vested, and while it was competent for Congress to sell, reserve or dispose of the land for other purposes than those originally contemplated by the granting act. (Northern Pacific Railroad Co. v. Sanders, 166 U. S., 620, 634; Menotti v. Dillon, 167 U. S., 703, 720; Northern Pacific Railroad Co. v. Amacker, 175 U. S., 564; William E. Inman v. Northern Pacific Railroad Co., 28 L. D., 95.)

This act is *in pari materia* with the several railroad land grants, and section one thereof clearly has the effect, as to all lands the right to which had not theretofore vested in the grantee company by definite location of the line of road or other identification of the lands granted, of protecting actual settlers who, prior to the time when notice of the withdrawal of the lands was received at the local land office, made pre-emption or homestead entries thereof. Heretofore it had been held by the Department (Northern Pacific Railroad Co., 20 L. D., 191; Campan v. Northern Pacific Railroad Co., 28 L. D., 118; Northern Pacific Railroad Co., v. Sherwood, 26 L. D., 126) that the confirmation of such entries by this section is made dependent upon compliance with the pre-emption or homestead laws, as the case may be, and the presentation of proper proofs thereof by the claimants; that is, that the confirmation is conditional and intended solely for the benefit of the settler whose entry is made prior to the receipt at the local office of the notice of withdrawal, but in the later case of Northern Pacific Railroad Co. v. Amacker, *supra*, the supreme court holds that the confirmation of such entries, where they are otherwise regular, is not conditional or dependent upon compliance with the pre-emption or homestead laws or the presentation of proper proofs of such compliance, but validates them as against the withdrawal and any rights of the grantee company thereunder. To the extent of this conflict said departmental decisions are overruled.

Buck's pre-emption filing, made after the definite location of the line of road but before notice of the withdrawal made on account thereof was received at the local office, was therefore a valid filing or claim and excepted the land covered thereby from the grant. When Buck's claim was finally terminated by relinquishment the land became subject to homestead entry, and the decision of your office sustaining the entry of Jones, made at that time, is affirmed.

## LIEU SELECTION—ACT OF JUNE 4, 1897.

A. J. HARRELL.

The requirement of posting and publication of notice, under the circular regulations of December 18, 1899, in the case of a lieu selection under the act of June 4, 1897, is not applicable to a selection theretofore regularly accepted and approved.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 28, 1900.* (E. B., Jr.)

December 4, 1897, A. J. Harrell made application to select, under the act of June 4, 1897 (30 Stat., 11, 36), what will be when surveyed the NW $\frac{1}{4}$  of the SE $\frac{1}{4}$  of section 2, the NW $\frac{1}{4}$  of the NE $\frac{1}{4}$  and NE $\frac{1}{4}$  of the NW $\frac{1}{4}$  of section 3 and the SE $\frac{1}{4}$  of the NW $\frac{1}{4}$  of section 26, T. 15 S., R. 18 E., Boise meridian, Hailey, Idaho, land district, in lieu of the SW $\frac{1}{4}$  of the SW $\frac{1}{4}$  of section 35, T. 20 S., R. 32 E., and lots 2, 3 and 4 of section 2, T. 21 S., R. 32 E., M. D. M., included within the limits of the Sierra forest reservation.

Title to the lands offered by Harrell in exchange for the said lieu lands is shown to have passed out of the United States by patent dated April 4, 1891, and to have been acquired by him by purchase October 27, 1897. He executed a deed to the United States for these lands November 23, 1897, at which time title thereto appeared to have been still in him, and the land free from liability for taxes and from other incumbrances, in pursuance of the purpose expressed in his said application "to relinquish and reconvey said lands to the United States and in lieu thereof to select" the lands in the Boise, Idaho, land district, as hereinbefore described.

July 13, 1899, your office accepted Harrell's relinquishment and approved his lieu selection; but by decision of December 20, 1899, your office revoked its approval of the selection and required the applicant, Harrel, to give notice of the selection by publication and posting as provided in circular instructions approved December 18, 1899 (29 L. D., 391, 393-4). From that decision Harrell appeals, assigning error therein—

First: In giving to said circular a retroactive effect.

Second: In revoking an approval under previous regulations, merely to impose additional obligations under later ones, and

Third: In setting aside the contract entered into July 13, 1899, without the consent of both contracting parties.

So far as appears from the record before the Department, Harrell had fully complied with the exchange provisions of the said act, and with all existing regulations thereunder, at the time of the approval of his selection, and thenceforward the same was ready for patenting as soon as the public survey should be extended over the lands embraced therein and the period of four months should expire after the receipt of the approved township plat at the local office. Under the then existing regulations,

nothing further remained to be done by Harrell to secure the issue of patent. It is not suggested, by the decision of your office, that the land is not of the character subject to selection under said act, nor that there was any valid adverse claim thereto at the time of the selection. While these matters will remain open to inquiry and determination by the land department in a proper way, as in other cases arising under the public land laws, until the issuance of patent, the *prima facie* determination of them in favor of the lieu land claimant by the action of your office in approving the lieu selection is not impugned or questioned by the mere fact that new regulations, with respect to the manner of ascertaining and establishing these facts, were adopted after the approval of said selection, and the revocation of said approval ought not to have been made for that reason alone.

The exchange became complete, in contemplation of law, upon the approval of the selection, and it ought not to have been disturbed in a manner different from that in which a final entry would be disturbed. The government was fully reinvested with title to the lands in the Sierra forest reserve relinquished by Harrell, and he acquired a vested right in the lands he had selected outside such reserve. He only needed a patent from the United States to invest him with the full legal title, and the patent, when issued to him, would relate back to the date of the approval of the selection. The transaction having reached such a stage, the Department is of opinion that the subsequent requirement in the regulations of December 18, 1899, *supra*, as to notice, is not properly applicable to the selection of Harrell.

This conclusion is in harmony with a long line of precedents arising in cases wherein, although the subject matter is different from that of the case at bar, the principle announced is essentially the same. These precedents are well collated and cited in the case of Mary R. Leonard (9 L. D., 189); and see also *Oliver v. Thomas et al.* (5 L. D., 167).

The decision of your office is, therefore, reversed. You will reinstate Harrell's said selection.

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#### RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT CLAIM.

##### HASTINGS AND DAKOTA RY. CO. *v.* SONNENBERG.

A settler on land included within an existing railroad indemnity selection acquires no additional right, as against such selection, by the purchase of the possessory claim and improvements of a prior settler.

It is not necessary in the case of indemnity selections under the grant of July 4, 1866, and the designation of losses in support thereof, that the lands should be described according to their smallest legal sub-divisions.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 28, 1900.* (E. J. H.)

The S.E.  $\frac{1}{4}$  of Sec. 21, T. 121 N., R. 41 W., Marshall land district, Minnesota, is within the indemnity limits common to the grants to the

St. Paul, Minneapolis and Manitoba and the Hastings and Dakota Railway Companies, for which withdrawals were made but revoked on May 22, 1891 (12 L. D., 541).

The respective claims of said companies, within such indemnity limits, were considered by the Department in a case between said companies on October 23, 1891 (13 L. D., 440), and the attempted selection of each, which included the tract in controversy in this case, was rejected, and the lands were held to be

subject to entry by the first legal applicant, or to selection by the company first presenting application therefor in the manner prescribed by the regulations governing such selections.

On October 29, 1891, pursuant to that decision, the Hastings and Dakota company filed a list of selections which included the above-described tract, designating a basis therefor.

On August, 31, 1894, John Sonnenberg applied to make homestead entry for the same tract, alleging in his corroborated affidavit, filed therewith, that the tract was settled upon twelve or fifteen years before by Louis Bach, and was continuously cultivated and improved by him until about five years before; that Bach had then sold the improvements to one Otos, who built a shanty and continued to cultivate and improve the land until the spring of 1892, when affiant, Sonnenberg, "purchased the improvements and claim to the land from Otos;" that he had continuously resided upon, cultivated, and improved the land ever since, and had a house, barn, granary, well, and about one hundred acres under cultivation upon the premises, all of the value of \$1,100. He also stated that he had declared his intention to become a citizen of the United States, and was qualified to make entry.

The company filed a protest against the allowance of his application, claiming superior rights under its indemnity selection, and asked a hearing thereon, but did not traverse the allegations of Sonnenberg's affidavit.

No hearing seems to have been had in the case, but the papers were forwarded to your office without action thereon by the local officers, so far as the record discloses, and on October 18, 1898, your office decision held that Otos was a settler on the land when the company made its selection, and, if qualified, might have made entry notwithstanding such selection, but that under departmental decision in the case of *Dunnigan v. Northern Pacific R. R. Co.* (27 L. D., 467), the privilege thus accorded the settler "is personal to him and not transferable," and in view of the fact that the company's selection antedated the settlement and application of Sonnenberg, his application to make entry was rejected.

From this decision Sonnenberg appealed, and his counsel, in his assignment of errors, claims, in substance, that it was error not to have held that the tract was subject to entry as a homestead by Sonnenberg at the date of presentation of his application.

It was stated in the corroborated affidavit of Sonnenberg, in effect, that about the year 1889, one Otos purchased the improvements on the land of one Bach, and that Otos "continued to cultivate and improve the land (built a shanty and done some breaking) until in the spring of 1892," when he sold out to Sonnenberg. It is not alleged nor shown in the case that Otos was an actual resident on the land, or that he was qualified to make entry when the company made its selection on October 29, 1891. It does not necessarily follow that Otos resided upon the land because he built a "shanty."

In the case of *Hastings and Dakota Railway Company v. Grinden* (27 L. D., 137), it was held that

a possessory claim to land, and cultivation thereof, unaccompanied by actual residence thereon, will not defeat the right of the company to make indemnity selection thereof.

Moreover, if Otos was an actual settler and qualified entryman, under the decision in the *Dunnigan* case, cited by your office decision, a purchaser of the possessory claim and improvements of such settler, does not, by such purchase, strengthen the position resulting from his own settlement on the land, or other initiation of claim thereto, after such selection is noted of record.

That case has repeatedly been cited and followed by the Department.

Counsel for Sonnenberg further claims that it was error not to have held that the selection of this tract

was void and without effect for the reason that no specific designation of loss was made as the basis for the indemnity claimed.

The company's selection list, so far as it relates to this tract (S. E.  $\frac{1}{4}$  of Sec. 21, T. 121 N., R. 41 W.), is as follows:

"All except E.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$  Sec. 21, T. 121, R. 41, in lieu of W.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$ , N. W.  $\frac{1}{4}$  and S.  $\frac{1}{2}$  Sec. 29, T. 115, R. 30."

Counsel for Sonnenberg urges that this is in no sense a description of the land selected, nor such an arrangement of selections and bases opposite each other, "tract for tract," as to comply with departmental requirements, and cites several cases claimed to be in favor of this contention. An examination of said cases, however, does not seem to substantiate this claim. In the case of *St. Paul, Minneapolis and Manitoba Ry. Co. and St. Paul and Northern Pacific R. R. Co.* (13 L. D., 349), one of the cases cited by counsel, it was held that—

the selection must be made tract for tract of the lost lands, not exceeding, however, in any case, an entire section. . . . If the loss is of an entire section, because, perhaps, of the swamp land grant, it will be lawful to select as indemnity therefor an entire section, or parts of a section, or sections, in one group; not exceeding in quantity the land lost.

In the case of *Florida Central and Peninsular R. R. Co.* (15 L. D., 529), also cited, the foregoing decision is quoted from approvingly upon this point.

Also, in the case of *La Bar v. Northern Pacific R. R. Co.* (17 L. D., 406), there is no further requirement than that a proper basis shall be

shown for each and all lands claimed as indemnity, "the same to be arranged tract for tract, in accordance with departmental requirements."

The act of July 4, 1866, making the grant to the Hastings and Dakota Railway Company provides that where, at the time of definite location, the United States have disposed of "any section or part thereof," it shall be lawful to select, in lieu thereof, "so much land in alternate sections or parts of sections," as shall be equal to the lands disposed of.

Under the terms of this grant, and the foregoing decisions of the Department, there does not seem to be any requirement that, in the selections and designations of losses, the lands shall be described according to their *smallest legal subdivisions*.

Section 21, T. 121, R. 41, is a full section, containing 640 acres, and the description in the selection list of "all except E.  $\frac{1}{2}$  N. E.  $\frac{1}{4}$  S. 21," etc., is equivalent to saying the W.  $\frac{1}{2}$  N. E.  $\frac{1}{4}$ , N. W.  $\frac{1}{4}$  and S.  $\frac{1}{2}$  of said section, and seems to be sufficiently definite. The losses designated, for which this selection was made, are the corresponding portions of Sec. 29, T. 115, R. 30.

In the case of William Hickey (26 L. D., 621), it was held that indemnity selections are made under the direction of the Secretary of the Interior, and the enforcement of any requirement in the matter of specification of a loss is only for his information, and as a bar to the enlargement of the grant, and may be waived whenever he deems such course advisable.

In the case of Hastings and Dakota Railway Company *v.* Grinden (on review, 27 L. D., 427), the specification of losses filed by the company was "all of S. 35, T. 114, R. 28." It was shown by Grinden that there had been five separate and distinct entries of lands in said section, which constituted the loss to the company, and he claimed that it was incumbent upon the company to separately specify each particular loss.

It was held, however, in the decision of the case, that if they were all lost and otherwise a proper basis, there is really no good ground to be urged against the inclusion of them all, being in one section, in a single loss.

Under the foregoing decisions, it would seem that the company's selection and designation of loss, as to the lands in controversy in this case, are within departmental requirements, and therefore valid, and Sonnenberg not having made settlement upon the land claimed by him until some time subsequent to said selection by the company, his claim is subordinate thereto.

The decision of your office, rejecting Sonnenberg's homestead application, is therefore affirmed.

## MINING CLAIM—NOTICE OF APPLICATION FOR PATENT.

SUBURBAN GOLD MINING AND LAND CO. ET AL. *v.* GIBBERD.

An error occurring in the published notice of application for mineral patent will not be held sufficient to require new notice, where it is of a character not to mislead, and the different forms of notice, as published and posted, when taken together show with accuracy the location and boundaries of the land included within the application.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) February 28, 1900. (C. J. W.)

November 21, 1895, Anna Gibberd filed application for patent (No. 1312), for the Little Valley lode mining claim, survey No. 9845, Cripple Creek mining district, Pueblo, Colorado, notice of which application was duly published for sixty days, the first publication being November 23, 1895. During the period of application three adverse claims were filed, and suits were duly instituted thereon. December 22, 1897, proof of the final disposition of all three of said suits, largely in favor of the applicant for patent, was filed. In the meantime, however, the following protests against said application for patent had been filed, viz:

April 23, 1896, by the Suburban Gold Mining and Land Company, alleging that the location of the Little Valley was illegally made, because within the limits of the Illinois placer claim; that the statutory expenditure of five hundred dollars had not been made on said lode claim, and that no mineral bearing rock in place had been discovered thereon:

June 3, 1896, by Sarah M. Cozad *et al.*, as owners of the Ollie lode claim, in conflict with said Little Valley, alleging that the published notice gave the survey number as 9854, instead of 9845, and that the connection with a corner of the public survey as given was erroneous, in that it gave a tie to the north quarter corner of Sec. 24, T. 15 S., R. 70. W., whereas the correct connection is with the west quarter corner of said section 24, and that protestants were misled by the error, and failed to protect their rights by filing an adverse claim:

October 31, 1896, by C. H. Dixon, as owner of the Salisbury lode claim, in conflict with the Little Valley, alleging failure upon the part of the Little Valley claimant to make the required expenditure of five hundred dollars in labor or improvements on the claim, and failure to discover mineral bearing rock in place on said claim: and December 7, 1896, by George Andrews, as owner of the Mascott lode claim, in conflict with the Little Valley, with allegations in substance similar to those last above stated.

August 13, 1898, the local officers considered the protests and expressed the opinion that they did not present proper grounds upon which to order a hearing, but that the error in the published notice of the application for patent was sufficient to invalidate the notice, and

they thereupon dismissed the protests and required the applicant to republish notice. All parties were duly advised of said action. Two appeals therefrom were filed, one by the applicant for patent alleging that it was error to require the republication of notice of the application, and one by the Suburban Gold Mining and Land Company alleging that it was error to hold that the allegations contained in the protest filed by said company were not sufficient to require a hearing. The other protestants did not appeal.

December 3, 1898, your office considered the matters presented by each of said appeals, and affirmed the action of the local officers.

The case is before the department on the further appeal of the applicant for patent, alleging error in your office decision in so far as it requires her to republish notice of her application. The Suburban Gold Mining and Land Company did not appeal from said decision.

The only matter presented for departmental consideration at this time, therefore, is as to the sufficiency of the publication of the notice of the application for patent. Said notice as published is as follows:

MINING APPLICATION No. 1312,  
U. S. LAND OFFICE, PUEBLO, COLORADO,

*November 21, 1895.*

Notice is hereby given that Anna Gibberd, whose post-office address is Colorado Springs, Colorado, has this day filed her application for a patent for 1426.4 linear feet of the Little Valley Mine or vein, bearing gold and silver, with surface ground 276.1 feet in width, situate, lying and being in Cripple Creek Mining District, County of El Paso, State of Colorado, and known and designated by the field notes and official plat, on file in this office as lot No. 9845, in township 15 S., range 70 W., of sixth principal meridian.

The exterior boundaries of said lot No. 9845 being as follows, to wit:  
Variation, none available.

Beginning at corner No. 1, whence the N.  $\frac{1}{4}$  cor. Sec. 24, T. 15 S., R. 70 W., of the 6th P. M., bears S.  $7^{\circ} 15'$  W. 537.63 ft.; thence N.  $15^{\circ} 9'$  W., 216.10 ft. cor. No. 2; thence N.  $77^{\circ} 54' 20''$  E. 1426.4 ft. to cor. No. 3; thence S.  $15^{\circ} 09'$  E. 276.1 ft. to cor. No. 4; thence S.  $77^{\circ} 54' 20''$  W. 1426.4 to cor. No. 1, the place of beginning.

Containing 9.028 acres.

Located in the NW.  $\frac{1}{4}$  of Sec. 24, T. 15 S., R. 70 W., of the 6th P. M., and is of record in the office of the recorder of El Paso County, Colorado Springs, Colorado.

RAYMOND MILLER,

*Register.*

First pub. Nov. 23, last Jan. 25, 1896.

As no adjoining claims are mentioned in the published notice, the locus of the claim applied for is fixed by the connection with the public survey corner, and the statement in the notice that the claim is located in the NW.  $\frac{1}{4}$  of Sec. 24, T. 15 S., R. 70 W., of the sixth principal meridian. The notice gives the public survey corner to which the claim is tied as the north quarter corner of Sec. 24, and gives the course and distance from corner No. 1 of the claim to the public survey corner, to which the claim is tied, the distance from corner No. 1 of the claim to the connecting corner being 537.63 feet, bearing S.  $7^{\circ} 15'$  W. According to this description, it is apparent that the claim would be on section

13, and not on section 24, as stated in another part of the notice. Thus, the notice on its face shows error, which would be sufficient to put any one interested in a mining claim in section 13 or 24 upon inquiry as to what the error was. It is not of a nature to mislead, but, on the contrary, to stimulate further inquiry. The notice and diagram posted on the claim, the notice posted in the land office, and the field notes and map of the survey filed in the land office, all show that the claim is connected with the public survey at the west quarter corner of section 24, and not at the north quarter corner, as stated in the published notice. An examination of the record, therefore, would have enabled the inquirer to have readily identified and made certain the ground applied for, and there was enough in the published notice to put any interested person of ordinary prudence and intelligence upon further inquiry. As matter of fact, three adverse claimants did take notice, and filed their adverse claims, upon which timely suits appear to have been instituted and have been determined in the courts.

The contention of the applicant is, in substance, that the three forms of notice required by section 2325 of the Revised Statutes (none of which may be omitted) constitute the notice required by law, and, if together they show the location and boundaries of the claim, such notice is good. The contention would appear to be sound, provided that each form of notice—the noticed posted on the land, the notice posted in the land office and the published notice—is free from such error as is calculated to mislead a person of ordinary prudence and intelligence.

The published notice under consideration suggests error upon its face, and also suggests the necessity for further inquiry in order to determine in what particular it is erroneous, and, as the other forms of notice clearly show the mistake in the published notice, while together they show with accuracy the location and boundaries of the land applied for, it is believed that the case is within the reason of the rule announced in the case of *Hallett v. Hamburg lodes* (27 L. D., 104), and that it was error to require a republication of the notice. It is so held, and your office decision in this respect is reversed.

Your office forwarded June 8, 1899, as additional to the record, protest by John Phillip Schuch, Jr., *et al.*, against the application of Anna Gibberd, filed in the local office May 11, 1899, after your office decision was rendered. The same is returned for appropriate action by your office at the proper time.

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DE LONG *v.* FROST.

Motion for review of departmental decision of September 26, 1899, 29 L. D., 201, denied by Secretary Hitchcock, March 1, 1900.

## HOMESTEAD CONTEST—CULTIVATION.

NORTON *v.* ACKLEY.

Cultivation of the land embraced within a homestead entry is an essential requisite to due compliance with the homestead law; and a charge of failure to cultivate furnishes a proper basis for a hearing.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) March 1, 1900. (J. R. W.)

Edward O. Norton has appealed to the department from your office decision of September 18, 1899, approving the action of the local office rejecting his application to contest Daniel Ackley's homestead entry, made June 20, 1893, for the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 17, and the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 8, T. 67 N., R. 20 W., 4th P. M., Duluth, Minnesota.

Said Norton, February 26, 1898, filed contest against said entry charging abandonment for more than six months, which was dismissed, May 16, 1898, the day for hearing, for want of prosecution. After due notice, no application was made for reinstatement.

October 17, 1898, Norton filed new contest notice, alleging:—

He is well acquainted with the tract of land embraced in the homestead entry of Daniel Ackley . . . knows present condition of said land; there is on said land a log house, dilapidated and uninhabitable, in which there were no household effects of any description, and which from all appearances had never been occupied; there is no clearing on said land, which has never been cultivated; there are no improvements whatever thereon, except the abandoned house; affiant examined said land on or about September 20th, 1898, said Ackley was not at that time residing there, and the indications as above set forth are that he never resided there. Affiant is informed and believes said Ackley has not since his said entry served in the military or naval service of the United States. Wherefore affiant alleges said Ackley has not resided on, cultivated or improved said land as required by law.

The corroborating affidavit alleges:

they are acquainted with the tract described . . . and know from personal observation that the statements therein are true, and they are informed and believe said Daniel Ackley has not since his said entry been engaged in the military or naval service, etc.

November 17, 1898, the local office rejected the second contest application because a cause of action was not stated, and because his first contest had been dismissed for want of prosecution he should not be permitted to renew his charge, citing *Delaney v. Bowers*, 1 L. D., 163.

December 4, 1898, Norton filed, as amendment, a corroborated affidavit that, September 10, 1898, no part of the land had ever been cultivated or cleared.

Your office decision held that as there was nothing to show that Norton's second contest was *supra* in good faith, it was not within the rule of *Delaney v. Bowers*, *supra*, and should not for that reason be rejected, but that the affidavit was insufficient, in that it states—

Upon examination of the tract he found, as set forth, the same in a certain condition from which he would conclude defendant never resided upon his homestead,

it not being alleged as a fact that such was the case . . . as such charges are not affirmatively alleged, as would warrant cancellation of the entry. Your local office action . . . is concurred in.

An affidavit for contest should aver some fact which if true warrants cancellation of the entry, and upon which issue may be taken, and to proof or disproof of which evidence may be directed. In *Parker v. Lynch*, 20 L. D., 13, it was held:

As Parker's affidavit was on information and belief, and North's corroborating affidavit was of the most general character, not even a single fact being stated within his knowledge which would support any of the charges, there was at this stage of the proceedings no sufficient reason for allowing so irregular a contest.

Respecting contest affidavits, after lapse of time entitling the entryman to make final proof, it was held, in *Davis v. Fairbanks*, 9 L. D., 530:

After the expiration of five years from entry . . . it should unequivocally appear from the charge that, if the same was true, the claimant had not earned his claim by a compliance with the law within the term of five years from entry or before the initiation of the contest.

The affidavit may properly be held to state mere conclusions as to residence. The observations from which affiant makes his conclusion, "wherefore affiant alleges said Ackley has not resided on . . . said land as required by law," do not unequivocally and necessarily lead to the conclusion based upon them. The fact allegations of affiant's observations made September 20, 1898, are that—

the log house was dilapidated and uninhabitable, in which there are no household effects of any description and which from all appearances had never been occupied.

The five year period of residence expired June 20, 1898. That there was nothing in September indicating habitation, no household effects, and a dilapidated and uninhabitable condition of the house, does not presumptively show such conditions existed prior to and up to June, 1898, three months earlier. For all that appears in the affidavit the conditions as to residence and condition of the house may have come into existence after June 20, 1898, and the conclusion is not warranted by the facts stated.

The affidavit, however, also says:

There is no clearing on said land, which has never been cultivated; there are no improvements whatever thereon, except the abandoned house . . . Wherefore affiant alleges said Ackley has not . . . cultivated or improved said land as required by law.

The land is in a wooded region. Neither signs of clearing for cultivation, nor signs of cultivation, could be obliterated in three months intervening between June 20, and September 20. If there were on September 20th no observable signs of improvement, clearing or cultivation, it would follow unequivocally and necessarily that the land had not been improved, cleared or cultivated. The conclusion of fact and specific charge is justified and supported by the facts stated. It is in fact the only one that could be based on the facts observed.

Your office decision, however, holds:

There is no specific rule as to the amount of cultivation and improvements actually required of a homesteader and, in absence of an allegation of such default in the

matter of residence as would warrant a cancellation of the entry, the ordering of a hearing on the general charge of failure to cultivate and improve the land would not be warranted.

In this your decision errs. Residence alone will not be held sufficient compliance with the law and is not considered by decisions of the department to be so. Settlement *and cultivation* are both required by section 2290 of the Revised Statutes, and cultivation is required by section 2291 of the Revised Statutes, as construed by decisions. Charles C. Waters, 3 L. D., 140; John T. Wooten, 5 L. D., 389; Adelphi Allen, 6 L. D., 420; Reas *v.* Ludlow, 22 L. D., 205.

You will therefore direct a hearing upon the charge of failure to cultivate.

Your office decision is accordingly modified.

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HOMESTEAD ENTRY—RESERVATION.

JACK B. BAKER.

An order of the Secretary of the Interior directing the reservation of a tract of public land for school purposes, while subsisting, effectually precludes the allowance of a homestead entry of the land so reserved.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 1, 1900.* (C. W. P.)

By your letter of July 19, 1899, you transmit the appeal of Jack B. Baker from your office decision of April 29, 1899. Said decision rejects the application of Baker, dated December 12, 1898, to make second homestead entry, covering the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 3, T. 6 N., R. 1 E., Oklahoma land district, Oklahoma Territory.

It appears that on February 28, 1898, Baker made homestead entry, No. 13,144, of the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 9, T. 5 N., R. 3 E., Oklahoma district, which was canceled upon relinquishment, October 18, 1898.

Baker's corroborated affidavit, filed in support of his application, shows that he established residence on the land covered by entry No. 13,144, on March 3, 1898, built a house, planted an orchard, cleared two acres, and planted five acres to cotton; that his crop was destroyed by the overflow of "Pond creek," which surrounds the land on three sides; that this overflow occurred in May, 1898, and that nearly all of the land entered by him was submerged and remained under water for several days—a part of it had standing water on it until some time in the month of August following; that he and his entire family were made ill with malarial fever, and were obliged to remove to higher land; that before making his entry he examined the tract and saw no indication that it had ever been under water; but that he has since learnt that the land is subject to annual overflows; that he bought out

the interest of a prior claimant for \$300, and, on discovering that he could not live on the land, he executed a relinquishment of his right for a team of mules, a wagon and \$30 in money, which did not compensate him for the improvements and labor he had spent on said land.

It appears from the record that the Commissioner of Indian Affairs having recommended that the tracts of land described as the SW.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 3, T. 6 N., R. 1 E., Oklahoma, embraced in the Indian trust patents to Theodore and Julia Rhodd, and relinquished by the guardians of said Theodore and Julia Rhodd to the United States, be set aside and reserved for school purposes, the Secretary of the Interior, by letter, dated September 22, 1893, directed your office to set aside and reserve for school purposes the tracts allotted to the said Theodore and Julia Rhodd and relinquished by their guardians, and that by letter of September 26, 1893, the local officers at Oklahoma were accordingly instructed by your office to withhold said tracts from settlement or entry of any description until they were further advised by your office.

It is contended that the Secretary of the Interior had no power or authority under any act or acts of Congress to hold said land in reservation, and that your office therefore erred in not declaring said land vacant public land.

Although there is no specific statutory authority to the President to reserve public lands,

from an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of ground belonging to the United States to be reserved from sale, and set apart for public uses.

It is true that said tracts have not been formally set aside and reserved by the President for the purposes stated, in accordance with the opinion of the Assistant Attorney General in the case of Territory of Alaska, 13 L. D., 426. But in *Wilcox v. Jackson*, 13 Peters, 498, the supreme court, in constructing an act of Congress providing that all lands are excepted from pre-emption, which are reserved from sale by order of the President, said:

The President speaks and acts through the heads of the several departments, in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the war department. Hence we consider the act of the war department, in requiring this reservation to be made, as being, in legal contemplation, the act of the President, and consequently, that the reservation thus made was, in legal effect, a reservation made by order of the President, within the terms of the act of Congress.

And in *Wolsey v. Chapman*, 101 U. S., 755, it was held that an order of the Secretary of the Interior directing that the lands on the Des Moines river above Raccoon fork be reserved from sale was, in contemplation of law, the order of the President, and had the same effect as a proclamation mentioned in the act of Congress of September 4, 1841 (5 Stat., 453), entitled "An Act to appropriate the proceeds of the sales

of public lands and to grant pre-emption rights." And to the same effect is the decision in *Walcott v. Des Moines Co.*, 5 Wallace, 681. And the withdrawal of said tracts never having been revoked, its effect as against settlement or entry remained unchanged, although the purpose of the withdrawal may have ceased to exist. (*Jackson, Lansing and Saginaw R. R. Co.*, 5 L. D., 432.) Hence the action of your office in rejecting Baker's application was correct, and the decision appealed from is affirmed.

HOMESTEAD ENTRY—RELINQUISHMENT.

HARRIS *v.* WATSON.

The administrator of a deceased entryman is without authority under the homestead laws to relinquish the entry of the decedent.

The case of Peter W. Bennet; 6 L. D., 672, overruled.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) March 3, 1900. (W. M. W.)

The land involved in this case is the N. E.  $\frac{1}{4}$  of Sec. 12, T. 144 N., R. 64 W., Fargo, North Dakota, land district.

This tract was entered under the homestead law by Thomas Dooley, June 17, 1896.

September 2, 1898, James Moody Watson filed an affidavit of contest against said entry, alleging that the entryman

died on said homestead on the 23d day of June, 1898, leaving no heirs who are residents or citizens of the United States, or who have declared their intention to become citizens of the United States.

At the same time Watson filed in the local office an affidavit, showing that he had made diligent search and inquiry for the heirs of the entryman, and as a result he found that he was unable to make personal service of notice of contest on said heirs and that he could not ascertain their whereabouts, and according to his information and belief they were non-residents of the State of North Dakota; that he had known the entryman intimately for fifteen years;

that he has frequently said to me that he had no relatives, kith or kin, in the United States, and none nearer than England. Said Thomas Dooley was, at the time of his death, a bachelor of about fifty-five years of age.

Watson asked that notice of his contest be given by publication. Upon the showing made, the register directed the notice to be served by publication in a newspaper published in the county where the land is situated, and fixed October 7, 1898, as the time of the hearing.

September 6, 1898, C. B. Harris filed an affidavit of contest against Dooley's entry, alleging that said Dooley

died on the 23d day of June, 1898, and since said date the tract has been wholly abandoned by the heirs of said Dooley, if heirs there be. That there are no heirs to said deceased entryman now in or residing in the United States, and that he has no heirs who are citizens of the United States, or who have declared their intention to become citizens.

The local officers held Harris' contest subject to action on the pending contest of Watson.

September 29, 1898, there was filed in the local office a relinquishment of Dooley's entry, executed by the administrator of his estate. Said relinquishment appears to have been authorized by the probate court of the county in which the tract involved is situated. On the same day the local officers accepted the relinquishment and allowed Watson to make homestead entry of the land, and they also dismissed the contests of both Watson and Harris, and notified their attorneys of such action.

October 6, 1898, Harris filed an application to make homestead entry of the tract, alleging: "That on the 24th day of June, 1898, I settled upon said land with my family," with the intention of making the same a home and acquiring title to the same, and that he has ever since lived on said land and has a house and barn thereon and seventy acres under cultivation. With his application he filed an affidavit reciting the filing of his contest and that of Watson, the relinquishment of Dooley's entry by his administrator, the death of the entryman, the dismissal of both contests, and further:

That deponent and his family, consisting of a wife and three children, was residing upon the said land at the date he filed his contest, and was . . . living there on the 29th day of September, 1898, the day upon which the relinquishment was filed in the local office and said entry relinquished. Wherefore, deponent asks that a hearing be ordered by the Hon. Register and Receiver, and that he be permitted to show his settlement and residence upon said land and that his settlement was prior to the entry of said J. Moody Watson.

The local officers rejected his application for conflict with Watson's entry.

Harris appealed from the decision of the local officers of September 29, 1898, dismissing his contest and canceling the entry of Dooley and awarding the tract to Watson as a successful contestant; and also appealed from the action of the local officers of October 6, 1898, rejecting his application to enter the tract and refusing to order a hearing upon his allegation of prior settlement.

February 4, 1899, your office affirmed the actions of the register and receiver, dismissed Harris' contest, and held Watson's entry intact.

Harris appeals, and with his appeal there is an affidavit of his attorney stating, among other things, that the administrator of the estate of Dooley

is a partner of the said J. Moody Watson, and entered into a conspiracy to defeat the said Harris from obtaining this land; that the relinquishment by the administrator, on the order of the county court, was a part of the said conspiracy to defeat said Harris. Deponent further swears that the relinquishment of the said entry was not the result of the contest of said Watson; but that the contest was instituted by the said Watson for the express purpose of holding it—the land—until such time as his partner, the administrator, could obtain an order of the said court to make a relinquishment. Said relinquishment was made as a part of said conspiracy, and was in no wise the result of the contest of said J. Moody Watson. Deponent therefore asks that said Harris be permitted to show that the relinquishment was not the result of the said contest, and that a hearing be ordered for that purpose.

It is claimed, in the appeal, that your office erred in holding that the relinquishment made by the administrator of the estate of the deceased entryman was valid; that it was error to hold that

an administrator has any authority over a homestead of a deceased entryman, or that a relinquishment made by an order of the county court is valid.

It is further claimed that the method of establishing that there are no heirs is not by an affidavit of an administrator filed before a probate court; that in

a proceeding to reinstate land as public, it is required that an action be brought for that purpose, and the decision in such a case be rendered by the land department and not by the county court;

that it was error to hold that the relinquishment was the result of the contest filed by Watson; that Harris having been a settler on the tract when the entry was canceled, it was error not to have held that he was entitled to enter the tract by reason of his prior settlement thereon.

In sustaining the relinquishment of Dooley's entry by his administrator, your office followed the case of Peter W. Bennet (6 L. D., 672), wherein it was held (syllabus) that:

An administrator, acting under direction of the court, on the finding of fact that no heir or heirs survive, qualified to succeed to the rights of the deceased homesteader, is authorized to execute a relinquishment of the entry.

In the case of *Stimson v. Squire* (27 L. D., 611), the Department used this language:

The administrator of a deceased entryman is without authority under the homestead laws to relinquish the entry of the decedent, whether authorized so to do by the local probate courts or not. Under the federal statute the rights of a deceased entryman descend or go to his widow, heirs, or devisees, and there is no provision in the law that the administrator may exercise any rights or powers in the premises. In the present case it does not appear that the deceased entrywoman may not have heirs or devisees, and even if it did so appear there would still be no right of relinquishment in the administrator. Before *Stimson* can make entry of the land covered by Mrs. Alfrey's entry, which has never been properly canceled, he will have to contest the entry in the regular way, with notice to the heirs of Mrs. Alfrey, if any.

These views are in conflict with those expressed in the *Bennet* case, *supra*, and said case is hereby overruled, and *Stimson v. Squire* will be followed.

As the administrator of Dooley's estate was without authority to relinquish the entry, it follows that it was improperly canceled, and that Watson's entry was erroneously allowed and should now be canceled, and the entry of Dooley reinstated.

Watson, as the first contestant, had the right, and it was his duty, if a *bona fide* contestant, to proceed with the trial of his case against the heirs of Dooley, and upon proof of his allegations the entry should have been canceled, and Watson would have been entitled to a preferred right to enter the tract (*Barksdale v. Rhodes*, 28 L. D., 136), and this would have ended the matter so far as Harris' rights are concerned, for he could acquire no rights as against the government, the entryman,

or a prior successful contestant, by reason of his settlement upon the land while it was embraced in Dooley's entry.

In lieu of causing notice of his contest to be served, and proceeding with his case in accordance with the rules of practice, Watson elected to procure the relinquishment of said entry by the administrator of the deceased entryman's estate, and when he did so his contest was dismissed.

As before shown, the relinquishment was not authorized under the law, and, therefore, it did not operate to release and cancel Dooley's entry. Consequently the allowance of Watson's entry was erroneous, and he gained no rights thereby. It follows that the action of the local officers, in dismissing the contest of both Watson and Harris, was error. It is true Watson did not appeal from this erroneous action, but having secured an entry of the land upon his filing the relinquishment of the administrator of Dooley's estate, he had no motive for taking an appeal, having, by the allowance of his entry, secured all that he could gain as a contestant, and under the circumstances he should not be held bound by his failure to appeal.

Dooley's entry will be reinstated on the record, and the case will proceed to hearing on the contest of Watson, after due notice to the heirs of the deceased entryman, Dooley. Harris will also be given notice of this decision and of the day set for the hearing, and will be allowed to intervene for the purpose of submitting evidence on the charge made by him.

Departmental decision of the 15th ultimo is recalled and vacated and this is substituted therefor. Your office decision is modified to accord with the views herein expressed.

With the papers in the case, your office transmitted the following: (1) Corroborated affidavit of contest against Watson's entry, filed by Harris in the local office May 6, 1899, charging failure to establish residence upon the tract and abandonment for more than six months, endorsed, "Held pending final disposition of case of Harris *v.* Watson," and upon which the local officers refused to issue notices of contest; (2) A paper purporting to be an appeal to your office by Harris from the action of the local officers in declining to issue notices of his contest.

There is nothing to show that your office ever acted upon the so-called appeal.

These papers are returned for proper disposition by your office in the light of the decision hereby rendered.

## RAILROAD RIGHT OF WAY—LEASE FOR WAREHOUSE PURPOSES.

## CLEAR WATER SHORT LINE RY. CO.

Under the provisions of the act of March 1, 1899, granting a right of way through the Nez Perces Indian lands, the railway company may erect, or permit others to erect, upon its right of way and depot grounds, suitable structures or buildings, such as warehouses and elevators, to facilitate the convenient receipt and delivery of freight, so long as the full exercise of the franchises granted is not interfered with, and a free and safe passage is left for the carriage of freight and passengers.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,*  
*March 3, 1900.* (F. W. C.)

I am in receipt, through your reference under date February 21st last, of a letter from the Commissioner of Indian Affairs, dated February 19th last, requesting an opinion as to whether, under the provisions of the act of March 1, 1899 (30 Stat., 918), granting to the Clear Water Short Line Railway Company a right of way through the Nez Perces Indian lands in Idaho, the company may lawfully lease portions of its right of way and depot grounds for the erection of warehouses and elevators thereon.

The right of way granted by said act was for the "construction and operation" of a railroad and telegraph line within the Nez Perces Indian Reservation, in the State of Idaho, the grant being to the extent of fifty feet in width on each side of the central line of the road, with the right to take from lands adjacent to the line of road material, stone, earth, timber, necessary for the construction of the road; also ground adjacent to such right of way for station buildings, depots and machine-shops, side-tracks, turn-tables, 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 road.

The grant is similar to that made by other acts of Congress granting right of way across the public lands and other reservations; and as warehouses and elevators are useful and necessary to the proper operation of the railroad in its service of the public, there can be no question but that the erection of such buildings by the company would not be inconsistent with the purposes for which this right of way was granted. In the case of *New Mexico v. U. S. Trust Co.* (172 U. S., 171), a grant of a right of way, made in practically the same terms as that under consideration, was held to be more than ordinary easement,

one having the attributes of a fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property.

The Commissioner of Indian Affairs does not seem to doubt the right of the company to construct like structures on its right of way, but he is of opinion that the company can not delegate such right to others.

This identical question does not seem to have been directly passed upon by the courts, but the principle is clearly covered by the decision of the supreme court in the case of *Grand Trunk R. R. Co. v. Richardson et al.* (91 U. S., 454), although in that case the right of way was not secured under a grant from the United States. In that case the railroad company, resisting a claim for damages occasioned by the destruction of certain buildings within its right of way, contended that the property destroyed was wrongfully within the lines of its right of way, and objected to the admission of evidence to the effect that the injured building had been erected within those lines under a license of the company given to facilitate the convenient receipt and delivery of freight. The court said, at pages 468 and 469:

The admission of this evidence is the subject of the first assignment of error; and in its support it has been argued that it was the duty of the railroad company to preserve its entire roadway for the use for which it was incorporated; that it had no authority to grant licenses to others to use any part thereof for the erection of buildings; and, therefore, that the license to the plaintiffs, if any was made, was void. Thus the basis of the objection to the evidence appears to be, that it was immaterial. We are, however, of opinion that it was properly admitted. If the buildings of the plaintiffs were rightfully where they were, if there was no trespass upon the roadway of the company, it was clearly a pertinent fact to be shown; and while it must be admitted that a railroad company has the exclusive control of all the land within the lines of its roadway, and is not at liberty to alienate any part of it so as to interfere with the full exercise of the franchises granted, we are not prepared to assert that it may not license the erection of buildings for its convenience, even though they may be also for the convenience of others. It is not doubted that the defendant might have erected similar structures on the ground on which the plaintiffs' buildings were placed, if in its judgment the structures were convenient for the receipt and delivery of freight on its road. Such erections would not have been inconsistent with the purposes for which its charter was granted. And, if the company might have put up the buildings, why might it not license others to do the same thing for the same object; namely, the increase of its facilities for the receipt and delivery of freight? The public is not injured, and it has no right to complain, so long as a free and safe passage is left for the carriage of freight and passengers. There is, then, no well-founded objection to the admission of evidence of a license, or evidence that the plaintiffs' buildings were partly within the lines of the roadway by the consent of the defendant.

Again, in the case of *Northern Pacific Railroad Co. v. Smith*, 171 U. S., 260, 275-276, in referring to the use made of the right of way by others with permission from the company, it was said by the court:

The precise character of the business carried on by such tenants is not disclosed to us, but we are permitted to presume that it is consistent with the public duties and purposes of the railroad company; and, at any rate, a forfeiture for misuser could not be enforced in a private action.

It is stated on behalf of the Clear Water Short Line Railway Company:

It has been deemed wise public policy that the warehouse business should be independent of the railroad ownership, and it is the general custom throughout the wheat producing sections for the railroads to permit the warehouse companies to erect elevators at the shipping points adjacent to their tracks.

That custom is in the interest of the farmers who have no other place for the storage of their wheat, and it is, I think, in vogue without question, on reservations as well as elsewhere.

The Commissioner of Indian Affairs, in his letter submitting the matter, reports:

that the erection of a suitable number of warehouses and grain elevators adjacent to the line of the road through the former Nez Perces Indian Reservation will prove a benefit alike to the settlers and the Indians.

After careful consideration of the matter, I am of opinion that the railway company may erect, or permit others to erect, upon its right of way and depot grounds, suitable structures or buildings, such as warehouses and elevators, to facilitate the convenient receipt and delivery of freight, so long as the full exercise of the franchises granted is not interfered with and a free and safe passage is left for the carriage of freight and passengers.

Approved: March 3, 1900.

E. A. HITCHCOCK,  
*Secretary.*

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RULES AND REGULATIONS GOVERNING THE USE OF TIMBER ON PUBLIC MINERAL LANDS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., January 18, 1900.*

By virtue of the power vested in the Secretary of the Interior by the first section of the act of June 3, 1878, entitled "An act authorizing the citizens of Colorado, Nevada and the Territories to fell and remove timber on the public domain for mining and domestic purposes," the following rules and regulations are hereby prescribed:

1. The act applies to the States of Colorado, Nevada, Montana, Idaho, Wyoming, North Dakota, South Dakota, and Utah, and the Territories of New Mexico and Arizona, and all other mineral districts of the United States.

2. The land from which timber may be felled or removed under the provisions of this act, must be known to be of a *strictly mineral* character and "not subject to entry under existing laws of the United States, except for mineral entry." Parties who take timber from the public lands under assumed authority of this act must stand prepared to show that their acts are within the prescribed terms of the law granting such privilege, the burden being on such parties of proving by a preponderance of evidence that the land from which the timber is taken is "mineral" within the meaning of the act.

3. The privileges granted are confined to citizens of the United States and other persons, *bona fide* residents of the States, Territories and other mineral districts, provided for in the act.

4. The uses for which timber may be felled or removed are limited by the wording of the act to "building, agricultural, mining, or other domestic purposes."

5. No timber is permitted to be felled or removed for purposes of sale or traffic, or to manufacture the same into lumber or other timber product as an article of merchandise, or for any other use whatsoever, except as defined in section 4 of these rules and regulations.

6. No timber cut or removed under the provisions of this act may be transported out of the State or Territory where procured.

7. No timber is permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining.

8. No growing trees of any kind whatsoever less than eight inches in diameter are permitted to be cut.

9. Persons felling or removing timber under the provisions of this act must utilize all of each tree cut that can be profitably used, and must dispose of the tops, brush and other refuse in such manner as to prevent the spread of forest fires.

10. These rules and regulations shall take effect February 15, 1900, and all existing rules and regulations heretofore prescribed under said act by this Department are hereby rescinded.

W. A. RICHARDS,  
*Acting Commissioner.*

Approved, January 18, 1900.

E. A. HITCHCOCK, *Secretary.*

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RULES AND REGULATIONS GOVERNING THE USE OF TIMBER ON NON-MINERAL PUBLIC LANDS IN CERTAIN STATES AND TERRITORIES, UNDER THE ACT OF MARCH 3, 1891 (26 STAT., 1093), AS EXTENDED BY THE ACT OF FEBRUARY 13, 1893 (27 STAT., 444).

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., February 10, 1900.*

By virtue of the power vested in the Secretary of the Interior by the act of March 3, 1891 (26 Stat., 1093), the following rules and regulations are hereby prescribed:

1. The act, so far as it relates to timber on public lands, as extended by the act of February 13, 1893 (27 Stat., 444), applies only to the States of Colorado, Montana, Idaho, North Dakota, South Dakota, Wyoming, Nevada and Utah, and the Territories of Arizona and New Mexico. The act originally extended to the District of Alaska, but in that respect it has been superseded by section 11 of the act of May 14, 1898 (30 Stat., 409), under which other and separate regulations are prescribed for the District of Alaska.

2. The intention of the act of March 3, 1891, is to enable settlers upon public lands and other residents within the States and Territories above named to secure from public timber lands timber or lumber for

agricultural, mining, manufacturing, or domestic purposes, for use in the State or Territory where obtained, under rules and regulations to be made and prescribed by the Secretary of the Interior.

3. Settlers upon public lands and other residents of the States and Territories above named may procure timber free of charge from unoccupied, unreserved, nonmineral public lands within said States and Territories, strictly for their own use for firewood, fencing, building, or other agricultural, mining, manufacturing or domestic purposes, but not for sale or disposal, nor for use by other persons, nor for export from the State or Territory where procured. The cutting or removal of timber or lumber to an amount exceeding in stumpage value \$50 in any one year will not be permitted, except upon application to the Secretary of the Interior, and after the granting of a special permit. Except as above provided, it is not necessary for actual residents to secure permission to take timber from public lands in said States and Territories for the purposes aforesaid. The exercise of such privilege is, however, subject at all times to supervision by the Department with a view to such restriction as may be deemed necessary.

4. In cases where qualified persons are not in position to procure timber from the public lands themselves, it is allowable for them to secure the cutting, removing, sawing, or other manufacture of the timber through the medium of others upon an agreement with the parties thus acting as their agents that they shall be paid a sufficient amount only to cover their time, labor and other legitimate expenses incurred in connection therewith, exclusive of any charge for the timber itself; but no person, whether acting for himself, as an agent for another, or otherwise, will be permitted to cut or remove in any one year timber or lumber to an amount exceeding in stumpage value \$50, except upon application to the Secretary of the Interior, and upon the granting of a special permit.

5. The uses specified in section 3 of these rules and regulations constitute the only purposes for which timber may be taken from public lands in said States and Territories, under this act.

6. The cutting and removing of timber, free of charge, under said act of March 3, 1891, is confined to unreserved, unoccupied, nonmineral public lands, in the States and Territories named therein, inasmuch as the act specifically provides that the same shall not operate to repeal the act of June 3, 1878 (20 Stat., 88), which makes provision in said States and Territories, for the free cutting of timber on public lands that are known to be of a strictly mineral character for the uses named in said act.

7. It is further provided in said act of March 3, 1891, that "nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain." Consequently, no timber may be cut or taken under this act from public lands either by or for the use of any railroad company.

8. Section 2461, United States Revised Statutes, is still in force in the States and Territories herein named, and its provisions may be enforced against any person, or persons, who cut or remove, or cause or procure to be cut or removed, or aid or assist or are employed in cutting or removing, any timber from public lands therein, except as allowed by law.

9. The Secretary of the Interior reserves the right to revoke the privileges granted, in any cases wherein he has information that persons are abusing the same, or when it is necessary for the public good.

10. All rules and regulations heretofore prescribed under said act of March 3, 1891, relating to the use of timber on public lands in the above-named States and Territories, are hereby revoked.<sup>1</sup>

W. A. RICHARDS,  
*Acting Commissioner.*

Approved, February 10, 1900.

E. A. HITCHCOCK, *Secretary.*

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MINING CLAIM—RELINQUISHMENT.

J. ARTHUR CONNELL.

An applicant for mineral entry may eliminate by relinquishment any part of a location, not essential to its validity, without prejudice to his claim for the residue.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 20, 1900.* (E. B., Jr.)

This is an appeal by J. Arthur Connell from the decision of your office dated September 12, 1898, in the matter of mineral entry No. 1494, made by him December 22, 1897, for the Fanny Davenport and nine other contiguous lode mining claims embraced in survey No. 10063, Pueblo, Colorado, land district.

It is not necessary to set out the facts in this case in detail. In adverse proceedings against Connell's application for patent certain judgments were rendered by the local court dividing the ground in conflict between the parties thereto. Because these judgments were "by stipulation and consent of the parties," and not in accordance with priority of location as found by said decision, your office declined to recognize and give effect to them as to ground embraced in or excluded from the entry in accordance therewith, and so held the entry for cancellation in part, and declined to allow certain tracts embraced in the lode claims as applied for to be excluded from the entry.

It has been repeatedly held by the Department that judgments of courts in adverse proceedings under the mining laws are none the less binding upon the parties and the land department because rendered in pursuance of a stipulation between the parties (Stranger Lode, 28 L.

<sup>1</sup> See 12 L. D., 456; 13 L. D., 149; 14 L. D., 96; 26 L. D., 399.

D., 321; Greater Gold Belt Mining Company, Id., 398; Carrie S. Gold Mining Co., 29 L. D., 287; and Barney Conway, Id., 388). The decision of your office holding the said entry for cancellation in part and declining to allow certain tracts designated therein as "A" and "B", respectively, to be excluded from the entry, on the ground above stated, was therefore erroneous.

It appears, however, from the record that the exclusion of said tract "B" is not based upon and pursuant to the judgment of a court in adverse proceedings as stated in the said decision of your office, but upon and pursuant to a relinquishment thereof duly made by said Connell to the United States. It is no objection to the validity or regularity of the relinquishment that it was made in favor of the T. F. Gibbons lode mining claim, which was located subsequent to the Little Cylon, one of the claims embraced in said entry, and with which it conflicts. The relinquishment runs directly to the United States; and whether the tract relinquished shall or shall not inure to the owners of the said T. F. Gibbons claim is not a question in issue in the present case. There can be no question of the right of said Connell to eliminate by relinquishment or otherwise any part of the Little Cylon location not essential to its validity, without prejudice to his right to the residue thereof. It does not appear that the tract relinquished is essential to the validity of the Little Cylon location. The tract having been duly relinquished was properly excluded from the entry (Carrie S. Gold Mining Co., *supra*).

The decision of your office is reversed in accordance with the views herein expressed.

LIEU SELECTIONS—ACT OF JUNE 4, 1897.

WILLIAM S. TEVIS.

A relinquishment tendered under the act of June 4, 1897, of land embraced within a forest reservation, with a view to a selection of lands in lieu thereof, should not be accepted in the absence of an accompanying application to make such selection.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) February 28, 1900. (E. B., Jr.)

It appears that on August 23, 1899, William S. Tevis, offered for filing in your office certain papers relating to the NE $\frac{1}{4}$  of the SE $\frac{1}{4}$  of Sec. 31, and the NW $\frac{1}{4}$  of the SW $\frac{1}{4}$  and the W.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 32, T. 24 S., R. 31 E., M. D. M., Visalia, California land district. These papers were (1) a patent from the United States, dated January 15, 1896, to James M. Denham, for the land above described, (2) a deed dated February 17, 1899, from said Tevis to the United States for the said land, and (3) an abstract of title to the same brought down to February 24, 1899. The said land is included within the limits of the

Sierra forest reservation. The said papers were offered for filing as a relinquishment of the said land, and, when duly accepted, as a complete reinvestiture of the United States with the title thereto, with a view to the selection thereafter of vacant land of equal area open to settlement, under the provisions of the act of June 4, 1897 (30 Stat., 11, 36).

By decision dated September 22, 1899, your office declined to accept or consider the said papers "in the absence of a formal application by said Tevis selecting a tract embracing in area at least a portion of the area of the tract relinquished to the United States," and therefore returned the papers to the said Tevis. From this decision he appeals, insisting that it is not necessary that an application to select lieu land under said act should be filed with the relinquishment of the land used as a basis for selection, but that such application may be made at any time thereafter. He also retenders with the appeal the said papers.

The provision of the said act under which the said papers were offered reads:

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner there may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided, further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

Upon the question presented in this case the following language used by the Department in the case of *F. A. Hyde et al.*, on review (28 L. D., 284, 286), is directly in point:

The provision of the statute under which this case arises clearly contemplates an exchange of lands. The parties to the exchange are the United States, on the one hand, and on the other a holder of "an unperfected bona fide claim" within the limits of a forest reservation or an owner "by patent" of land so situated. A case is not properly presented for the favorable action of the land department under said provision until there is filed a relinquishment of the tract covered by the unperfected *bona fide* claim or patent and a selection by the claimant or owner of the land in lieu thereof. The officers of the land department are not authorized to accept, consider or pass upon a relinquishment of the tract within the limits of a forest reservation, except in connection with a proffered or tendered selection of other lands in lieu thereof.

Paragraphs 15 and 16 of the rules and regulations issued June 30, 1897, under said act (24 L. D., 589, 592), clearly require that in all cases of exchange of lands under said act, whether the land relinquished be "a tract covered by an unperfected *bona fide* claim or by a patent," an application to select lieu lands must accompany the relinquishment of the lands included within the limits of a forest reservation.

It is essential to a selection of lieu lands under said act that the lands relinquished should, at the time of the selection, be included within the

limits of a public forest reservation, designated and set apart as such by executive proclamation under section 24 of the act of March 3, 1891 (26 Stat., 1095, 1103). In the act of 1897 provision is made for the survey of the public lands in such reservations, and for the elimination therefrom of such lands as are not adapted to the purposes thereof as therein defined and set forth; and the President is therein expressly—authorized at any time to modify any executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve.

Changes of boundary lines of forest reserves have already been made under these provisions of that act and others are under consideration, and if parties were allowed to relinquish lands thereunder with the understanding that they thereby acquired the right to select lieu lands at any time in the future which might suit their pleasure or convenience, it might happen that between the time of relinquishment and an application to select lieu lands the land relinquished had been eliminated from the boundaries of the forest reservation and was therefore no longer a proper basis for the making or allowance of a lieu selection. Such a situation would, to say the least, embarrass the officers of the land department because of the supposed obligation of the government to consummate the exchange of land theretofore undertaken, and be also certain to cause serious annoyance to the party who had so relinquished and reconveyed his land to the United States. There is no statute under which title so relinquished or reconveyed to the government can be returned or restored to the party making the relinquishment or reconveyance, that is to say, such a contingency or situation is wholly unprovided for in the existing legislation. The Department can not escape the conviction, upon careful consideration, that the act contemplates and that good administration and the best interests of all concerned in the exchange of lands so provided for require that the steps necessary to complete such exchange, when once initiated, be concluded as promptly as possible, and that as contributory to that end an application to select lieu lands should accompany the papers filed to effect a relinquishment to the United States of the land upon which the lieu selection is based.

These views are so plainly at variance with the suggestion in the decision of your office, to the effect that a formal application by Tevis to select "a tract embracing in area at least a portion of the area of the tract relinquished to the United States," would justify the acceptance of the relinquishment, as to call for no further allusion thereto than to say that the Department does not concur in the suggestion.

The action of your office declining to accept or consider the said papers is affirmed in accordance with the views herein expressed.

## LIEU SELECTIONS—ACT OF JUNE 4, 1897.

## INSTRUCTIONS.

A person relinquishing land in a forest reservation, with a view to making a selection in lieu thereof, under the act of June 4, 1897, should, at the time of such relinquishment, designate the land which he desires in lieu of that relinquished, and such designation should embrace a tract or tracts equal in area to that relinquished.

Directions given for the disposition of cases where relinquishments have been presented with selections in partial satisfaction only of the claim under the relinquishment.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) March 6, 1900. (E. B., Jr.)

The Department is in receipt of your office letters of the 12, and 13, January, last, asking instructions as follows:

*First.* Must a person relinquishing and reconveying land in a forest reservation, under the act of June 4, 1897 (30 Stat., 36), at the time of surrender, designate the land which he desires in lieu of the land surrendered, or, can such reconveyance be accepted without a corresponding selection being made?

*Second.* Should the application for selection embrace a tract or tracts equal in area to that relinquished? For example, if 640 acres in a forest reserve are reconveyed to the United States under one deed can such reconveyance be made the basis of several selections under separate applications at different times?

The first portion of each of these questions must be answered in the affirmative and the latter portion of each in the negative, for reasons fully stated in departmental decisions of April 14, 1899, in *F. A. Hyde et al.* (28 L. D., 284), and February 28, 1900, in *Wm. S. Tevis* (29 L. D., 575).

It would not be necessary to say more in this connection were it not that it appears (see your office letters of July 8, 1899, to C. W. Stone of Warren, Penn., and October 14, 1899, to the register and receiver at Duluth, Minn., and your office decision of September 22, 1899, in the case of *Wm. S. Tevis, supra*.) that, notwithstanding the departmental decision in *F. A. Hyde et al., supra*, your office has been accepting relinquishments under said act which are accompanied by a selection of other lands equivalent in area to only a portion of the lands relinquished, and recognizing the right of the one making the relinquishment to select at some subsequent time or times at his pleasure such quantity of land as will make that selected equal to that relinquished. Under this practice numerous selections under said act have been approved by your office, and others, more numerous, are pending, unconsidered as yet, covering, in each instance, a tract or tracts equal in area to a part only of the area of the land relinquished to the United States, these selections being intended to be only in partial satisfaction of such relinquishments and to be followed at some future date by additional

selections for the difference in area between the land relinquished and that previously selected.

It also appears that later, and on January 16, 1900, your office gave to all local land officers the following direction:

In the matter of lieu selections under act of June 4, 1897 (30 Stat., 36), and in accordance with the decision of the Department in the case of *F. A. Hyde et al.*, 28 L. D., 284, you are directed to decline to receive any relinquishment to the United States of lands within a forest reserve unless accompanied by an application (selection) for a tract or tracts equal in area to the tract or tracts so relinquished.

After its receipt by them this direction should prevent the acceptance by local officers of relinquishments under said act unless accompanied by selections equal in area to the tracts relinquished.

What is the proper action to be taken upon prior relinquishments accompanied by selections of tracts equal in area to a part only of the tracts relinquished? Under the regulations of June 30, 1897 (24 L. D., 589, 592), and the decision in the case of *Hyde et al.*, *supra*, these relinquishments ought not to have been accepted; but inasmuch as they have been accepted by your office and in many instances selections in partial satisfaction thereof have been approved by your office, the Department, upon careful consideration, deems it best, in the interest of good administration and to avoid unnecessary hardship to those who relied upon the erroneous practice sanctioned by your office, to give the following directions in the premises:

1. In cases where relinquishments under said act have been accepted and selections in partial satisfaction thereof have been approved, the same will be allowed to stand, notwithstanding the selections do not exhaust the claims to lieu lands. But you will notify all such claimants that their failure heretofore or delay henceforward to select the balance of the area necessary to exhaust their claims under said act, will be at their own risk. Not only are the boundaries of forest reserves subject to change as pointed out in the decision in the case of *Tevis*, *supra*, but bills are now pending before Congress the purpose of which is to modify the conditions under which lieu selections based upon relinquishments of lands within such boundaries may be allowed. Additional selections of lands in satisfaction of relinquishments previously made will be subject to all changes occurring in the meantime both in the reservation boundaries and in the law governing the right to make selection of lieu lands.

2. In cases of pending unconsidered relinquishments made prior to the receipt by the local officers of your said office direction of January 16, 1900, and accompanied by selections in partial satisfaction thereof, you will require the claimants, within ninety days from notice of this requirement, to make additional selections in full satisfaction of such relinquishments, and upon their failure, respectively, to do so their





Howe and Robb, but none on Woodruff, but, June 8, 1892, submitted affidavit of service on Woodruff's attorney by copy at his office, being unable to make personal service. June 30, 1891, Woodruff appealed. Robb did not. May 10, 1892, your office reversed the local office, held Howe's entry for cancellation, and gave Woodruff the preference right.

November 26, 1892, the Department refused a writ of certiorari on Burton's application, and January 5, 1893, Burton asked the Department to review its decision refusing the certiorari. June 7, 1892, Howe appealed to the Department, with proof of service, and the matters of Burton's application for review (treated as an appeal) and Howe's appeal were considered together. (18 L. D., 31.) Burton petitioned for a rehearing, which, on satisfactory showing of absence of laches, was entertained, August 28, 1899.

The grounds on which the rehearing is asked are:

Exclusion by the register and receiver from the record of the statement made by defendant in writing; error in not permitting plaintiff to introduce the deposition of one Charles F. Howe, taken by defendant; error in holding, from the testimony, that plaintiff was attorney for defendant, and in excluding his testimony as confidential; and newly discovered evidence set out in affidavits.

As to the confidential relation of petitioner to the defendant, no new evidence on that point is presented.

In respect to the deposition of Charles Howe the facts were, that the entryman, Henry Howe, had taken the witness's deposition on his behalf. Burton had cross-examined. At the hearing the entryman had not offered the deposition, and Burton then offered it on his own behalf, and it was excluded. On appeal to the department it was held (18 L. D., 31-35):

The effort of Burton to introduce the testimony of Charles Howe procured by Henry Howe was clearly not competent as such evidence was the personal right of the defendant. Thus it follows that Burton has failed to introduce competent authority [evidence] in support of his claim which leaves Woodruff and Howe as the only parties now to be considered.

The theory here expressed, that evidence duly taken is the property of him adducing it, and can be suppressed or withdrawn at pleasure, without consent of the adverse party, is erroneous, and requires reconsideration of the case. A party deprived of evidence which he was entitled to use has not had a fair trial. No authority is cited. The aim of a judicial inquiry is the attainment of justice. Evidence once adduced belongs to the court, and is not property of the party. By whomsoever adduced, it is the duty of the court to consider and apply it for the purpose of attaining justice. A court is not at liberty to ignore evidence, or to permit a party to suppress evidence, which tends against the contention of him by whom it was brought into court.

In respect to depositions the authorities are numerous that depositions taken and transmitted to the court may be used by either party to

the issue, irrespective of by whom taken. *Fountain v. Ware*, 56 Ala., 558; *McArdle v. Bullock*, 45 Ga., 89; *Woodruff v. Garner*, 39 Ind., 246; *Citizens' Bank v. Rhulard*, 67 Ia., 316; *Rucker v. Reid*, 36 Kans., 468; *Sullivan v. Morris*, 8 Bush (Ky.), 698; *Chase v. Springvale*, 75 Me., 156; *McClintock v. Curd*, 32 Mo., 411; *O'Connor v. Amer. &c.*, 56 Pa. St., 231; *Brandon v. Mullenix*, 11 Heisk (Tenn.), 496; *Echols v. Staunton*, 3 W. Va., 574; *Hazleton v. Union Bank*, 32 Wis., 34.

That the proposition above stated in the opinion in 18 L. D., 35, was erroneous, on re-examination is clear. Burton was entitled to use the deposition of Charles Howe, taken at instance of his adversary, and denial of his right to do so was to deprive him of evidence which he had right to offer and to have considered.

Burton also complains as ground for rehearing of exclusion of a statement of facts. No reference is made to this matter in the opinion in 18 L. D., 31. The record of proceedings in the local office shows that objection of Howe was sustained to the questions:

State whether or not John Burton requested Henry Howe February 16, 1891, to let him have the agreed statement of facts he prepared some time in March, 1890?

State whether or not Henry Howe made a statement of facts of this case in March, 1890?

Here John Burton offers to prove that an agreed statement of facts was entered into by him as contestant and Henry Howe as defendant in this case; that the original is not in his possession or under his control, but in possession of defendant in this case. He therefore asks that he be permitted to introduce a copy of said agreement and stipulation after the same has been duly certified by him as a statement of facts made and entered into by said Henry Howe, defendant.

This, on objection of counsel for Howe, was excluded by the local officers "as in nature of a compromise."

The nature of the paper here sought to be proved by secondary evidence is shown by the petition for rehearing to be not a stipulation, or agreement upon the facts of the case, but a narrative respecting the following events from April 18, 1889. When Howe, senior, met his son at Purcell, was with him three days, got there "specific directions as to how to get to the claim he wanted me to take, so I could as well have gone there without him as with him;" that, following these directions, on reaching Oklahoma station, ten minutes past 2 p. m., April 22, 1889, he came in sight of his son, who "when he saw I saw him started east and I followed, but did not catch up till we got within a few rods of the west line of the claim," when the son stopped to talk to a man, and the three went to the spring on the claim.

This, while not a stipulation or agreement, was an admission of the facts. Had it been stated orally in conversation to Burton or to a third party, proof of it was competent against the party making it. It was not less competent because reduced to writing by the party, signed, read and published, and then kept in his own possession. It was not in the nature of a compromise, but was an admission merely, though, perhaps, made with intention and for the purpose of being mutually

accepted by both parties as a written statement of facts. Until so signed, it is subject to being recalled, explained or denied. Any admission may be explained or disproved, and the force of it thus avoided. The party is not concluded by the admission, but it is *competent* and provable against the party making it. *Bishop v. Fletcher*, 48 Mich., 555; *Tilghman v. Fisher*, 9 Watts (Pa.), 441; *Readman v. Conway*, 126 Mass., 374; *Snell v. Bray*, 56 Wis., 156; *Greenleaf's Ev.*, Vol. 1, Sec. 169. It was clearly error to exclude proof of defendant's own statement of the manner and circumstances of his settlement on the tract when offered by his adversary for purpose of showing violation of law and of disqualifying the entryman to make the entry.

Burton asks for rehearing on ground of newly discovered evidence. James Shaw and John Jones make oath that April 21, 1899, the day before the opening, they were in the Indian Territory, at Rice's crossing, and Henry Howe, the entryman, rode a horse across the South Canadian River at that point, and they were then acquainted with the entryman. They informed Burton of the fact February 26, 1894. Emil Bracht and Watson T. Bracht make affidavit that April 12th or 13th Henry Howe, entryman, at instance of his son, Charles F. Howe, met his son and the two Brachts at a camp near a brick-yard, north of Purcell, south of South Canadian River, in the Indian Territory; on April 16, or 17, Charles F. Howe and Henry Howe in presence of the Brachts arranged that the entryman was to take logs cut by the son, with help of Emil Bracht, and placed near the spring on the land in controversy, and was to make entry of the land in controversy; was to be furnished money, a team, implements, and material. Description of the proposed claim, its location, and a sketch map, and direction how to reach it from Oklahoma station were given the entryman by the son, who had been in the prohibited territory. Charles F. Howe, on the night of April 21, with the two Brachts, traveled from their camp to said tract, arriving there seven A. M., April 22, 1889, the day of the opening, where the two Howes met substantially as stated in the above mentioned alleged admission, or statement of the entryman. Affiants did not inform Burton of these facts till March 5, 1894.

W. T. and Fannie McMichael, on or about July, 1889, and at divers times afterward, at their residence on the SW.  $\frac{1}{4}$  of the section wherein the claim lies, stated the same matters set out in detail as are given in substance in the statement, or admission of the entryman above mentioned, which they first communicated to Burton March 5, 1894.

It may be, as remarked by adverse counsel, remarkable that on the day when information of final decision of Woodruff's contest was received by telegraph Burton was able to learn of these four witnesses and the facts within their knowledge. But no counter showing is submitted, though counsel were served with the petition and affidavits. It is not incredible that witnesses friendly to one party (as for instance Woodruff), in a contest between several, should conceal their knowledge of

material facts from the other parties till the party with whom they sympathized was no longer interested. The evidence, if introduced and not rebutted or explained, could not fail to determine the issue between Howe and Burton. It is not merely material, but unrebutted would be controlling and decisive in Burton's favor. Burton swears positively that knowledge of the fact that these several witnesses knew of these facts, was not known to him till the times stated in their affidavits; that he had inquired of Emil Bracht, but he had deceived him and denied knowledge of them. Had Burton known the facts at the trial he could not have had compulsory process to get the testimony till the Oklahoma act (Sec. 1596, Ok. Stat., 1893,) ratified by Congress March 3, 1891, Section 17, 26 Stat., 1026, and was not chargeable with laches for not obtaining the evidence.

It appears, therefore, that Burton has been deprived of a fair trial of his contest. The decision heretofore made upon his contest is therefore vacated, and a new hearing awarded.

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MINING CLAIM—SURVEY—MEANDERED STREAM.

ARGILLITE ORNAMENTAL STONE CO.

In the case of an application for mineral patent that embraces more than one location survey and plat must so exhibit the boundaries as to clearly define each location.

Land below high water mark of a meandered stream (Missouri River) should not be included within the survey of a mining claim.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *March 7, 1900.* *(C. J. W.)*

April 1, 1898, the Argillite Ornamental Stone Company made mineral entry No. 3584 for a placer claim, survey No. 5090, Helena, Montana, embracing two separate locations made September 29, 1888,—one for one hundred and the other for one hundred and forty acres.

August 5, 1898, upon examination of the record, your office found that the plat of survey did not show the separate locations as it should, and an amended survey was required.

September 13, 1898, said company filed a motion for review of said decision.

January 24, 1899, said motion was denied, and claimant was allowed sixty days from notice within which to take proper steps to secure the amended survey, failing which the entry was held for cancellation.

April 1, 1899, the claimant filed a motion for review.

May 3, 1899, said motion was denied, and instructions were given the surveyor-general, as follows:

You will call the attention of the deputy who makes the amended survey to the fact that line 2-3 runs into the Missouri river and that a part of the river is thus

within the claim as surveyed. No part of the claim should extend beyond the high water mark of the river. If as line 2-3 is now run it does not extend beyond this point, an explanation to that effect would be received. If on the other hand this line is beyond high water mark, a new boundary on the east of the 140 acre location should be run with permanent corners established, properly numbered in the series for that location, so as to mark each change of course necessary to keep within the limits herein indicated.

You will also call the deputy's attention to the fact that corner 5 as now shown by the survey is established beyond the limits of the 140 acre location, so that lines 4-5 and 25 and 4-2 include in the 140 location a tract that properly belongs in the 100 acre location.

The claimant has appealed to the Department.

The main question presented is as to the necessity for an amended survey. The survey embraces two locations. The objection made by your office to the plat as returned is as follows:

The plat does not show these separate locations as it should, and the corners of the whole claim are numbered consecutively from one to six, inclusive, instead of beginning with corner No. 1 for each location.

The appellant contends: (1) That the plat does show the two locations accurately and separately. This contention is disproved by the plat itself. (2) That if the plat is defective, as stated by your office, the fault is with the office of the surveyor-general, and appellant is not responsible therefor.

Section 2334 of the Revised Statutes, *inter alia*, provides:

The surveyor-general of the United States may appoint in each land-district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining-claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer-claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make this survey.

Thus, the law provides the manner in which applicants for patent to mineral claims may obtain such survey of them as is required by statute and the regulations of the department. It is the duty of the land department, however, to require in each case such survey and plat as the law contemplates, and where an error is apparent in the survey and plat returned, to require its correction, without inquiry as to who was at fault—the applicant or the surveyor.

One error in the survey and plat in question is, that the two locations embraced in the one survey are not so designated as to show the boundaries of each, and render them easily distinguishable in all their parts.

That the survey and plat in a case where more than one location is embraced therein must so exhibit the boundaries of each as to clearly define the locations, is in accordance with settled ruling of the department. (S. F. Mackie, 5 L. D., 199; Golden Sun Mining Company, 6 L. D., 808.)

It is also insisted that it was error upon the part of your office, in your decision of May 3, 1899, overruling the motion for re-review, to base your action partially upon objections to the survey and plat other than those stated in your decision of August 5, 1898, the particular matter referred to being the fact that the survey and plat show a portion of a meandered stream (Missouri river) to be included in the claim.

There is nothing in this contention. It was competent for your office to call attention to any error in the survey or plat not previously observed, with a view to its correction, so long as the case remained in the jurisdiction of your office. The survey as exhibited by the plat clearly shows the easterly line thereof to be below high water mark of the Missouri river, for a considerable distance, thus apparently including within the claim land which is not public land within the meaning of the mining laws, and therefore not subject to entry.

The record discloses sufficient ground for the amended survey, and your office decisions requiring the same are accordingly affirmed.

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COLLIGAN *v.* DAIGLE.

Petition for rehearing denied by Secretary Hitchcock, March 8, 1900. See departmental decision of November 21, 1898, 27 L. D., 621.

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PRACTICE—SERVICE OF NOTICE BY PUBLICATION.

DAVIES *v.* LACKNER'S HEIRS.

Rule 14 of Practice (Rules of 1896) requires no notice by registered mail, in service of notice by publication, where the suit is against the unknown heirs of the entryman, and it is affirmatively shown that the address, either past or present, of the defendant heirs is unknown, and that there are no heirs at decedent's last known address.

*Secretary Hitchcock to the Commissioner of the General Land Office, March*  
(W. V. D.) 8, 1900. (J. R. W.)

April 4, 1889, George Lackner, a naturalized citizen of Austrian birth, made timber culture entry of the E.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 14, T. 117 N., R. 50 W., Watertown land district, South Dakota. August 4, 1897, William Davies filed contest affidavit against said entry, alleging said Lackner died on or about August 15, 1894, and to affiant's best knowledge, information and belief left no heirs in the United States; at his death he was a single man, a county charge; that affiant made diligent inquiry among the friends and acquaintances of said Lackner, and was unable to learn the name of any heir, "and that there are no heirs whatever, except a rumor that he had a brother-in-law in Germany;" affiant made inquiry of Orker Nelson, Jens Jensen and Benett Geramo, living

near said land. Plaintiff specifically charged failure of the entryman or of any heir to plant any part of the tract to trees, seeds or cuttings. The affidavit was duly corroborated. Contest notice was issued and returned not served. November 22, 1897, plaintiff filed affidavit, alleging he had made diligent search, and inquiry for the heirs of said decedent at the post-offices and through the neighborhood in vicinity of the land, for purpose of securing service on and ascertaining the names of the heirs of said Lackner, if any he had; also of three persons named living near the land; also at Watertown, which is near the land, and of the postmaster at Goodwin, South Dakota, which was Lackner's address while he was living on the land, and was unable to find any one who knew anything about decedent's relatives, or whether he had any living; that Lackner during his lifetime was reputed to have no relatives in this country, and such was the understanding of his neighbors living near the tract. November 26, 1897, the local office issued alias notice for hearing January 4, 1898, and authorized service by publication, which was duly made, and copy duly posted in the local office and on the land, but no notice was mailed to the unknown heirs, because, as stated in the record, said heirs had no known address. Hearing was had January 4, 1898, no appearance being made by or for any heir, and February, 1898, the local office recommended cancellation of the entry. Your office decision held:

Service of notice of hearing . . . . does not comply with the rules of practice, in that a copy thereof was not mailed to defendants at Goodwin, South Dakota, the entryman's address of record. The residence of the heir is presumed to be that of his ancestor, and notice of hearing should have been sent to the ancestor's post-office. This not having been done, you failed to obtain jurisdiction. . . . For the reason stated, your decision is set aside.

Contestant appealed to the department.

The contest was initiated August 4, 1897. Rule 14 as then existing required notice by registered letter to be mailed only to the "last known address of each person to be notified." In the case at bar it was affirmatively shown that the address, either past or present, of defendants, the heirs, was unknown, and that there were no heirs at decedent's last known address. No notice by registered mail was required. *Carpenter v. Kopecky's Heirs*, 29 L. D., 445. The service made conformed to the then existing rules.

Your office decision is therefore reversed.

## RAILROAD GRANT—ISSUANCE OF PATENTS.

## CENTRAL PACIFIC RY. CO. ET AL.

Directions given in the matter of the issuance of patents on account of the grants made by the acts of July 1, 1862, and July 2, 1864, to aid in the construction of the Central Pacific railroad, and the grant made by the act of July 25, 1866, to aid in the construction of the California and Oregon railroad.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 8, 1900.* (F. W. C.)

The Department has again considered the request on behalf of both the Central Pacific Railway Company and the Central Pacific Railroad Company, that patents hereafter issued on account of grants made by the acts of July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 356), to aid in the construction of the Central Pacific railroad, and the grant made by the act of July 25, 1866 (14 Stat., 239), to aid in the construction of the California and Oregon railroad, be issued, with certain exceptions, in the name of the Central Pacific *Railway* Company, as grantee of the Central Pacific Railroad Company, the Central Pacific Railroad Company having conveyed all of its property, including the portions of the land grants above described, which are not included in said exceptions, to the Central Pacific Railway Company. The exceptions from the conveyance are lands sold prior to the execution of the mortgage from the Central Pacific Railroad Company to Charles Croker and Silas W. Sanderson, dated the first day of October, 1870, securing the payment of the land bonds of said last-mentioned company, and all such parts and parcels of said lands as shall have since been released from said mortgage in accordance with the provisions thereof. Lists of the lands included in the exceptions are filed, and as to these lands it is desired that the patents issue to the Central Pacific Railroad Company, thus affording a muniment of title to the purchasers thereof from that company.

The exceptions aggregate approximately 58,580.95 acres. Of this amount there have been listed on account of the grants approximately 17,043.26 acres, which are pending undisposed of, the lands included therein being mostly cullings from the lists presented on account of the grants and not patented for various reasons. It is stated to be the intention, in future applications for patents under the aforesaid grants, to designate therein the particular company to which the patent should be issued.

Upon further consideration of the matter, the request is granted, and in the future issue of patents under these grants you will be governed accordingly.

## STATE SELECTION—SETTLEMENT RIGHT—ACT OF AUGUST 18, 1894.

BROWN *v.* STATE OF IDAHO.

The right of selection accorded to the State by the act of August 18, 1894, does not extend to land embraced within a prior adverse settlement claim that is asserted in due time after survey.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 8, 1900.* (G. B. G.)

This is an appeal by the State of Idaho from your office decision of April 8, 1899, rejecting its application to select, per list No. 4, for State, charitable and other institutions, the E.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 31 and the W.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 32, T. 41 N., R. 1 E., Lewiston, Idaho, under the grants to the State for such purposes, made by the act of July 3, 1890 (26 Stat., 215), entitled "An act to provide for the admission of the State of Idaho into the Union."

By an act of August 18, 1894 (28 Stat., 372, 394-395), it was provided that the governors of certain States, including the State of Idaho, might apply to the Commissioner of the General Land Office for the survey of any township or townships of public lands remaining unsurveyed in any of the several surveying districts in the State at the date of the application, and that—

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.

By permission and under authority of this act, the governor of the State of Idaho filed in your office, May 7, 1895, an application for the survey of said township, and a notice of the withdrawal thereof from settlement issued from your office May 14, 1895, to take effect as of the date of the filing of the State's application for survey. The survey was made, the plat thereof being filed in the local office at Lewiston, Idaho, January 10, 1898.

In the meantime, however, and on December 14, 1897, the State of Idaho filed a list of selections embracing said tract, and, January 24, 1898, Charles D. Brown applied to make homestead entry thereof, alleging settlement August 22, 1894.

June 3, 1898, your office ordered a hearing to determine the respective rights of the parties, which contest was heard at the local office July 27, 1898. August 12, 1898, and before the local officers rendered their decision in the case, the State refiled its list of selections embracing said tract, which was rejected by the local officers, and, September 17, 1898, upon the stipulations entered into between the parties at the

hearing, and the evidence adduced thereat, these officers recommended that the State's said selection of December 14, 1897, be canceled as to said tract, and that Brown's application be allowed, and upon the appeal of the State, your office affirmed said decision, and the State's application was rejected, as aforesaid.

The testimony taken at the hearing shows that Brown went upon the land in controversy, in August, 1894, and marked the boundaries of the claim; that in October, 1894, he went to the State of Maine for his family, returning with the members thereof to Moscow, Idaho, in April, 1895; that in March, 1895, he let the contract for a house to be built upon the land, which was built. It does not appear just when this house was completed, but it was ready for occupancy and he moved his family into it May 20, 1895, and it is clear that he has since that time resided upon the land and cultivated it as required by law.

The land in controversy was therefore, at the date of the State's application for survey thereof, at the date of the withdrawal, at the date of the survey, and at the date of the filing of the plat of survey in the local office, embraced in the valid adverse claim of Brown, and the State did not have a preference right, or any right, to select said tract so long as said adverse claim was duly prosecuted, and Brown having filed his application to enter the same in the local office before the expiration of three months from the filing of the plat of the survey thereof, his claim must be upheld.

It is not necessary for the purposes of a decision in this case to analyze the grounds upon which your office decision rests, nor to set forth in detail the contentions of the appellant. It can make no difference in this case whether the filing of the State's list, December 14, 1897, was premature, under the ruling of the department in the case of *Benson v. State of Idaho* (24 L. D., 272), nor is it material whether that case rests on sufficient grounds. Neither is it an important consideration, if said list was prematurely filed, what effect that filing had upon the right of the State to refile its list August 12, 1898, nor what would have been the legal effect of such refiling, in the absence of a valid adverse claim to the land initiated prior to the State's application for survey. There are several cases before the department involving the claim of the State to select other lands in this and other townships, and these questions may arise in some of those cases. One of the contentions of the appellant herein is that these several cases should be consolidated, but, inasmuch as the contest of the State in each case is against another and a different claimant, this contention cannot be sustained, and the motion to consolidate is denied.

The decision appealed from is affirmed.

## MINING CLAIM—NOTICE OF APPLICATION.

HENRY WAX ET AL.

A published notice of application for mineral patent that shows no connection of the claim with a mineral monument, or corner of the public survey, is fatally defective.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 8, 1900.* (C. J. W.)

December 29, 1898, Henry Wax and A. T. Reynolds made mineral entry No. 12, at Lewiston, Idaho, for the Bullion lode claim, survey No. 1296.

April 11, 1899, your office took up the record and found the published notice of the application upon which the entry was allowed to be fatally defective, and required the applicants to republish notice of said application, and to post said notice and plat anew on said claim and in the local office, as in the original case.

The applicants for patent have appealed from your office decision, and insist upon the sufficiency of their published notice as given. This is the only question presented by the appeal. The land applied for is unsurveyed, the claim being connected with a United States location monument, the mention of which and its course and distance from corner No. 1 of the claim are omitted from the published notice of the application for patent. The effect of the failure of the notice as published to show the connection of the claim with a corner of a public survey, or with a mineral monument, is to be considered.

In the case of Hallett and Hamburg Lodes (27 L. D., 104, 1081-09) the department, speaking on this subject, said:

Although neither the statute nor the official regulations expressly require that the published notice give a connection by course and distance between the claim and a corner of the public survey or a mineral monument, yet it has been repeatedly held, and under the practice of your office and the decisions of the Department has become well settled, that such a connection should be given therein (Tennessee Lode, 7 L. D., 392; Hoffman *et al. v. Venard et al.*, 14 L. D., 45; Broad Ax Lode, 22 L. D., 244; and Sulphur Springs Quicksilver Mine, 22 L. D., 715.

Since the decision in the Hallett and Hamburg case, rendered June 25, 1898, the rule therein referred to has been incorporated in the mining regulations (28 L. D., 577, 603).

The published notice in question shows no connection of the claim with a mineral monument or corner of the public survey, and your office properly held the notice to be insufficient.

The decision appealed from is accordingly affirmed.

## LIEU SELECTIONS—ACT OF JUNE 4, 1897.

## E. S. GOSNEY.

The right of lieu selection under the act of June 4, 1897, is expressly restricted to "vacant land open to settlement," and hence can not be allowed, where the land applied for is embraced within an existing forest reservation, established by proclamation of the President under section 24, act of March 3, 1891.

If agricultural lands are improvidently included in a forest reservation they can be eliminated therefrom only by a proclamation of the President, or by the action of Congress, and, until so eliminated, such lands will continue a part of the reservation.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 8, 1900.* (E. B., Jr.)

By your office decision of May 29, 1899, the application of E. S. Gosney, filed August 29, 1898, to select, under the act of June 4, 1897 (30 Stat., 11, 36), the NW $\frac{1}{4}$  of the SW $\frac{1}{4}$  of section 22, T. 18 N., R. 8 E., G. and S. M., Prescott, Arizona, land district, in lieu of the SE $\frac{1}{4}$  of the SE $\frac{1}{4}$  of section 20, T. 20 S., R. 31 E., M. D. M., within the limits of the Sierra forest reserve was rejected for the reason that the tract applied for was part of the San Francisco Mountains forest reserves created August 17, 1898, by proclamation of the President.

Gosney appeals from the rejection of his application, contending, in effect:

1. That the said proclamation did not legally prevent the selection as lieu land of the land above described in the San Francisco Mountains forest reserves.
2. That said land is agricultural in character and therefore not of the character intended to be embraced in such forest reserves.

The land which Gosney applied to select constitutes, with certain other lands, the San Francisco Mountains forest reserves which were "reserved from entry or settlement and set apart as public reservations" August 17, 1898, by proclamation of the President (30 Stat., 1780), pursuant to authority contained in section twenty-four of the act of March 3, 1891 (26 Stat., 1095, 1103), as follows:

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

The act of June 4, 1897, *supra*, under which Gosney made his application to select expressly restricts selections thereunder to "vacant land open to settlement."

It thus appears that when Gosney made application to select the tract in question it was actually reserved from entry or settlement. It is still so reserved so far as appears. Not being "vacant land open to settlement" it is not subject to lieu selection under said act.

It is also provided in the act of June 4, 1897, *supra*, that—

No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable condi-

tions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but 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.

and that—

Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, published in two papers of general circulation in the State or Territory wherein any forest reservation is situated and near the said reservation, 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.

The President is hereby authorized at any time to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve.

From these provisions of the act of 1897 it clearly appears that Congress did not intend to authorize the inclusion in public forest reservations "of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes"; and also that adequate provision is made for the elimination from such reservations of lands of the character just described and their restoration to the public domain.

But where public agricultural lands are improvidently included in a forest reservation they can be eliminated therefrom only by a proclamation of the President or by the action of Congress, and until so eliminated they will continue a part of the reservation and be withheld from settlement and entry. It does not appear from the record in this case whether or not the land Gosney sought to select is agricultural in character. But if it be conceded that it is of such character it is still none the less reserved from entry or settlement, and so not subject to lieu selection, so long as it remains a part of a public forest reservation.

The decision of your office is correct and is therefore affirmed.

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#### LIEU SELECTIONS—RAILROAD LANDS—ACT OF JUNE 4, 1897.

##### INSTRUCTIONS.

Lands granted to railroad companies can not be made bases for lieu selections under the act of June 4, 1897, except in cases where the full legal title to such lands has passed out of the government, and beyond the control of the Land Department, by a patent, or by some means which is the full legal equivalent thereof.

*Secretary Hitchcock to the Commissioner of the General Land Office, March*  
(W. V. D.) 9, 1900. (E. B., JR.)

Replying to your office inquiry of December 19, 1899, relative to exchanges under the provisions of the act of June 4, 1897 (30 Stat., 11, 36), of lands granted to railroad companies, and subsequently included

within the boundaries of forest reserves, for public lands outside such reserves, you are advised that the Department sees no reason to modify in any way its instructions in point, dated April 26, 1899, 28 L. D., 328 (referred to by you as embodied in circular instructions dated May 9, 1899, 28 L. D., 521, reissued December 19, 1899, 29 L. D., 391), that lands so granted can not be made bases for lieu selections under said act except in cases where the full legal title to such lands has "passed out of the government and beyond the control of the land department by a patent or by some means which is the full legal equivalent thereof."

It is essential, among other things, that lands used as bases in exchanges under said act must be "covered by an unperfected *bona fide* claim or by a patent." In the case of *F. A. Hyde et al.*, 28 L. D., 284, 267, construing the words just quoted from the exchange provision of the act, the Department said:

Here are indicated two distinct degrees of right or title to land: First—an inchoate, inceptive or equitable right or title susceptible of perfection by compliance with law, and, second—full legal or fee simple title, the holders or possessors of which are spoken of respectively as "settler" and "owner." The tract which Belden has offered to the government in exchange is "covered" not by "patent," in the literal meaning of the term, but by direct grant from the United States to the State of California, by means of an act of Congress, as already stated. In *Michigan Land and Lumber Co. v. Rust* (168 U. S., 589, 592) it is said:

"Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the land department of the government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. *Strother v. Lucas*, 12 Pet., 410, 454; *Grignon's Lessee v. Astor*, 2 How., 319; *Chouteau v. Eckhart*, 2 How., 344, 372; *Glasgow v. Hotiz*, 1 Black, 595; *Langleau v. Hanes*, 21 Wall., 521; *Ryan v. Carter*, 93 U. S. 78. Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title, *Rev. Stat. Sec. 2449*; *Fraser v. O'Connor*, 115 U. S., 102; but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent, *Bagnell v. Broderick*, 13 Pet., 436, 450; and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost."

Here the act of Congress passed the fee and therefore made no provision for the issue of a patent. Title by such means is the simplest and highest known to our laws, and is beyond question the full equivalent of title by patent, which is the deed or instrument by which the executive, in pursuance of law, conveys the title to public lands.

The question then presented in this connection is, whether the term "patent," as used in said provision, should be taken in its literal signification only, or should be construed to have been used in the broader, general sense to denote a tract to which the full legal title, however granted or conveyed, has passed out of the government and beyond the control of the land department, in contradistinction to the other and lower degree of right or title indicated by the words "unperfected *bona fide* claim." The Department is constrained to so construe it, in order to give effect to the evident purpose of Congress in the premises, as gathered from this and kindred legislation.

In its instructions of April 26, 1899, *supra*, the Department also said:

That which may be relinquished is described as "a tract covered by an unperfected *bona fide* claim or by a patent," and is believed to include any tract covered by

any unperfected *bona fide* claim under any of the general land laws of the United States (other than the mining laws), or to which the full legal title has passed out of the government and beyond the control of the land department by any means which is the full legal equivalent of a patent.

As the Department construes the provision in question there are, therefore, two general classes who may avail themselves of the exchange of lands therein provided for, that is (1) those holding unperfected *bona fide* claims within the boundaries of forest reserves, under any of the general land laws other than the mining laws, and (2) those holding lands within such boundaries under a patent or its equivalent, meaning by "equivalent" an act of Congress where that passes the fee and makes no provision for the issuing of patent or other instrument of conveyance by the executive branch of the government, or a certification where that is the prescribed method of transferring the title.

Those claiming under grants to aid in the construction of railroads fall within the second of these classes, if within either. Lands held under such grants are not held as unperfected *bona fide* claims under the general land laws, and are therefore not available as bases for lieu selections unless they are covered by a patent or its equivalent. The acts making these grants expressly provide for the issuing of patents or other instruments of conveyance by the executive branch of the government and until this is done the grant is in process of administration and adjustment and the land is within its jurisdiction and control to the extent at least that it is authorized and empowered to ascertain whether the land is of the character contemplated by the granting act, that is, whether mineral or non-mineral, and whether at the time when the right of the railroad company attached and became fixed and vested under the grant the land was excepted therefrom because otherwise disposed of, reserved, or claimed within the meaning of the excepting clauses in the act making the grant. As to these lands therefore there is nothing which, prior to the issuance of patent or other prescribed instrument of conveyance, passes the full legal title out of the government and beyond the jurisdiction and control of the land department to such an extent as to be the equivalent of a patent. Congress having provided for the relinquishment of lands within the limits of a forest reserve only when covered by one of two classes of claim or title, and lands embraced in a railroad land grant being in no respect or contingency included in the first of these classes, and being included in the second only when covered by a patent, which as heretofore held includes whatever is its full legal equivalent, it follows that such lands when not covered by a patent or its equivalent can not be so relinquished and made bases for lieu selections.

Adhering to the views heretofore and herein expressed, it is not necessary to consider, as suggested in your office letter, the status, under the exchange provisions of said act, of unsurveyed railroad lands which are within the boundaries of a public forest reservation.

## LIEU SELECTIONS—ACT OF JUNE 4, 1897.

## SANTA FE PACIFIC RY. CO.

The act of June 4, 1897, with respect to lieu land selections, was intended to provide for extinguishing private title to such lands only as would be a part of an established forest reservation if it were not for their private ownership.

*Secretary Hitchcock to the Commissioner of the General Land Office, March 9, 1900.*

I have considered the appeal of the Santa Fe Pacific Railway Company from the following decision of your office:

On the 1st ultimo, the register transmitted to this office the application of the Santa Fé Pacific R. R. Co., to select under the act of June 4, 1897 (30 Stat., 36), lieu selection No. 1082, all of Sec. 34, T. 22 N., R. 2 W., G and S. R. M., in lieu of Sec. 15, T. 20 N., R. 9 E., same meridan, each tract containing 640 acres.

In said application it is alleged that the land made the basis of said selection, as above described, is situate and lying within the boundaries of the San Francisco Mountains forest reserves, Territory of Arizona, and that the said railroad company is the owner thereof, or at least was, prior to October 17, 1899, when it was deeded to the United States.

The records of this office show, in regard to the creation of the San Francisco Mountains forest reserves, that in laying the papers in the case before the Secretary of the Interior, this office directed attention to the fact that the same presented for consideration a very serious question of lieu lands selections, inasmuch as it was shown therein, in regard to some 200,000 acres of timbered railroad lands secured by certain individuals, that, should the same be included in a forest reservation, after removing the timber therefrom the denuded and worthless scattered tracts of land might be used as a basis for a lieu selection of a compact body of fine valley lands, under the provisions of the said act of June 4, 1897.

In view of the grave proportions which it was recognized that this question of the relinquishment to the government of private holdings within forest reservations and the selection of unreserved lands in lieu thereof, had at that time assumed, this office suggested that, since the region in this case included lands granted to the Atlantic and Pacific Railroad, it would be advisable to guard against any complications that might arise from the inclusion within a forest reserve of a large area of railroad lands; and accordingly, recommended that the proclamation reserve in express terms the even numbered sections, and thereby make a separate reservation of each even numbered section, all to be grouped and known under the general name of the San Francisco Mountains forest reserves.

The whole question of the advisability of *not* creating one general reserve which would include the railroad sections within its limits, was, consequently, before the Secretary of the Interior and the President for consideration before the issuance of the proclamation of August 17, 1898, making, instead thereof, a separate reservation of each even numbered section.

From the above it is clear that the railroad section in question, viz: section 15, township 20 N., range 9 E., is not within a forest reservation; and, consequently, cannot be made the basis of an exchange under the said act of June 4, 1897, *i. e.*, relinquished or reconveyed to the United States and other lands be selected in lieu thereof.

Accordingly, the said selection by the Santa Fé Pacific R. R. Co. is hereby rejected subject to appeal within the usual time.

In addition to the matter stated in the decision of your office, the records of this Department show that your office letter of August 12, 1898,

recommending the establishment of the San Francisco Mountains forest reserves and urging the propriety of making a separate reservation of each even-numbered section with a view to avoiding the application of the lieu land provision of the act of June 4, 1897, to the alternate odd-numbered sections granted to the Atlantic and Pacific Railroad Company, was laid before the President, and that in the light of that communication the proclamation establishing these forest reserves was issued in the form recommended by your office. The lands which by the terms of the proclamation are so reserved are "the even numbered sections in" certain enumerated townships (30 Stat., 1780). Had the odd numbered sections been public lands at the time of the proclamation, they would not, under its terms, have been reserved from entry or settlement or set apart as forest reserves, but would have continued to be subject to settlement and entry under the general land laws; and if the odd numbered sections were now relinquished to the United States they would not become a part of these forest reserves, but would become subject to settlement and entry under the general land laws. Obviously it was intended by this lieu land enactment to provide for extinguishing private title to such lands only as would be a part of an established forest reservation if it were not for their private ownership.

Your office decision is therefore affirmed.

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PAYMENTS REQUIRED FOR GREAT SIOUX INDIAN LANDS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
WASHINGTON, D. C., *March 28, 1899.*

REGISTERS AND RECEIVERS,

*Bismarck, N. Dak., Huron, Pierre, Chamberlain,  
Rapid City, S. Dak., and O'Neill, Nebr.*

GENTLEMEN: Your attention is called to the following provisions of an act of Congress approved March 3, 1899 (30 Stat., 1102), entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred, and for other purposes," viz:

That all persons who may have heretofore settled upon that portion of the Great Sioux Indian Reservation which was opened up to settlement under and by virtue of the act of March second, eighteen hundred and eighty-nine, entitled "An act to divide a portion of the reservation of the Sioux Nation of Indians in Dakota into separate reservations and to secure the relinquishment of the Indian title to the remainder and for other purposes," may secure patents for the lands embraced in their entry upon making the payments required in section twenty-one of said act of March second, eighteen hundred and eighty-nine, above referred to, and no other or further payments shall be required of said claimants, whether proof and payment be made after fourteen months or five years from the date of settlement upon said lands.

It is to be observed that the act provides that all persons who may have "heretofore" settled upon that portion of said reservation which was opened up to settlement by said act of March 2, 1889 (25 Stat., 888), may secure patents for the lands embraced in their entries upon making the payments required in section 21 of said act whether proof and payment be made after fourteen months or five years from the date of settlement. Hereafter when such parties pay the price fixed by section 21 of said act, you will not require an additional payment of \$1.25 per acre for the privilege of commuting their entries, which has been done since the Department rendered its decision of May 13, 1896 (22 L. D., 550). See the cases of Randall McDonnell (27 L. D., 72) and Austin G. Brassfield (27 L. D., 395).

Persons who did not settle upon said reservation prior to the passage of the act of March 3, 1899, are not entitled to the benefits of the law quoted.

Very respectfully,

BINGER HERMANN,  
*Commissioner.*

Approved:

THOS. RYAN,  
*Acting Secretary.*

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SOLDIERS' ADDITIONAL HOMESTEAD—NON-CONTIGUOUS TRACTS.

EDGAR BOICE.

There is no statutory requirement that a soldiers' additional homestead entry shall be made of contiguous tracts, or in compact form.  
The case of Wesley Pringle, 13 L. D., 519, overruled.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 12, 1900.* (J. R. W.)

August 13, 1898, Edgar Boice, as assignee of Sarah E. Sparks, widow of John P. Sparks, applied to the local land office, Cheyenne, Wyoming, under sections 2306 and 2307 of the Revised Statutes, to enter the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 24, Tp. 17 N., R. 67 W., and the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 12, Tp. 16 N., R. 67 W., 6th P. M., which was rejected "because the forties applied for were non-contiguous," from which ruling the applicant appealed, and by your office decision of February 16, 1899, said ruling was affirmed, from which ruling the applicant has appealed to this Department.

The applicant admits your office decision to be correct under general rule 25, page 88, general circular July 11, 1899, and the decision of the land department in Wesley Pringle, 13 L. D., 519, but insists such ruling is in contravention of the law, as construed by the supreme court in *Webster v. Luther*, 163 U. S., 331.

The Department must conform its practice and administration of the

law to the construction given to the law by the supreme court. In *Webster v. Luther*, 163 U. S., 331, the supreme court had the soldiers' additional homestead law before it for construction, to determine whether the right thereby conferred was purely personal or was alienable. This Department had been ruling that the right was purely personal and not alienable.

In construing the law with reference to alienability of the right, the supreme court calls attention to the fact that in the act of March 3, 1873 (17 Stat., 605), amending the act of June 8, 1872 (17 Stat., 333), from which said section 2306 is taken, the words, "under the provisions of this act" and "contiguous to the tract embraced in the first entry," which were contained in the act of 1873, were omitted from the amended act. Reviewing the history of legislation on this subject, the court, at page 339, says :

If, then, Congress did not burden the right to additional lands with the condition that they should be contiguous to those originally entered, it would seem necessarily to follow that the grant of additional lands was without restrictions, and, consequently, there was no purpose to interfere with the disposition by the homesteader of such additional lands, or of his interest in them, in any mode he deemed proper or that might be adopted in respect of other property owned by him.

The court adopts the following language of the supreme court of Minnesota in the same cause :

It was a mere gratuity. There was no other purpose but to give it as a sort of compensation for the person's failure to get the full quota of one hundred and sixty acres by his first homestead entry. There is no reason to suppose it was intended to hamper the gift with conditions that would lessen its value, nor that it was intended to be made in any but the most advantageous form to the donee. After the right was conferred it was immaterial to the government whether the original donee should continue to hold it, or should transfer it to another. . . . 50 Minnesota, 77, 83.

The court also adopts the opinion of the United States circuit court of appeals, eighth circuit, in *Barnes v. Poirier*, 27 U. S. C. C. A., 500 :

The beneficiary was left free to select this additional land from any portion of the vast public domain described in the act, and free to apply it to any beneficial use that he chose. It was an unfettered gift in the nature of compensation for past services. It vested a property right in the donee. The presumption is that Congress intended to make this right as valuable as possible. Its real value was measured by the price that could be obtained by its sale. The prohibition of its sale or disposition would have made it nearly, if not quite, valueless to a beneficiary who had already established his home on the public domain. Any restriction upon its alienation must decrease its value. We are unable to find anything in the acts of Congress or in the dictates of an enlightened public policy that requires the imposition of any such restraint.

The court proceeding with its own construction, at page 341, says :

Much stress is placed by the plaintiff in error upon the practice of the land department during a certain period, based upon the idea that the right of entry given by the statute of additional lands was entirely personal, and not assignable or transferable. We cannot give to this practice in the land office the effect claimed for it by the plaintiff in error. The practical construction given to an act of Congress, fairly susceptible of different constructions, by one of the Executive Departments of the government, is always entitled to the highest respect, and in doubtful

cases should be followed by the courts, especially when important interests have grown up under the practice adopted. [Citing authorities.] But this court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute.

While the exact question here was not raised in either of the foregoing cases, it appears to be within their principle. The right is a gift in quantity without restrictions and unfettered. The right to make such entry appears to be nowise different from the right to make private entry of offered lands by a purchaser, except that payment need not be made. One having right to make private entry would be permitted to do so of non-contiguous tracts. Section 2306 does not impose the condition that the entry of additional lands shall be of contiguous tracts or in compact form. The law for original homestead entries does so require, for the obvious reason that the object of the statute is the occupation and improvement of the public lands as farms and homes. In making grant of the right to enter additional lands no such object was in view, for this had generally been accomplished by the original entry. "There was," says the court, "no reason to suppose it was intended to hamper the gift with conditions that would lessen its value, nor that it was intended to be made in any but the most advantageous form to the donee," as most comports with the dignity and grace of the sovereign which was thus acknowledging its obligation, and rendering "a sort of compensation for the person's failure to get the full quota of one hundred and sixty acres by his first homestead entry." The requirement that the land shall be contiguous or forming one compact body is seemingly purposely omitted from the statute. So only the entry is made by government subdivisions, it is for the entryman alone to judge what will be most advantageous to him, and to locate the gratuity, untrammelled with conditions as to contiguity and compact form, not imposed by the statute. This is in the view of the Department the necessary deduction from the construction given the statute by the supreme court. The case of Wesley Pringle (13 L. D., 519), on which your office decision is based, is overruled.

Your office decision is therefore hereby reversed, and the entry will be allowed as applied for.

#### SIoux HALF BREED SCRIP—CONTIGUITY OF LOCATED TRACTS.

##### AUGUSTA BROWN.

The act of July 17, 1854, authorizing the issuance of Sioux half breed scrip, does not require that the locations of such scrip should be made of contiguous tracts.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) March 12, 1900. (G. C. R.)

This case involves the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of sec. 20 and the NE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of sec. 28, Tp. 17 S., R. 58 N., Pueblo land district, Colorado.

July 24, 1880, Sioux half breed scrip No. 633, "C," which was issued to Augusta Brown November 24, 1856, for eighty acres, was located by her attorney in fact, Albert D. Davis, upon said tracts, which was surveyed land and subject to pre-emption at that time.

March 19, 1898, your office directed that notice be given the scribee, through her attorney, that thirty days would be allowed to show cause why the location should not be canceled, for the reason that the tracts located are not contiguous. Notice was accordingly sent by registered letter to Sanburn, Colorado, the post-office nearest the land, and the same was returned unclaimed.

Notice having been received that the Glens Falls Live Stock Company, of Sanburn, Colorado, claimed the land as transferee, your office directed that notice be given to that company of the action taken.

Upon receipt of notice, the company filed a motion for a review of your said office decision. April 21, 1899, your office denied the motion, and held the location for cancellation, because the land located was non-contiguous.

The company's appeal brings the case to this department.

The act of July 17, 1854 (10 Stat., 304), which authorized the issue of scrip in exchange for certain lands belonging to Sioux Indians of mixed blood, does not directly, or by implication, require that locations of the scrip be made of contiguous tracts.

In the case of F. M. Heatón (6 L. D., 648), the Department refused to accept a surrender of such scrip calling for eighty acres, and to issue in its stead two pieces of scrip of forty acres each, and this without referring to the prior decision in the case of S. L. M. Barlow (5 L. D., 695), which sustained the practice of substituting forty acre scrip for that of a larger denomination, but these cases do not discuss or affect the right of the scribee to locate his scrip on non-contiguous tracts.

The decision of your office is reversed.

#### MINING CLAIM—APPLICATION FOR PATENT.

##### SOUTH CAROLINA LODE AND OTHER CLAIMS.

Proceedings instituted to secure a mineral patent by one who is without interest in, or control over, the lands applied for, are without statutory authority, and must be vacated.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 12, 1900.* (A. B. P.)

The facts disclosed by the record in this case are as follows:

May 28, 1898, by an order of the United States circuit court for the district of South Dakota, western division, made in the suit of David Jones *v.* Edgemont and Union Hill Smelting Company, Savery Bradley

was appointed receiver for said Edgemont and Union Hill Smelting Company, and as such receiver was—

authorized, empowered, and instructed to take all steps and proceedings necessary or proper towards the obtaining of patents from the United States for all of the unpatented lode and placer claims owned or claimed by said company in Lawrence county, South Dakota.

August 27, 1898, application for patent to the South Carolina, Lita, B. & M., Calumet, Calumet No. 2, and Calumet No. 3 lode mining claims, survey No. 1178, Rapid City land district (Lawrence county), South Dakota, was filed by Savery Bradley, as receiver for the Edgemont and Union Hill Smelting Company. Said company became the owner of all said claims, except the Lita, in 1897, but it does not appear ever to have owned the Lita claim. In July, 1898, said Bradley, receiver, and said Edgemont and Union Hill Smelting Company sold and conveyed all of said claims, except the Lita, to John A. Graham and George A. Fletcher, trustees, and such sale was ratified and confirmed by an order of said United States circuit court, made in said suit, July 20, 1898. The Lita claim was conveyed to said Graham and Fletcher, trustees, by the Milton Trust Company, by deed dated August 10, 1898.

At the date of the filing of the application for patent, therefore, all the claims were held by said trustees. Notwithstanding this, for some unexplained reason, the application for patent was filed by and in the name of said Bradley as receiver for said Edgemont and Union Hill Smelting Company. December 12, 1898, mineral entry No. 943, embracing all the claims included in the application for patent was made in the names of said John A. Graham and George A. Fletcher, trustees.

In the meantime, however, September 22, 1898, Graham, one of said trustees, had died, and November 21, 1898, Fletcher, the surviving trustee, had executed and delivered to the Galena Mining and Smelting Company a deed conveying all of said claims except the Lita. On or about December 15, 1898, after the entry had been allowed, Fletcher, as surviving trustee, also executed and delivered to the Milton Trust Company, a deed conveying the Lita claim. In an affidavit filed in the record, Fletcher states that both said deeds were executed and delivered by him according to and in full compliance with the terms and conditions of his said trust.

It thus appears that at the date of the filing of the application for patent, the Edgemont and Union Hill Smelting Company and Bradley, its receiver, had, by the sanction of the court by whose order said receiver was appointed, sold and conveyed the five claims originally owned and held by said company, and that at the date of the entry embracing the six claims in question, one of the trustees named as an entryman was dead, and all the claims, except the Lita, were held and owned by the Galena Mining and Smelting Company—the Lita only being held by Fletcher as surviving trustee.

Your office, by decision of May 25, 1899, held that the entry in ques-

tion could not be allowed to stand and the local officers were directed to advise the parties in interest that they would be allowed sixty days from notice within which to show cause why the entry should not be canceled as to the Lita claim, and that in default of such showing the entry would be so canceled.

The record is now before the Department on an appeal filed by certain parties styling themselves "Attorneys for the entrymen and their successors in interest."

It is apparent, from the facts stated, that the application for patent and the proceedings thereon have been irregular. Before Bradley, as receiver for the Edgemont and Union Hill Smelting Company, filed the application for patent, he had, with the authority and sanction of the court by whom he was appointed, and in conjunction with said company, sold and conveyed to other parties five of the claims embraced in the application, and to the remaining claim—the Lita—he does not appear at any time to have had any right or title whatever. His duties as receiver, with respect to the South Carolina, B. & M., Calumet, Calumet No. 2, and Calumet No. 3 claims, were apparently discharged when, under the direction and with the approval of the court, he sold and conveyed said claims to Graham and Fletcher, trustees. Surely he could not, after such sale and conveyance, lawfully exercise any further control over said claims. At the date of the application for patent, so far as the present record shows, he stood in the position of a stranger to said claims. The statute does not recognize the right of a person having no interest in or control of a mining claim, to apply for a patent to such claim. This was the position occupied by said receiver at the time he filed the application in question. Nor was he in any better position with respect to the Lita claim, never having had any right to or control of that claim.

In view of the foregoing, it is clear that the patent proceedings have been grossly irregular from the beginning, and that the application filed by said receiver should not have been accepted. All the proceedings had thereon must therefore be vacated, and the entry in question canceled. The parties interested will be allowed to institute new proceedings for patent, however, if they so desire, and the decision appealed from is accordingly modified.

## MINING CLAIM—EXPENDITURE—RULE 53.

## B. P. O. E. GOLD MINING Co.

The proviso to rule 53 of the mining regulations with respect to the requisite showing of expenditure under an application for mineral patent that embraces several claims held in common, and does not pass to entry prior to July 1, 1898, is not applicable, if the record fails to show that such application was prevented from being passed to entry, prior to said date, by protest or adverse claim.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 12, 1900.* (A. B. P.)

July 8, 1898, The B. P. O. E. Gold Mining Company filed application for patent embracing the Britta, Omaha No. 1, and Omaha No. 2 lode mining claims and the Dude mill site claim, survey No. 11803 A. and B., Pueblo, Colorado. Publication and posting of notice of the application appear to have been regularly made. The first publication was on July 17, 1897.

June 29, 1898, a protest against the allowance of entry on the application for patent as to the mill site claim was filed by one Benjamin F. Read.

November 21, 1898, the applicant company filed a waiver of its claim as to the mill site, accompanied by the statement that, "owing to pendency of protest, entry was not made prior to July 1, 1898," and was allowed to make mineral entry No. 1806, embracing the three lode claims.

February 16, 1899, your office considered the case and held the entry for cancellation on the ground that the expenditure of only \$850 in labor or improvements on the three claims had been shown, and no sufficient reason appeared why the application for patent was not carried to entry prior to July 1, 1898.

The applicant company has appealed to the Department.

The publication and posting of notice of the application for patent were completed in September, 1897, and no adverse claim was filed. Nor was there any protest against the application prior to the one filed by Read June 29, 1898. The appellant company contends that because of the filing of that protest this case is brought within the proviso to Rule 53 of the mining regulations (28 L. D., 579, 603), which rule and proviso are as follows:

The claimant at the time of filing the application for patent, or at any time within the sixty days of publication, is required to file with the register, a certificate of the surveyor-general that not less than five hundred dollars' worth of labor has been expended or improvements made, by the applicant or his grantors, upon each location embraced in the application, or if the application embraces several locations held in common, that an amount equal to five hundred dollars for each location, has been so expended upon, and for the benefit of, the entire group; that the plat filed by the claimant is correct; that the field notes of the survey, as filed, furnish such an accurate description of the claim as will if incorporated in a patent serve to fully

identify the premises and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the locus thereof: *Provided*, That as to all applications for patent made and passed to entry before July 1, 1898, or which are by protests or adverse claims prevented from being passed to entry before that time, where the application embraces several locations held in common, proof of an expenditure of five hundred dollars upon the group will be sufficient and an expenditure of that amount need not be shown to have been made upon, or for the benefit of, each location embraced in the application.

Two classes of cases, embracing claims held in common, are covered by said proviso: (1) Applications for patent made and passed to entry prior to July 1, 1898; and (2) applications for patent, though made before July 1, 1898, were by protests or adverse claims prevented from being passed to entry before that date.

It is clear that the present case does not come within either of said classes. Not in the first, for the reason that although the application for patent was filed prior to July 1, 1898, it was not carried to entry before that time. Neither does it fall within the second class for the reason that there is nothing in the record to show that the application for patent was *prevented from being passed to entry* prior to July 1, 1898, by protest or adverse claim. As before stated there was no adverse claim, nor was there a protest until that of June 29, 1898. The application for patent was without adverse claim or protest against it for the entire period from the date of the completion of the publication and posting of notice in September, 1897, until June 29, 1898. Manifestly, therefore, it cannot be said that the application was *prevented* from being carried to entry, at any time during that period, by protest or adverse claim, and the contention of the appellant in this respect is wholly without merit. The protest of June 29, 1898, was only operative on and after the date of its filing. While its effect, doubtless, was to prevent entry after its filing, it could have no such effect prior to that time.

The decision of your office, holding the entry in question for cancellation is clearly right, and the same is affirmed.

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CONTESTANT—PREFERENCE RIGHT—TIMBER LAND.

ROWLEY *v.* HAYES.

A contestant who, during the progress of the trial, waives his preferred right of entry, is no longer a party in interest; and the case is thereafter a matter between the entryman and the government.

The fact that land is more valuable for its timber than for agricultural purposes, is a circumstance to be considered as bearing upon the good faith of an agricultural claimant, but does not in itself require the cancellation of his entry.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 17, 1900.* (J. R. W.)

Robert C. Rowley has appealed from your office decision of April 8, 1899, dismissing his contest against the homestead entry of Daniel F.

Hayes, made July 23, 1894, for the SW $\frac{1}{4}$  of the NW $\frac{1}{4}$  and NW $\frac{1}{4}$  of the SW $\frac{1}{4}$  of Sec. 1 and SE $\frac{1}{4}$  of the NE $\frac{1}{4}$  and NE $\frac{1}{4}$  of the SE $\frac{1}{4}$  of Sec. 2, T. 36 N., R. 3 E., Seattle land district, Washington.

May 18, 1898, Rowley filed his contest affidavit alleging abandonment and failure to establish and maintain residence on the land; that said entry was not made for the sole purpose of actual settlement and cultivation; that said entryman has cut and removed timber for speculation and not for purpose of cultivation or improvement.

After notice both parties appeared in person and with counsel at the hearing, August 12, 1898, before the local officers, who found:

The land involved is a heavily timbered tract, unproductive and unfit for cultivation; that the improvements placed thereon are meager, while nominally residing on the land, entryman has spent his time working elsewhere earning money no portion of which, not even money derived from sale of shingle-bolts, has been put into improving his homestead. By no act has he shown good faith.

The local office recommended cancellation of the entry. On Hayes' appeal your office decision reversed their finding, and contestant appealed to the Department.

Contestant testified and produced several witnesses who testify claimant was on the land when they were there, and none of the evidence tends to show an abandonment, and they testify that the land is chiefly valuable for its timber and is unfit for agricultural purposes; that there is little soil, the land is broken, gravelly and rocky, not suitable for agricultural use, and valueless when the timber is taken off; that some of the timber has been sold. There is one acre of clearing and a house fourteen by sixteen. Claimant has made a road on the land out to the lake, worth \$125, and the clearing was worth \$250 to \$500 per acre.

Contestant on closing his testimony waived his preference right of entry and filed a timber land application asking it be suspended and made part of the record. Thereupon the local office ruled defendant should pay costs of his evidence, direct and cross-examination, under Rule 55. Defendant then testified. His cross-examination being deemed prolix by his counsel, by advice of the latter he refused further to answer and the case was closed.

Defendant testified he built his house and established his residence on the land January 1895, has since resided there, and values his improvements at \$200. He is unmarried, and without other means than his labor; has been absent, at work earning means for his living, but never to exceed two months at any time; that he cleared one acre and slashed another, and made a road from his house to the lake. He had earned by work for neighbors at various times, he estimates, \$500, and sold shingle-bolts, seventy cords, from timber cut to make his clearing, amounting to \$140. He testifies one hundred and thirty acres of the land is loamy soil fit for cultivation; that the land had been in litigation and he was notified in April, 1896, by former timber claimants, not to cut or permit cutting timber, or in any manner to commit waste,

that if he did so suit for damages would be brought; that fear that he might lose his improvements and labor caused him to do no more than he had done on the land.

Your office decision held that on contestant's waiver of preference right he was no longer a party in interest; that the case was therefore a matter between the entryman and the government. Your office ruling on this point is correct. The cases of *Thompson v. Smith* (22 L. D., 248) and *Dammon v. Sinclair* (26 L. D., 210) clearly supercede anything to the contrary in *Emblen v. Weed* (13 L. D., 722).

Your office decision further finds that the land has not been abandoned by claimant; that there is nothing tending to show the entry was made for speculation except that the land is more valuable for its timber than for agricultural purposes. The evidence clearly supports such decision. That the land is more valuable for its timber than for agricultural purposes is only a circumstance to be considered with other evidence as bearing upon the good faith of the entry. Such fact does not of itself render a homestead entry subject to cancellation. *Porter v. Throop* (6 L. D., 691); *Harper v. Eiene* (26 L. D., 151); *Wright v. Larson* (7 L. D., 555); *John A. McKay* (8 L. D., 526). There is no legal reason against an entryman having a homestead covering valuable timber lands.

The circumstances of the entryman, his lack of means, being unmarried and dependent upon his labor for support and for means to make improvements; the time necessary to open out a home on heavily timbered land, and the uncertainty of the event of litigation for a time hanging over the land, prevent the meagreness of his improvements being held evidence of bad faith. The sale of timber cut for purpose of clearing and improvement is not evidence of speculative intent in making the entry, and the evidence shows the improvements made in cost and value are more than the proceeds of the shingle-bolts sold.

Your office decision is hereby affirmed.

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RAILROAD GRANT—PRIVATE CLAIM.

RILEY *v.* CENTRAL PACIFIC R. R. CO.

Lands lying within an odd-numbered section, and embraced within the out-boundaries of a private claim of lesser quantity, but not required in satisfaction of the private claim, nor included within the survey of such claim at the time of the attachment of rights under a railroad grant, are subject to the operation of said grant.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 17, 1900.* (F. W. C.)

John F. Riley has appealed from your office decision of October 15, 1898, holding for cancellation his pre-emption declaratory statement covering the NW.  $\frac{1}{4}$  of Sec. 15, T. 1 S., R. 2 W., San Francisco land district, California, for conflict with the grant made by the acts of July

1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 356), to aid in the construction of the Central Pacific railroad.

From the statement contained in your office decision it appears that this land was included in the withdrawal ordered December 23, 1864, upon the map of general route filed by the Central Pacific Railroad Company December 8, 1864, and the right of the company under its grant is held to have attached in the vicinity of the tract in question January 21, 1870. (*Rees v. Central Pacific R. R. Co.*, 5 L. D., 62.)

The right to purchase a portion of said NW.  $\frac{1}{4}$  of Sec. 15, under section 7 of the act of July 23, 1866 (14 Stat., 218), was awarded to Naphtaly, in the case of *Naphtaly v. Bregard et al.* (14 L. D., 536).

One H. W. Carpentier applied to purchase a portion of the said NW.  $\frac{1}{4}$  of said section 15, together with other land, under the act of July 23, 1866, but his application was denied. (*Carpentier v. Mahew et al.*, 14 L. D., 665.)

From the statement of facts made in the last-mentioned case it appears that the NW.  $\frac{1}{4}$  of said section 15 was included in a survey of what was known as the Laguna de los Palos Colorados grant, made by United States deputy surveyor H. A. Higley in 1855, which was a grant of three leagues within a larger outlying boundary. The survey by Higley was accepted by the United States as correctly representing the exterior boundaries of said grant.

In September, 1860, one La Croze made a survey of the lands claimed under the grant, which survey was approved by the surveyor general November 19th of the same year. This survey was excepted to by some of the claimants under the grant, and the plat of survey was, on December 3, 1860, on petition of the claimants, ordered into the district court for the northern district of California for investigation and adjudication. By decree of the court dated July 29, 1874, the La Croze survey was disapproved and rejected and a new survey ordered. In pursuance of the decree in said case a survey was made and approved by this Department and patent issued in accordance therewith. This survey is known as the Boardman survey.

For some reason not disclosed by the record, Riley was permitted to file pre-emption declaratory statement for the tract in question April 17, 1883, in which statement he alleged settlement upon the land June 12, 1882. It is under said filing that he lays claim to the land, urging that because of the inclusion of the tract within the Higley survey at the date of the attachment of rights under the railroad grant it was thereby excepted from the operation of said grant.

Your office decision, following that of the Department in the case of *Brady v. Central Pacific R. R. Co.* (11 L. D., 463), which was based upon the decision of the supreme court in the case of *United States v. McLaughlin* (127 U. S., 428), because of the fact that the Mexican grant in question was one of quantity within a larger area, held that within the larger area or exterior boundaries of the said grant the lands were

subject to the operation of the railroad grant, except as to the quantity actually required in satisfaction of the Mexican grant.

There is no claim that the land in question was included within the La Croze survey, made in 1860. In fact, a certified copy of the plat of that survey on file in your office clearly shows that this tract was not included within said survey.

Upon consideration of the matter the decision of your office is affirmed.

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SCHOOL INDEMNITY SELECTION—HOMESTEAD ENTRY.

BUTLER *v.* STATE OF CALIFORNIA (ON REVIEW).

The State may be permitted to designate a new basis in support of an indemnity school selection, where it is found that the basis originally assigned is invalid, but that the selection so made was accepted, and the land sold to an actual occupant.

An intervening homestead application does not present any obstacle to such action, for land in the actual possession and occupancy of one holding under claim and color of title is not subject to homestead entry.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 17, 1900.* (G. B. G.)

This is a motion by the State of California for a review of departmental decision of August 24, 1899 (29 L. D., 127), in the case of John J. Butler against said State, which decision affirms your office decisions of October 19, 1897, and January 24, 1898, holding for cancellation the State's indemnity school selection of the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  and the E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 22, T. 10 N., R. 7 W., San Francisco land district, California, and directing the allowance of Butler's homestead application to enter the same land.

The motion has been duly entertained and due service thereof has been made under Rule 114 of Practice.

The State's application to select this land was filed in the local office June 22, 1892, section 16, township 2 south, range 32 west, being therein designated as the basis for said selection. This application was certified to your office by the local officers in accordance with the circular of instructions of July 23, 1885 (4 L. D., 79, 80), which directs registers and receivers to withhold approval of applications to select indemnity school lands in the State of California, and to refuse to receive the legal fees, until advised by your office that the selections may be admitted. October 22, 1892, your office, upon an examination of said application, directed the local officers to accept the selection, which was done November 2, 1892, and the list returned to your office in the regular course. March 20, 1897, more than four years after the acceptance of said selection, the said John J. Butler filed an application to enter the selected tract under the homestead law, which application was rejected by the local officers because of the State's selection, and he appealed to your office. October 19, 1897, and on review January 24, 1898, your

office considering the matter found that there was not a valid basis for the State's selection, the State having already had certified to it under its school grant more land than it was entitled to as indemnity on account of losses in said township 2 south, range 32 west, and upon the State's appeal these decisions were affirmed by the Department, as hereinbefore stated.

It is urged in the motion, among other things, that the Department erred in failing to accord to the State the right to substitute a new basis for the selection of the land involved, and in support of this contention it is shown that the State's application to select the tract was made upon the initiative of one Gilbert Palache, who was in possession of and had valuable improvements upon said tract at the time, he having purchased the improvements and necessary rights of a prior settler; that after the application of the State had been returned to the local office, with directions from your office to allow the same and accept the fees due thereon, and after such fees had in fact been paid, the State, November 10, 1892, issued to the said Palache a certificate of purchase, which certificate, upon compliance with the laws providing for the sale of such lands, entitles him to a patent from the State of California for the land in controversy; that since said certificate was issued to him, he has been in the open, notorious, peaceable, and adverse possession of the same, and has paid all taxes thereon due to the State of California.

Under the circumstances, it is believed that the State should be permitted to designate another base for said selection. The homestead application of Butler does not present any obstacle to such action. Land in the actual possession and occupancy of one holding the same under claim and color of title is not subject to homestead entry. *Jones v. Arthur* (28 L. D., 235).

The decision under review is modified, in so far as it directs the cancellation of said selection, and your office will advise the State that it will be permitted to designate a new base in support of the selection.

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

CHARLES H. EMERSON.

A co-owner, who is entitled under section 2324 R. S., to succeed to the interest of a delinquent co-owner, on his failure after notice to contribute his proportion of the annual expenditures, does not lose such right by the sale of his own interest in the mining claim before the completion of proceedings begun by him under said section.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 17, 1900.* (F. W. C.)

May 5, 1892, J. T. Holmes and Jacob May located the Ida Lee lode mining claim, and March 5, 1895, E. M. Binford and Charles H. Emer-

son located the Talisman lode mining claim, these two locations being made upon adjoining ground situated in the Cripple Creek mining district, El Paso county, Colorado.

November 7, 1895, Charles H. Emerson made application for a patent for said claims, mineral survey No. 9619, the abstract of title filed with his application showing that the possessory title to the whole of the Talisman claim was in him by virtue of a conveyance from E. M. Binford, his co-locator, and showing that the said J. T. Holmes had, on February 26, 1895, executed to him (Emerson) a deed purporting to convey the whole of the Ida Lee claim. March 18, 1898, the local officers allowed Emerson to make mineral entry, No. 1655, embracing both these claims, but, on July 18, 1898, your office denied the application for patent on the ground that Emerson became the owner of only a one-half interest in the Ida Lee claim by virtue of the deed from Holmes, and that the other one-half interest in said claim remains in Jacob May, one of the locators. Emerson has appealed to the Department, contending that by virtue of certain proceedings had under section 2324 of the Revised Statutes, and by virtue of the deed from Holmes, the title to the whole of the said Ida Lee claim was in him (Emerson) at the date of the application for patent.

This contention is based upon the following facts:

It appears that Holmes began the publication of a notice to May in a weekly newspaper, in its issue of March 2, 1895, which notice appeared in each succeeding weekly issue of said paper for ninety days thereafter, to the effect that he (Holmes) had expended a certain sum of money in labor and improvements upon the Ida Lee claim during the years 1892, 1893 and 1894, in order to hold the same under the provisions of the laws of the United States concerning annual labor upon mining claims, the said expenditure being the amount required to hold said claim for the period ending December 31, 1894, and that, if within ninety days from the publication of the notice, the said May should fail or refuse to contribute his proportion of such expenditure as co-owner, his interest would become the property of Holmes.

Section 2324 of the Revised Statutes is, in part, as follows:

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

It appears that May failed to contribute his portion of the expenditures required by this statute within the period of ninety days after the notice by publication, but before the expiration of that period Holmes had transferred the Ida Lee lode claim to Emerson, and the

question arises whether his right under the proceedings begun to acquire the interest of May under the statute was defeated by his transfer to Emerson. The statute limits the right to acquire the interest in the defaulting owner to the co-owners who performed the labor and make the improvements required by law in order to hold the claim. Holmes was a co-owner with May during the years 1892, 1893 and 1894, and performed the labor required. He was therefore, under the statute, clearly entitled to reimbursement from May for the expenditures made on account of this claim during the years named, or to succeed to May's interest on his failure to make contribution of his proportion of the expenditures, after notice given in the manner prescribed by the statute. While he could not transfer the right granted him under the statute to acquire May's interest in this claim, yet the transfer of his interest in the claim to another did not prevent his acquirement of May's interest, for the reason that he was nevertheless the co-owner with May during the period of May's failure to contribute and did himself perform or make the improvements upon said claim during said period of default.

The case of *Turner v. Sawyer*, 150 U. S., 578, is not controlling of the case here under consideration. There the party who gave the notice was not a co-owner with the defaulting owner during the period of his default.

The deed from Holmes to Emerson was such that under the laws of the State it passed an after-acquired title. It follows that by reason thereof the title acquired by Holmes, upon the expiration of the period within which May was permitted to contribute his proportion of the expenditures, passed to Emerson by reason thereof.

Other defects in the title noticed in departmental letter of November 1, 1899, are explained in the subsequent showing filed on behalf of the mineral claimant.

The decision of your office is therefore accordingly reversed, and the mineral entry will be passed to patent, unless other and sufficient reasons appear for withholding issue of the same.

#### RAILROAD GRANT—PRE-EMPTION CLAIM.

##### CENTRAL PACIFIC R. R. CO.

Pre-emptive rights, under a filing for a tract of unoffered land, are not terminated by a proclamation of offering and sale, where the land is subsequently withheld from such offering. A filing occupying such status is a subsisting record claim that will except the land covered thereby from the operation of a railroad grant on definite location.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 17, 1900.* (F. W. C.)

The Central Pacific Railroad Company has appealed from your office decision of December 2, 1898, refusing to issue to said company a

patent covering the NW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 7, T. 10 N., R. 7 E., M. D. M., Sacramento land district, California, under the grant made by the acts of July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 356), in which it was held that said tract was excepted from the grant for said company because at the date of the filing of the map showing the line of definite location opposite the tract in question, to wit, May 26, 1864, said tract was included in the subsisting pre-emption filing made by J. T. Hinton on September 16, 1856, alleging settlement June 10, 1853.

Relative to said tract your office reports that it was included in the proclamation, No. 614, dated June 30, 1858, and was proclaimed to be offered for sale on February 14, 1859, but was, with other lands in said township, withheld from sale and offering under said proclamation upon "information received from the surveyor-general stating that they were covered in whole or in part by private land claims." Because of being so withheld from said offering, your office decision holds that the preemptive right under the filing by Hinton was not defeated by his failure to make proof and payment for the land prior to the day erroneously appointed for the public offering thereof, referring as authority therefor to departmental decision in the case of Central Pacific Railroad Company *v.* Taylor, 11 L. D., 445.

In its appeal the company does not question the statement relative to the erroneous inclusion of said tract within the proclamation referred to, and the subsequent withholding of the tract from sale under said proclamation. It nevertheless urges that said filing was an expired filing at the date of the definite location, and did not, for that reason, serve to except the tract in question from the operation of its grant.

Under the law of September 4, 1841 (5 Stat., 453-7), no limitation was placed upon pre-emption filings made for lands that had not been offered, in the matter of the time when proof should be made thereunder, otherwise than as contained in the 14th section of said act, by which it was provided:

That this act shall not delay the sale of any of the public lands of the United States beyond the time which has been, or may be, appointed by the proclamation of the president, nor shall the provisions of this act be available to any person or persons who shall fail to make the proof and payment, and file the affidavit before the day appointed for the commencement of the sales as aforesaid.

Had this tract been regularly offered in accordance with the proclamation of the President, by the preemptor's failure to make proof and payment before the day appointed for the commencement of the sale, all rights under the preemption filing theretofore made would have been lost. But as this tract was withheld from the offering and sale under the proclamation No. 614 before referred to, your office properly ruled that the preemptor's rights were not terminated by the offering under said proclamation, and as a consequence the filing by Hinton was a subsisting record claim at the time of the filing of the map of definite

location, and therefore served to except the tract from the operation of the grant under which appellant claims. Your office decision is accordingly affirmed.

COAL LAND ENTRY—ASSIGNMENT—DECLARATORY STATEMENT.

REED *v.* NELSON.

The right of a coal land claimant to make entry is not affected by his sale of an option to purchase an assignment of such right, where the option expires with no advantage taken thereof.

The right to purchase coal lands is not initiated by filing a declaratory statement therefor, but by the actual discovery of coal on the land, and the performance of some act of improvement sufficient to give notice to the world of an intent to purchase said land under the coal land laws.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 19, 1900.* (W. A. E.)

October 28, 1896, Cyrenius Sellers filed coal declaratory statement No. 817, Ute series, for the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 7, T. 15 S., R. 86 W., Gunnison, Colorado, land district.

May 3, 1897, James W. Reed filed coal declaratory statement No. 856, Ute series, for the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of said section, township and range, alleging possession that day.

May 22, 1897, C. O. Nelson filed coal declaratory statement No. 857, Ute series, for the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$ , and the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of the same section, alleging possession May 13, 1897.

October 21, 1897, Larry Power filed coal declaratory statement No. 891, Ute series, for the same land included in Nelson's declaratory statement.

November 15, 1897, Nelson applied to purchase the land covered by his declaratory statement and tendered \$3200 in payment therefor. This tender was refused on account of the other filings of record, and the adverse claimants were cited to appear at the local office on December 28, 1897, to show cause why their declaratory statements should not be canceled and Nelson be allowed to make entry.

On the day appointed Reed and Nelson appeared, in person and by their attorneys, but Sellers and Power made default. By stipulation of the attorneys, the hearing was continued to January 24, 1898, on which day testimony was submitted on behalf of Reed and Nelson, Sellers and Power continuing in default.

April 30, 1898, the local officers rendered their decision recommending that the coal declaratory statements of Sellers and Power be canceled, that Reed's declaratory statement be held intact, that Nelson's declaratory statement be canceled as to the land in conflict between him and Reed, viz: the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of said section 7, and that Nelson be permitted to purchase the remainder of the land applied for by him.

From this action Nelson appealed, and by your office letter of October 20, 1898, the decision of the local officers was affirmed, so far as it held that the declaratory statements of Sellers and Powers should be canceled, but reversed in so far as it held that Reed's declaratory statement should be held intact.

Reed's appeal brings the matter before the Department.

There is no question as to the character of the land in controversy. Both parties assert that it is more valuable for coal than for any other purpose, and the evidence bears out this assertion.

It appears from the testimony submitted on behalf of Reed that he has been for some time in the employ of the Citizen's Coal and Coke Company; that on May 3, 1897, he was in Gunnison on business for said company; that he there met a friend who told him that the land here in controversy was vacant; that he immediately went over to the local office and filed his declaratory statement therefor; that previous to this time he had been over the land, but had never investigated it or done any work thereon with a view to purchasing it; that on May 12, 1897, he went on the land in company with Joseph C. Watson, William Hogan and Thomas Gorman, and while there on that day made a contract with Watson to drill for coal on this land. Watson, it appears, had long been in the employ of H. Van Mater, who was the president of both the Citizen's Coal and Coke Company and the Alpine Coal Company. Reed testifies that while on the land on May 12, he did some digging, but did not uncover any coal. He could not remember, however, how much digging he did or what kind of an instrument he used. Watson testifies that a pick and a shovel were carried on the land on that day, and that Reed did about five minutes' digging. Both Hogan and Gorman, however, who appeared as witnesses for Reed, testify that they were present at that time and that they saw no pick and shovel, and did not see Reed do any digging. About nine o'clock on May 13, 1897, Watson went on the land to begin work. Several holes were dug during that and succeeding days, but no coal was discovered. About May 20, 1897, Reed went on the land and selected a place to dig and a shaft about four and a half feet square and ten feet deep to bed rock was dug at the point indicated by Reed. At the bottom of this shaft a thin vein of "bony" (that is, coal mixed with slate or rock and unfit for use) was disclosed. The drill was then started in this shaft and on July 1, 1897, the drill had reached a depth of 218 feet, at which depth it is alleged, a vein of coal six feet, four inches thick was struck. Since then nothing further has been done on the land by Reed or any one acting for him. The value of this drilling was alleged to be about \$170, but up to the date of the hearing no portion of the sum had been paid by Reed. The men who operated the drill were paid in the checks of the Citizen's Coal and Coke Company. Watson testifies that when he went on the land on May 13, 1897, he saw Nelson at work, but that Nelson was working on the claim of Valentine Zeilinger, directly west of the tract in controversy.

The testimony submitted on behalf of Nelson shows that he learned in February, 1897, that this land was vacant; that about six o'clock on the morning of May 13, 1897, he went on the land in company with A. P. Sprankle; that they hunted for the west line of this forty and found a stake at the southwest corner from which they sighted north; that Nelson got his tools and went to work about 7:30 or 8 o'clock, at a point about one hundred feet east of the west line as he and Sprankle had located the line from the stake that morning; that he soon found a coal crop; that he was at work when Watson came on the land; that Watson walked over to where Nelson was at work, and told him that he was on Zeilinger's land; that Nelson insisted that he was not on Zeilinger's land, but on the forty here in controversy; that Watson told him that Reed had filed on that land; that Nelson offered to quit, if Watson would show him any break in the ground or notice of any kind that the land was occupied, but that Watson did not do so. Watson then went off and put a man by the name of Albert Zweifel to work on another part of this tract. Nelson went over to where Zweifel was working and notified him to stop, as he (Nelson) claimed the land. Zweifel refused to do so, and Nelson then got two witnesses and again notified Zweifel to stop work, but Zweifel declined. Nelson thereupon went back to work, and worked the balance of the day. The next morning, May 14, the first thing he did was to post a notice of his claim on the land. He then resumed work at the place where he had been working the day before, but had scarcely started when several men, among whom was Valentine Zeilinger, ordered him off very roughly, and one of them threatened him with a gun. Nelson told them that he was not on Zeilinger's land and was not claiming that land. He called their attention to his notice, and Zeilinger went over and tore it down, apparently without stopping to read it. As they would not listen to his explanations, Nelson left, considering his life in danger if he stayed. It appears that the Citizen's Coal and Coke Company had a contract to purchase the Zeilinger land, if coal was developed on it in sufficient quantities; that Watson had charge of it as the representative of the company; and that he was standing a short distance away when Zeilinger and his party drove Nelson off. After having been driven off, Nelson went to Gunnison, and stayed a day or two, and on the 18th of May he took two men with him and went back to work. Nelson and one of the other men worked all day at the same place where Nelson had worked before, and the third man was put to work about three hundred yards from there in a northeasterly direction. On the 19th Nelson went to work near where he had located the third man the day before. An open cut was run a short distance and then a shaft sunk, disclosing a four foot vein of coal. It appears that this discovery was on the forty acres north of the tract here in dispute, but well within the one hundred and sixty acres claimed by Nelson. May 22, 1897, Nelson went to Gunnison and filed his declaratory statement. His improvements at the date of the hearing on the entire one

hundred and sixty acres claimed by him were valued at about \$300, and consisted of several cuts and shafts and a cabin.

It appears in regard to the west line of the forty acres in question that the Citizen's Coal and Coke Company was buying coal lands in section seven, and that it employed a surveyor by the name of O. H. Aikine to run the section lines; that A. P. Sprankle (who went on this land with Nelson on May 13, 1897, to help him locate the lines,) assisted Aikine in running the section lines; that a stake was put up at what was supposed to be the southwest corner of the land here in question; that through some mistake this stake was located about two hundred feet too far west; that sighting north from this stake the work done by Nelson on May 13, 1897, was about one hundred feet east of the west line of the tract in dispute; that the survey was afterwards corrected; and that according to the last and correct survey, the work done by Nelson on May 13, was about one hundred feet west of the west line of this tract, that is, on the Zeilinger land.

It is alleged by the protestant that Nelson did not apply to purchase this land for his own use and benefit, but for the use and benefit of another. No testimony was submitted in support of this allegation except that brought out on the cross-examination of Nelson himself. From this it appears that in June, 1897, Nelson gave to one O. S. Stores "an option to purchase an assignment," as provided for by paragraph 37 of the circular of July 31, 1882 (1 L. D., 687), in relation to the sale of coal lands; that Stores paid for this option \$150 in cash and the cost of some of the work on the land; that the option ran until December 15, 1897; that Stores failed to take advantage of it and it was forfeited. The assignment of a right to purchase coal lands is recognized by the Department when properly executed, and the fact that Nelson sold to Stores an option to purchase such an assignment does not affect his good faith.

The following extracts from the Revised Statutes of the United States are applicable to the present case:

SEC. 2348. [In part.] 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.

SEC. 2349. [In part.] 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.

SEC. 2351. [In part.] 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.

From these extracts it clearly appears that the right to purchase coal lands is initiated by the actual discovery of coal on the land and the performance of some act of improvement sufficient to give notice to the

world of an intent to purchase such lands as coal lands. The right to purchase such lands can not be initiated by the filing of a declaratory statement therefor. In case of conflicting claims to coal lands the preference right is determined, not by the date of the filing of the declaratory statements (unless, indeed, the prior possessor has filed his declaratory statement out of time), but by priority of possession and improvement.

It appears from Reed's own statements that he filed his declaratory statement for the land in dispute within ten minutes after he learned that it was vacant and before he had performed any act of improvement thereon. No right was initiated by the filing of this declaratory statement, and whatever right he has dates from the time he actually developed coal on the land.

It is clear that Reed did not develop coal on this land on May 12, 1897. He himself says that he did not uncover any coal on that day and two of his witnesses say that they were on the land with him at that time and that they did not see any tools nor did they see Reed do any digging. No coal whatever was discovered on this land by Reed or any one acting for him prior to May 20, 1897, and the thin streak disclosed on that day was unfit for use. Reed's first actual discovery of merchantable coal was on July 1, 1897, when the drill struck a good sized vein.

At the time that Watson went on the land on May 13, 1897, Nelson was already at work, but it is alleged that Nelson was working west of this land on the Zeilinger tract. The corrected survey shows that this allegation is true, but it appears that Nelson took all reasonable precautions to get on this land; that he took with him on the morning of May 13, a man who had assisted in running the south line of the section; that they found a stake which had been placed at what was supposed to be the southwest corner of the tract in dispute; that they sighted north from this stake; that Nelson then began work at a point about one hundred feet east of the west line as thus located; that the survey of the south line of the section, on which Nelson relied, was erroneous; that through no fault of his the work he did on May 13, 1897, was actually on the Zeilinger tract, west of the land in dispute; that he has never claimed the Zeilinger land; but that he has, from the very first, claimed the land here in controversy. It is unnecessary, however, in view of the other facts disclosed by the record, and of the rulings of the Department, to consider whether, under the circumstances, the discovery made by Nelson on May 13, 1897, was constructively upon the land in dispute and inures to his benefit. On May 19, 1897, Nelson uncovered a four-foot vein of coal on the forty acres north of the tract here in dispute, that is, on a portion of the one hundred and sixty acres for which he filed his declaratory statement. This was prior to any discovery made by Reed. Nelson has, from the very first claimed the entire one hundred and sixty acres he is now seeking to purchase and the notice put up by him on the morning of May 14,

1897, described the land as it was afterwards described in his declaratory statement.

In the case of *Hamilton v. Anderson* (19 L. D., 168), it was held that it is not necessary that there should

be an actual development of coal on each forty-acre subdivision of the one hundred and sixty acres for which entry is allowed under the mining laws.

See also *McWilliams et al. v. Green River Coal Association*, 23 L. D., 127.

It thus appears that apart from any consideration of the discovery and development made by Nelson on May 13, 1897, on what he supposed to be the tract here in controversy but which proved to be on the Zeilinger tract, Nelson's right was initiated by the development on May 19, 1897, of a four-foot vein of coal on a portion of the one hundred and sixty acres claimed by him; that this development and improvement was promptly followed by the filing of his declaratory statement, which included the tract in dispute; that Reed gained no right by the filing of his declaratory statement on May 3, 1897, before he had discovered or developed coal on this land; and that at the time he initiated his claim by the actual development of coal on the land Nelson's right had already attached to the tract in dispute.

Your office decision is accordingly affirmed.

#### INDIAN LANDS—RAILROAD RIGHT OF WAY.

##### MINNESOTA AND MANITOBA R. R. CO.

The cession to the United States of the Red Lake Indian lands made in pursuance of the act of January 14, 1889, was for the sole purpose of disposing of said lands for the benefit of the Indians, and said lands are therefore not public lands, subject to the general right of way act of March 3, 1875.

The act of March 2, 1899, granting a right of way for a railway, telegraph, and telephone line, through "any Indian reservation" or through "any lands reserved for an Indian agency or for other purposes in connection with the Indian service," does not in terms cover lands occupying the status of those ceded under the act of January 14, 1889, or necessarily indicate an intention to include such lands within the scope of its operation, and the Department is therefore not justified in taking any action with respect to said lands under said act of 1899.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior*  
*March 19, 1900.* (W. C. P.)

In response to your request for an opinion as to which of two acts (March 3, 1875, 18 Stat., 482, and March 2, 1899, 30 Stat., 990), applies to the right of way asked for by the Minnesota and Manitoba Railroad Company, the following is respectfully submitted:

This company filed with the Commissioner of Indian Affairs an application

under the provisions of the act of Congress approved March 2, 1899, for authority to survey and locate a line of railroad across the ceded lands of the Red Lake Indian reservation, beginning on Rainy river at or near the mouth of Bandette river, and going in a northwesterly direction to or near Buffalo Point, on the international boundary.

The Commissioner of Indian Affairs submitted the matter to this Department recommending that the authority be granted and in his report said:

As the Department is aware, the lands through and across which the company seeks to acquire a right of way are embraced in the agreements with the Chippewa Indians negotiated under the provisions of the act of Congress of January 14, 1889 (25 Stat., 642). A diminished reservation was retained for the use and occupancy of the Red Lake Indians and the remainder of the lands were ceded to the United States for disposition under the provisions of the act. The title to the land involved is therefore in the government; but this Department has retained jurisdiction of the lands within the ceded portion of the reservation for the purpose of carrying out the provisions of the said act of January 14, 1889, namely, for the disposal of the said lands either as "pine lands" or as "agricultural lands." So far, therefore, as this office can see, the Department still retains such jurisdiction of the lands as to make it incumbent on the company to secure right of way over and across the same under the provisions of the said act of March 2, 1899, rather than under the provisions of the act of March 3, 1875.

The matter was referred to the Commissioner of the General Land Office for report, who said—

The Commissioner of Indian Affairs reports that these lands have not been opened to settlement but are still held in a state of reservation for the purpose of carrying out the provisions of the act of January 14, 1889 (25 Stat., 642). This office has frequently held that the general right of way act does not apply to lands in this condition. The company can not therefore proceed under the act of 1875 in obtaining the right of way across these lands. . . .

Holding that the act of 1875 does not apply to this case, I have to report that no action is required thereon by this office.

The act of 1875, commonly spoken of as "the general right of way act," grants a right of way "through the public lands of the United States."

These lands were ceded to the United States by the Chippewa Indians as a result of negotiations authorized by the act of January 14, 1889 (25 Stat., 642), for the purposes and upon the terms specified in said act. That act provided that upon the cession by the Indians being obtained and approved the ceded lands should be examined and classified as "pine lands" and "agricultural lands," that the "pine lands" should be appraised and sold at public auction to the highest bidder for cash; that the "agricultural lands" should be disposed of to actual settlers under the provisions of the homestead law with the added requirement of a payment of one dollar and twenty-five cents per acre, and that the money accruing from the disposal of said lands, after deducting the expenses incurred in connection with the cession and disposal, should be deposited in the Treasury of the United States to the credit of the Indians to be paid to them as therein provided.

The United States by this cession took over the title of the Indians in and to the lands ceded for the sole purpose of disposing of them for the benefit of the Indians in the manner designated. They are not subject to the operation of the general land laws and are not public

lands of the United States. I concur with the Commissioner of the General Land Office that the act of 1875 does not apply to these lands.

The act of 1899 grants a right of way for a railway, telegraph and telephone line

through any Indian reservation in any State or Territory, or through any lands held by an Indian tribe or nation in Indian Territory, or through any lands reserved for an Indian agency or for other purposes in connection with the Indian service, or through any lands which have been allotted to any individual Indian.

These lands are no longer within any Indian reservation and are not part of the lands retained as a reservation for the Red Lake band of Chippewa Indians which are definitely described by boundaries in the article of cession. They are not in Indian Territory and they have not been allotted to individual Indians. They are not "reserved for an Indian agency or for other purposes in connection with the Indian service." The other purposes here contemplated are such as are similar to that of an Indian agency—that is, such as are connected with the practical administration of Indian affairs and for the accomplishment of which the lands over which a right of way is sought are set apart. These lands are not thus reserved, but are directed to be sold with an express limitation as to the manner of their disposal and the application of the proceeds, and this limitation is of such a character as to exclude their disposal for right of way purposes. It is true, as said by the Commissioner of Indian Affairs, that this Department still retains jurisdiction of the lands for the purpose of carrying out the provisions of the act of January 14, 1889, but for that purpose only. The authority to make any other disposition than that provided for by said act does not rest in this Department. If there is any such authority, in the absence of a further agreement between the United States and the Indians, it is in Congress. The language used in the act of 1899 does not, in terms, cover lands situated as these are, or necessarily indicate that it was the intention to subject them to its provisions and to that extent modify the act of 1889. In the absence of a reasonably clear indication of an intent to extend the act of 1899 to these lands, this Department is not justified in assuming the power to approve a right of way over them or to grant this applicant authority to survey and locate a line of railroad across them, or to deal with them otherwise than as contemplated by the act of 1889.

For the reasons given herein I am of opinion that neither of the acts referred to applies to the right of way sought to be obtained.

Approved, March 19, 1900,

E. A. HITCHCOCK,

*Secretary.*

## SCHOOL LANDS--ACT OF JULY 16, 1894.

LAW *v.* STATE OF UTAH.

The grant of school lands to the State of Utah became operative on the admission of the State into the Union; and where at such date a portion of a school section is embraced within a subsisting timber-culture entry, made prior to the date of the granting act, the State takes title to such land subject only to the entry-man's right to perfect title under his entry, and if said entry is subsequently canceled the title of the State becomes complete as of the date of admission, to the exclusion of any preference right on the part of a contestant who secures such cancellation.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 19, 1900.* (H. G.)

The State of Utah appeals from the decision of your office of September 17, 1898, which directed the allowance of the application of Albert A. Law to make homestead entry for the SW.  $\frac{1}{4}$  of Sec. 32, T. 10 N., R. 1 E., Salt Lake land district, Utah.

It appears from the record that on March 14, 1888, Samuel K. McMurdie made timber-culture entry of said land, and that on June 18, 1897, Albert A. Law contested said entry on the ground of non-compliance with law.

The contest resulted in the cancellation of McMurdie's entry on May 17, 1898. Law being notified of such cancellation, and of a preference right of entry, supposed to accrue to him by reason of his successful contest, applied to make homestead entry of the tract on July 5, 1898. His application was rejected by the local office for the reason that the land was a portion of a school section which had inured to the State of Utah under its grant. Law appealed to your office, which reversed the action of the local office and returned his application to make homestead entry for allowance in case no other objection existed. The State has appealed to this Department.

In substance, the grounds of the appeal are that the grant of lands for the support of public schools, contained in the act admitting Utah as a State, was a grant *in praesenti* and related back and became operative from and after the date of the approval of the admission act on July 16, 1894; that Law's contest against the timber-culture entry of McMurdie was improperly brought, in that it was instituted subsequent to the grant, after which the land in question was not subject to entry, the title thereto having then passed absolutely to the State under the terms of the admission act.

The grant to the State of Utah for the support of common schools is found in the sixth section of the act of July 16, 1894 (28 Stat., 107, 109), and provides, among other things, that upon the admission of the State into the Union sections numbered two, sixteen, thirty-two, and thirty-six in every township of the State are granted to the State for the support of common schools, and that where such sections or any parts

thereof have been sold or otherwise disposed of "by or under authority of any act of Congress," other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same are taken, are granted to the State as indemnity lands.

The grant made to the State of Utah became operative January 4, 1896, on the admission of the State into the Union by the proclamation of the President (29 Stat., 876), as provided in the admission act (*Utah v. Allen et al.*, 27 L. D., 53).

Law's contest was initiated after the admission of the State into the Union and resulted in a cancellation of the timber-culture entry of McMurdie made long prior to the time when Utah became a State.

Whatever right McMurdie secured by reason of his timber-culture entry was subject to his compliance with law. His entry was canceled for his failure to comply with the law, but whether this failure occurred before or after the admission of the State into the Union, is not stated and is of no moment. At the time of the State's admission the fee was in the United States and passed to the State subject only to the right of McMurdie to perfect title under his entry, and when that entry was canceled the title of the State became complete as of the date of admission.

The tenth section of the act admitting Utah into the Union, *supra*, provides, among other things, that the land granted to the State for educational purposes, "shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be surveyed for school purposes only." This section clearly prohibits the initiation of a claim of any character to the specific school lands granted to the State after its admission into the Union. It follows that the homestead entry of Law can not be allowed, because the application to make it was made after the admission of the State into the Union; and because, further, the contest whereby he claims to have obtained his preference right of entry was also begun after that date. But if his contest had been commenced prior to the admission of the State, he would be in no better position. The grant to Utah contains no words of exception which would protect or save a preference right of entry such as is given by the second section of the act of May 14, 1880 (21 Stat., 140), to successful contestants, and this right, not being a vested one, would therefore have been avoided and extinguished by the grant to the State. *August W. Hendrickson* (13 L. D., 169, 171); *Yosemite Valley case* (15 Wall., 77); *Norton v. Evans et al.* (82 Fed. Rep., 804).

The decision of your office is reversed, and the application of Albert Law, to make homestead entry for the tract, will stand rejected.

## ARTHUR F. HOGSETT.

Motion for review of departmental decision of December 14, 1899, 29 L. D., 355, denied by Secretary Hitchcock, March 20, 1900.

## HOMESTEAD CONTEST—ACT OF JUNE 16, 1898.

## WALKER v. SMITH.

The act of June 16, 1898, in requiring that under all contests in which the charge is abandonment, it must be proved at the hearing that the settler's alleged absence from the land was not due to his employment in the military or naval service, does not prescribe what shall be the measure of proof thus required, nor of what it shall consist; and the proof in such case will be held sufficient when it shows with reasonable certainty that the alleged absence was not due to such employment and service.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 24, 1900.* (A. S. T.)

On August 20, 1892, Robert Smith made homestead entry No. 10,202, for lots 3, 4, 9 and 10, Sec. 18, T. 6 N., R. 8 W., Oregon City, Oregon, land district.

On October 18, 1898, John H. Walker filed his affidavit of contest against said entry in which it is alleged that—

the said entryman has wholly abandoned said entry; that he has not resided on said claim for more than three years, nor has he made any improvements thereon nor cultivated the same at any time since making entry, and that his absence from the land is not due to his employment in the military or naval service of the United States in time of war.

On November 30, 1898, said Walker filed his affidavit, alleging that he had made diligent inquiry to ascertain the whereabouts of said Smith but had been unable to locate him, and that he believed that he was a non-resident of the State of Oregon, and that personal service could not be had upon him.

Notice of contest was issued on October 20, 1898, citing the parties to appear for trial at the local land office on December 12, 1898. On December 15, 1898, a new notice of contest was issued citing the parties to appear at the same place on February 7, 1899. Said notice was published according to law, posted in the local land office and on the land, and a copy sent by registered mail addressed to the defendant at Olney, Oregon, his post-office of record, all as required by law. The notice mailed to the defendant was returned unclaimed.

The contestant appeared with his witnesses on the day fixed for the hearing, and submitted testimony. The defendant failed to appear.

The evidence shows that the defendant abandoned the land more than five years ago and has never returned to it, and that his whereabouts are unknown to the witnesses.

The register and receiver found that the defendant had failed to comply with the homestead law as to residence on, and improvement and cultivation of the land, and they recommended that the entry be canceled, and on March 8, 1899, sent by registered mail a copy of their decision addressed to the defendant at Olney, Oregon, but it was returned unclaimed. On April 24, 1899, they transmitted the record to your office and reported that no appeal from their said decision had been filed.

On November 15, 1899, your office rendered a decision remanding the case to the local office for further hearing upon the allegation that the absence of the defendant from the land is not due to his employment in the military or naval service of the United States, and from your said decision the contestant has appealed to this Department.

The act of June 16, 1898 (30 Stat., 473), provides that 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*, that the settler's alleged absence from the land was not due to his employment as a soldier, sailor or marine in the service of the United States in the war with Spain or any other war in which the United States might be engaged. The affidavit in the case at bar contains the prescribed allegation, and therefore gave jurisdiction to the local officers to issue notice and hear the contest. Congress has not prescribed what shall be the measure of proof required, nor of what it shall consist, but the proof will be held to be sufficient when it shows with reasonable certainty that such absence was not due to such employment and service.

In the case at bar it is shown by the proof offered at the hearing, that after making the entry the defendant had the land surveyed and finding that it did not embrace the land he supposed it would he said that he did not want the entry. The proof further shows that he remained in the vicinity and worked for the witness McFarland for a year or two afterward but did not go upon or improve the claim. He then left, and has not been on the land for more than five years. It is thus shown that he did not abandon it on account of such employment or service.

It being shown by the proof that his abandonment of the entry was because he did not want the land, it is fair to presume that his continued absence from the land is due to the same cause, and therefore not to employment in the army or navy of the United States.

Your said decision is therefore reversed, and said entry will be canceled.



The local officers were accordingly directed to notify him that he would be allowed sixty days from notice in which to show cause why his entry should not be canceled or to appeal from said decision, failing which his entry would be canceled without further notice.

From this action the claimant has appealed to the Department.

Section 2319 of the Revised Statutes of the United States provides that all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such.

A declaration of intention to become a citizen of the United States must be made under oath before a court of record (Sec. 2165 R. S. U. S.), and in the absence of clear proof to the contrary is presumed to be made in good faith. This intention may be abandoned, however, before admission to full citizenship, and in such a case the privilege of exploration and purchase of mineral lands of the United States conferred by section 2319 upon those who have declared their intention to become citizens is lost. In other words, the intention to become a citizen of the United States must be a *bona fide* existing one at the time of purchase in order to entitle the applicant to a patent.

The question is presented in this case as to whether the claimant here has abandoned his intention to become a citizen of the United States, but the evidence on that point is meager and unsatisfactory. You are accordingly directed to call upon him to state under oath whether at the time of his entry, May 20, 1898, he had given up his domicile and permanent residence in this country, and whether it was then still his intention to become a citizen of the United States. In case he fails to furnish this information within a reasonable time, after due notice, it will be presumed that he has abandoned such intention and his entry will be canceled; but if the required information is given, you will consider it in connection with the other facts disclosed by the record and dispose of the case accordingly. Your office decision is so modified.

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INDIAN LANDS—PUYALLUP ALLOTMENTS—ACT OF AUGUST 9, 1888.

OPINION.

In determining the ownership of Puyallup allotted lands the rule of descent, as to the rights of white men who have married Indian women, is unaffected by the provisions of the act of August 9, 1888, as said act does not extend to allotments but is limited in its application to tribal property.

The opinion of January 25, 1895, 20 L. D., 157, modified, in so far as it excepts white men from the inheritance of allotment property, or makes said act applicable thereto.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,*  
*March 28, 1900.* (C. J. G.)

On December 21, 1894, the Commissioner of Indian Affairs transmitted to the Department with his report thereon, a letter from the

chairman of the Puyallup Indian commission, who asked for instructions on certain matters relating to the duties of said commission.

This letter, as well as the report, was referred to the then Assistant Attorney-General for an opinion upon the questions therein presented among which was the following: "What rules are to be applied to the descent of Indian lands where the original allottees or some of them have died?"

In response to the above reference, an opinion was rendered by the Assistant Attorney-General January 25, 1895 (20 L. D., 157), which held as to the status of white men who are married to Indians, as follows:

However, since the act of August 9, 1888 (25 Stat., 392), a white man, not a member of the tribe, marrying a Puyallup woman, can acquire no right by virtue of said marriage, in any allotment, or any tribal property, to which said woman may be entitled, and hence such a man would be excluded from the operation of the rule above stated. I am of the opinion that a white man who had prior to the act of 1888, *supra*, married a Puyallup woman, and who had not been regularly incorporated as a member of said tribe, could not be regarded as a member of the family under the treaty, because not an Indian, and hence would not come within the purview of any rule of descent prescribed by the President to secure possession of said home to the family, and I recommend that the rule as above stated shall be modified so as to exclude said men from its operation.

In other words, the manner of determining who are the heirs of a deceased holder "in fee simple or for the life of another," under the laws of the State of Washington, should be pursued in ascertaining who are the heirs of deceased allottees, *with the exceptions*, that white men not members of the tribe, married to Puyallup Indians since August 9, 1888, and white men not incorporated in the tribe, who prior to that date married Puyallup women, be not considered.

Nevertheless, to save any question concerning the title thereto, I am of the opinion that the consent of such men to the sale of the allotments in which their deceased wives may have been interested is advisable.

The Secretary of the Interior having approved this opinion the same was transmitted to the Puyallup commissioners for their information and guidance in ascertaining who are the heirs of deceased Puyallup allottees.

January 18, 1900, the Commissioner of Indian Affairs addressed a communication to you, which has been referred to me for opinion, and which, after referring to the Assistant Attorney-General's opinion of January 25, 1895, contains the following statement:

Under date of December 29, 1899, Commissioner Snowden addressed a letter to this office stating that Charles Case, a white man, and Katie Adams, a Puyallup Indian woman, were married on April 6, 1895; that Katie Case is now deceased and in view of the opinion of the Assistant Attorney-General relative to white men married to Indian women, above referred to, and the instructions heretofore given by this office in respect to the ascertainment of the allottees and true owners of Puyallup allotments and the heirs of deceased allottees, he desired to be informed whether the said white man, Charles Case, is one of the legal heirs of Katie Case, who has a one-third interest in Puyallup patents Nos. 10 and 125.

The Commissioner of Indian Affairs, after then referring to the following language of the said opinion of January 25, 1895: "However,

since the act of August 9, 1888 (25 Stat., 392), a white man, not a member of the tribe, marrying a Puyallup woman, can acquire no right by virtue of said marriage, in any allotment, or any tribal property to which said woman may be entitled; and hence such a man would be excluded from the operation of the rule," invites attention to the fact that the word "allotment" does not occur in section 1 of the said act of August 9, 1888, and submits that the said section "relates solely to tribal property, to the tribal privilege, or to the tribal interest which an Indian woman may have therein, and not to an allotment of land." He therefore requests a reconsideration of the opinion of January 25, 1895, "in order that it may be modified in accordance with the provisions of the said act of August 9, 1888, which relates, in the opinion of this office, to tribal property, and not individual allotments."

The Puyallup reservation was set apart under the treaty of December 26, 1854 (10 Stat., 1132); which contains the following provision:

ART. 6. The President may . . . at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

Article 6 of the treaty with the Omahas (10 Stat., 1044) is in part as follows:

and he (the President) may prescribe such rules and regulations as will ensure to the family in case of the death of the head thereof, the possession and enjoyment of such permanent home and improvements thereon.

In pursuance of the foregoing, allotments were made to the Puyallup Indians February 1, 1884, and were approved by the Department October 21, 1884. Patents were issued January 30, 1886, by the terms of which the lands described therein were given and granted to the allottee, "and to his heirs." No specific declaration, however, as to the descent of these allotted lands, in case of the death of the allottee, appears to have been made by the President or the Secretary of the Interior under his direction prior to November 14, 1893, when instructions to a commission appointed under the act of March 3, 1893 (27 Stat., 612, 633), to sell portions of said lands were approved by the Department. Under the general allotment act of February 8, 1887 (24 Stat., 388) it is provided that the law of descent in force in the State or Territory where such lands are located shall apply thereto after the same have been patented. On February 6, 1892, the Secretary of the Interior, in transmitting to the President the report of the former Puyallup commission, stated that the heirs of Puyallup allottees should be ascertained according to the laws of the State of Washington, with the addition of a provision similar to that contained in section

5 of the amendatory act of February 28, 1891 (26 Stat., 794), respecting illegitimate children. The act of March 3, 1893, *supra*, made it the duty of the commission appointed thereunder to "ascertain who are the true owners of the allotted lands;" and the instructions to said commission, approved November 14, 1893, and hereinbefore referred to, directed that in case of deceased allottees their heirs were to be determined according to the law of descent of the State of Washington. In the opinion of the Assistant Attorney General of January 25, 1895, it was held that these instructions, approved by the Secretary of the Interior, were "in effect a rule of descent prescribed by the President, is absolute and authoritative, and in complete accord with the policy of the government concerning the descent of allotted Indian lands, established long before the patenting of these lands." The Commissioner of Indian Affairs states that the Puyallup lands have been patented; the fee is therefore in the allottee subject only to certain restrictions as to alienation and leasing. As the heirs of a Puyallup allottee are thus to be ascertained according to the law of the State of Washington, it follows that in case of the death of a Puyallup woman married to a white man, her heirs are to be determined in the same manner, unless there is some inhibition in the act of August 9, 1888.

It will be observed that the foregoing legislation and regulations refer solely to allotment property. There appears to have been no legislation respecting the right to tribal property of a white man, through marriage to an Indian woman, as distinct from an allotment, prior to the said act of August 9, 1888, section 1 of which provides—

That no white man, not otherwise a member of any tribe of Indians, who may hereafter marry an Indian woman, member of any Indian tribe in the United States, or any of its territories, except the Five Civilized Tribes in the Indian Territory, shall by such marriage hereafter acquire any rights to any tribal property, privilege, or interest whatever to which any member of such tribe is entitled.

This section, enacted to meet this condition among others, has reference solely to tribal property. Section 2 also refers to tribal property and to no other kind of property. That section reads as follows:

That every Indian woman, member of any such tribe of Indians, who may hereafter be married to any citizen of the United States, is hereby declared to become by such marriage a citizen of the United States, with all the rights, privileges, and immunities of any such citizen, being a married woman: *Provided*, That nothing in this act contained shall impair or in any way affect the right or title of such married woman to any tribal property or any interest therein.

By the first section, a white man, not otherwise a member of any tribe of Indians, who marries an Indian woman subsequently to the passage of said act does not by such marriage "acquire any right to any tribal property, privilege, or interest whatever to which any member of such tribe is entitled." This legislation, in my opinion, does not include an allotment which is not tribal property.

I therefore concur in the conclusion of the Commissioner of Indian

Affairs and am of opinion that, in so far as the opinion of January 25, 1895, excepts white men from an inheritance in allotment property, or makes the act of August 9, 1888, applicable thereto, it should not be followed.

Approved, March 28, 1900.

E. A. HITCHCOCK,

*Secretary.*

CIRCULAR RELATING TO DEPOSITS BY RAILROAD COMPANIES FOR THE SURVEY OF PUBLIC LANDS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,

Washington, D. C., April 8, 1899.

*To United States Surveyors-General and Registers and Receivers of United States District Land Offices.*

GENTLEMEN: Your attention is invited to the act of Congress approved February 27, 1899 (30 Stat., 892), entitled "An Act to authorize the Commissioner of the General Land Office to cause public lands to be surveyed in certain cases." The act reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when any railroad company claiming a grant of land under any act of Congress, desiring to secure the survey of any unsurveyed lands within the limits of its grant, shall file an application therefor in writing with the surveyor-general of the State in which the lands sought to be surveyed are situated, and deposit in a proper United States depository to the credit of the United States a sum sufficient to pay for such survey and for the examination thereof pursuant to law and the rules and regulations of the Department of the Interior under the direction of the Commissioner of the General Land Office, it shall thereupon be the duty of the Commissioner of the General Land Office, or the Director of the Geological Survey, as the case may be, to cause said lands to be surveyed.*

For any deposits made by any railroad company hereunder, certificates shall be issued, which may be used by such railroad company, its successors or assigns, to the same extent as cash is now allowed in payment of entries of public lands under existing law and regulations for any public lands of the United States in the States where the surveys were made, or for any survey or office fees due the United States from such railroad company on account of surveys of lands within its grant. The Secretary of the Interior shall provide such rules and regulations as may be necessary for carrying out the foregoing provisions.

The provisions of law heretofore governing the survey (under the deposit system) of unsurveyed lands within the limits of a railroad land grant are contained in the act of August 20, 1894 (28 Stats., 423), amending sections 2401, 2402, and 2403 of the Revised Statutes of the United States.

The rules and regulations as heretofore prescribed by this Department as necessary for carrying out the provisions of said act of August 20, 1894, are contained in the circular of this office dated August 7, 1895 (21 L. D., 77), and you are advised that said rules and regulations

are applicable to the act of February 27, 1899, quoted above, and now in effect.

The surveyors-general, however, in furnishing the applicants with an estimate as to the cost of the surveys desired, including the cost of both the field and office work (as heretofore required by paragraph 12, page 3, of said instructions), will hereafter include in their estimate the cost of the *examination* of such surveys as may be applied for by said railroad companies.

The triplicate of the set of certificates issued in the name of a railroad company for amounts deposited on account of such surveys will not only be receivable from such railroad company, its successors or assigns, by the receivers of public moneys for the several United States district land offices, in accordance with paragraph 20, page 4, of said circular of instructions dated August 7, 1895, but said certificates may also be surrendered to the Commissioner of the General Land Office by such railroad company, its successors or assigns, in payment for any survey or office fees due the United States from such railroad company on account of surveys of lands within its grant.

Very respectfully,

BINGER HERMANN,  
*Commissioner.*

Approved:

E. A. HITCHCOCK,  
*Secretary.*

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

MILLER *v.* TACOMA LAND COMPANY.

A settlement claim to railroad land acquired after the passage of the act of March 3, 1887, and subsequent to the sale of the land by the railroad company, will not defeat the right of the purchaser to perfect title under section 5 of said act. It is not necessary, on the part of a purchaser from a railroad company, to invoke the protective provisions of said section, until such time as it has been authoritatively determined that the title of the railroad company has failed.

One knowing that land is claimed by a railroad company under its grant, and having constructive notice of the sale thereof, as shown by a recorded deed, can not thereafter initiate any right to such land which will defeat the right of the purchaser from the company to perfect title under said section.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 28, 1900.* (G. B. G.)

George L. Miller has appealed from your office decision of September 20, 1898, rejecting his application to make homestead entry for lots 2, 3, 4 and 5, and the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 17, T. 19 N., R. 2 E., Olympia land district, Washington, and holding that the Tacoma Land Company is entitled to make payment to the United States and receive a patent for said land under the provisions of section 5 of the act of March 3, 1887 (24 Stat., 556, 557-558). Said section is as follows:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its

grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

The land in controversy is within the primary limits of the grant to the Northern Pacific Railroad Company by the joint resolution of May 31, 1870 (16 Stat., 378), is a numbered section prescribed in the grant, is coterminous with the line of constructed road from Portland, Oregon, to Tacoma, Washington, as definitely located May 14, 1874, has not been conveyed to or for the use of said company, it having been excepted from the operation of the grant by reason of the donation claim of one Allen Saunders therefor, filed April 30, 1855, which was a claim of record at the date of the grant, and was sold by the railroad company, December 30, 1874, to the Tacoma Land Company, a corporation under the laws of the State of Pennsylvania, and therefore a citizen of the United States.

At the date of the sale to the Tacoma Land Company said land was not in the *bona fide* occupation of an adverse claimant, whose claim and occupation have not since been voluntarily abandoned, and, if said land company was a *bona fide* purchaser of the land from the railroad company, it has the right to make proof and payment to the United States for said lands at the ordinary government price for like lands and receive a patent therefor from the United States, unless, under the facts of this case, that right is defeated by the second proviso of said section. See departmental decision of February 11, 1898, in the case of the Northern Pacific Railroad Company *v.* George L. Miller (unreported); Tacoma Land Company *v.* Northern Pacific Railroad Company *et al.* (26 L. D., 503); Bardon *v.* Northern Pacific Railroad Company (145 U. S., 535).

Miller's application to enter said land was filed December 14, 1893, and he does not claim to have made settlement prior to that date. The settlement contemplated by the second proviso is a settlement subsequent to December 1, 1882, and prior to March 3, 1887, the date of the act. A settlement claim acquired after the passage of the act of March 3, 1887, and subsequent to the sale of the land by the railroad company, will not defeat the right of the purchaser to perfect its title. Holton

*et al. v. Rutledge* (20 L. D., 227). The application of the Tacoma Land Company was not filed until August 8, 1895, and it appears that at that time Miller had built a house upon the land and was living in it, and it is contended, in effect, that said company was in laches in presenting its claims, and ought not now be heard to dispute Miller's settlement claim. This contention is without force. The railroad company listed this land August 27, 1884, the decision of the Department holding that said land was excepted from the grant was not made until February 11, 1898, and the company's listing thereof was not canceled by your office until September 20, 1898. The sale by the railroad company to the land company, December 30, 1874, is evidenced by a deed of general warranty of that date, duly recorded March 10, 1875, and until it had been authoritatively determined that the title of the railroad company had failed, the Tacoma Land Company had the right to rely upon that title. It was not compelled to question its own title, and when it volunteered to do so by filing its application to purchase the land from the United States, the railroad company resisted the application, on the ground that the railroad company's title had not failed. There was no lack of diligence. On the contrary, the land company applied to purchase the land before it had been declared that its title through the railroad company had failed, and therefore before it was necessary to make such application to protect its rights under section 5 of the act of March 3, 1887. Moreover, Miller knowing that the land in controversy was of an odd-numbered section in the primary limits of the grant to the railroad company, and having at least constructive notice of the sale to the land company, as shown by the recorded deed, could not thereafter initiate any right which would defeat the land company's right to purchase under the fifth section of the act. *Tacoma Land Company v. Northern Pacific Railroad Company, supra.*

There is nothing in the record to rebut the *prima facie* showing made by the deed that the Tacoma Land Company is a *bona fide* purchaser of the land involved. The decision appealed from is therefore affirmed.

#### MINING CLAIM—PROOF OF EXPENDITURE.

##### REX LODGE CLAIM.

The fact that the requisite expenditure on a mining claim is not shown to have been made prior to the expiration of the period of publication of a notice of application for patent is not material, where a new notice of the application is subsequently published under which the proof of expenditure is regularly furnished.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) March 28, 1900. (C. J. W.)

December 27, 1898, the Colorado Development Company made mineral entry No. 1865, for the Rex lode mining claim, Pueblo, Colorado,

after having three times published notice of the application for the statutory period, the last of said publications commencing February 27, 1897. Said successive publications appear to have been made upon the same application, filed April 4, 1896, and for the purpose of allowing the applicant to comply with the requirement of section 2325 Revised Statutes, as to the filing of the certificate of the United States surveyor-general, that five hundred dollars' worth of labor had been expended, or improvements made upon the claim, by said company or its grantors. The proof appears to have been complete at the expiration of each of the publications made, except that as to the first and second, the required surveyor-general's certificate had not been filed. This certificate, dated February 11, 1897, was not filed in the local office until February 12, 1897.

May 5, 1899, your office addressed a communication to the United States surveyor-general of Colorado, containing the following statement:

As the required amount of improvements had not been made on the claim at the date of survey, the certificate of the surveyor-general, dated February 11, 1897, was furnished stating that the improvements consisted of a shaft 5 x 7 ft., 10 ft. deep, valued at \$75, and shaft 4 x 8 ft., 94 ft. deep, valued at \$1,000, but it was not shown that at least \$500 worth of improvements were placed on the claim prior to the expiration of the first period of publication; viz., June 13, 1896. This must be shown. You will therefore require the claimant to furnish a certificate by the deputy mineral surveyor stating when the statutory amount of improvements were completed, and you will report in the matter.

The claimant was allowed sixty days within which to furnish the required evidence or to appeal, in default of which it was stated the entry would be canceled without further notice.

The claimant has appealed from your office decision, alleging error in requiring it to furnish evidence that the stated expenditure in labor or improvements on the claim had been made prior to the expiration of a period of publication under which it claims nothing, and error in not holding that the surveyor-general's certificate showing such expenditure to have been made prior to the expiration of the period of publication of notice, next preceding its entry, the only one upon which it relies, was sufficient.

The first two publications of notice by the applicant for patent, to which your office refers, are without significance in the case and need not have been referred to at all, since the applicant did not complete its proof under them. A third notice of the application for patent was duly published for sixty days, commencing February 27, 1897, and under that notice, the required proof as to the expenditure in labor or improvements on the claim, was regularly furnished, and is in all respects sufficient.

Your office decision is accordingly reversed, and, if the proofs are found otherwise regular, the entry will be passed to patent in its order.

## PRICE OF COAL LAND.

## CLINTON S. CONANT.

The price of coal land is determined by the distance of the land from a completed railroad, irrespective of its distance from the nearest shipping point on such road.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 29, 1900.* (A. B. P.)

January 26, 1899, Clinton S. Conant applied to enter lots 2 and 3 of section 33, T. 149 N., R. 74 W., Devil's Lake, North Dakota, containing 29.70 acres, as coal lands, and made tender of \$10 per acre as the purchase price therefor.

The local officers rejected the application on the ground that the lands applied for are situated within fifteen miles of a completed railroad, and cannot therefore be entered at less than \$20 per acre.

Upon appeal by Conant, your office, by decision of June 6, 1899, affirmed the action below, and thereupon Conant appealed to the Department.

It is not questioned that the lands applied for are in fact situated within fifteen miles of the Minneapolis, St. Paul and Sault Ste. Marie Railroad, but it is contended that inasmuch as said lands are more than fifteen miles from the nearest shipping point on said railroad, they are therefore subject to sale and entry at \$10 per acre.

The statute regulating the disposal of coal lands (sections 2347 to 2352, inclusive, Revised Statutes), provides, amongst other things, that they shall be subject to entry by the persons entitled—

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.

In the case of Frank Foster *et al.* (2 L. D., 730, 733), the Department considered the provision of the statute just quoted and held the same to mean that coal lands "must be paid for at the rate of \$20 per acre where it lies within 15 miles of a completed railroad, not an accessible completed railroad." The same principle applies to the present case. The lands are within fifteen miles of a completed railroad, and the law, in plain and unequivocal terms, requires that they shall be paid for at the price of \$20 per acre. To give the statute the construction contended for would necessitate the importation of words into the same in order to change its meaning; and this, there is no authority to do. *Newhall v. Sanger* (92 U. S., 761, 765).

The decision of your office is accordingly affirmed.

## APPLICATION FOR SURVEY—ISLAND—WITHDRAWAL.

## MAC E. COURT.

The Department may properly decline to entertain an application for the survey of an island, where, in the opinion of the Secretary of War, the island should be retained by the government, with a view to its future occupation for military purposes.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 31, 1900.* (C. W. P.)

Mac E. Court has appealed from your office decision of September 21, 1899, denying his application for the survey of two islands in section 17, township 36 north, range 2 west, Olympia land district, Washington.

On May 6, 1899, Mac E. Court, of Orcas, San Juan county, Washington, filed in the surveyor-general's office at Olympia, Washington, an application for the survey of two islands shown upon a diagram accompanying the application to be in West Sound in section 17, township 36 north, range 2 west, Willamette meridian, Washington.

The joint affidavit on page 2 of the application shows that the islands contain an aggregate area of 20.35 acres of land; that the width of the channel on either side between the islands and the main shores is about one hundred feet, and the depth thereof at ordinary stages of the water about six feet; that the islands are about ten to fifteen feet above high water mark, not subject to overflow, and the land fit for agricultural purposes; and that improvements have been made upon the islands by the applicant as follows: "Five acres slashed and a small shanty built," and that the value thereof is about \$25.

Notice of the applicant's intention to apply for the survey appears to have been served upon the owners of the adjoining lands upon the shores opposite the islands, and no protests appear to have been filed against the application.

On June 14, 1899, your office addressed a communication to the Secretary of the Interior, calling attention to said application and stating that the islands in question being situated in the waters north of Puget Sound, within the limits awarded to the United States by the decision of the Emperor of Germany, of October 21, 1872, might be needed as reservations for public purposes, and requesting before taking action on said application that the War, Treasury, and Navy Departments be called upon for reports as to whether the islands were likely to be needed in the future for military, light-house, or other public purposes under the jurisdiction of said Departments.

In the letter of the Secretary of War, dated July 5, 1899, in answer to the request of this Department to inform it whether these islands were likely to be needed in the future for military purposes, it is stated as follows:

I beg to inform you that the board of engineers, to whom the matter was referred, reports as follows:

"The probable future development of the Puget Sound country will, it is believed, draw attention to needs that cannot now be definitely foreseen. It is easily conceivable that at some future time the United States may desire possession of the islands described within. They lie near the comparatively narrow entrance to a deep water harbor, and are well located to serve as the sites of defensive works. Under these circumstances, it is the opinion of the board of engineers that the United States should retain possession of these islands."

The chief of engineers, U. S. Army, concurs in the views expressed by the board of engineers, and is of opinion that the islands should be retained by the United States for possible future defenses for the protection of the waters of West Sound.

In these views the Department concurs.

The Secretary of the Navy and the Secretary of the Treasury, in their letters, state that they do not desire that these islands be set aside for naval or light-house purposes.

It appears from the above statement that the islands applied to be surveyed, in the opinion of the Secretary of War, "should be retained by the government for possible future defenses for the protection of the waters of West Sound."

It is objected by the appellant that this Department has no authority to direct the withdrawal of said islands for the object and purpose above stated.

It is held by the supreme court in *Wolsey v. Chapman*, 101 U. S., 755, 769, that the acts of the heads of departments within the scope of their powers are in law the acts of the President.

In the State of California, *ex parte*, 20 L. D., 327, it was held (syllabus) that:

The Secretary of the Interior may properly direct the withdrawal of land from disposal, in order to preserve sequoias or other large trees growing thereon.

Your office decision denying Mr. Court's application is therefore affirmed.

#### REPAYMENT—PRICE OF LAND WITHIN RAILROAD LIMITS.

##### ROMONA LOPEZ.

The even-numbered sections within the primary limits of the grant for the Southern Pacific branch line, and the forfeited grant for the Atlantic and Pacific, are properly rated at double minimum, although within such conflicting limits the prior grant to the Atlantic and Pacific operated to defeat the grant to the Southern Pacific.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) March 31, 1900. (F. W. C.)

Under date of November 8th last there was filed in this Department an application, on behalf of Romona Lopez, for the repayment of \$150, charged her on account of the commutation of her homestead entry covering the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and the NE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 22, T. 3 N., R. 16 W., S. B. M., Los Angeles land district, California, the same being in excess of one dollar and twenty-five cents per acre.

The land in question is within the common granted limits of the grant made by the act of July 27, 1866 (14 Stat., 292), to aid in the construction of the Atlantic and Pacific railroad, and that made by the act of March 3, 1871 (16 Stat., 573), to aid in the construction of the Southern Pacific railroad branch line.

The portion of the first-named road within the overlap referred to was never constructed, and the grant made by the act of July 27, 1866, was, by the act of July 6, 1886 (24 Stat., 123), forfeited for non-construction. The Southern Pacific railroad was duly constructed through and beyond the conflict here in question.

Within the conflict a claim was made to the odd-numbered sections on account of the Southern Pacific grant, but the title to such odd-numbered sections as had been included in the prior grant to aid in the construction of the Atlantic and Pacific railroad was quieted in the United States by the decision of the supreme court in the case of the United States *v.* Southern Pacific R. R. Co. (168 U. S., 1).

Romona Lopez made homestead entry for the tract here in question March 20, 1896, and commuted the same to cash June 27, 1899, when she was required to pay for the same at the rate of two dollars and fifty cents per acre, being double the minimum price, because of the fact that the lands are part of an alternate reserved section within the limits of the grant made by the act of March 3, 1871, *supra*, to aid in the construction of the Southern Pacific railroad branch line.

The act of March 3, 1871, making the grant to aid in the construction of the Southern Pacific railroad, contains no provision whatever relative to the price of the alternate sections, but section 2357 of the Revised Statutes provides:

That the price to be paid for alternate reserved lands, along the line of railroads within the limits granted by any act of Congress, shall be two dollars and fifty cents per acre.

Being within the common limits of the two grants the tract in question was subject to the increase in price on account of either grant, but was relieved from the effect of the grant made by the act of 1866, to aid in the construction of the Atlantic and Pacific railroad, by the forfeiture of said grant and the provisions of the 4th section of the act of March 2, 1889 (25 Stat., 854).

It is nevertheless a fact that the tract in question is part of an even-numbered section and within the limits of the grant made by the act of March 3, 1871, to aid in the construction of the Southern Pacific railroad, branch line, which was duly constructed long before the acts of July 6, 1886, and March 2, 1889, so that the land entered by Romona Lopez has received by that construction the same benefit and advantage which it would have received had the adjoining odd-numbered sections passed to that company under said grant instead of the right to indemnity provided for in the granting act.

The question as to whether the Southern Pacific Railroad Company might acquire title to any or all of the odd-numbered sections within

the conflict between its grant and that for the Atlantic and Pacific Railroad Company can not alter the price of the even sections. As early as 1884 a similar question was raised in regard to the grant to the Northern Pacific Railroad Company, the lands in question being those released from the reservation made for the benefit of the Crow Indians. Said reservation was held to be sufficient to except from the operation of the grant to the Northern Pacific Railroad Company the odd-numbered sections, and it was urged that because of this fact the even sections within the limits of the grant to the Northern Pacific Railroad Company and also within said reservation were not subject to the increase in price. In considering this matter, however, it was said (*Clark v. Northern Pacific R. R. Co.*, 3 L. D., 158):

The even sections along said line are fixed by law at \$2.50 per acre, being alternate reserved sections along the line of a land grant road, and your ruling to the effect that, where the odd sections by reason of being in a state of reservation at date of definite location are excepted out of the grant, such exception operates to destroy the alternation of the even sections and thus preserves the single minimum price of \$1.25 per acre is error. The grant is of quantity to be taken in place where the lands are in condition to pass by the grant at definite location, with indemnity for the alternate odd sections exceptionally taken out of the grant by sale, reservation, pre-emption claim, or otherwise. It may be that a single quarter section is thus excepted; it may be a whole quarter section; it may be several sections; and it may be a large tract; but the principle is precisely the same. It is in each particular case an alternate odd section that, but for the exceptional condition as expressed in the grant, would pass.

The application under consideration is made under the provisions of the act of June 16, 1880 (21 Stat., 287), the second section of which provides:

In all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns.

The limits of the grant made by the act of March 3, 1871, to aid in the construction of the Southern Pacific railroad branch line, were clearly defined and as established include the lands in question. Said grant has never been forfeited, and the application for repayment is accordingly denied.

#### TIMBER CULTURE CONTEST—COMMUTATION OF ENTRY.

##### CAPRA *v.* TETREBAULT.

A contest against a timber culture entry, for non-compliance with law, will be dismissed, where it appears that the default is cured prior to the contest, and that the entryman if he continues to comply with the law will be entitled to commute his entry under the act of March 3, 1891.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 31, 1900.* (G. J. H.)

Antonio Capra has appealed from your office decision of August 19, 1899, reversing the action of the local officers and dismissing his con-

test, filed December 20, 1897, against the timber culture entry of Archille Tetreault, made June 28, 1890, for the NW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 25, T. 7 N., R. 3 E., B. H. M., Rapid City land district, South Dakota.

The record in this case shows that during the period of almost seven years immediately following the making of the entry the entryman did nothing on the land in question except to dig up and remove the stone from a part of the tract, during the first and second years, in order that the land might be plowed; that about the last of May, 1897, he broke from two and a half to three acres of the land and planted it to corn; that on August 2nd of the same year he planted the plowed ground to ash tree seeds; that claimant gives as reasons for his failure to sooner comply with the law that the ground was of such a character, being rolling and with "gumbo" soil, that trees or seeds would not be likely to grow during dry seasons, and that owing to the dry weather during the first seven years, and the failure of his neighbors to get trees to grow on better ground, he did not think it best to plant until the wet season of the spring of 1897; and that the testimony shows that during the years 1893 and 1895 there were severe drouths, but during the other years preceding 1897 fair crops were raised in that vicinity.

The tract in question covering only forty acres, the entryman was not, under the timber culture law, required to cultivate and plant a larger area than two and one-half acres. This he had done prior to the initiation of the contest, and such cultivation and planting were known to the contestant at the time the contest was brought. That the entryman was in default for a long period of time is clear, but it is equally clear that he had in good faith cured such default prior to the contest. It has been frequently held by this Department that under such circumstances a contest must be dismissed. It was attempted to be shown that the cultivation and planting done by the entryman in 1897 were induced by his knowledge of the impending contest. This attempt, however, was not successful. The entryman states that he does not remember ever hearing anything about any contest against the claim and that he cultivated and planted the land in good faith and with the intention of complying with the timber culture law. The contestant himself states that he does not know whether the entryman knew of the impending contest or not; that contestant had inquired about the tract at the local office during the winter before, but had concluded to drop the matter at that time; and that he does not know whether the entryman ever heard of this or not. None of the other witnesses show that the entryman knew anything about any impending contest at the time he performed the work upon his claim in 1897.

In the fourth assignment of error in the appeal it is alleged that—

Said decision of the Honorable Commissioner is against law, in that it presumes that a timber culture entryman, by doing some little work even ten or twelve years after a total abandonment and default, cures all such default, and can defeat a contest brought in good faith by some one desirous of taking and using the land.

The lifetime of a timber culture entry is thirteen years, and the law requires that the entryman shall, within that time, "plant, protect, and keep in a healthy, growing condition for eight years," upon the land included in his entry, the acreage of trees necessary to a compliance with the law. By the fifth proviso of section one of the act of March 3, 1891 (26 Stat., 1095), the right is extended to persons having certain qualifications to commute their entries, in certain cases, at the rate of one dollar and twenty-five cents per acre. For this purpose it is necessary that the person shall have in good faith complied with the provisions of the timber culture law for four years immediately preceding his offer of proof. In the case of Joseph Kelly (29 L. D., 214) it was held (syllabus) that—

The right to commute a timber culture entry under the act of March 3, 1891, can be exercised at any time within the life of the entry by one who can show that he has complied with the timber culture law for the four years preceding the application to commute.

Almost seven of the thirteen years constituting the lifetime of the entry having elapsed before the entryman in the present case began cultivating the land, it is clear that he can not now, within the life of the entry, perform the necessary cultivation and planting for the required period of eight years. It would seem, however, six years of the entry yet remaining when he began compliance with the law, that he still has the right, after showing a compliance for four years immediately preceding his offer of proof, to commute his entry by the payment of one dollar and twenty-five cents per acre. This being so, it would not be just to deprive him of this right on a contest brought after he had in good faith cured his laches, and especially as his acts of cultivation and planting were well known to the contestant prior to and at the time of the initiation of the contest.

Your office decision is correct, and it is hereby affirmed.

#### SOLDIER'S ADDITIONAL HOMESTEAD—ASSIGNMENT OF RIGHT.

##### EDWARD O'KEEFE.

There is no statutory requirement that the tracts located under a soldier's additional homestead right shall be contiguous, or form one compact body of land. A soldier's additional homestead right may, in the matter of the acreage the soldier is entitled to thereunder, be divided on the basis of legal sub-divisions, and, as so divided, assigned to different purchasers, each of whom will take by such assignment the right of location to the extent of his purchase.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 4, 1900.* (W. M. W.)

June 3, 1897, Edward O'Keefe, as the assignee of Thomas O. George made soldier's additional entry for lot 4, Sec. 18, T. 35 N., R. 22 E., Wausau, Wisconsin, in satisfaction of a certificate of right issued by

your office, May 29, 1896, in the name of George and recertified in the name of M. J. Wine.

May 19, 1898, your office submitted the matter to the Department, and requested instructions, and, October 20, 1898, the Department rendered a decision thereon. (See 27 L. D., 565.)

April 5, 1899, your office held for cancellation O'Keefe's entry of the lot in question, pursuant to said departmental decision.

O'Keefe filed a relinquishment of said entry dated May 31, 1899, and the local officers canceled his entry, June 7, 1899, upon the records of their office. At the time he filed his relinquishment of his entry under the George certificate, O'Keefe filed an application to enter said lot 4, Sec. 18, under section 2306 of the Revised Statutes, as the assignee of John O. Sutton, who made homestead entry of the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 33, T. 9 N., R. 30 W., Dardanelle, Arkansas, December 9, 1873, which was canceled upon relinquishment March 13, 1896.

The local officers transmitted O'Keefe's application to enter the tract in question, as Sutton's assignee, to your office, as required by the circulars of February 18, 1890, and December 4, 1896 (see General Circular of July 11, 1899, pp. 259 and 260).

August 5, 1899, your office rejected O'Keefe's application, and he appealed to the Department.

The matters and facts necessary to be considered are stated in your office decision, as follows:

Sutton makes affidavit that he is the identical person who made said entry; that he has made no other homestead entry, and that he served in Co. "E," 9th Regt. Tenn., Cav. Vols., from September 28, 1863, to September 11, 1865. He executed the customary affidavits and assigned his right under Sec. 2306 R. S. to William E. Moses, of Denver, Colorado, on April 24, 1899, the papers having been executed before John H. Dixon, notary public, at Mortimer, McMinn county, Tenn. Moses assigned Sutton's right under section 2306 R. S., to the extent of 40 acres, to Edward O'Keefe on May 3, 1899, and on May 31, O'Keefe filed his application to enter said Lot 4 as such assignee.

It also appears that by letter of May 22, 1899, the register and receiver of Durango, Colorado, transmitted, among other applications under Sec. 2306 R. S., the application of Alex T. Sullenberger as the assignee of John O. Sutton, to enter the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  Sec. 12, T. 34 N., R. 3 W., N. M. M.

The papers upon which said application is based were executed by Sutton on April 24, 1899, before said John H. Dixon, notary public. Sutton assigned his rights to William E. Moses, of Denver, Colorado, and Moses assigned Sutton's right to the extent of 80 acres to Alex T. Sullenberger, on May 3, 1899.

By letter "C" of June 20, 1899, Sutton was allowed fifteen days from said date to show cause why Mr. O'Keefe's application should not be granted. No response has been received.

It appears from the foregoing that Sutton assigned his right to enter 120 acres under Sec. 2306 R. S. to W. E. Moses; that Moses assigned 40 acres of said right to O'Keefe and 80 acres thereof to Sullenberger; that an application has been made to locate 80 acres of Sutton's right in the Durango, Colorado, district, and that an application has been made to locate 40 acres of said right on Lot 4, Sec. 18, T. 35 N., R. 22 E. This is regarded as equivalent to an attempt to make a soldier's additional homestead entry for incontinent tracts. Rule 25 of the general rules applicable to the different classes of entries found on page 80 of the General Circular of this office

of October 30, 1895, requires that in homestead entries the tracts covered by an entry must be contiguous to each other so as to form one body of land. In the case of Wesley Pringle (13 L. D., 519), the Department decided that incontiguous tracts cannot be embraced within a soldier's additional homestead entry.....

The application filed in the Durango land office was prior in point of time, and therefore takes precedence over O'Keefe's application.

For the foregoing reasons O'Keefe's application is rejected subject to his right of appeal.

It thus appears that your office rejected O'Keefe's application because the tract he applied for is not contiguous to the eighty acres of land previously applied for by Sullenberger.

In the recent case of Edgar Boice, assignee of Sarah E. Sparks (29 L. D., 599), the Department fully considered and discussed at length the question as to whether an additional entry under section 2306 of the Revised Statutes can properly be allowed for non-contiguous land, and it was held that:

The requirement that the land shall be contiguous or forming one compact body is seemingly purposely omitted from the statute. So only the entry is made by government subdivisions, it is for the entryman alone to judge what will be most advantageous to him, and to locate the gratuity, untrammelled with conditions as to contiguity and compact form, not imposed by the statute.

In this case the soldier appears to have had the right to enter one hundred and twenty acres of land in addition to the forty acres covered by his original entry in Arkansas; this right he could exercise himself, or he could sell and transfer it to another. Under the reasoning in Edgar Boice, *supra*, and the authorities cited therein, it follows that the soldier, Sutton, was at liberty, if he so desired, to divide his right and locate it upon as many legal subdivisions of land subject to entry as he saw fit, to the full amount of one hundred and twenty acres. Sutton's sale and transfer of his soldier's additional right to Moses invested the latter with the same rights under the law that Sutton possessed before he made the sale and transfer, and it follows that Moses had the right to sell and transfer to O'Keefe the right to make additional entry for forty acres, and also to sell and transfer to Sullenberger the right to make entry for the remaining eighty acres covered by his (Moses') purchase from Sutton.

From the foregoing it follows that your office erred in denying O'Keefe's application to enter the lot in question as the assignee of Sutton, provided he shows himself to have been qualified and there was no adverse claim for said lot at the time his application was made, and for this error your office decision appealed from must be and hereby is reversed.

July 11, 1899, the local officers at Wausau transmitted O'Keefe's petition, dated June 29, 1899, asking to be permitted to pay cash for the tract in question, in lieu of the invalid certificate issued in the name of George, under the provisions of the act of March 3, 1893 (27 Stat., 593).

August 16, 1899, your office denied said petition of O'Keefe, and he appealed to the Department.

In view of the conclusion hereinbefore reached, it becomes unnecessary to consider or pass upon the questions presented by O'Keefe's appeal from your office decision of August 16, 1899.

PRACTICE—TIME ALLOWED FOR APPEAL—RE-REVIEW.

FLAT TOP AND SUSIE LODGE CLAIMS.

The Rules of Practice, in fixing the time within which an appeal may be filed from a decision of the General Land Office, make no provision for excluding the time during which a motion for the re-review of such decision is pending.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) April 4, 1900. (A. B. P.)

By decision of January 9, 1899, your office dismissed the protest filed by H. E. Harrington against the issuance of patent upon mineral entry No. 1753, made July 28, 1898, by The Atlanta, Cripple Creek and Creede Mining Company, for the Flat Top and Little Susie lode mining claims, survey No. 10278, Pueblo, Colorado.

February 7, 1899, protestant filed a motion for review of said decision, which was denied by your office July 17, 1899.

August 15, 1899, certain letters addressed to your office by counsel for protestant were received and filed. They were treated as a motion for re review, and, by decision of August 24, 1899, the motion was denied.

September 8, 1899, the protestant filed an appeal from the decision of January 9, 1899, and thereupon the papers in the case were transmitted to the Department.

September 18, 1899, counsel for said mining company filed a motion to dismiss said appeal because not filed within the time prescribed by the Rules of Practice. No answer to said motion to dismiss has been filed.

In the absence of any showing to the contrary, it will be assumed that notice of the decision of January 9, 1899, and of the decision of July 17, 1899, on review, was promptly given by your office, and in view thereof it is evident that said appeal was not filed within sixty days from notice of the decision appealed from as required by the Rules of Practice. The notice of each of said decisions was given to the resident attorney of the protestant under Rule 97 of Practice. According to Rule 79, the time between the filing of a motion for review of a decision of your office, and notice of the decision upon such motion is excluded in computing the time allowed for appeal, but there is no provision in the Rules of Practice for the filing of a motion for re-review of a decision of your office, and, consequently, no provision for excluding the time between the filing of such a motion and notice of the decision thereon.

The decision here appealed from was rendered January 9, 1899. The appeal was not filed until September 8, 1899. In the computation of the time it is proper to exclude the period between the date of filing

the motion for review, and the date of notice of the decision denying the same; but no other exclusion can properly be made under the rules.

From the showing made in the motion to dismiss, nothing appearing to the contrary, it is clear that the appeal in question was filed out of time, and the same is accordingly dismissed.

ADDITIONAL HOMESTEAD—ACTS OF 1879 AND 1889.

SARAH J. WALPOLE.

An additional homestead entry under the act of March 3, 1879, can only be made of land adjoining that embraced within the original entry.

The right to make an additional entry under section 6, act of March 2, 1889, is limited to persons "entitled, under the provisions of the homestead law, to enter a homestead;" hence a married woman can not be allowed to make such an entry in the absence of evidence showing that she is the head of the family.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 5, 1900.* (G. J. H.)

Sarah J. Walpole has appealed from your office decision of December 22, 1899, holding for cancellation her homestead entry, No. 14,477, made February 26, 1898, for the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 14, and the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 23, T. 25 N., R. 7 W., 5th P. M., Ironton land district, Missouri, as an additional entry, "under act of Mch. 3, 1879, and Sec. 6 act Mch. 2, 1889," to Lincoln, Nebraska, H. E. No. 14,145, F. C. No. 8782, for the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , Sec. 24, T. 10, R. 2 W., 6th P. M., which she made under the name of Sarah J. Kilbourn and which was patented June 15, 1880.

It appears that when the claimant herein made her first entry, in the State of Nebraska, the land selected by her lay within the limits of a railroad, was therefore, under the then-existing laws, rated at the double minimum price, and she was restricted to an entry of eighty acres. The act of March 3, 1879 (20 Stat., 472), declared, in relation to entries of this kind, that—

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

Under this act it is necessary that the land embraced in the additional entry shall be "adjoining the land embraced in his original entry." In the present case the land included in the additional entry is not only not contiguous to that embraced in the original entry, but it is located in a different State. Clearly, therefore, Mrs. Walpole's additional entry can not stand under the act of March 3, 1879.

The sixth section of the act of March 2, 1889 (25 Stat., 854), declares—

That every person entitled, under the provisions of the homestead laws, to enter a homestead, who has heretofore complied with or who shall hereafter comply with

the conditions of said laws, and who shall have made his final proof thereunder for a quantity of land less than one hundred and sixty acres and received the receiver's final receipt therefor, shall be entitled under said laws to enter as a personal right, and not assignable, by legal subdivisions of the public lands of the United States subject to homestead entry, so much additional land as added to the quantity previously so entered by him shall not exceed one hundred and sixty acres.

It will be noticed that the privilege granted by this section is limited to "every person entitled, under the provisions of the homestead laws, to enter a homestead." Section 2289 of the Revised Statutes, as amended by the fifth section of the act of March 3, 1891 (26 Stat., 1095), prescribing who shall be entitled to make homestead entry, declares that—

Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter section, or less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands.

It is well settled by the decisions of this Department that, as a rule, a married woman can not be considered the head of a family and is not entitled to make homestead entry. (*Rachel M. McKee*, 2 L. D., 112.) In the case of *Nix v. Simon* (19 L. D., 85), however, it was held by this Department (syllabus) that—

A married woman, whose husband from disease and infirmity is permanently incapacitated to support the family, is qualified to make a homestead entry as the "head of a family."

In support of her appeal claimant states that—

The formal application was duly made to the Dist. U. S. Land Office, Ironton, Mo., and a statement was also made in regard to the original entry, to enable the Genl. L. O., Washington, D. C., to at once identify the same, and this was accepted by the Ironton office, and duplicate issued. My entry was made in good faith and for a home, and if I had suspected any irregularity, I would have thought that I would have been notified, between the date of entry and the end of the six months allowed by law for actual residence, but now, nearly two years have elapsed between entry and notice. I made personal settlement and improvements within the six months allowed, exhausting all my little means in trying faithfully to fulfill the legal requirements. Of course my means were small, but these were "my all" to me, and, if this entry is canceled, I am utterly ruined. . . .

Further, I am a native born citizen of the U. S., am 70 years of age, and very much of an invalid, yet I am practically, at the same time, the "head of the family," for my husband, who is nearly as old as I am, is a confirmed invalid, and has not for years been able to do any kind of work at all. I can establish this by affidavits, if such be necessary. Should any be required, please give me notice.

In view of these allegations of the claimant and the decision of the Department in the case of *Nix v. Simon*, above referred to, she will be allowed a reasonable time, to be fixed by your office, within which to furnish evidence showing the incapacity of her husband to provide a support and that she is practically the head of the family. If a satisfactory showing in this respect be made within the time limited, the entry in question will remain intact; otherwise it will be canceled.

Your office decision is accordingly modified.

## ACCOUNTS—UNEARNED FEES AND UNOFFICIAL MONEYS.

## CIRCULAR.

*Commissioner Hermann to registers and receivers, February 27, 1900.*

Hereafter the Receiver in his quarterly account of Unearned Fees and Unofficial Moneys (Form 4—103 a) will be required to classify the several items for which he takes credit in the account, and to show the total amount of each class. For this purpose a recapitulation will be required at the end of the account under the following heads:

1. Purchase money applied on land entries allowed, accounted for in Receiver's account for Sales of Public (or Indian) Lands.
2. Fees and Commissions earned, and applied on land entries, accounted for in Receiver's account for Sales of Public Lands.
3. Cancellation fees earned, accounted for in Receiver's account for Sales of Public Lands.
4. Testimony fees in contest cases earned, accounted for in Receiver's Sales and Contest accounts.
5. Amount applied on sales of public timber, deposited and accounted for as Miscellaneous Receipts.
6. Amount paid to publishers for publishing notices relating to land entries.
7. Amount returned to depositors.

All items in the two classes last named must be supported by vouchers executed conformably with the requirements of circular of June 5, 1897 (24 L. D., 505).

Such recapitulation should be made with great care, for any failure to make the required classification absolutely correct will necessitate a return of the account for correction.

Approved:

E. A. HITCHCOCK,  
*Secretary.*

## ACCOUNTS—REGISTERED LETTERS.

## CIRCULAR.

*Commissioner Hermann to surveyors-general, registers and receivers, and special agents, March 1, 1900.*

You will hereafter be governed, in the matter of registration of official letters, by the following rules:

1. The general correspondence of your office with this office or the public is not required to be registered, and such registration will not be paid for by the United States.
2. Official returns will not be registered.
3. Certificates of deposit on account of surveys will not be registered.
4. Notices of hearings in contest cases required by Rule 14 of Prac-

tice to be mailed by registered letter, are to be sent by contestants, who must furnish proof thereof, and are not to be registered at the public expense.

5. Notices of hearings and decisions in cases where hearings are ordered on behalf of the government, will be registered as a matter of evidence.

6. In addition to the registration of notices of hearings and decisions, as heretofore provided, it is directed that all notices required to be given by you of your decisions, or of decisions of this office, involving the right of appeal, or the exercise of other rights within a certain time, be served by you personally or by registered letter.

7. When personal service is had, you will transmit to this office the acknowledgment of such service or evidence thereof. When service is made by registered letter, the registry return receipt, or returned letter, as the case may be, must, in every instance, be sent up with the papers in the case, or otherwise accounted for.

8. Such costs of registration as are payable by the government will be paid out of the advances from the proper appropriations, and estimates therefor will be embraced in the usual requisitions.

9. In accounts for contingent expenses, under the head of registration of letters, separate registration receipts from the postmaster will not be required, and in lieu thereof disbursing agents will prepare quarterly statements, in detail, showing the letters registered during the quarter, which are to be signed by the postmaster and certified to by the disbursing agent.

10. In rendering accounts carry balances from quarter to quarter until the amount advanced is exhausted, when a new advance will be made for the ensuing quarter.

Approved:

E. A. HITCHCOCK,  
*Secretary.*

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

HASTINGS AND DAKOTA RY. CO. *v.* KNUDSON.

Where a homestead entry is canceled on account of the right of a railroad company to select the land under the act of June 22, 1874, and the company fails, after due notice, to perfect its selection within a reasonable time, such failure on the part of the company must be held to work an abandonment of its right, and entitle the entryman, who has continued to reside on the land, to the reinstatement of his entry.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 7, 1900.* (E. J. H.)

The Hastings and Dakota Railway Company has appealed from your office decision of August 17, 1899, holding for reinstatement defendant Knudson's homestead entry for lot 4, Sec. 4, T. 120 N., R. 44 W., Marshall land district, Minnesota.

On July 14, 1886, the Hastings and Dakota company made application to select the above-described tract, under the act of June 22, 1874 (18 Stat., 194), in lieu of the N.  $\frac{1}{2}$  of the N.E.  $\frac{1}{4}$  of Sec. 5, T. 114 N., R. 37 W., relinquished in favor of a settler.

Lot 4 was free from adverse claims, and subject to disposal at the date of the company's application therefor, and no question is raised as to the sufficiency of the basis.

On September 17, 1892, while the company's application was pending in your office, Johannes Knudson was permitted to make homestead entry for said lot.

On December 1, 1896, the homestead entry of Knudson was held for cancellation with a view to the allowance of the company's application to select. No appeal was taken by Knudson, and on April 3, 1897, said decision was declared to be final. Knudson's entry was canceled, and the company advised that the selection of the tract could be made.

It appears that the company had failed to pay the fees and perfect its selection for a period of more than two years, when on May 10, 1899, Knudson filed an application for reinstatement of his entry, alleging that he was unable to read or write the English language and could not interpret the notification that he received of the action of your office of December 1, 1896, holding his entry for cancellation; that he did not understand that his entry was to be canceled until long after the time for appeal had expired; that he made settlement upon the land about October 1, 1892, and built a house and stable, dug a well, and had about ten acres broken, said improvements being of the value of \$200; and that, with his family, he had resided thereon ever since. His declaration of intention to become a citizen of the United States, made on September 13, 1892, is on file in the case.

On August 17, 1899, your office decision held that, as the company did not perfect its selection of the tract for more than two years after notification of its right so to do, "its action must be construed, in the face of Knudson's continuous residence and improvement of the land, as an abandonment of its intention to select the same," and Knudson's entry was held for reinstatement. Your said office decision cited, as authority for such ruling, the case of Hastings and Dakota Railway Company *v.* Berg *et al.* (24 L. D., 145). In that case it was held that—

The failure of a railroad company to perfect an indemnity selection, within a reasonable time after notice of final decision recognizing the right of selection, must be held to work an abandonment of its prior right, where the withdrawal has been revoked, and an adverse claim intervened.

From this decision the company has appealed to the Department, claiming

manifest error in holding this case in any way governed by the decisions of the Department which require railroad companies to select *indemnity* land within a reasonable time after notice of final decision recognizing the right of selection,

and argues that there is a manifest difference between a case where the land in the primary limits, in lieu of which an indemnity selection

is taken, is lost to the company by reason of prior appropriation or other disposition within the excepting provisions of the grant, and a case, like one at bar, where, under the act of June 22, 1874, the right of the company to the land in the primary limits was fixed and absolute, and there under the United States invites an exchange of land with the company.

Counsel for Knudson filed motion for dismissal of the company's appeal, alleging that said appeal admits the laches charged by the decision of your office, and presents no real cause for grievance therewith, and declares that no such distinction exists, as claimed by the company, between an ordinary railroad indemnity selection, and a selection made under the provisions of the act of June 22, 1874, in so far as relates to necessity for diligent prosecution of the claim by the company in good faith.

It is not disputed but that the company was duly notified of the action of your office of April 3, 1897, cancelling Knudson's entry, and that it could perfect its selection of the land.

Under the pre-emption and homestead laws, and other laws relating to the disposal of public lands, reasonable periods were fixed by statute within which things required must be done in order to perfect a claim, failure or neglect of which would subject the claim to forfeiture.

The right of entry has been awarded to settlers in many cases before the General Land Office and the Department, the cancellation of conflicting selections being deferred, and to be made only in the event that the settler should place his entry of record within a prescribed time.

It is manifestly contrary to public policy, as well as the practice of the Department, to allow lands to be held in reservation for unlimited periods awaiting convenience of claimants in presenting their claims in a proper manner.

The Department is unable to concur with the contention of counsel for the company that such a distinction should be made between an ordinary indemnity selection and a lieu selection under the act of 1874, as not to require the company, in a case arising under that act, to perfect its selection within a reasonable time as against an adverse claimant who is an actual resident upon the land. The rule laid down in the case of *Hastings and Dakota Railway Company v. Berg et al.*, *supra*, is equally applicable to the case at bar.

The company having been duly and seasonably advised of the action of your office cancelling Knudson's entry, and that its attempted selection of the tract could be perfected, was bound, within a reasonable time, to take proper steps to perfect its right thereto. Having failed so to do, its laches worked an abandonment of its rights, in the presence of Knudson's settlement and adverse claim.

In the case at bar, Knudson presents a stronger claim even than that of Berg in the case cited herein. In this case Knudson had an entry, with improvements and residence upon the land, at the time of your

office decision in favor of the company, and has continued to reside thereon, while in the case cited, Berg had no prior connection with the land as a settler or applicant, but applied to make entry about a year after departmental decision giving the company the right to make selection. Moreover, in the case at bar Knudson's entry should not have been canceled by your office, unless within a limited time the company paid the required fees, thus completing its selection of the land.

In this view of the case, your office decision reinstating Knudson's entry is affirmed, and the company's attempted selection of the tract rejected.

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TIMBER LAND ENTRY—EQUITABLE ACTION.

THERESA MCMANUS.

A timber land entry should not be allowed in the absence of a personal examination of the land by the purchaser; but an entry made without such examination may be referred to the Board of Equitable Adjudication if the defect is subsequently cured by the purchaser.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 11, 1900.* (J. L. McC.)

Theresa McManus, on August 25, 1898, made timber-land entry for the S. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of Sec. 13, T. 66 N., R. 19 W., Duluth land district, Minnesota.

On September 15, 1899, your office, upon examination of the final proof, suspended the same, directed the attention of the local officers to the fact that Miss McManus had failed to make a personal examination of the land, as required by the regulations of your office (see General Circular of July 11, 1899, page 46, paragraph 8), and instructed them to notify her that unless such requirements were complied with, within sixty days, said entry would be canceled.

On November 18, 1899, counsel for Miss McManus addressed a letter to your office, urging that said order of suspension be revoked, contending that the case was, in all essential respects, similar to that of Mary E. Gardner (16 L. D., 560), and directing attention to a number of cases in which entry had been allowed and the lands passed to patent, where the person making the entry had not personally made an examination of the land.

Your office, by letter of December 13, 1899, declined to revoke its order of September 15, 1899, *supra*, suspending the entry.

From this action Miss McManus has appealed, still insisting that the case is ruled by that of Mary E. Gardner, *supra*; and that patent should issue upon the proof already offered.

It appears that your office, on October 18, 1898, in a letter to the local officers at Duluth, directed their attention to the fact that a number of timber-land entries had been allowed in that district where

the applicants had failed to make personal examination of the land, and instructed them to require all parties thereafter to make such personal examination.

In Miss McManus's sworn statement, filed in the local office May 4, 1898, in the printed portion of the blank furnished by your office, the sentence, "I have personally examined said land, and from my personal knowledge state that said land is unfit for cultivation and chiefly valuable for its timber," was in part erased, and certain words interlined in manuscript, so that the sentence reads: "said land has been examined, and from such information and knowledge state that said land is unfit for cultivation," etc. From this it would appear that there was no falsehood on her part, or attempt to mislead the local officers, at the time of her making application to enter said land. It appears upon the face of her final proof that she frankly stated that she had never personally examined the land, and that the local officers, before whom said proof was made, nevertheless accepted the same and received her money in payment therefor. Said final proof and payment were made (August 25, 1898) prior to the date of your office instructions of October 18, 1898, to the local officers at Duluth, requiring personal examination thereafter. But that was not by any means the first time that such instructions had been given. The circular of instructions approved by the Department July 16, 1878, prescribed the language of the sworn statement in part as follows (see *Grace v. Carpenter*, 14 L. D., 436-9):

That I have personally examined said land, and from my personal knowledge state that said land is unfit for cultivation and valuable chiefly for its timber.

Substantially the same instructions are given in the departmental circular of May 21, 1887, section 8:

The sworn statement before the register and receiver required as above (section 2 of the act), must be made upon the personal knowledge of applicant, except in the particulars in which the statute provides that the affidavit may be made upon information and belief.

See also Gen. Cir., Oct. 30, 1895, p. 45.

Notwithstanding these circulars, it appears that a practice had grown up in the Duluth office of allowing entries to be made without the applicant making affidavit that he or she had personally examined the land.

In the case of Mary E. Gardner, *supra*, it appeared in the record that "she did go on the land and examine it two weeks prior to making final proof." In the case at bar it does not appear that the applicant has ever made a personal examination of the land. The Department is of opinion that this is a statutory requirement, which can not be dispensed with. Your decision, in so far as it so holds, is therefore hereby affirmed. In case, however, Miss McManus shall hereafter, within a reasonable period, make such personal examination of the

land, it would appear that, in the absence of any adverse right, her claim would be entitled to consideration by the board of equitable adjudication.

The decision of your office is modified as herein indicated.

RAILROAD GRANT—NOTICE OF WITHDRAWAL—ACT OF APRIL 21, 1876.

OREGON AND CALIFORNIA R. R. CO. *v.* JONES (ON REVIEW).

Section 1, act of April 21, 1876, providing for the protection of entries made prior to the time when notice of the withdrawal under a railroad grant is received at the local office, has no applicability where rights have heretofore vested under railroad grants, but establishes a new rule subject to the conditions of which such rights shall thereafter attach.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 11, 1900,* (L. L. B.)

Counsel for the Oregon and California Railroad Company have filed a motion for review of the case of said company against Charles E. Jones (29 L. D., 550), involving the N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , the NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , the E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , and the NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 11, T. 39 S., R. 3 W., Roseburg, Oregon, land district.

The land in controversy is within the primary limits of that portion of the grant made by the act of July 25, 1866 (14 Stat., 239), of which the Oregon and California Railroad Company became the beneficiary under the designation of the legislature of the State of Oregon. The line of road opposite thereto was definitely located September 6, 1883, on account of which an executive order of withdrawal was made by letter of October 27, 1883, received at the local office November 7, 1883. October 4, 1883, nearly a month after such definite location, but before notice thereof or of the withdrawal made on account thereof was received at the local office, William R. Buck filed pre-emption declaratory statement for the land in controversy, alleging settlement thereon on the second of that month.

July 6, 1886, Buck transmuted his pre-emption filing into a homestead entry, and August 24, of the same year, relinquished said entry, whereupon Charles E. Jones made homestead entry of the land. Jones afterward submitted proof of his compliance with the homestead law, upon which final certificate issued to him December 12, 1892.

The decision complained of sustained the entry of Jones as against the claim of the company.

The grounds stated in the motion are:

1. That upon the definite location of the road the title to said land absolutely vested in the railroad company and that Buck by his subsequent settlement and pre-emption filing could not defeat the title thus vested in the company.
2. That as the settlement and filing of Buck was illegal and void, the subsequent

homestead entry of Jones could confer no right on him because the land was not "unappropriated public lands" at the time of his application to make homestead entry, and his entry thereof was likewise illegal and void.

In the argument filed in support of the motion several decisions of the supreme court are cited, holding that the title of the company attached upon the filing of the map of definite location with the Secretary of the Interior. That this is the correct interpretation of the act creating this grant has not, it is believed, been seriously questioned by this department, since the decision in *Van Wyck v. Knevals* (106 U. S., 360), and certainly not in the decision sought to be reviewed.

The question adjudicated in the case at bar was as to the effect of the statute of April 21, 1876 (19 Stat., 35), upon the acts of Congress conferring grants in aid of railroads, and it was therein held that:

This act is *in pari materia* with the several railroad land grants, and section one thereof clearly has the effect, as to all lands the right to which had not theretofore vested in the grantee company by definite location of the line of road or other identification of the lands granted, of protecting actual settlers, who, prior to the time when notice of the withdrawal of the lands was received at the local land office, made pre-emption or homestead entries thereof.

The decisions cited by counsel in their brief are in nowise contrary to the above interpretation of the act of April 21, 1876. The construction of this act is not involved in any of those decisions, except the *Northern Pacific Railroad Company v. Amacker* (175 U. S., 564), which was followed in the decision complained of.

It has been repeatedly decided by the supreme court that Congress, prior to the definite location of the road, has the right to dispose of the lands on the general route of the road as it saw proper.

In *Northern Pacific Railroad Company v. Sanders* (166 U. S., 620), it is said:

The company acquired, by fixing its general route, only an inchoate right to the odd numbered sections granted by Congress, and no right attached to any specific section until the road was definitely located and the map thereof filed and accepted. Until such definite location it was competent for Congress to dispose of the public lands on the general route of the road as it saw proper.

In *Menotti v. Dillon* (167 U. S., 703, 705, syllabus), it is said:

The railroad company accepted the grant subject to the possibility that Congress might, in its discretion, and prior to the definite location of its line, sell, reserve or dispose of enumerated sections for other purposes than those originally contemplated.

If Congress had the right to dispose of these lands prior to the definite location of the road, before which time title would not pass to the company, it had the right as to all lands not so vested in the company to enact other needful legislation for the protection of the rights of entrymen upon lands embraced within the limits of the grant. Congress exercised this right in the enactment of the statute now under consideration. It is *in pari materia* with the statutes pertaining to railroad grants and by all rules of construction it must be con-

sidered in connection with such statutes. Prior to the enactment of this statute, in general (and the grant of this company is not an exception), upon filing the map of definite location the land within the limits of the grant passed irrevocably to the beneficiary in the grant, to the exclusion of all subsequent claimants. In view of the hardships frequently arising from permitting entries and filings to be made and money and labor expended in improvements by claimants whose claims might thereafter be asserted before information could be had at the local office of the action of the company in filing its map of definite location with the Secretary, Congress passed the act of April 21, 1876, which allowed such *bona fide* claimants to go on and perfect their claims, so initiated, "prior to the time when the notice of the withdrawal of the lands embraced in such grants was received at the local land office," etc. Congress thus adopted a new rule for the purpose of avoiding the hardships theretofore arising under these land grants. While this act has no application to lands to which rights had heretofore become vested, it established a new rule subject to the conditions of which the right of railroad companies under their respective grants would attach in the future.

But although the statute under consideration may be one of a series or group, it may still be that the legislature designs to depart from the general purpose or policy of its previous enactments on the general subject; and if such a design is unmistakably apparent on the face of the act, it must be given effect. It would be entirely erroneous, in such a case, to defeat the will of the legislature by undertaking to reconcile the act with prior statutes, or to control its terms by theirs. (Black on Interpretation of Laws, 209.)

In this instance the design of Congress to depart from the general policy of its previous enactments is so plain as to render discussion unnecessary.

In the case at bar, the line of the California and Oregon Railroad Company opposite the lands in controversy having been definitely located in 1883, subsequent to the passage of the act of April 21, 1876, the rights of the company attaching upon such location are subject to the provisions and restrictions contained in said act, one of which is that the grant to the company shall not prevail over a homestead or pre-emption claimant who was an actual settler upon the land and whose entry was made in good faith prior to the time when notice of the withdrawal of the lands embraced in the grant was received at the local office.

In the Amacker case (*supra*) the only question discussed having relation to the act of April 21, 1876, was as to whether the protection of that act extended to any claimant other than the original entryman, and the court held, in effect, that if there was an entry of record at date of the filing of the map (in that case of general route) in the local office, although such entry might afterwards be abandoned or canceled, the land did not come within the operation of the withdrawal,

but was subject to entry as other unappropriated public lands. In so far as it treated of the right of Congress to control the disposition of lands prior to the filing of the map of definite location of the road with the Secretary, the court followed the construction in *Northern Pacific R. R. Co. v. Sanders and Menotti v. Dillon*, above cited. It is true, that in the *Amacker* case the withdrawal was made upon the map of general route, but can it be doubted that the act of April 21, 1876, applies equally to withdrawals made upon the definite location of the line, where, as in this case, the act making the grant provides for withdrawal of the lands only upon the filing of a map of definite location or its equivalent?

The motion is denied.

SOLDIERS' ADDITIONAL HOMESTEAD—DUPLICATE CERTIFICATE  
OF RIGHT.

JULIA A. LAWRENCE.

The right to make a soldier's additional homestead entry, if not exercised during the lifetime of the soldier, becomes an asset of his estate, if there be no widow or minor orphan children entitled to such right.

If under the existing practice a certificate of such right was issued to the soldier in his lifetime, and it is satisfactorily shown that said certificate has been lost or destroyed, a duplicate thereof may issue on the application of the personal representative of the deceased soldier.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 11, 1900.* (G. C. R.)

June 21, 1878, your office issued to Robert Ireton a soldier's additional homestead certificate for eighty acres. It appears that his original entry, made for eighty acres of land in the State of Wisconsin, had been cancelled April 28, 1871, on his relinquishment thereof, and under the conditions imposed at the time the certificate was issued he was required to become an actual settler on the land located, "as in case of an original entryman."

Ireton died January 25, 1882, leaving a widow (Julia A.), three sons (Thomas R., John W. and Jesse W.), and one daughter (Rachel A.).

The certificate when issued was transmitted to Sanborn and King, of this city, and by them sent to A. O. Bailey, Ireton's local attorney, of Menomonie, Wisconsin.

It appears that the certificate never came into the possession of Ireton or any member of his family, but was either lost or destroyed while in said Bailey's possession; the records of your office do not show that the certificate was ever located or that any entry was ever made with it.

These facts all appear in connection with an application filed in your office, December 3, 1898, by Julia A. Lawrence, of Eau Claire, Wisconsin, for the re-issuance and recertification to her of the said certificate

originally issued to Ireton. With the application Mrs. Lawrence filed satisfactory proof, showing that she was, until her marriage with one Lawrence, the widow of said Ireton; she also filed in connection with her application, in affidavit form, assignments to her of the right of all the children of the said Ireton in and to said certificate. The affidavits of the four heirs of Ireton contain the statement that the said certificate had never been in their possession, and that they had never in any manner disposed of their interest in the same.

Your office, by decision of September 15, 1899, rejected said application, and Mrs. Lawrence has appealed to the Department. In rejecting said application, your office says:

On the death of the soldier, Robert Ireton, the statute, by section 2307, R. S., cast the right to make an additional entry on his widow, if unmarried, and in case of her death or marriage, the right to make an additional entry passed to the minor orphan children. It appears that the widow remarried, thereby divesting herself of the statutory right above mentioned, and it appears further from the affidavits of James McDonald and John Curran that all the surviving children born to Robert Ireton and his wife are of legal age, and that there are, therefore, no statutory successors to the right carried by said certificate.

The right which was declared in the certificate existed under the law only in favor of the soldier, his widow, or minor orphan children, under said sections 2306 and 2307 R. S. The act of August 18, 1894 (28 Stat., 397), validated all outstanding certificates only in the hands of the original party or parties entitled under said sections, or of the bona fide purchasers. As it appears that the certificate has never been sold and there are no parties who can take under the statute, there is now no right in existence which can be reissued to any one or recertified under said act of August 1894, *supra*.

The testimony shows, and your office so finds, that a soldier's additional homestead certificate was issued to Robert Ireton, June 21, 1878; that the same never came into the possession of the soldier, but was lost or destroyed while in possession of his local attorney, and that there is no record showing that the certificate was ever used in making an entry.

In the case of Henry N. Copp (23 L. D., 123), it was held that, in view of the provisions of the act of August 18, 1894 (*supra*), validating outstanding soldiers' additional certificates in the hands of *bona fide* purchasers, a duplicate certificate may issue to such purchaser, in the name of the soldier on due showing of the loss of the original, and the further fact that it has not been located.

The mere loss of the certificate itself can not be treated as the loss or destruction of any rights thereunder. The right of Ireton to an additional entry of eighty acres of land was determined by the proper officers of the government, and upon his application that right was certified.

The certificate of right was accompanied by a statement that the soldier must settle upon the land located thereunder, but Congress never intended that such a condition should be imposed, *Webster v. Luther* (163 U. S., 331).

The right to enter additional land conferred by section 2306 is personal property, and assignable.

In the case of Williford Jenkins (29 L. D., 510), it was held, in effect, that if a soldier, entitled to the right to make a soldiers' additional homestead entry, dies without having exercised said right, leaving no widow or minor orphan children, the right to make said entry vests in his personal representative; and if the right was certified to him in his lifetime under the then existing practice a duplicate certificate of said right may issue, in the name of the deceased soldier, on the application of his personal representative, it being satisfactorily shown that the original certificate has been lost or destroyed.

It follows that in the case here stated the right is a proper asset of the estate of the deceased soldier to be administered as any other personal property. Being an asset of the estate and assignable, a duplicate certificate on the showing made may be issued in the name of Robert Ireton, the deceased soldier, and delivered to the personal representative of said deceased, or his lawfully authorized agent.

The decision appealed from is reversed.

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REPAYMENT—RESERVOIR DECLARATORY STATEMENT.

WILLIAM F. ALLEN.

A reservoir declaratory statement is not an entry within the meaning of the repayment act; hence the fees paid on such statement cannot be repaid if it is subsequently canceled for conflict with a prior entry.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 11, 1900.* (C. J. G.)

The Department is in receipt of your office letter of March 14, 1900, transmitting the application of William F. Allen for repayment of the fees paid by him on reservoir declaratory statement No. 1345, for the N.E.  $\frac{1}{4}$  of N.W.  $\frac{1}{4}$  of Sec. 17, T. 25 N., R. 19 W., O'Neill land district, Nebraska, filed June 13, 1899, under the act of January 13, 1897 (29 Stat., 484). You ask to be advised upon the following point:

As the second section of the act of June 16, 1880 (21 Stat., 287), specifies that repayment shall be made upon certain canceled *entries*, I submit whether relief may be extended thereunder in the case of canceled reservoir statements that were in conflict with prior entries.

Such reservoir declaratory statement is not an entry within the meaning of said repayment act, and your office is advised that repayment is not authorized in the cases stated.

## COLVILLE INDIAN LANDS OPENED TO SETTLEMENT.

## INSTRUCTIONS.

*Commissioner Hermann to registers and receivers, Waterville and Spokane Falls, Washington, April 12, 1900.*

I have to call your attention to the proclamation issued by the President on the 10th instant, by which all the non-mineral lands in the north half of the Colville reservation, Washington, vacated by the act of July 1, 1892 (27 Stat., 62), and July 1, 1898 (30 Stat., 571), except those allotted to and reserved for the Indians, and for other purposes, will be opened to settlement and entry under the statutory provisions therein recited, at and after the hour of 12 o'clock, noon (Pacific standard time) of the 10th day of October, 1900.

With regard to the lands described in the proclamation, you will observe that the acts referred to provide that, subject to the reservations and allotments to Indians of the Colville reservation, all the tracts shall be disposed of under the general laws applicable to the disposition of public lands in the State of Washington.

It is further provided by section three of the act of July 1, 1892, *supra*:

That each entryman under the homestead laws shall, within five years from the date of his original entry and before receiving a final certificate for the land covered by his entry, pay to the United States for the land so taken by him in addition to fees provided by law the sum of one dollar and fifty cents per acre, one-third of which shall be paid within two years after the date of the original entry; 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 sum to be paid as aforesaid.

All applicants to enter these lands must possess the qualifications required by the law under which he desires to make entry. The homestead applicant must pay the usual fee and commissions at the time of making his entry. Within two years thereafter he must pay the sum of fifty cents per acre, and within five years from the date of his entry, and before receiving a final certificate he must pay an additional sum of one dollar per acre.

As said lands are restored to entry under the general laws, homestead entrymen may commute their entries under section 2301 R. S. by paying for the land at the rate of \$1.50 per acre, the price fixed in the act of 1892, *supra*, but no final commissions will be collected when commutation proof is submitted. The commissions in the original and final entry under section 2291 R. S., will be computed at the rate of \$1.25 per acre, the ordinary minimum price of public lands under the general provisions of section 2357 R. S.

The ordinary blanks for the different classes of entries under the

general laws will be used, reference being made thereon, and on the abstracts to the act of July 1, 1892, Colville Indian reservation lands.

You will open a separate series of numbers for each class of entries, beginning with number one, reporting them in separate and special abstracts and report and account for the same in your regular monthly and quarterly Colville Indian reservation accounts.

Upon receipt of the first payment of fifty cents per acre from homestead claimants, the receiver will issue a cash receipt for the money, noting thereon, "first payment Colville Indian Reservation homestead," and when final proof is submitted and final payment made the regular final certificate and receipt should issue, as well as a separate cash receipt for the final payment of \$1.00 per acre.

Sections sixteen and thirty-six in each township will be subject to such right of the State of Washington thereto as may be ascertained and determined by the land department in the administration of the grant of lands in place to that State for the support of common schools.

The notices, required by circular of instructions of October 21, 1885 (4 L. D., 202), as to the filing of the plats of survey in your office, should be posted by you at such date as will make the date of filing the same as the date of the opening of the lands to settlement and entry.

On receipt of this letter you will cause a notice to be published for thirty days in some newspaper of general circulation in the vicinity of the land, giving the date on which the lands will be opened to settlement and entry.

Approved, E. A. HITCHCOCK, *Secretary.*

#### Mining Claim—Lode Line—Extra Lateral Rights.

##### BEIK ET AL v. NICKERSON.

The right of the locator to follow the strike of the lode ceases at the point where the lode crosses the line of the location; but the validity of the location is not affected by the fact that the lode crosses the side line thereof.

The mining regulations do not require that the notice of application for mineral patent, as posted or published, shall contain a description of the lode line, reference being made in these notices to the official plat of survey on which is indicated the general course or direction of the vein.

An allegation on the part of a protestant that the allowance of a mineral entry as applied for will injuriously affect the extra-lateral rights of the protestant, does not present, in the absence of any surface conflict, a question of which the Department will take cognizance.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 12, 1900.* (W. A. E.)

February 12, 1898, Charles J. Nickerson filed application for patent to the Rattlesnake Lode mining claim, survey No. 3498, Marysville,

California, land district, and publication of notice of the application was commenced February 18, 1898.

April 31, 1898, George Beik *et al.* filed a protest against the allowance of entry on said application, alleging as grounds of protest:

1. That protestants are the owners of the Levant lode mining claim, located in close proximity to the Rattlesnake claim; that the ledge contained in the Rattlesnake claim is the same ledge that runs through the Levant claim; and that the allowance of entry for the Rattlesnake would injuriously affect the extra-lateral rights of protestants as owners of the Levant claim.

2. That at the date of filing application for survey of said Rattlesnake claim, Charles J. Nickerson was not the owner thereof.

3. That no work was done upon or for the benefit of the Rattlesnake claim for two years prior to the application for patent.

4. That at no time prior to the official survey was there a valid location of said claim upon the ground.

5. That the published and posted notices of said mineral application do not comply with the mining regulations in that neither of said notices gives a description of the lode line in any way, manner, or form.

A hearing was duly had on this protest, both parties appearing and submitting testimony, and on December 28, 1898, the register and receiver rendered dissenting opinions, the register recommending that the application to make entry be rejected and the receiver recommending that it be allowed.

Both parties appealed, and by your office decision of June 13, 1899, the finding of the receiver was affirmed and the protest dismissed.

The protestant's appeal from this action brings the matter before the Department.

A careful examination of the confused and unsatisfactory mass of testimony submitted in the case shows the facts to be as follows:

The Rattlesnake lode mining claim was originally located by W. H. Chappell, on January 6, 1886. In April, 1887, Chappell sold the claim to Charles J. Nickerson, the present claimant and applicant. Pending this sale, Nickerson employed a surveyor by the name of Reece to run the lines. Reece ran and staked all the lines, including the lode line, and brushed them where there was any undergrowth. It appears, however, that the location as marked on the ground did not correspond with the description given in the location notice. In the latter the claim was described as a rectangle, 1,500 feet long and 600 feet wide, but as marked on the ground the claim was less than 1,500 feet in length and had an angle in the side lines. The location as staked and the location notice covered practically the same ground, though, except that the notice covered a larger area than was actually staked. In June, 1887, Nickerson located this claim as the Golden Queen lode mining claim, describing it according to the Reece survey. This location notice does not appear on the records of Butte County, California, where this

land is situated, and is not referred to in the abstract of title, but is shown on the records of the extinct Forbestown mining district. It seems to have been ignored and forgotten even by Nickerson himself until it was resurrected and introduced in evidence during the progress of the hearing in this case.

At the same time that Nickerson purchased the Rattlesnake claim, he also purchased an adjoining claim, called the Honeycomb lode mining claim. These two claims were consolidated and thereafter worked and known as the Golden Queen mine. Shortly after his purchase, Nickerson conveyed various interests in these two claims to different parties, but these interests were subsequently reconveyed to him, and at the date of his application the entire title was in him. In these several deeds of conveyance no mention is made of the Golden Queen location of June, 1887, the claim being named in the deeds at the Rattlesnake and described according to the old Chappell location notice.

November 27, 1895, Nickerson made a new location of the Rattlesnake claim. Notice of this location was recorded November 30, 1895, and immediately thereafter Nickerson applied for a survey of the claim. An order for survey, based on this location, was issued, but when the United States deputy mineral surveyor went on the ground he found that there was a discrepancy between the claim as marked on the ground and the location notice on which the order for survey was based. He therefore did not proceed with the survey at that time, and reported the facts to Nickerson and the United States surveyor-general. December 17, 1895, Nickerson made an amended location of the Rattlesnake claim. This amended location agreed almost exactly with the old Chappell location as marked on the ground and surveyed and staked by Reece. An amended order for survey, based on the amended location of December 17, 1895, was then issued, and in July, 1897, the survey was made. There is some dispute as to whether this official survey followed the lines of the amended location as marked on the ground, but the preponderance of the evidence shows that there is a substantial agreement. It appears that the Gold Bank mine, a patented claim, adjoins the Rattlesnake on the east; that a compromise boundary line was agreed on by Nickerson and the owners of the Gold Bank, this agreement being reduced to writing and recorded; that in making the official survey the deputy surveyor followed this compromise line, which varied only slightly from the description of the east end line of the Rattlesnake as given in the amended location notice; and that the west end line of the Rattlesnake was swung slightly east, with the northwest corner as an axis, to make it parallel with the east end line.

At the eastern end of the Rattlesnake claim, near the boundary line between that claim and the Gold Bank mine, is a ravine, and it appears that the most convenient place for beginning operations on the vein is in this ravine. Shortly after the purchase of this claim in 1887, Nickerson and his co-owners began work in this ravine by driving tunnels

and erecting buildings for the convenient working of the ore. These improvements consist of a fully equipped ten stamp mill, a blacksmith shop, buddle house, store room for sulphurets, canvas plants, tunnels, shafts, upraisers, etc., and their value is estimated at about \$70,000. The buildings, it appears, are located on land belonging to the Gold Bank mining company, under an agreement with said company.

Testimony is submitted by the protestants to prove that the lode or vein does not follow the course shown on the official plat, but that it crosses the north side line at a point a short distance east of the northwest corner. This is disputed by the witnesses for the applicant, but even if it were true, it would not be material. The right of the locator to follow the strike of the lode ceases at the point where the lode crosses the line of the location, and it makes no difference, so far as the validity of the location is concerned, whether the lode crosses the side line as claimed or not.

From the above resume of the evidence it appears that at the date of his application for patent the entire title to this claim was in Nickerson; that no one else is claiming or asserting any interest therein; and that whatever may have been the degree of his interest in this claim at the time he applied for a survey thereof, all his actions in regard thereto have been ratified by the conveyance to him of all outstanding interests.

The allegation in the protest that no work had been done upon or for the benefit of this claim for two years last past presents a question that goes only to the right of possession in a dispute between rival or adverse claimants for the same mineral land, and is a matter solely for the determination of the courts. *P. Wolenberg et al.*, 29 L. L., 302. This portion of the protest will not, therefore, be entertained or considered by the Department.

The published and posted notices of the application for patent do not contain a description of the lode line and a statement of the course and length thereof each way from the discovery or other well defined object; nor do the rules require that the notice, as published or posted, shall contain a description of the lode line. Reference is made in these notices to the official plat on which is indicated the general course or direction of the vein.

There is no surface conflict between the Levant claim, owned by the protestants here, and the Rattlesnake claim, but it is alleged that the allowance of entry for the Rattlesnake claim would injuriously affect the extra-lateral rights of the Levant claimants. This is not a question of which the Department will take cognizance. It is purely a matter for the determination of the courts and the issue of patent for the Rattlesnake claim will not be an adjudication as to any extra-lateral rights that the Levant claimants may possess.

Your office decision is hereby affirmed, and the protest of Beik *et al.* is dismissed.

## ANDREW FERGUS.

Motion for review of departmental decision of February 23, 1900, 29 L. D., 536, denied by Secretary Hitchcock, April 14, 1900.

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

## GREENE ET AL. v. WILDER ET AL.

No right to a confirmatory patent under section 4, act of March 3, 1887, can be based on a contract of purchase that has been canceled by the company for failure to comply with the terms thereof.

A purchase of railroad lands by one who is at such a time a director in the railroad company, trustee for the bondholders in the mortgage of the railroad lands, and party defendant, as such trustee, in a pending suit instituted by the United States to recover title to the lands, is not a purchase, in "good faith;" and no right to a confirmatory patent under said section can be predicated on such purchase.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 17, 1900.* (J. R. W.)

Fanny S. and Cornelia Day Wilder; Judson L. Greene and Elizabeth Harker; and Albin C. Chalstrom have appealed to the Department from your office decision of August 7, 1899, involving the N.  $\frac{1}{2}$  of Sec. 1, T. 95, R. 42 W., Des Moines, Iowa.

The land was patented (the NW.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of said Sec. 1, June 17, 1873, and the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  January 25, 1875,) to the State of Iowa under the act of May 12, 1864 (13 Stat., 72), for the Sioux City and St. Paul Railroad Company. The patents were vacated October 21, 1895 (159 U. S., 349), at suit of the United States against said company, instituted October 4, 1889. On February 21, 1896, the lands, the title to which was restored under said suit, were opened to entry under the instructions of November 18, 1895.

February 12, 1896, Fanny S. and Cornelia Day Wilder, heirs of Amherst H. Wilder, deceased, filed in the local office an application under section 4 of the act of March 3, 1887 (24 Stat., 556), for a confirmatory patent to all of the lands before described, and on the same day Judson L. Greene, jointly with Elizabeth Harker, widow of William Harker, for the benefit of his heirs, tendered a like application for a confirmatory patent to said lands; also under said act, as settlers and not as purchasers, notice of claim was filed, January 27, 1896, by Charles Gustafson for the NE.  $\frac{1}{4}$ , and, February 26, 1896, by William Egdorf, for the NW.  $\frac{1}{4}$ . February 27, 1896, said Egdorf filed homestead application for said NW.  $\frac{1}{4}$ , alleging settlement April 15, 1894, and the same day Albin W. Chalstrom filed homestead application therefor, not claiming settlement or improvement. March 18, 1896, said Gustafson filed homestead application for said NE.  $\frac{1}{4}$ , alleging residence since 1884.

There were other applications not necessary to be noticed, no rights being now asserted thereunder.

Notices of the applications were duly given for hearing, May 20, 1896, but hearing was postponed to September 16, 1896, when said Gustafson, Egdorf, and Chalstrom appeared in person and with counsel, and the other mentioned parties by counsel. May 27, 1897, the local office recommended that the homestead applications by Gustafson and Egdorf be accepted, and that all other applications be rejected. On appeals of Greene and Harker, the Wilders and Chalstrom, to your office, the recommendation of the local office was affirmed, and said appellants appealed to the Department.

There is no conflict in the evidence.

August 27, 1887, the railroad company, by contract, sold said NE.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  to William Harker and J. L. Greene, jointly, on deferred payments, they paying \$489.33 at execution of the contract. Said contract contained a proviso for forfeiture upon failure to make the deferred payments at stipulated times, and upon failure to pay the taxes upon the land, which by the terms of the contract were to be paid by the purchasers. May 17, 1888, Harker wrote the company declining to make further payment of principal, interest, or taxes, until title was settled and possession given, the lands being in the possession of certain adverse claimants, and requested a modification of the contract of purchase, relieving them from further payments, or a return of the amount paid, and that the purchasers had contracted subject to occupation by the squatter, and had agreed to abide result of the pending ejectment suit against the occupants. The company declined to change the agreement and said it expected purchasers to make payments promptly. No further payments of purchase price or taxes was made. October 10, 1889, the purchasers were advised that their contract had been canceled. December 26, 1892, Harker and Greene again wrote the company that, if it would return the amount paid and interest, they would surrender their contract. The company answered, December 30, 1892, that it had demanded payment of overdue instalments, which they neglected, and in due course the contract had been canceled. Since cancellation of the contract of purchase by the company, the parties claiming under said contract cannot be considered as purchasers entitled to benefits of the act of March 3, 1887, and the rejection by your office of the application for a confirmatory patent, based upon said contract, is affirmed.

On September 10, 1890, Amherst H. Wilder was a director in said railroad company, and a trustee for the bondholders in the mortgage of the railroad lands. On that day the company conveyed the lands here in question to Gotlieb Schwartz, for said Wilder, and September 26, 1890, said Schwartz conveyed them to said Wilder. The company sold the land to Wilder, and at his request so conveyed because he did not wish the deed, which he as trustee had to execute, to run to himself.

He paid for the land in land grant bonds. This purchase was made nearly one year after the institution of the suit by the United States to recover the title to the land, and Wilder, as trustee, was party defendant to that suit and knew all about it.

Under the facts and circumstances shown in this case, Wilder could not have purchased "in good faith" within the meaning of the act of March 3, 1887, or "in actual ignorance of any defect in the railroad company's title," or "in reliance upon the action of the government in the apparent transfer of title."

In *United States v. Winona, etc.*, Railroad (165 U. S., 480), the court construed the words "bona fide" and "good faith" as applied to purchasers of said lands, and said:

It matters not what constructive notice may be chargeable to such a purchaser, if, in actual ignorance of any defect in the railroad company's title, and in reliance upon the action of the government in the apparent transfer of title by certification or patent, he had made an honest purchase of the land.

Mr. Wilder does not come within this modified definition of "bona fide" or "good faith" purchaser, and no rights can be successfully maintained under the act of March 3, 1887, predicated upon said purchase. The action of your office in denying the application for a confirmatory patent to the heirs of Wilder is therefore affirmed.

Gustafson was in possession of the tract he now claims and had been for six years residing there, cultivating and improving the same, and Egdorf was in possession of, residing on, and improving the tract claimed by him at the date of the application by Chalstrom, who had never settled upon or improved the land.

Your office decision, in so far as it sustained the homestead applications of Gustafson and Egdorf and rejected the homestead application of Chalstrom, is also affirmed.

#### MINING CLAIM—RIGHTS ACQUIRED BY LOCATION.

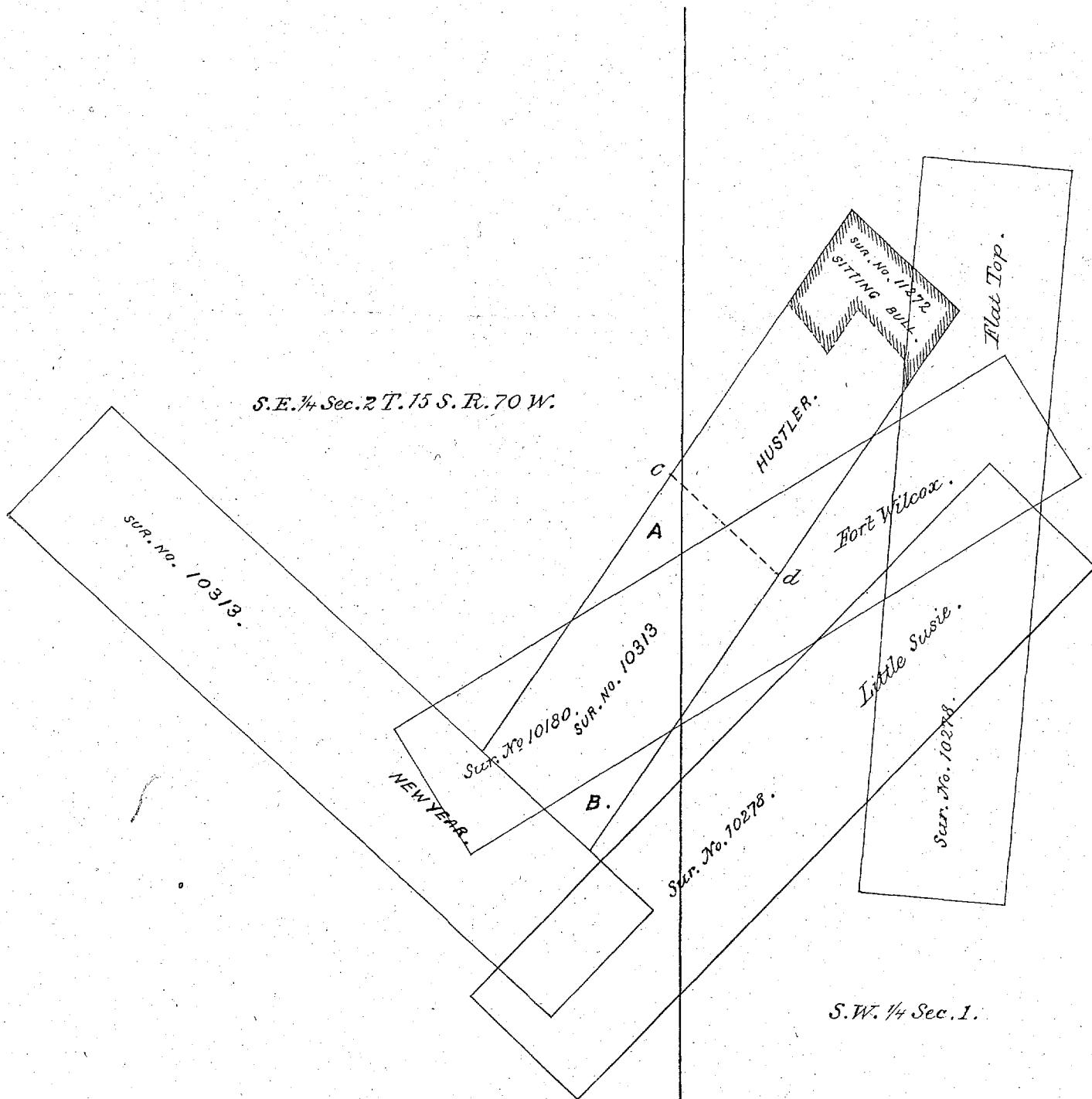
##### HUSTLER AND NEW YEAR LODE CLAIMS.

The location of a mining claim, as made upon the surface of the ground by the locator, determines the extent of his rights below the surface, and the end lines of the location, as established by him on the surface, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike, except in a case where it is developed that the location has been placed, not along, but across the course or strike of the vein, in which event the side lines of the location become the end lines, and the end lines the side lines of the claim.

Directions given for the modification of Rules 7 and 8 of the Mining Regulations, in so far as they are in conflict with the conclusions herein reached.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 18, 1900.* (A. B. P.)

February 3, 1898, H. W. Davis made mineral entry No. 1618, for the Hustler and New Year lode mining claims, survey No. 10313, Pueblo,



S.E. 1/4 Sec. 2 T. 15 S. R. 70 W.

S.W. 1/4 Sec. 1.

Scale 300 feet to an inch.

Div. N. G. L. O. Mch. 26. 1900. J. U.

Colorado, excluding therefrom certain conflicts with the Fort Wilcox lode claim, survey No. 10180, and the Sitting Bull lode claim, survey No. 11272.

As located and surveyed the southerly end line of the Hustler claim is laid upon the northerly side line of the New Year, thus forming the only point of junction between the two claims. The easterly side line of the Hustler, in its southwesterly course, extends entirely across, and some distance beyond, the Fort Wilcox claim. The westerly side line of the Hustler extends into, but not entirely across the Fort Wilcox. There is thus embraced in the Hustler location, at its southeasterly corner, a small triangular piece of ground adjoining the southerly side line of the Fort Wilcox, and the northerly side line of the New Year (tract B on the accompanying diagram), and not embraced in any other claim.

July 1, 1898, your office required an amended survey to be made in order to more specifically describe the exclusions from the entry, and also for the purpose of establishing a new southerly end line of the Hustler claim at the point where the assumed lode line of that claim, in its southwesterly course, intersects the northerly side line of the Fort Wilcox claim (dotted line C and D on said diagram), whose location antedated that of the Hustler. The amended survey was accordingly made, and as one of the results thereof the Hustler and New Year claims were rendered non-contiguous. December 8, 1898; your office directed that the mineral entryman be allowed sixty days from notice within which to show cause why his entry should not be canceled as to the Hustler claim because of such non-contiguity, and held that in default of such showing the entry would be canceled to the extent indicated without further notice.

February 21, 1899, the entryman, presumably assuming the action of your office, whereby his claims were rendered non-contiguous, to be correct, filed his written consent to the cancellation of his entry as to the Hustler claim, and on March 15, 1899, the entry was accordingly canceled as to that claim, and approved for patent as to the New Year claim. Patent for the New Year claim was thereupon issued April 4, 1899. Subsequently, however, resident counsel for the applicant for patent filed a petition asking that your office reconsider and review its action requiring the establishment of a new southerly end line for the Hustler claim, contending, in substance and effect, that such action was erroneous, and that the entry of the Hustler claim as originally allowed should be reinstated and passed to patent under the application and former proceedings had thereon.

This petition was denied by your office, and the applicant for patent thereupon appealed to the Department.

In addition to rendering the Hustler and New Year claims non-contiguous, as stated, and therefore not subject to application and entry as adjoining claims held in common, the effect of the action of

your office is to deny the right of the applicant for patent, to two small triangular parcels of ground, represented on the accompanying diagram as tracts A and B, which were embraced in the Hustler claim as originally located, surveyed, and applied for. The appellant contends that both these tracts were lawfully included in the location of the Hustler claim, and that, having included them in his application for patent, proceedings thereon having in all respects been regular and without adverse claim, he is entitled to entry and patent embracing them as a part of the Hustler claim. As has been shown, they were embraced in the entry as originally allowed, and the question presented is, whether the action of your office requiring the establishment of a new southerly end line for the Hustler claim, at the point and in the manner stated, thus excluding from said claim the two small triangular tracts aforesaid, and thereby rendering the New Year and Hustler claims non-contiguous, and for that reason not subject to entry and patent as adjoining claims held in common, was legal and proper. That action is based upon paragraph 7 of the mining regulations, which is as follows:

The rights granted to locators under section 2322, Revised Statutes, are restricted to such locations on veins, lodes, or ledges as may be "situated on the *public domain*." In applications for lode claims where the survey conflicts with the survey or location lines of a prior valid lode claim and the ground within the conflicting surveys is excluded, the applicant not only has no right to the excluded ground, but he has no right to that portion of any vein or lode the top or apex of which lies within such excluded ground, unless his location was prior to May 10, 1872. His right to the lode claimed terminates where the lode, in its onward course or strike, intersects the exterior boundary of such excluded ground and passes within it. The end line of his survey should not, therefore, be established beyond such intersection.

The case of *Del Monte Mining Co. v. Last Chance Mining Co.* (171 U. S., 55), was one where a number of questions were certified by the lower court to the supreme court for decision. One of the questions certified was—

May any of the lines of a junior lode location be laid within, upon or across the surface of a valid senior location for the purpose of defining for or securing to such junior location under ground or extra-lateral rights not in conflict with any rights of the senior location?

The supreme court, after referring specifically to and quoting from the earlier cases of *Belk v. Meagher* (104 U. S., 279) and *Gwillim v. Donnellan* (115 U. S., 45), said:

The question presented in each of those cases was whether a second location is effectual to appropriate territory covered by a prior substituting and valid location, and it was held it is not. Of the correctness of those decisions there can be no doubt. A valid location appropriates the surface, and the rights given by such location cannot, so long as it remains in force, be disturbed by any acts of third parties. Whatever rights on or beneath the surface passed to the first locator can in no manner be diminished or affected by a subsequent location. But that is not the question here presented. Indeed, the form in which it is put excludes any impairment or disturbance of the substantial rights of the prior locator. The question is whether the lines of a junior lode location may be laid upon a valid senior location for the purpose of defin-

ing or securing "underground or extra-lateral rights not in conflict with any rights of the senior location." In other words, in order to comply with the statute, which requires that the end lines of a claim shall be parallel, and in order to secure all the unoccupied surface to which it is entitled, with all the underground rights which attach to possession and ownership of the surface, may a junior locator place an end line within the limits of a prior location?

And after an elaborate discussion of the mining statutes, in so far as they relate to the subject, and an exhaustive review of the authorities, and of the practice of the land department, bearing directly or indirectly upon the same, the court held that the question should be answered in the affirmative, and it was so answered. In its opinion (pages 83 and 84) the court said:

A party who is in actual possession of a valid location may maintain that possession and exclude every one from trespassing thereon, and no one is at liberty to forcibly disturb his possession or enter upon the premises. At the same time the fact is also to be recognized that these locations are generally made upon lands open, unenclosed and not subject to any full actual occupation, where the limits of possessory rights are vague and uncertain and where the validity of apparent locations is unsettled and doubtful. Under those circumstances it is not strange—on the contrary it is something to be expected and, as we have seen, is a common experience—that conflicting locations are made, one overlapping another, and sometimes the overlap repeated by many different locations. And while in the adjustment of those conflicts the rights of the first locator to the surface within his location, as well as to veins beneath his surface, must be secured and confirmed, why should a subsequent location be held absolutely void for all purposes and wholly ignored? Recognizing it so far as it establishes the fact that the second locator has made a claim, and in making that claim has located parallel end lines, deprives the first locator of nothing. Certainly, if the rights of the prior locator are not infringed upon, who is prejudiced by awarding to the second locator all the benefits which the statute gives to the making of a claim? To say that the subsequent locator must—when it appears that his lines are to any extent upon territory covered by a prior valid location—go through the form of making a relocation simply works delay and may prevent him, as we have seen, from obtaining an amount of surface to which he is entitled, unless he abandons the underground and extra-lateral rights which are secured only by parallel end lines.

In its discussion of another branch of the case, likewise pertinent to the question here presented, the court, referring to the cases of *Argentine Mining Company v. Terrible Mining Company* (122 U. S., 478) and *King v. Amy, etc., Mining Company* (152 U. S., 222), said, among other things, that one of the principles settled by those cases was—

that the lines of a location as made by the locator are the only lines that will be recognized; that the courts have no power to establish new lines or make a new location.

And then passing to an examination of the provisions of the statute in their relation to the subject, it was further said:

Premising that the discoverer of a vein makes the location, that he is entitled to make a location not exceeding 1500 feet in length along the course of such vein and not exceeding "three hundred feet on each side of the middle of the vein at the surface," that a location thus made discloses end and side lines, that he is required to make the end lines parallel, that by such parallel end lines he places limits not

merely to the surface area but limits beyond which below the surface he cannot go on the course of the vein, that it must be assumed that he will take all the length of the vein that he can, we find from section 2322 that he is entitled to "all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically." Every vein whose apex is within the vertical limits of his surface lines passes to him by virtue of his location. He is not limited to only those veins which extend from one end line to another, or from one side line to another, or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines. Not only is he entitled to all veins whose apexes are within such limits, but he is entitled to them throughout their entire depth, "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." In other words, given a vein whose apex is within his surface limits he can pursue that vein as far as he pleases in its downward course outside the vertical side lines. But he can pursue the vein in its depth only outside the vertical side lines of his location, for the statute provides that the "right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between 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.

This places a limit on the length of the vein beyond which he may not go, but it does not say that he shall not go outside the vertical side lines unless the vein in its course reaches the vertical planes of the end lines. Nowhere is it said that he must have a vein which either on or below the surface extends from end line to end line in order to pursue that vein in its dip outside the vertical side line.

The conclusions of the court were finally summed up in the following propositions:

First, the location as made on the surface by the locator determines the extent of rights below the surface. Second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. Third, every vein "the top or apex of which lies inside of such surface lines extended downward vertically" becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor. Fourth, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed not along but across the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines, and this upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location.

In the case under consideration the Hustler claim as located, overlaps, and one of its side lines entirely crosses, the prior apparently valid Fort Wilcox location, as shown in the accompanying diagram. As thus located the Hustler was surveyed and included in the application for patent along with the adjoining New Year claim. Was the Hustler claim legally and properly located, notwithstanding the said conflict?

In view of the considerations stated and the principles established by the supreme court in the Del Monte-Last Chance case, and in the

earlier decisions referred to by the court, the Department is of the opinion that this question must be answered in the affirmative.

Recognizing the Hustler location then, as in all respects valid, subject only to existing superior rights under any prior location in conflict therewith, what are the rights of the applicant for patent in this case with respect to the Hustler claim?

Assuming that the course of the Hustler lode follows the center line of the location, the applicant for patent, as the owner of the Hustler claim, is entitled to the lode, in so far as it concerns the present controversy, throughout its entire depth, etc., up to the point where, in its onward course or strike, it intersects the northwesterly side line of the prior Fort Wilcox location and passes within it. This is not all, however. If it were, the action of your office requiring the establishment of a new southerly end line of the Hustler claim at the point hereinbefore indicated, would probably work no great injury to the Hustler owner. But in addition to what may be properly termed the Hustler lode, as located, the owner of that claim, by virtue of section 2322 of the Revised Statutes, is entitled to "the exclusive right of possession and enjoyment of all the surface included within the lines" of the location, except the parts within the excluded conflicts as shown, "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 location.

It is not that he has been deprived of any right with respect to what may be termed the Hustler lode that the appellant complains, but that by the action of your office, he has been deprived of his right under the statute to the exclusive possession and enjoyment of the surface area of said tracts A and B, and of the veins, lodes, or ledges the tops or apexes of which may lie within the lines thereof extended downward vertically, and within the end lines of the Hustler location as originally surveyed and marked on the ground. In other words, his contention is that the surface, and underground or extra-lateral rights, secured to him under the law by virtue of his location of the Hustler lode, have been denied him by your office to the extent of the area included in said tracts A and B.

The Department is of the opinion that this contention, though somewhat at variance with the existing practice, is in accord with the principles established by the supreme court in the Del Monte-Last Chance case, and that, in the light of those principles, the action of your office cannot be sustained.

Rules 7 and 8 of the mining regulations were first adopted substantially as they now exist, by circular of December 4, 1884 (3 L. D., 540-1). That circular was referred to by the court in the Del Monte-Last Chance case (page 82) as having slightly qualified the previously

existing instructions on the subject, and as being to that extent out of harmony with the court's views. The patents involved in that case, though issued subsequently to said circular, were in accord with the previously existing practice, to which the court referred with approval. Each patent gave the entire boundaries of the original location, and excepted therefrom those portions included within the prior valid locations, so that on the face of the patent appeared the original survey of the location with the parallel end lines, the territory granted, and the territory excluded (page 80).

This was upon the principle that the location, as made on the surface by the locator himself, determines the extent of his rights below the surface, and that the end lines as he established them on the surface, and not as they may be established by the land department for him, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike, except in a case where it is developed that the location has been placed not along but across the course or strike of the vein, in which event the side lines become the end lines, and the end lines become the side lines of the claim.

Applying this principle to the facts of the present case, it is clear that the action of your office, if sustained, would deprive the applicant for patent of surface, and underground or extra-lateral rights, with respect to said tracts A and B, to which he is entitled under the law by virtue of his location of the Hustler lode. Assuming that he has complied with the law in other respects, he is entitled to entry and patent for the Hustler claim as located, surveyed, and applied for, excepting therefrom the conflict with the prior Fort Wilcox location and the conflict with the Sitting Bull claim as excluded by the application.

The decision of your office is therefore reversed. The applicant's entry will be reinstated as to the Hustler claim, and if it is found that the law in other respects has been complied with, the same will be passed to patent in accordance with the original survey of that claim. The amended survey, made in answer to the requirement of your office, will be disregarded.

In so far as Rules 7 and 8 of the mining regulations are in conflict with the views herein expressed they will no longer be followed, and you are requested to submit, for the approval of the Department, a modification of said rules 7 and 8 to conform to the principles established by the supreme court in the Del Monte-Last Chance case, and as herein set forth and followed.

## RAILROAD GRANT—CLASSIFICATION OF LANDS—MINING CLAIM.

LUTHYE ET AL *v.* NORTHERN PACIFIC R. R. CO.

The classification of land as mineral, by the board of commissioners, acting under the provisions of the act of February 26, 1895, and the final approval of such classification by the Secretary of the Interior, is in effect a cancellation of a previous selection of said land by the Northern Pacific company; and thereafter the said company, or any one claiming right or title through said company, cannot be heard to question the character of the land, except upon the ground of fraud in the matter of such classification.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 18, 1900.* (C. J. W.)

November 12, 1896, Hans and Nick Luthye filed application for patent No. 3780 for the Luther Lodge lode mining claim, Helena, Montana, situated in lot 4 of Sec. 25, T. 7 N., R. 14 W. Notice of said application was duly published and posted for the period required by law, during which time no adverse claim was filed. It appears that said lot 4 is within the indemnity limits of the grant to the Northern Pacific Railroad Company, and was selected by said company, under its grant, May 6, 1893, in list No. 220. March 5, 1897, the mineral claimants applied to make entry of said mining claim, but the local officers refused to allow entry to be made because of conflict with the aforesaid selection by the railroad company. No appeal was taken, but on May 21, 1897, said mineral applicants filed a petition asking for a hearing, and the same was forwarded to your office with the papers in the case, accompanied by the recommendation of the local officers that a hearing be ordered. The petition alleges that the land is mineral in character and has long been known as mineral land, and is surrounded by mineral entries.

June 3, 1897, your office directed the local officers to order a hearing and to give notice of the same to the mineral claimants and to the proper representative of the Northern Pacific Railroad Company. The hearing was had, and resulted in a finding by the local officers to the effect that the land is not mineral in character, and a recommendation that the mineral application be rejected. June 14, 1898, the mineral applicants filed a motion for rehearing on the ground of new developments and discoveries of mineral bearing veins upon said claim, and a rehearing was accordingly allowed and had.

April 4, 1899, the register and receiver rendered disagreeing opinions, the receiver finding the land to be mineral in character, and the register finding it to be non-mineral in character. Both parties appealed, and on June 30, 1899, your office reversed the decision of the receiver, and affirmed that of the register. From this decision the mineral claimants have appealed to the Department.

The railroad company has filed in the Department a motion to dis-

miss said appeal. For reasons which will hereafter appear, it is believed that this motion need not be considered and disposed of as a preliminary matter.

The testimony taken at the two hearings is voluminous, but will not now be entered upon. A record fact of which the Department must take notice, which was not referred to by the local officers nor by your office, is of such significance as to require the remanding of the case to your office for consideration anew as hereinafter directed.

It appears that said lot 4 was classified as mineral land by the board of commissioners appointed under the provisions of the act of February 26, 1895 (28 Stat., 683), for the Helena land district, Montana. It is included in the E.  $\frac{1}{2}$  of the E.  $\frac{1}{2}$  of section 25, and was first returned by said commissioners in their report for the month of January, 1898, in which the unpatented portion of the E.  $\frac{1}{2}$  of the E.  $\frac{1}{2}$  of section 25 was classified as mineral. The mineral claim in question was then a part of lot 4, as described in the plats of survey on file in the local office. The report for the month of January appears to have been returned to said commissioners for a more particular designation as to what lands in the E.  $\frac{1}{2}$  of the E.  $\frac{1}{2}$  of section 25 were classified as mineral, and said lot 4 was again returned in the report for the month of August, 1898, as mineral land, and the classification was advertised as required by law and no protest was filed. The report of said classification was approved by the Secretary of the Interior April 5, 1899. Since said approval, the official plat of survey of said lot 4 was changed by order of your office, indicating thereon the Luther Lodge lode mining claim, survey No. 5008, and dividing said lot 4 into new lots 4, 11, and 12. This change in the description of the land is without effect upon the action of said board of commissioners and of the Department in classifying original lot 4 as mineral land.

The first section of the act of February 26, 1895, aforesaid, enacts—

That the Secretary of the Interior be, and is hereby, authorized and directed, as speedily as practicable, to cause all lands within the land districts hereinafter named in the State of Montana and Idaho within the land grant and indemnity land grant limits of the Northern Pacific Railroad Company, as defined by an act of Congress entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," approved July second, eighteen hundred and sixty-four, and acts supplemental to and amendatory thereof, to be examined and classified by commissioners to be appointed as hereinafter provided, with special reference to the mineral or non-mineral character of such lands, and 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 in said land districts which upon examination shall be classified as provided in this act as mineral lands.

Section 5 provides the method whereby, and specifies the time within which, the railroad company may object to the classification as mineral of any particular land within the grant to said company, and be heard before the classification is approved.

## Section 6 provides—

That as to the lands against the classification whereof no protest shall have been filed as hereinbefore provided, the classification, when approved by the Secretary of the Interior, shall be considered final, except in case of fraud, and all plats and records of the local and general land offices shall be made to conform to such classification.

It is apparent that the chief purpose of the act was to determine speedily and finally what lands, within the limits of the grant to the Northern Pacific Railroad Company, in certain land districts in the States of Montana and Idaho, were excepted from the operations of the grant by reason of their mineral character. A selection or filing by the railroad company, before or after the passage of the act, would make no difference, since all selections and filings by or for the railroad company, upon lands classified under said act as mineral lands, were to be canceled. The classification of said lot 4 as mineral land by the board of commissioners, and the final approval of such classification by the Secretary of the Interior, was, in effect, a cancellation of the selection of said lot by the Northern Pacific Railroad Company, and thereafter neither said railroad company nor anyone claiming title or right through said company could be heard to question the mineral character of the land, except upon the ground of fraud, which is neither alleged nor shown in this case. *Lamb et al. v. Northern Pacific Railroad Company* (29 L. D., 102). It was, therefore, error on the part of your office to undertake to determine the character of the land as between the mineral claimants and the Northern Pacific Railroad Company, when the mineral character of the land had been previously determined between the United States and said company.

Your office decision of June 30, 1899, is accordingly vacated, and the record is remanded for proceedings to be had adjudicating the case as between the United States and the mineral applicants in accordance with the law applicable to such cases.

## RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

AMERICUS *v.* HALL.

There is no right of purchase under section 5, act of March 3, 1887, on the part of one who has assigned to the railroad company the contract of purchase under which he claims, and surrendered possession thereof in accordance with such assignment.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) April 19, 1900. (A. S. T.)

On September 6, 1898, Virgil Americus applied to make homestead entry for the NE.  $\frac{1}{4}$  of Sec. 9, T. 4 N., R. 17 W., S. B. M., Los Angeles, California, land district, and on the same day John Hall applied to

purchase said tract under the provisions of the act of Congress approved March 3, 1887 (24 Stat., 556). On October 14, 1898, Americus was allowed to make said entry as No. 8751.

The land in question is a portion of the lands lying within the primary limits of the grant formerly made to the Atlantic and Pacific Railroad Company and was declared forfeited by the act of July 6, 1886 (24 Stat., 123), and is also within the limits of the grant made by the act of March 3, 1871, to the Southern Pacific Railroad Company to aid in the construction of its branch line. Within the conflict between the two grants, the Atlantic and Pacific was the superior grant and upon its forfeiture the title was restored to the United States free from any claim on account of the Southern Pacific Railroad grant (168 U. S. 1). These lands were opened to entry September 6, 1898, and both said applications were made on that day. Americus alleged in his application that he had resided on the land continuously since January 21, 1893.

Hall, in his application, alleged that the land was sold by the Southern Pacific Railroad Company to Alice A. Hall on March 28, 1890, and that he claimed it by mesne conveyances; that at the date of said sale it was not in the *bona fide* occupancy of adverse claimant under the preemption or homestead laws, and that it had not been settled upon prior or subsequent to the first day of December, 1882, by any person or persons claiming the right to enter the same under the settlement laws, except Americus, who went on the same in 1891 or 1892 "as a jumper of claimant" and that he (Hall) and the party from whom he claimed were *bona fide* purchasers of the land from the Southern Pacific Railroad Company. Pursuant to notice Americus submitted final proof on February 16, 1899, when Hall filed his protest alleging that he had purchased said land from the Southern Pacific Railroad Company and had cultivated and improved it prior to any settlement thereon by Americus, and that Americus had not settled on it in good faith.

On February 17, 1899, Hall submitted proof of his right to purchase the land and Americus protested on the ground that Hall had not purchased the land from said railroad company in good faith, and upon the ground that he (Americus) had an existing homestead entry on the land.

By agreement of parties the case was set for hearing on February 21, 1899, when both parties appeared in person and by their attorneys and each testified in his own behalf, and the case was thereupon closed; but before a decision was rendered by the register and receiver, Hall filed the affidavits of himself and Leonard Merrill, copies of which had been served on Americus. These affidavits appear to have been filed with a view to their consideration as evidence in the case.

On the hearing Americus testified that he settled on the land on January 21, 1893; that he then purchased a house there from one

Rehart, at the price of \$20; that Rehart probably told him that Mr. Hall had purchased the land from the railroad company; and that he (Americus) had not paid for the house.

Hall testified that his wife, Alice A. Hall, purchased the land from the railroad company; that they were divorced in April, 1898, and that she subsequently assigned to him the deed she held from the railroad company; that at the time of said assignment he did not know that Americus was on the land, and that he (Hall) had made extensive improvements on the land. In his said affidavit, filed after the hearing and prior to the decision by the register and receiver, Hall alleges that the said Alice A. Hall, was, at the time of said purchase from the railroad company, a citizen of the United States, being native born; that said purchase was made by him in his wife's name; that he paid to said railroad company all that was paid on said purchase, being \$204.80, of his own money; that after their divorce, in the settlement of their property interests, she assigned her apparent interest in said contract to him, and that he subsequently assigned it to the railroad company in order to get back from it the \$204.80 he had paid for the land, so that he might use it in the purchase of the land from the government, he having no other means of purchasing the land, and that he was advised by his attorneys that he could make said assignment, receive said money from the railroad company, and then prove up and pay for the land the same as though he still had the contract in his possession.

Leonard Merrill, in his said affidavit, states that about August 1, 1898, Hall brought said contract to him and employed him to collect from the railroad company the money he had paid on said contract, and then stated that he wanted to get the money with which to purchase the land from the government; that he (Merrill) corresponded with the railroad company about refunding the money and was informed that it would pay back the money if Hall would assign the contract to it, and that he advised Hall that it was necessary for him to make the assignment in order to get the money, and that he could prove up on the land after making the assignment.

What purports to be a copy of said contract is on file in this case, and it provides that upon failure of the railroad company to perfect title to the land, so as to enable it to convey the land to Mrs. Hall, it would refund the \$204.80 without interest. The assignment of Alice A. Hall to John Hall is endorsed on said contract and dated July 29, 1898, and that of John Hall to the railroad company, dated August 22, 1898, is also endorsed thereon, and on the margin is written the following:

This contract, No. 10,264, canceled August 25, 1898, and all the money received thereon by the S. P. R. R. Co. returned to John Hall, the company's title to the land having failed; for full information concerning this transaction see the papers attached hereto.

By section 5 of the act of March 3, 1887 (24 Stat., 556), it is provided:

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

The assignment of Hall to the railroad company is as follows:

I, John Hall, to whom the within contract No. 10264 is sold, assigned and transferred, for and in consideration of the sum of two hundred and four 80/100, \$204.80, to me in hand paid, do hereby sell, assign and transfer all my right, title, interest and claim in and to the within contract, unto the Southern Pacific Railroad company, its successors and assigns forever.

Witness my hand and seal at Los Angeles, California, this 22 day of August, 1898.

JOHN HALL.

Without entering upon a discussion of the question as to what, if any, rights Hall acquired by said purchase or by said assignment, it is sufficient to say that by the assignment to the company he transferred *all* his interests in said contract to the railroad company, and divested himself of whatever rights he may previously have had under the contract. The statute contemplates that the party applying to purchase the land from the government, shall be the owner, by purchase from the railroad company, or by assignment, or inheritance from one who purchased from the railroad company, of some interest in the land, and it cannot be said that Hall, after executing said assignment and surrendering possession of said contract to the railroad company, was the owner of any interest either in the land or in said contract.

Your said decision is therefore affirmed, and said application of Hall is rejected.

#### INDIAN LANDS—ALLOTMENT—RELINQUISHMENT.

##### STEPHEN GHEEN.

The relinquishment of an Indian allotment is not effective until approved by the Secretary of the Interior; and, pending departmental action on such relinquishment, no intervening claim to the land should be allowed.

Secretary Hitchcock to the Commissioner of the General Land Office,  
(W. V. D.) April 19, 1900. (W. C. P.)

January 29, 1900, this Department rendered a decision (unreported) affirming your office decision rejecting the application of Stephen Gheen to make soldier's additional homestead entry for the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  and the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$ , Sec. 13, T. 66 N., R. 19 W., 4th p. m., Duluth, Minnesota, land district, because of conflict with Indian allot-

ment No. 29 to Nancy Gheen, and the applicant has filed a motion for review of said departmental decision upon the ground that it was rendered upon an incomplete record.

October 2, 1888, Nancy Gheen made application for an Indian allotment of certain unsurveyed land which was allowed. When the land was surveyed, the allotment was, May 3, 1893, adjusted to conform to such survey to include the lands in question December 23, 1898, she filed in the local office a statement under oath in which she said—

That when said allotment was made this deponent fully believed that she was entitled to said land under the act mentioned, and that she had then fully complied with the requirements of said act. That she is now informed and believes that she has no rights under said act.

I therefore relinquish to the United States all my right, title and interest in and to said land and to each and every part of the same forever.

In respect to this paper, the register said:

Rejected January 13, 1899, because claimant's right is Indian allotment No. 29 and the same is not offered as an application to relinquish. Indian allotments can not be relinquished at this office except by order of the Commissioner of the General Land Office.

The allottee appealed from this action of the register. February 16, 1899, the local officers transmitted an affidavit of the allottee, dated February 9, in which, after stating that she applied for an allotment of said land under the act of February 8, 1887, she said—

That when she made said allotment, she having Indian blood in her, believed that she was entitled to said land. That she is now informed and believes that she, being the daughter of a white man, has no right under said act. That her father was a white man and she is a white woman. That she also attempted to enter said land under act of August 3rd 1878, timber and stone. Also that she has attempted to relinquish said land at two different times. That she has not received money or other valuable consideration as an inducement to relinquish said land, but has a good and sufficient reason for so doing.

That she hereby relinquishes to the United States all her right, title and interest in and to said land by reason of any or all of said acts.

Your office considered her appeal and in a decision of April 1, 1899, after reciting that the allotment application was approved June 28, 1892, and afterwards suspended for investigation, and that a special agent had reported that Nancy Gheen is a half-breed, that she lived on the land for two years but abandoned it in 1892 to live on other land, that it is valuable for timber, that she had filed a sworn statement for it under the timber land law and that her improvements are valued at \$45.00, it is said:

As this office has no authority to accept the relinquishment of an Indian allotment, your action in refusing the same was correct and is approved. Inasmuch, however, as a statement under oath, is now filed by the party, from which it appears that she is the daughter of a white man and so not competent to receive an allotment, it is considered that such acknowledgment of illegality may be accepted as conclusive and the allotment canceled. Such action is hereby taken.

There was no appeal from this decision.

January 13, 1899, Stephen Gheen filed his application to make entry for said land under section 2306, Revised Statutes. The local officers rejected his application "because of conflict with Indian allotment No. 29 in favor of Nancy Gheen, the same being intact on the records of this office." The applicant appealed to your office claiming that his application should have been allowed "the segregation of the land applied for having been removed by the relinquishment of the previously subsisting Indian allotment." Your office by decision of May 10, 1899, affirmed the action of the local office rejecting Gheen's application and upon appeal that decision was affirmed by the departmental decision of which a review is now asked.

The fact that the relinquishment of the Indian allottee was not among the papers transmitted with the appeal was referred to in said decision, and it was said:

Its omission, however, is immaterial because an Indian allottee, without the approval of this Department on a proper application, can not relinquish or convey the allotted lands.

It is insisted that if said relinquishment with the affidavits of the allottee relating to her allotment and relinquishment, together with the record of the action taken thereon, had been before the Department, a different conclusion would have been reached. The papers and record referred to have been examined and the facts are found to be as hereinbefore set forth.

In the argument it is asserted that your office allowed a contest to be brought against this allotment and has taken the same course as to other allotments, and that this course of bringing claims of this character within the operation of the act of May 14, 1880 (21 Stat., 140), in the matter of contests operated also to bring them within the provisions of that act as to relinquishment, and that at the time of this relinquishment a rule of action had been adopted that justified the allottee and this applicant in proceeding upon the belief that the filing of the relinquishment at the local office operated to relieve the land from segregation, and thus to subject it to appropriation by the first legal applicant. This contention can not be sustained. In no case, and at no time, has it been held that the relinquishment of an Indian allotment has the effect of releasing the land immediately upon its filing in the local office. The rule has always been that such relinquishments have no effect until approved by the Secretary of the Interior.

It is also insisted that even though the local officers had no authority to act upon said relinquishment yet it should have been accepted when shown to have been made for good reasons, and given effect as of the time of its presentation at the local office. The case of *Dickie v. Kennedy* (27 L. D., 305), is cited in support of this contention. There an application to make homestead entry was presented with a relinquishment of a Crow Indian allotment, and the local officers permitted the entry to be made. The relinquishment was afterwards

approved by the Secretary of the Interior and in a contest between two claimants for the land subsequently coming before this Department that entry was, under the circumstances, allowed to stand, although irregularly allowed. This decision does not sustain the contention of the applicant here, but, on the contrary, recognizes the rule which he is attacking.

In this case the Indian allotment segregated the land from the public domain and served to prevent any other disposition of it. The fact that the allotment should not have been allowed was not disclosed upon the face of the record but required proof outside that record to establish it. The allotment was therefore *prima facie* valid and was a bar to the allowance by the local officers of the filing of any other claim for the land. Furthermore, this allotment with others had been suspended pending an investigation as to its legality, and this alone was sufficient to prevent the local officers from taking any action relative thereto or to the land covered by it. They had no authority to allow Gheen to make entry for said land in pursuance of his application. The rule that relinquishments of Indian allotments shall not become effective until approved by the Secretary of the Interior is a wise one for the protection of the allottees and is too well established to require any discussion. There seems to be no sufficient reason for holding that a different rule should apply to a relinquishment made because the allottee is not an Indian. The question as to whether one is an Indian within the purview of the allotment laws is not always easily determined. The statement in a relinquishment to the effect that the allottee is not an Indian should not be accepted without examination into the facts, and no claim should be allowed to attach to the land pending such examination. It is the established policy of this Department to prevent as far as possible controversies between Indian allottees and other claimants involving the right of such Indian to any particular tract of land or his qualifications to have an allotment. An effective enforcement of this policy requires that full control of the land in an allotment and of all questions relating thereto shall be retained until the allotment is finally canceled. There is no good reason for making cases like the one under consideration exceptions to this rule.

For the reasons given herein the conclusion reached by the former departmental decision is adhered to and the motion for review is denied.

## ALASKAN LANDS—ROADWAY RESERVATION—TRAMWAY.

GEORGE N. WRIGHT.

The Department is without authority to approve an application for permission to occupy a portion of the roadway reservation, along the shore line of Alaska, for the purpose of a passage over and upon said reservation of an aerial tramway, and the erection thereon of warehouse buildings to be used in connection with said tramway.

*Secretary Hitchcock to the Commissioner of the General Land Office, April*  
(W. V. D.) 19, 1900. (A. B. P.)

The Department is in receipt of your office communication of February 17, 1900, with accompanying papers, submitting for departmental action the application of George N. Wright for permission to use so much of the roadway reservation of sixty feet in width parallel to the shore line of Behring Sea, at the city of Nome, in the District of Alaska, set apart and reserved for the use of the public as a highway under the provisions of section ten of the act of May 14, 1898 (30 Stat., 409), as may be necessary for the passage over and upon said reservation of a proposed aerial tramway, and for the erection thereon of certain buildings for storage and warehouse purposes, to be used in connection with said tramway.

It is set forth in said application, in substance and effect, that the proposed tramway is to extend from a point five thousand three hundred feet at sea, where a wharf is to be constructed, to a convenient landing place on the shore at said city of Nome; that the purpose of said tramway, and of the buildings for storage and warehouse purposes to be used in connection therewith, is to provide a safe means for the landing of freight and passengers from seagoing vessels which touch at that point; and that the only ground suitable for the location of the storage and warehouse buildings, and for the running of the tramway on the shore in order to reach said buildings, is the said strip of land sixty feet in width parallel to the shore line, reserved as aforesaid, for the use of the public as a highway.

Accompanying the application is a plat of the city of Anvil—now the city of Nome—based upon a survey made in August 1899, on which the roadway reservation, under the statute, in front of the city along the shore of the sea, is represented at one point as the "Government Roadway," and at another as the "Water Front Reserve," and it is stated that said reservation, as thus represented, is actually being enforced by the military authorities at said city.

Your said communication, after stating, among other things, that the information before your office indicates an actual occupancy of the land embraced in said survey and plat, for townsite purposes; that the same has been surveyed with the view to making townsite entry thereof; that settlement rights have been acquired by the occupants

which will become vested if such entry should be made; and that said roadway reservation, in the event of such townsite entry, would thereby become dedicated to the public use the same as other streets of the town; recommends that the application be not allowed.

The only law authorizing the Secretary of the Interior to grant permits to individuals or corporations for the operation of public highways or business enterprises in the District of Alaska, is found in section six of the aforesaid act of May 14, 1898, which, among other things, provides:

That the Secretary of the Interior is hereby authorized to issue a permit, by instrument in writing, in conformity with and subject to the restrictions herein contained, unto any responsible person, company, or corporation, for a right of way over the public domain in said District, not to exceed one hundred feet in width, and ground for station and other necessary purposes, not to exceed five acres for each station for each five miles of road, to construct wagon roads and wire rope, serial, or other tramways, and the privilege of taking all necessary material from the public domain in said District for the construction of said wagon roads or tramways, together with the right, subject to supervision and at rates to be approved by said Secretary, to levy and collect toll or freight and passenger charges on passengers, animals, freight, or vehicles passing over the same for a period not exceeding twenty years.

In the case of Nome Transportation Company (29 L. D., 447), which involved an application for right of way for the construction of a tramway, somewhat similar to the application here in question, this section of the statute was considered in its relation to the aforesaid provision of section ten thereof, reserving "a roadway sixty feet in width parallel to the shore line, as near as practicable," along the navigable waters in the District of Alaska, "for the use of the public as a highway," and, referring to the departmental construction of the term "shore line" as meaning "high water line" (27 L. D., 248, 263-4), it was there held as follows:

In order, therefore, that this reservation of a highway for the benefit of the public may not be interfered with, it is necessary that the right of way in question should not, at any point, approach nearer the shore than the distance of sixty feet from the high water line thereof.

The present application relates only to lands within the distance of sixty feet from the shore line. While the correctness of the views expressed in the opinion referred to, as applicable to all cases of the disposal of the public lands abutting on navigable waters in said District, under the provisions of said act of May 14, 1898, is not seriously questioned by the applicant, it is contended that inasmuch as the lands upon which the city of Nome is situated are claimed under both the townsite and mining laws of the United States as extended to the District of Alaska by the acts of March 3, 1891 (26 Stat., 1095, 1099), and May 17, 1884 (23 Stat., 25, 26), respectively, and inasmuch as no reservation of a public highway, such as that here in question, is contained in either of said acts, the statute making said reservation should not be held applicable to the present case.

It is not necessary, nor would it be proper, to answer this contention at this time for the reason that the facts here presented do not call for a discussion of the question thus raised, or warrant the expression of any opinion thereon. There has as yet been no disposition by the land department, under either of the acts referred to, of any of the lands upon which the city of Nome is situated. You state that the lands appear to be claimed under the townsite laws, and that survey thereof has been made with the view to townsite entry, but it appears from your said communication that no application for such entry has as yet been filed, and there is nothing in this record to indicate that application has been made for any of said lands under the mining laws. The lands may never be disposed of under either the townsite or mining laws so far as anything shown by the present record is concerned. It will be time enough to determine whether the reservation here under consideration applies to lands disposed of under those laws, as extended to the District of Alaska, when a case is presented which involves that question. Until then it would not be proper to express any opinion in the matter.

In view of what has been said, the Department is without authority, under existing law and the facts presented, to grant the application of Mr. Wright, and your office recommendation that the same be not allowed, is approved.

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REPAYMENT—ACT OF JUNE 15, 1880.

J. B. HAGGIN.

Repayment of the purchase price paid on a cash entry made under the act of June 15, 1880, by one claiming the status of a transferee, must be denied, where such entry is canceled because the "instrument in writing," by which the alleged transfer was made, is not "*bona fide*."

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) April 20, 1900. (C. J. G.)

The Department has considered the appeal of J. B. Haggin from your office decision of October 20, 1899, denying his application for repayment of fees, commissions and purchase money paid by him on cash entries Nos. 3880 and 3881, respectively, for the N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 18, T. 28 S., R. 25 E., and the W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 20, T. 27 S., R. 25 E., Visalia land district, California.

November 15, 1875, soldiers' additional homestead entry No. 1574, final certificate No. 1399, January 11, 1882, under section 2306 of the Revised Statutes, was made in the name of Elisha Lee, for the tract embraced in cash entry No. 3880; and on the same day, to wit, November 15, 1875, soldiers' additional homestead entry No. 1629, final certificate No. 429, was made in the name of Philip A. Parker, for the tract

embraced in cash entry No. 3881. The additional entry made in the name of Lee was canceled October 14, 1885, because of the cancellation on March 30, 1882, of his original homestead entry; and that in the name of Parker was canceled October 10, 1885, because a prior additional homestead entry was made at Susanville, California, in October, 1875, in the same name and based on the same original homestead entry and military service, and because of the doubtful execution of the additional entry papers.

February 6, 1886, Haggin was allowed to make cash entries of the lands described, under section 2 of the act of June 15, 1880 (21 Stat., 237), which is as follows:

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

Haggin's claim of right to purchase as transferee under said section, is based on certain instruments of writing dated January 3, 1876, purporting to be deeds of conveyance for said lands executed by N. P. Chipman, as attorney-in-fact for Lee and Parker, to Haggin, the expressed consideration being \$100. Accompanying the papers also were other instruments in writing purporting to be powers of attorney, executed by Lee and Parker to said Chipman for the expressed consideration of \$100, empowering him to sell and convey any lands owned by them or which they might acquire under the provisions of section 2306 of the Revised Statutes.

It appearing that the name originally written in the deeds of conveyance as grantees had been erased and the name of Haggin inserted in lieu thereof, and no explanation being given for this alteration, your office held Haggin's cash entries for cancellation. He thereupon appealed to the Department, stating that he purchased these lands in good faith, relying upon the certificates issued in the name of Lee and Parker and believing their entries to be valid, but still offered no explanation of the alteration in their deeds of conveyance.

On January 16, 1888, in the case of Parker, and March 25, 1889, in the case of Lee, neither of which is reported, the Department affirmed the action of your office, holding that the alteration referred to was a manifest and material one, the burden thereby being upon the party claiming under the deeds to explain said alteration, and that in the absence of such explanation they were not "*bona fide* instruments in writing" within the meaning of the act of June 15, 1880; that in consequence Haggin was not an authorized transferee under section 2 of said act. His cash entries were ultimately canceled.

In his application for repayment, Haggin alleges, among other things, that in holding the additional entries of Lee and Parker for cancellation your office awarded him the alternative privilege of showing cause

why said entries should not be canceled, or of purchasing the tracts covered thereby under section 2 of the act of June 15, 1880; and that upon the cancellation of the additional entries he, through his agent, made said cash entries Nos. 3880 and 3881, and paid the required fees, commissions and purchase money.

Your office, in denying said application for repayment, refers to the case of J. B. Haggin (6 L. D., 457). That case involved the question of the right to purchase by Haggin, as transferee, under an altered instrument, as in this case, which was rejected for that reason; but in this case under consideration cash entries were actually made by him.

Under the act of June 16, 1880 (21 Stat., 287), the Secretary of the Interior is authorized to repay the fees, commissions and purchase money in cases where the entry is "canceled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed."

Under the construction of the act of June 15, 1880, in force at the time these cash entries were made, a transferee of a soldiers' certificate of additional right was permitted to purchase under said act upon showing his possession of said right "by *bona fide* instrument in writing." It is apparent from the circumstances of this case that Haggin's claim of right to purchase is not based on such an instrument.

The instruments purporting to be deeds of conveyance from Lee and Parker to Haggin, were apparently accepted by the local officers in the belief that they were *bona fide* instruments and therefore proper bases for the allowance of the cash entries applied for. It was not error for them to devolve upon him the risk incident to the subsequent discovery of the true character of said instruments. Upon a further examination by your office it was found that these instruments were not *bona fide* and said cash entries were accordingly held for cancellation. This decision was affirmed by the Department. No explanation of the want of good faith thus found in said conveyances has been made or attempted. This is a case, then, where the entries were wrongfully procured and not "erroneously allowed" within the meaning of the repayment act.

Your office decision denying repayment is accordingly affirmed.

## MINING CLAIM—BLANKET VEIN—LOCATION—ENTRY.

## HOMESTAKE MINING COMPANY.

In the case of a location on a horizontal or blanket vein, the apex of the lode is co-extensive with the distance between the side lines of the location, and every part or point of such apex within these limits is as much the middle of the vein, within the intent and meaning of section 2320 R. S., as any other part.

The mining laws contemplate that proceedings under an application for mineral patent should be prosecuted to completion within a reasonable period after the required publication, or after the termination of proceedings on adverse claims, if any are filed, and failure so to do is a waiver of rights secured under the application.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 20, 1900.* (W. A. E.)

September 10, 1879, the Giant and Old Abe Mining Company filed application for patent to the Palmetto lode mining claim, survey No. 147, in the Deadwood, now Rapid City, South Dakota, land district.

During the period of publication several adverse claims were filed and suits were duly instituted thereon. The last of these suits was finally settled October 18, 1886.

January 13, 1899, the Homestake Mining Company, the successor in interest of the Giant and Old Abe Mining Company, made entry upon the application of September 10, 1879, excluding all conflict with the patented claims: General Ellison, survey No. 224; Badger, survey No. 422; Pierce, survey No. 180; and Little Nettie, survey No. 201.

May 5, 1899, your office considered the entry, and held that the exclusions left only two small tracts widely separated; that there was no evidence of the discovery of mineral within the claimed limits nor any satisfactory showing as to the statutory expenditures or improvements for the benefit of the claim; and that the end lines of the claim are not parallel. The company was therefore allowed sixty days in which to furnish the necessary evidence in regard to discovery and improvements, and it was stated by your office that upon receipt of this evidence, if found to be satisfactory, an amended survey would be ordered to establish parallel end lines.

In compliance with the requirements of your office the claimant filed the affidavit of Thomas J. Grier, superintendent and agent of the Homestake Mining Company, to the effect that there is a general ore body containing gold in paying quantities extending over the entire length and breadth of the Palmetto claim as surveyed; that the Homestake Mining Company is now, and, for many years has been, extracting ore from the portion of the lode entered as well as the entire lode embraced in the original survey; and that more than \$10,000 worth of work and labor has been performed upon each of the two separate portions of the lode entered. This affidavit was corroborated by G. D. Foglesong and Horace S. Clark.

Upon consideration of this affidavit, together with the other papers in the case, it was held, by your office decision of June 14, 1899, that the nature of the expenditures referred to by affiant Grier does not appear; that the Palmetto claimant stood by in silence and permitted certain lode claims conflicting with the Palmetto to be entered as to such conflicts; that almost twenty years after the application for the Palmetto was filed the present claimant discovers that the two tracts now included in the Palmetto entry were not included in the other entries, and the dead Palmetto application is resurrected for the purpose of acquiring title to said tracts; that assuming that the apex of the lode upon which the discovery was originally made is parallel to the side lines of the survey and of equal distance from each, no portion of said lode or vein is within what now remains of said location; and that the discovery subsequently made upon each of the two tracts now entered can not be accepted, after this long period of rest, as validating the abandoned location, but should form the basis of a new location, survey, and application. The entry was accordingly held for cancellation.

From this action the claimant has appealed to the Department.

In support of the appeal there is filed an additional affidavit by Thomas J. Grier, in which he alleges that he is now, and has been since 1878, well acquainted with the tracts included in the Palmetto entry; that they are in the heart of the mineral bearing ore belt which the Homestake Mining Company has uninterruptedly worked day and night since 1878; that there has been expended \$10,000 in running tunnels leading to, and \$10,000 in extracting ore from, the two tracts in question; that at no time has it been the intention of the Homestake Company to abandon said tracts; and that actual developments upon the ground have shown that the apex of the Palmetto lode as originally located lies within the tracts now sought to be patented, as well as throughout the entire length and breadth of the original location. This affidavit is corroborated by Richard Blackstone, Con Green, and Abe Davidson.

It appears from these affidavits that the Palmetto claim is located upon a broad horizontal or blanket lode covering the entire area within the limits of the side and end lines. It is contended by the claimant that in such a case there can not be any distinguished "lode line," constituting the "middle of the vein at the surface," as is the case with the ideal lode or vein where non-mineral surface ground is included on each side for the convenient working of the vein or lode, but that the apex of the lode is co-extensive with the side lines, and that consequently it was error on the part of your office to hold that no portion of the lode or vein upon which the original discovery was made is within what now remains of the location.

In the case of the Iron Silver Mining Company *v.* Mike and Starr Gold and Silver Mining Company (143 U. S., 394), a re-argument was

ordered by the supreme court, on its own motion, upon several questions, the first of which was:

What constitutes a "lode or vein" within the meaning of sections 2320 and 2333 of the Revised Statutes.

Justice Brewer, delivering the opinion of the court said:

The fact is, there was an earnest inquiry as to whether . . . in view of the disclosures made in this, as in prior cases, of the existence of a body of mineral underlying a large area of country in the Leadville mining district, whose general horizontal direction, together with the sedimentary character of the superior rock, indicated something more of the nature of a deposit like a coal bed than of the vertical and descending fissure vein in which silver and gold are ordinarily found, it did not become necessary to hold that the only provisions of the statute under which title to any portion of this body of mineral, or the ground in which it is situated, can be acquired, are those with respect to placer claims. Of course, such conclusions would have compelled a revising of some former opinions, and have wrought great changes in the status of mining claims in that district. Because of this we have been very careful, and the investigations in these directions have been earnest and protracted. It would serve no useful purpose to state all the arguments which have been advanced and considered by us. It is enough to announce the results. Our conclusions are . . . that the title to portions of this horizontal vein or deposit, "blanket" vein as it is generally called, may be acquired under the sections concerning veins, lodes, etc. The fact that so many patents have been obtained under these sections, and that so many applications for patents are still pending, is a strong reason against a new and contrary ruling. That which has been accepted as law and acted upon by that mining community for such a length of time, should not be adjudged wholly a mistake and put entirely aside because of difficulties in the application of some minor provisions to the peculiarities of this vein or deposit.

Assuming that the title to portions of a horizontal or blanket vein may be acquired under the sections concerning veins, lodes, etc., and that it has been satisfactorily shown in the present case that the Palmetto claim is located on a portion of such a vein, the usual rule in regard to the apex or middle of the vein is one of the minor provisions referred to by the court as of difficult application to the peculiarities of a vein or deposit like that covered by the Palmetto claim. The only reasonable solution of the problem seems to be to hold that the apex of the lode is co-extensive with the distance between the side lines of the location and that every part or point of such apex within these limits is as much the middle of the vein, within the intent and meaning of section 2320 of the Revised Statutes, as any other part. It follows from this that your office erred in holding that no part of the lode as originally discovered is within what now remains of the location. As the ore body is shown to extend uninterruptedly over the entire claim (including the two small tracts in question) the loss of the original point of discovery by its inclusion in some other mineral claim is immaterial as affecting the validity of the location.

There is, however, a serious objection to the entry not considered in your office decision. As above stated, application for patent to the Palmetto claim was filed in 1879, and notice thereof was duly published. During the period of publication several adverse claims were

filed and suits instituted thereon. The last of these suits was finally settled in 1886, but entry was not made until 1899.

In the case of *Cain et al. v. Addenda Mining Company* (on review), 29 L. D., 62, it was held that the mining laws contemplate that proceedings under an application for mineral patent shall be prosecuted to completion within a reasonable period after the required publication, or after the termination of proceedings on adverse claims, if any are filed, and failure so to do constitutes a waiver of rights secured under the application. In that case application for patent was filed in 1879 and due publication thereof made. Certain adverse suits were commenced and these were terminated in 1882. No further proceedings were taken under the application, however, until 1894. It was held that as the Addenda company had permitted its application to lie dormant so many years without making payment of the purchase price, it had waived the rights obtained by the earlier proceedings upon the application and the entry was accordingly canceled. See also the case of *P. Wolenburg et al.*, 29 L. D., 302, 488.

It is alleged, as an excuse for the delay in this case, that one of the tracts embraced in the entry is immediately under the mouth of a wood chute that has been in daily use for the past twenty years; that it has been necessary for the Homestake Company to maintain an immense woodpile at that place, entirely covering the tract in question and preventing an accurate survey thereof, which survey was necessitated by the exclusion of conflicting claims; and that it was not until the company ceased using wood in such large quantities and began the use of coal, that said tract was cleared sufficiently to enable surveyors to make a survey thereof.

The excuse given is not sufficient to keep alive for so many years after the termination of the adverse suits the rights secured by the earlier proceedings upon the application for patent. If the company chose to maintain the woodpile at that place and allow the application to lie dormant, it was, of course, at liberty to do so, but by so doing it waived its rights under the application.

Under the authority of the cases above cited, therefore, the entry in question must be canceled. The claimant will be at liberty, however, to commence patent proceedings anew if it should so desire.

Your office decision is so modified.

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ANGUS CAMPBELL.

Motion for review of departmental decision of January 25, 1900, 29 L. D., 436, denied by Secretary Hitchcock, April 24, 1900.

## PRACTICE—NOTICE—SERVICE BY PUBLICATION.

CHRISTNER *v.* METZ.

If an error occurs in the service of notice by publication, which makes necessary a republication of the notice, a new affidavit should be filed as the basis of an order therefor, except where the defect in the service is discovered during the period of publication, and a proper publication is promptly made.

The case of *Claffin v. Thompson*, 28 L. D., 279, overruled.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) April 26, 1900. (J. R. W.)

January 30, 1896, Michael M. Christner filed a contest affidavit against William H. Metz's homestead entry for the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ , the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  and lot 2, Sec. 30, T. 7 N., R. 33 W., McCook, Nebraska, charging abandonment.

After a proper showing, notice by publication was authorized and attempted, but the day therein set for hearing was only twenty-six days after the first publication. February 24, 1897, your office discovered this defect, and required contestant "to apply for notice and proceed anew in strict compliance with the rules of practice." Contestant republished for proper time and in the right newspaper his notice of contest, but did not make and file a new affidavit that defendant could not be personally served. February 27, 1899, on receipt of this new record, your office again remanded the case and directed another publication on a new affidavit, showing that at that time defendant could not personally be served with notice. From this action contestant appealed to the Department.

September 1, 1899, the departmental decision modified your said office decision upon authority of *Claffin v. Thompson* (28 L. D., 279), and held:

As two years elapsed between the two publications the contestant will be required to file an affidavit showing that at the date of the last publication or at any time since the initiation of the contest the defendant was not a resident of the State of Nebraska, or amenable to personal service of notice. Upon filing such affidavit within the time by you directed contest will stand, and you will proceed to adjudicate the case on the record as made.

January 16, 1900, a departmental letter recalled said decision and directed return of the papers in the case for further consideration thereof. Said departmental decision had, however, been promulgated by your office, and October 14, 1899, complied with, contestant filing the affidavit required thereby.

In *Parker v. Castle*, on review (4 L. D., 84), it was held:

It is a principle as old as the common law itself that where personal or property rights are involved in a judicial inquiry, jurisdiction cannot be acquired until due notice thereof by personal service is given to the party or parties interested. In the progress of events exception has been made to this general rule where property rights are involved. But the exception exists only by virtue of statutory enactment,

and being in derogation of the common law right of personal service it is universally held that it must be shown affirmatively that the statutory requirements have all been complied with as a condition precedent to the acquiring of jurisdiction through the substituted service.

The rule thus announced accords with the law as declared by the supreme court in *Galpin v. Page* (18 Wall., 369):

In proceedings of this character where service is attempted in modes different from the course of the common law the statute must be strictly construed to give jurisdiction over the person of the defendant. A failure to comply with the rule there prescribed in any particular is fatal where it is not cured by an appearance. . . . If there is any different rule of decision in the State it could hardly be expected it would be followed by a federal court so as to cut off the right of a citizen of a different State from showing that the provisions of law by which judgment has been obtained against him have never been complied with.

The rule thus stated obtains very generally, if not invariably, throughout the States. It is held in Iowa (*Bradley v. Jamison*, 46 Iowa, 68), that:

An affidavit that the person to be served could not be found within the State must have appeared of record to confer jurisdiction upon the court for issuance of an order of publication.

In Nebraska, in *McGavock v. Pollock*, 13 Neb., 556:

Without an affidavit . . . the publication of notice was void and the judgment based thereon open to collateral attack.

In Kansas, in *Shields v. Miller*, 9 Kans., 390:

Where a service by publication has been made in such a case without such affidavit being first filed, the service is void, and every subsequent proceeding in the case founded on such service . . . must necessarily be void.

Citations to support this rule could be multiplied to an indefinite number and selected from reports of nearly every court of supreme judicature in the United States.

The Rules of Practice, established under the statutory power conferred on the Commissioner of the General Land Office and Secretary of the Interior, have, in proceedings before the land department, when not in conflict with provisions or requirements of statutes, the force and effect of a statute. Personal service is required in all cases where possible. Substituted service by publication is governed by Rule 11.

The appeal contends, and the former opinion proceeds on the assumption, that where, as in this case, a proper affidavit for substituted service was made and for any reason the attempted service fails, a new order and publication may be made upon the original affidavit.

That must obviously depend upon the lapse of time after the affidavit for substituted service. If the error in the attempted publication is discovered while the publication is still running and while the execution of the order for publication is still in progress, it would seem that if proper publication is promptly made a new affidavit will not be required as a basis therefor.

After the attempted publication or service is complete the defect or error is ordinarily not discovered till considerable time elapses, when the proceedings are attacked collaterally or are in the hands of a supervisory authority, as in the present case. A new and sufficient publication can not then be ordered, or had on the original affidavit.

Obtaining jurisdiction by substituted service is an extraordinary proceeding. The necessity for publication should be shown affirmatively to exist at the time it is resorted to. The fact of absence from the jurisdiction is one which the law recognizes may cease to exist. The defendant once absent may return. The absence should be proved to exist at the time the officer is asked judicially to determine that personal service can not be made and to order publication of notice. Proof that it existed at a former time is not proof of its existence at the time he is asked to act. Therefore, if a new publication has to be made, there should be a new affidavit. Precedents on this subject are few. The longest period between date of the affidavit and date of the order authorizing publication in which service was held valid, which has come to the notice of the Department, is in the case of *Forbes v. Hyde* (31 Cal., 342), where but four months elapsed. The proceeding was attacked collaterally. The court, with evident reluctance, sustained the service, but said without hesitation that it was erroneous, and would not be sustained, if it were being attacked directly, instead of collaterally.

The only safe and proper rule is to require a new affidavit if the defect in publication is not discovered till after attempted publication is complete.

The decision of *Claffin v. Thompson* (28 L. D., 279), so far as in conflict with this opinion, is overruled.

Said departmental decision of September 1, 1899, herein, is revoked. Your office decision is affirmed.

SCHOOL LANDS—SECTION 11, ACT OF FEBRUARY 22, 1899.

NOYES *v.* STATE OF MONTANA.

By section 11, act of February 22, 1899, all lands granted by said act for school purposes are reserved, whether surveyed or unsurveyed, from pre-emption, homestead entry, or other entry under the land laws of the United States. The provisions of the later act of February 28, 1891, amendatory of sections 2275, and 2276 R. S., protecting settlement rights acquired prior to survey, are inapplicable to a desert land entry.

*Secretary Hitchcock to the Commissioner of the General Land Office, April*  
(W. V. D.) 26, 1900. (H. G.)

William G. Noyes appealed from the decision of your office of December 2, 1898, holding for cancellation his desert-land entry for the S. E.

$\frac{1}{4}$  and S. W.  $\frac{1}{4}$  of Sec. 36, T. 2 S., R. 16 W., Missoula, Montana, land district, as on unsurveyed lands, made September 20, 1897.

The proceedings were treated as *ex parte* by your office, and the State of Montana had no notice of the appeal of Noyes from the decision of your office, which was in favor of the State. By departmental order of February 5, 1900, the papers in the case were returned to your office, with the direction that the entryman be required to serve notice of his appeal upon the attorney general or other proper officer of the State. This direction has been complied with, and the attorney general files a brief in support of the claim of the State to the disputed tract. The record has been retransmitted by your office for the consideration of the case upon its merits.

Township 2 south, range 15 west, lying east of the township within the limits of which the disputed tracts lie, has been surveyed and subdivided for many years, and your office, in effect, held that the location of the lines of said section 36 were thus sufficiently ascertained and defined to identify the section as a school section which had passed to the State by virtue of the act of February 22, 1889 (25 Stat., 676), providing for the admission of Montana and other States into the Federal Union, which became operative, under the terms of said act, by the proclamation of the President of November 8, 1889 (26 Stat., 1551), reciting that the terms imposed by said act had been complied with, and directing the admission of the State of Montana into the Union.

It appears, from a consultation of the records of your office, that the township lying south of the one within which the section in dispute is situate, has not been surveyed, although, as before stated, the one lying to the east has been surveyed and subdivided for many years prior to the entry of Noyes, which was permitted over seven years after the State had been admitted into the Union.

Your office decision is based upon a decision of your office in the case of Samuel B. Reeves (6 C. L. O., 76), wherein it is held that sections 16 and 36 of a township, while unsurveyed, may be ordinarily embraced in a desert-land entry, but if the surveys have so far progressed as to indicate which are the school sections, they can not be embraced in such entry. On behalf of the appellant is presented a departmental decision in the case of Harris *v.* State of Minnesota (1 C. L. L., 631), which seems to hold to the contrary, and to the effect that the survey of the exterior lines of a township can not be denominated a survey of the lands within the township.

It is not necessary to determine this question, for the reason that under the provisions of section 11 of the admission act, whether surveyed or unsurveyed, this land was not subject to desert land entry at the date (September 20, 1897) Noyes was permitted to make entry thereof.

Section 10 of the admission act (25 Stat., 676, 679) grants to the State sections 16 and 36 in each township in said State for the support

of the common schools, subject to rights under sale or other disposal previous to the time the act became operative by the admission of the State into the Union. Section 11 provides, *inter alia*, that all lands granted by the act for educational purposes shall not be subject to pre-emption, 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.

It is true that a like provision as to the State of Washington appearing in the said act, providing also for the admission of Montana into the Union, was held to be superseded by the act of February 28, 1891 (26 Stat., 796), amending sections 2275 and 2276 of the Revised Statutes, the latter act protecting "settlements" on school land prior to survey, and, therefore, the grants of school lands to the States mentioned in the act of February 22, 1889, are to be administered and adjusted under the provisions of this general later law. (State of Washington *v.* Kuhn, 24 L. D., 12; Todd *v.* State of Washington, 24 L. D., 106.) The act of February 28, 1891, *supra*, so far as applicable to this case, reads as follows:

Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted and may be selected by said State or Territory in lieu of such as may be thus taken by pre-emption or homestead settlers.

A desert-land entryman can not be said to be protected in his entry by the provisions of this amendatory statute. It applies solely to "settlements" with a view to pre-emption or homestead entry, and does not extend the relief to desert-land entrymen. The reservation of the granted lands, whether surveyed or unsurveyed, from "any other entry under the land laws" is still in force.

It appears that the entryman, relying upon his entry, has made improvements upon the tracts to the extent of five hundred dollars, which savor of the realty and can not be removed, such as ditches, etc., and that he has been prevented from acquiring other lands in the vicinity, which, since his entry, have been entered or settled upon. The fact that he may have been misled by the action of the local officers in allowing his entry, and that the hardships resulting to him may be considerable, will not authorize the Department to dispose of the land in opposition to the plain provision reserving it for the State. It rests with the State alone to protect him.

For the foregoing reasons, the decision of your office cancelling the entry is affirmed.

## PRIVATE LAND CLAIM—SECTION 3, ACT OF MARCH 3, 1819.

HOWELL *v.* HARALSON.

Section 3, of the act of March 3, 1819, for the adjustment of certain private land claims in Louisiana, makes provision for two classes: (1) every person whose claim is comprised in the lists or register of claims reported by the commissioners, and, (2) the persons embraced in the list of actual settlers. The words "not having written evidence of title," as employed in said section, are descriptive of the second class of donees, and not a limitation upon the first class.

In so far as in conflict herewith, the cases of *D. C. Hardee*, 7 L. D., 1; *Hardee v. United States*, 8 L. D., 391; *Ibid.* 16 L. D., 499; and *James Barbut*, 9 L. D., 514, are overruled.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) April 26, 1900. (J. R. W.)

Your office decision of March 15, 1898, refused, on petition of Mrs. Rufus K. Howell, to issue patent for the private land claim of Caleb Weeks, reported by Commissioner James O. Cosby as claim No. 4, register O. (3 Am. State Papers, Green's Ed., p 54), and refused to cancel the homestead entry of Fergus D. Haralson, for lots 1, 2, 3, 4, and 5, Sec. 27, T. 2 S., R. 3 W., resurvey of 1852, St. Helena meridian, New Orleans, Louisiana, being part of the land included in said private land claim, and also part of section 40 of the original survey.

By your office decision it is held, that section 3 of the act of March 3, 1819 (3 Stat., 528-30),—

Applies only to settlers "not having any written evidence of claim reported as aforesaid," and as the basis of Mr. Weeks' claim is a Spanish patent, the provisions of said section do not apply, in this case.

From this decision the claimant, Mrs. Howell, appealed, and assigns error in holding:

That section 3 of the act of Congress approved March 3, 1819 (3 Stat., 528), did not grant Caleb Weeks, or his legal representatives, the land in question as a donation, not to exceed six hundred and forty acres, by reason of his settlement and improvement of the same prior to April 15, 1813.

Under the section and act above mentioned, confirmation of Weeks' claim was sought, and June 4, 1830, the register and receiver of the local office at New Orleans, Louisiana, issued their certificate of recognition or confirmation thereof, but no patent has issued thereon.

March 4, 1889, Mrs. Howell, as successor of Caleb Weeks, filed with the surveyor-general for Louisiana, her application for survey of the land, preliminary to patenting the same.

September 7, 1894, the register and receiver certified to the surveyor-general an abstract of entries in that township, showing that the land covered by this private claim was vacant, and, September 19, 1894, the surveyor-general transmitted to your office a diagram in duplicate

purporting to represent Weeks' claim. July 11, 1895, the surveyor-general was notified by your office of the acceptance for filing of the plat, and leave was given him to file a triplicate in the local office. This diagram represented the claim of Caleb Weeks as embracing 273.72 acres in township 2 south, range 3 west, being a part or all of section 40 of the original survey. This section 40 covered lots 1, 2, and 7 of section 2, all of sections 22 and 27, and lot 1 of section 28 of the survey of 1852.

November 1, 1897, over three years after Mrs. Howell's application for survey, preparatory to patenting said claim, and notwithstanding the certificate of recognition or confirmation of the Weeks claim, issued June 4, 1830, which does not seem to have ever been canceled, Fergus D. Haralson was permitted by the register and receiver to make homestead entry of lots 1, 2, 3, 4, and 5, of section 27, of the survey of 1852, 109.72 acres.

Under departmental direction of December 26, 1899, Mrs. Howell made personal service of her appeal to the department and argument in support thereof upon Haralson, February 2, 1900, but he has made no response thereto, although the time given therefor has more than expired.

The land is in that part of Louisiana acquired by the United States from France by the treaty of Paris, April 30, 1803 (8 Stat., 200), which lies between the Mississippi and Perdido rivers and north of the Iberville, which was claimed by Spain as part of West Florida until the treaty of Madrid, February 22, 1819 (8 Stat., 252). Spain retained possession of all that territory till October 27, 1810, when, under a proclamation by the President, it was entered by United States troops, and April 15, 1813, by the surrender of Mobile, Spain was completely dispossessed, and all claim of Spanish authority terminated. *Foster v. Neilson* (2 Peters, 298-308). During this period of disputed sovereignty, Spain exercised *de facto* authority over the territory, making grants of lands therein.

In 1794, during the undisputed sovereignty of Spain over this territory, and prior both to the treaty of St. Ildefonso, concluded October 1, 1800, whereby Spain ceded Louisiana to France, and to the treaty of Paris, Caleb Weeks obtained conveyances from Juan O'Neil, Matthew DeLong and William Paine of their settlers' rights to the lands embraced in the claim in question, theretofore initiated under Spanish law. December 24, 1803, after the treaty of Paris, but during the period of disputed sovereignty, Weeks paid to the Spanish authorities, exercising *de facto* sovereignty over that locality, the valuation set on the land, about eighteen and three-quarters cents per acre, and obtained of Morales, the Spanish intendente, a patent for the same, described as three hundred and thirteen arpens of land, situate in the forks of Bayou Sara, surveyed by Trudeau, November 10, 1803.

The act of March 26, 1804 (2 Stat., 283), "erecting Louisiana into

two territories, and providing for the temporary government thereof," by section 14, declared:

That all grants for lands within the territories ceded by the French Republic to the United States, by the treaty of the thirtieth of April, in the year one thousand eight hundred and three, the title whereof was, at the date of the treaty of St. Ildefonso, in the crown, government, or nation of Spain, and every act and proceeding subsequent thereto, of whatsoever nature, towards the obtaining any grant, title, or claim to such lands, and under whatsoever authority transacted, or pretended, be, and the same are hereby declared to be, and to have been from the beginning, null, void, and of no effect in law or equity. *Provided, nevertheless,* that any thing in this section contained shall not be construed to make null and void any bona fide grant, made agreeably to the laws, usages and customs of the Spanish government to an actual settler on the lands so granted, for himself, and for his wife and family; or to make null and void any bona fide act or proceeding done by an actual settler agreeably to the laws, usages and customs of the Spanish government, to obtain a grant for lands actually settled on by the person or persons claiming title thereto, if such settlement in either case was actually made prior to the twentieth day of December, one thousand eight hundred and three: *And provided further,* that such grant shall not secure to the grantee or his assigns more than one mile square of land, together with such other and further quantity as heretofore hath been allowed for the wife and family of such actual settler, agreeably to the laws, usages and customs of the Spanish government.

After the United States occupied the territory, Congress passed the act of April 25, 1812 (2 Stat., 715), for the purpose of ascertaining the titles and claims to lands therein, and Weeks's claim, with the evidences thereof, was presented to Cosby, the proper commissioner appointed under the act, and was by him, September 1, 1814, reported in his register "C" of claims founded on grants, among others, of the Spanish government, agreeably to the laws, usages, or customs of such government, but which, in the opinion of the commissioner, were not valid. The reason for such report was, because the territory in which this and other claims in said list "C" were located was part of Louisiana, ceded to the United States by France, by the treaty of Paris, and all right and title of Spain thereto had been divested by the treaty of St. Ildefonso. He, however, reported that Caleb Weeks had cultivated and inhabited his three hundred and thirteen arpens of land from 1794 to 1814, the date of his report. (3 Am. State Papers, Green's Ed., 63-72.) As to the equities of such claimants, the commissioner said (page 62):

If the United States had taken possession of West Florida at the same time that they did of Louisiana west of the Mississippi, many serious injuries to individuals might have been prevented. As this was not the case, it becomes an inquiry of interest and importance, whether the government is not morally bound, both by considerations of equity and policy, to make them a compensation commensurate to the injuries they may have sustained? This could be done by making them donations of any quantity of land which the government may deem just; particularly that class of claimants who have improved and cultivated their lands. They are not numerous, and with few exceptions their claims are moderate.

The report shows that some of the claimants included in register "C" had not cultivated and inhabited their lands, while others had for a length of time ascertained by the commissioner, among the latter being

Caleb Weeks, whose period of cultivation and inhabitancy of his claim is given as from 1794 to 1814, the date of the report, as aforesaid.

After the treaty of Madrid, whereby Spain ceded East Florida and all her claim of sovereignty in West Florida to the United States, Congress, by the act of March 3, 1819 (3 Stat., 528), acted upon the claims reported by the several commissioners, viz:

By the first section all claims founded on complete Spanish grants, valid, in the opinion of the commissioners, agreeably to the laws, usages, and customs of said government, were confirmed.

By the second section all claims founded on any order of survey, requette, permission to settle, or any written evidence of claim derived from the Spanish authorities, before April 15, 1813, which in the opinion of the commissioners ought to be confirmed, and the lands claimed to have been cultivated and inhabited on or before that day were in like manner confirmed, with limitations as to the amount.

By the third section it was provided:

That every person, or his or her legal representative, whose claim is comprised in the lists, or register of claims, reported by the said commissioners, and the persons embraced in the list of actual settlers, or their legal representatives, not having any written evidence of claims reported as aforesaid, shall, where it appears by the said reports, or by the said lists, that the land claimed or settled on had been actually inhabited or cultivated, by such person or persons in whose right he claims, on or before the fifteenth day of April, one thousand eight hundred and thirteen, be entitled to a grant for the land so claimed, or settled on, as a donation: *Provided*, That not more than one tract shall be thus granted to any one person, and the same shall not contain more than six hundred and forty acres; and that no lands shall be thus granted which are claimed or recognized by the preceding sections of this act.

Before discussing the third section of this act, it is necessary to notice former legislation on the same subject.

While the United States persistently and perseveringly refused to recognize any right of Spain to dispose of lands west of the Perdido river after date of the treaty of St. Ildefonso, it showed, by repeated legislation, a magnanimous purpose and sense of moral obligation to protect actual settlers in that region in rights they may have in good faith supposed they had acquired under the *de facto* power exercised by Spain during the period of disputed sovereignty.

The act of March 26, 1804 (*supra*), in annulling Spanish grants, *excepted* bona fide grants to and claim of actual settlers making settlement before December 20, 1803, to the extent of not more than

one mile square of land, together with such other and further quantity as heretofore hath been allowed for the wife and family of such actual settler, agreeably to the laws, usages and customs of the Spanish government.

The act of April 25, 1812 (*supra*), in providing opportunity for inhabitants of that region to exhibit their titles and claims before commissioners, by section 8, authorized the commissioners to make and report lists "*of all actual settlers*," whether they had claims to land officially recognized or not, and the time of their settlement.

Both these acts are *in pari materia* with the act of 1819, and the latter is to be construed in the light given by them, and harmonious, if possible, with their purpose and spirit. Both former acts, though passed during the period of disputed sovereignty, magnanimously recognized an obligation of the sovereign *ex gratia* to protect the rights of a settler in good faith in a disputed territory, under whatever *de facto* authority such settlement was made.

Passing to the act of March 3, 1819, it is clear Congress intended thereby to deal completely with the whole subject. Sections 1 and 2 made provision for two distinct classes of claims—such complete and such incomplete grants as in opinion of the commissioners ought to be confirmed. Both were confirmed.

There would remain other classes of claimants, shown by the reports of the commissioners, where the land claimed or settled upon had been actually inhabited or cultivated by the claimant, or those in whose right he claimed, before the 15th of April, 1813, when the disputed sovereignty terminated, viz: (1) Claims of grants complete, evidenced by writing, which in opinion of the commissioners ought not to be recognized and confirmed. (2) Similar claims more or less incomplete, but having some written evidence. (3) Claims of actual settlers, having no written evidence in their support.

Read in the light of former legislation, it is clear Congress intended by section 3 to provide for all of these, and, as a donation, *ex gratia*, to assure to every actual settler in that territory—whether he had a valid claim or not, whether evidenced in writing or not—the land settled upon and actually inhabited or cultivated up to the amount of six hundred and forty acres, though it recognized none of their claims or titles to be valid.

Section 3 provides:—

[1] Every person . . . whose claim is comprised in the lists, or register of claims, reported by the said commissioners, [2] and the persons embraced in the list of actual settlers . . . not having any written evidence of claim . . . shall, where it appears by the said reports, or by the said lists, that the land claimed or settled on had been actually inhabited or cultivated, by such person . . . on or before the fifteenth day of April, one thousand eight hundred and thirteen, be entitled to a grant for the land . . . as a donation;

with the proviso that but one tract, and not over six hundred and forty acres, shall be thus made to one person, and no land confirmed by sections 1 and 2 shall be thus granted.

There are two classes here designated: (1) *Every person* whose claim is in the lists or register of claims. (2) Persons on the list of actual settlers, each subject to the proviso and limitation against quantity, plurality of tracts, and interference of the donation with the grants made by the previous sections. The words "not having written evidence of title" are descriptive of the second class of donees described in the section, and not a limitation upon the first class of donees.

Looking to Cosby's register "C," it will appear that all claims there entered rested on complete Spanish patents, dated between 1803 and 1810, inclusive, during disputed sovereignty, for amounts from 62 to 120,000 arpens (from about 54 to 102,084 acres). These claims could not be recognized as valid titles, but the claim of the inhabitant or cultivator could be recognized and *of grace* a donation be made to him. The claimants having written evidence of title had not as a class been guilty of any offense. The controversy was not with them. Refusal to recognize the titles of those having complete grants or rights, or those having incomplete initiate rights resting on written evidence more or less complete, of date after April 30, 1803, was not from hostility to that class of claimants but because the right of Spain to make the grant, or to confer the right, was denied. Except for this there was no reason why this class of claimants, if actual inhabitants or cultivators, should not be regarded as equally entitled to the good will and gracious bounty of the new sovereign as those who had merely the *possessio pedis*, the squatters unrecognized by the late *de facto* government. But if a construction is given to the section which makes the phrase "not having any written evidence of claim," etc., apply to all claimants named as beneficiaries in that section, then these equally meritorious inhabitants or cultivators—those in fact having an equity in their favor, as Commissioner Cosby had advised Congress,—are excluded from all benefit of the section, and none but mere squatters are admitted to the new sovereign's bounty.

There is no apparent reason for this harsh discrimination, or for this special favor of one class of claimants over those whose claims were at least equally meritorious, but who had the misfortune to have obtained from the *de facto* sovereign more or less complete written evidence of their title, or of their rights and status as inhabitants or cultivators.

The contemporary construction of this section is in harmony with that here given. No distinction was at that time made by the land department between actual settlers whose claims were reported in the lists or register of claims as having written evidence of title and those reported in the list of actual settlers having no written evidence of title. Both classes were held equally entitled to the donation. The letter of the commissioner of March 22, 1819, to the local officers, at Jackson Court-House (Instructions and Opinions, Part II, 712), referring to the third section, said:

This section blends lists or registers of claims with lists of actual settlers; and grants a donation of 640 acres to such persons in said lists as the commissioners reported as actual settlers on the 15th of April, 1813. Certificates of donation and patents from this office will issue for the claims confirmed by this section.

Again, the letter to the register and receiver at St. Helena, Louisiana, August 13, 1823 (Instructions and Opinions, Part II, 717-718), containing special instructions to the local officers as to carrying out the pro-

visions of said act of March 3, 1819, and the supplementary act of May 8, 1822 (3 Stat., 707), says:

The 3d section confirms the claims of *all the actual settlers previous to the 15th of April, 1813*, to a tract of land not exceeding 640 acres, as a donation. These claims must be so surveyed as to include the improvements, and not to interfere with any claims confirmed by the two first sections of the act; and, by a fair construction of the meaning and intent of the law, no domain can be granted to any person to whom a claim has been confirmed by the 1st and 2d sections.

The local officers, who granted the certificate of recognition or confirmation of this tract, June 4, 1830, evidently acted on this interpretation of the act.

That some later decisions of the department are in conflict with this construction must be admitted. In *D. C. Hardee* (7 L. D., 1); *Hardee v. United States* (8 L. D., 391); same case, on review (16 L. D., 499); and *James Barbut* (9 L. D., 514), statements and rulings are found which are in conflict with what is here said and held, but upon careful consideration these cases are to the extent of the conflict overruled.

Your office decision refusing to issue patent on the claim of Caleb Weeks is therefore reversed, and you will take such further action as may be proper in the premises. The homestead entry of Fergus D. Haralson, irregularly allowed by the local office, for lots 1, 2, 3, 4, and 5 of said section 27 of the survey of 1852, will be canceled.

This decision is subject to the condition that, before carrying the above direction into effect, you will ascertain whether the cash entry of Micajah Courtney, certificate 63, made November 16, 1830, for fractional section 28, township 2 south, range 3 west, is still subsisting, and is in conflict with the Weeks claim, and, if so, you will take proper measures to determine the rights of the conflicting claimants.

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#### CONTEST—COMPLIANCE WITH LAW PENDING LITIGATION.

##### GLOVER *v.* SWARTS.

During the pendency of a contest against a homestead entry, in which the issue is priority of settlement, the entryman must comply with the law in the matter of residence; and his default in this respect cannot be cured, as against the adverse claimant who has continued to reside on the land, by the resumption of residence prior to notice of a supplemental charge, on the part of said claimant alleging said default and asking to be heard thereon.

*Secretary Hitchcock to the Commissioner of the General Land Office, April*  
(W. V. D.) 27, 1900. (H. G.)

A motion for review of the departmental decision in the above-entitled case (29 L. D., 54) was entertained by departmental order of December 12, 1899. Counsel have filed elaborate briefs, and, owing to the importance of the questions presented, the case has been carefully

considered, and the entire record connected with the controversy between the parties has been carefully re-examined. The tract involved is described as lots 3 and 4, and the E.  $\frac{1}{2}$  of the S.W.  $\frac{1}{4}$  of Sec. 7, T. 26 N., R. 1 E., I. M., Perry, Oklahoma, land district. For a complete understanding of the case in all of its phases, it is necessary to detail the various proceedings.

Benjamin F. Swarts made homestead entry for the tract on September 26, 1893, alleging settlement thereon on September 16, 1893, the day the said tract and adjacent lands were opened to settlement and entry.

On October 6, 1893, John B. Glover filed his affidavit of contest alleging, in substance, that he was the prior settler, and a hearing was had between the parties upon such charge before the local office, beginning March 26, and terminating March 31, 1894. The local officers found that Swarts was the prior settler. Upon appeal your office did not pass upon the question of priority of settlement, but held that Swarts was disqualified by reason of his holding, at the time of his settlement and thereafter, a commission as postmaster at Otoe, in the Territory of Oklahoma. There was sufficient proof of the facts as found by your office that Swarts was acting as postmaster at and after the date of his settlement, as he introduced his commission as postmaster, bearing date May 18, 1892 (not 1893, as incorrectly stated in the record), and apparently excused some of his absences from the tract upon the ground that he was attending to the duties of postmaster at the postoffice. After the decision of your office holding him disqualified for the aforesaid reason, he cited the record of the Post Office Department, which was secured by request of this Department and which consisted of the certificate of the Postmaster General, then acting, showing that he (Swarts) had resigned his office on August 23, 1893, and that his successor was appointed on September 13, 1893. While protesting against the injection of this certificate into the record, as it formed no part of the testimony taken, Glover's counsel presented an affidavit of one William M. Snyder, postmaster at Otoe, showing that during the fall of 1893 and up to June, 1894, Swarts acted as deputy postmaster at said postoffice.

This Department held, upon consideration of such certificate, that Swarts was not acting as postmaster at the time of his settlement upon the tract, and was not disqualified (23 L. D., 480). No finding was made that he was the prior settler, until upon consideration of Glover's motion for review, which was denied May 18, 1897 (unreported, 24 L. D., 447).

A careful examination of the record shows that the local office was correct in finding, upon a preponderance of the evidence, that Swarts was the prior settler, his act of staking having taken place about ten minutes prior to the arrival of Glover upon the tract. Swarts also seems to have established his residence upon the tract within a month

after his initial act of settlement, as he had lived there some seventeen or eighteen days and had made improvements upon the tract. The hearing was had a little over six months after the opening day and settlement by Swarts, and it was difficult at that time to say that he had not established nor maintained a residence upon the land at the date of the hearing. His excuses for his absences were that he was attending to the duties of postmaster, and he introduced his commission as evidence of the fact of his appointment, without disclosing that he had resigned and that another had been appointed to fill his place. It appears nowhere in the record, except from Snyder's affidavit, when the latter qualified and entered upon the duties of such office, except that it was in the "fall of 1893."

On December 17, 1896, during the pendency before the Department of the motion for review, Glover filed a supplemental affidavit of contest charging non-compliance with the law as to the maintenance of residence by Swarts since the date of the original hearing. This was rejected by the local office because Swarts had asked for and obtained a leave of absence which had not then expired. This affidavit was thereafter amended charging that the leave of absence was fraudulently obtained by reason of the previous failure of Swarts to comply with the law.

No notice issued upon this supplemental charge, action thereon by the local officers being withheld until after the departmental decision denying the motion for review, which, during its pendency, acted as a supersedeas. Upon August 2, 1897, Swarts appeared and waived service of the notice of the supplemental charge, and requested that the case be set for hearing.

Swarts having applied to commute his homestead entry, the hearing upon the supplemental affidavit was finally ordered to be consolidated with the hearing on the final proof, and all matters at issue between the parties were directed to be determined at a time fixed. The final proof was never completed, the papers were lost, and upon being found, the proof was withdrawn by Swarts, with the consent of the local office, against the objection of Glover.

This hearing, in which both parties participated, resulted in the finding that Swarts had not complied with the law as to the maintenance of his residence upon the tract, but that he had cured his default prior to service of notice of the contest upon him, and this was affirmed by your office upon appeal. The decision of your office was reversed by the Department (29 L. D., 54); and this decision is assailed in the motion for review now under consideration.

The questions at issue are very clearly put in the brief filed by his counsel in reply to that filed by the attorneys for Glover:

1st. That Benjamin F. Swarts had in many ways evidenced his continuing purpose to hold this land as his home and had never abandoned same so as to warrant a cancellation of the entry.

2nd. That conceding a technical default as to residence upon Swarts' part, such

default was cured prior to the institution of contest by Glover alleging such abandonment, and

3rd. That the government was fully justified in excusing such default and permitting same to be cured prior to contest, notwithstanding Glover's adverse presence on the land.

That Swarts has not maintained his residence upon the tract in controversy was established at the second hearing. Indeed, reading the evidence taken at the first hearing with that subsequently taken, it is doubtful if a residence was ever established by Swarts upon the land in good faith and with the purpose of making it his home to the exclusion of one elsewhere. This may be gathered from his own testimony, as well as by the testimony offered on behalf of Glover. He was in business some distance from the tract and continued therein, making only occasional visits to the land, and leaving an employe in possession. It appears from his evidence that he endeavored to dispose of his business, but continued therein as general manager at the request of his creditors.

He has expended considerable money, estimated by him from \$700 to \$1,000, in the improvement of the claim, and has had possession of about one hundred and twenty acres of the land. He evidently has not been compelled, however, to resort to employment elsewhere, and his absences have not been caused by poverty, or any cause except that he desired to retain his business away from the land and to give it his personal supervision instead of entrusting the same to others. The concurrent findings of this Department, of your office, and the local office, that he has not maintained his residence upon the tract, are sustained by the evidence.

As to the other question raised, that he cured his default by placing his wife upon the tract directly before his leave of absence expired, it must be held that he could not cure such default in the presence of an adverse settlement claim, asserted in good faith and then pending and not fully determined, owing to the interposition of a motion for review.

It was held in the case of *Byrne v. Dorward* (5 L. D., 104, 105), that—

There can be no doubt of the correctness of the position that pending a final decision in a contest on whatever ground or charge, the entryman whose claim is attacked should continue to comply with the law, and that if he fail to do this he lays himself liable to attack in a subsequent contest should he successfully defend in the one pending. To hold otherwise would be to condone laches and to open the door to a practice which would enable parties, under the guise of a contest, to hold lands indefinitely without complying with the requirements of law under which their entries were made.

This rule has been followed without deviation, and has become axiomatic. (*Thompson et al. v. Craver*, 25 L. D., 279, 280, 281; *Williams v. Gentry*, 22 L. D., 633; *Rowan v. Kane*, 26 L. D., 341, 343; *Johnson et al. v. Smith*, 23 L. D., 317.) In the case of *Thompson et al. v. Craver*, *supra*, it is remarked in the course of the opinion:

Rights to agricultural public land may be initiated by settlers in three ways: by entry, by contest, and by settlement. Contests are divisible into two classes; first,

where the allegation is failure to comply with the law on the part of the entryman, irrespective of any superior right alleged by the contestant; and second, where the contest is based upon the assertion of superior rights and is not dependent upon delinquencies upon the part of the entryman. The difference between these two classes of contests is material and has been recognized by the Department. *Hall v. Stone* (16 L. D., 199), *Cotter v. McInnis* (21 L. D., 97), and *Foote v. McMillan* (22 L. D., 280).

Therein it is held that where a contest is based solely upon the laches of the defendant it is not incumbent upon the contestant to reside upon the land pending a determination of the contest, but that a contest filed, alleging superior rights, by reason of prior settlement, to that of the entryman, must be accompanied by the maintenance of residence.

The reason of this holding is apparent when it is remembered that pending contest an entryman must reside and continue his improvements upon the land despite the doubtful tenure of his holding, and the contestant so alleging prior settlement should be constrained to do as much.

The rule is enforced especially where the parties to the controversy rely upon priority of settlement. In this case, Swarts and Glover were both relying upon prior settlement. The authorities cited in the departmental decision complained of show that such laches can not be cured in the presence of a *bona fide* adverse settlement claim. It would be harsh to rule that an entryman, who pending contest to determine prior settlement, abandons the land, may on learning of a departmental decision in his favor and before a motion for review thereof is determined, resume residence on the land and thereby cure his default and forestall supplemental proceedings on account thereof by the contestant, who has meanwhile maintained *bona fide* residence upon the land, especially where the default occurring during the pendency of the contest, as in this instance, amounts to an absence for a period of thirty-three months, during which the entryman was more conveniently and profitably engaged in business remote from his claim.

It is not believed that the general rule that an entryman may, as against the government or as against a mere contestant for a preference right under section two of the act of May 14, 1880 (21 Stat., 140), cure his default prior to notice or knowledge of contest, should apply to a case like the one under consideration.

Such has never been the rule of this Department, and it is believed that the rule announced in the cases of *McCalla v. Acker* (29 L. D., 203); *Noble et al. v. Roberts* (28 L. D., 480); *Bates v. Bissell* (9 L. D., 546, 551), and in earlier decisions, ought to stand. In the last cited case the rule was applied as follows:

In the absence of an adverse claim, appellant's entry might be permitted to stand, but, in the face of a claim asserted in good faith for over three years by a party residing upon the land during all of the time, and having improvements thereon reasonably valued at a thousand dollars, this can not be permitted.

While in ordinary cases an entryman may cure his default prior to notice or knowledge of a contest, this rule gives way to another no less meritorious, viz: that the entryman can not cure his default as against one whose equities are clearly superior to his own.

It is urged that there was error in the departmental decision complained of in that it was held that—

While the present proceeding is in the nature of a new contest and covers matters not in issue in the original contest, it is based upon the failure of the entryman to comply with the law during the pendency of the original contest, a matter always the subject of an inquiry as germane to the original case.

There was no error in that ruling. Glover's charge of abandonment against Swarts was not an independent contest but rather a supplemental charge in the original contest, on which a supplemental hearing was sought in furtherance of a complete determination of the rights involved in the original contest.

A decision of the supreme court of Oklahoma, rendered in a case between the parties, involving the right of possession of the premises (*Glover v. Swarts*, 58 Pac. Rep., 943), is cited as contrary to the views announced in the departmental decision complained of. The court held, *inter alia* (syllabus), that a contest to cancel a homestead entry upon the ground of abandonment is a contest for a preference right of entry after the existing entry has been canceled, and one contesting for a preference right is not entitled to occupy any portion of the land in controversy, as against the entryman, until after he shall have procured the cancellation of the contested entry. This, as a general statement, is not in conflict with any departmental decision, nor is it understood that the decision of the court goes beyond the right of possession or attempts to mark out the limits of departmental authority, or to say that abandonment by an entryman during the pendency of a contest by one who is a good faith settler upon the land may not be made the subject of a supplemental inquiry rather than an independent contest.

The affidavit upon which the supplemental proceeding in this case was had charged in substance that the entryman wholly failed to maintain a residence in good faith upon the tract involved at any time during the thirty-three months elapsing since the hearing upon the original charge, and that he had not inhabited the tract otherwise than to make occasional visits thereto at intervals of from three to six months apart on which occasions he remained on said tract only from a few hours to one or two days, and had afterwards been habitually absent from the tract during said period, and, further, that the leave of absence obtained by him on January 10, 1896, was fraudulently procured by reason of the facts so stated. While this affidavit charged abandonment, its presentation was, as before stated, not the institution of an independent contest, but of a supplemental proceeding in the original contest. Repeated but unsuccessful efforts had been made by Glover to secure a hearing based on this charge while the proceedings upon the original charge were pending, and the affidavits presented in that connection were all made known to an attorney for Swarts. It is in evidence that Swarts's local attorney stated to witnesses, in effect, that Glover would have been successful if he had served notice of his contest

in time, but that this was thwarted by the attorney. The latter denies this statement, but the preponderance of the evidence is against him. Swarts, however, denies that he had any notice or knowledge of the supplemental charge before he placed his wife upon the tract. But without deciding the effect of such testimony, it is clear, from a long line of departmental decisions, that, as a matter of administrative policy, the default of Swarts—if indeed he ever established residence upon the tract in good faith—was not cured, and could not be cured, in the presence of an adverse settlement claim continually asserted in the utmost good faith, and which was subject only to the compliance of Swarts with the terms of the law requiring the maintenance of his residence upon the tract.

The motion for review is denied.

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AARON HARRIS.

Motion for review of departmental decision of February 10, 1900, 29 L. D., 486, denied by Secretary Hitchcock, April 27, 1900.

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HOMESTEAD—EQUITABLE ACTION—INSANE ENTRYMAN.

FETTE v. CHRISTIANSEN.

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

The provisions of the act of June 8, 1880, with respect to the issuance of patent in cases where a homesteader has become insane, do not authorize patent if the proof submitted fails to show the citizenship of the entryman.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 30, 1900.* (A. S. T.)

On May 31, 1888, Louis Christiansen made homestead entry No. 6088, for the SW.  $\frac{1}{4}$  of Sec. 10, T. 27 N., R. 43 E., Spokane Falls, Washington, and district.

On October 6, 1896, the register and receiver of said land office reported to your office that on May 31, 1896, they notified Christiansen that he would be allowed thirty days in which to show cause why said entry should not be canceled, Christiansen having failed to offer final proof within the time allowed by law. Said local officers also reported that they had been notified that Christiansen was in the insane asylum at Medical Lake, and that he desired to retain the land, but that no agent had been appointed to make final proof, and that more than forty days had elapsed and no steps had been taken. No action was taken

by your office, at that time, on said report and on September 29, 1898, the local officers called attention of your office to the matter.

On October 18, 1898, you advised the local officers to notify the superintendent of said asylum of Christiansen's right to make the proper proof and perfect his claim through whoever might legally represent him, and on January 28, 1899, the local officers reported to you that they had, on October 26, 1898, given the notice as advised by you, by registered mail, but that no action had been taken.

On February 19, 1899, Diedrick G. Fette filed his affidavit of contest against said entry, alleging "that the said Louis Christiansen has wholly failed to submit final proof in support of said entry within the time required by law." Said Fette at the same time applied to enter the land. The local officers rejected the affidavit of contest, and also the application to make entry for the land.

On March 1, 1899, you instructed the local officers that if Christiansen had complied with the requirements of the law as to residence on, and cultivation of, the land up the time when he became insane, and proper proof of that fact should be made, he was entitled to patent for the land and that until proper parties had been notified you did not feel warranted in canceling the entry; and you directed them to give notice in accordance with the requirements of the laws of the State of Washington relative to service of process upon insane persons.

On March 11, 1899, Fette appealed from said action of the local officers to your office. In said appeal Fette admits that Christiansen was committed to the insane asylum on May 18, 1892 "where he has remained as an inmate to the present time."

On March 21, 1899, said local officers reported that in response to former notices issued by them, Henry Cameron, as guardian of said Louis Christiansen, had on that day filed notice of his intention to offer final proof on said homestead entry, and had filed a certified copy of letters of guardianship, issued out of the superior court of Spokane county, State of Washington, on March 20, 1899, and that notice for publication had been issued.

On May 16, 1899, Cameron, as guardian, offered final proof on said entry in behalf of Christiansen, and on the same day Fette filed a protest against the acceptance of said proof. The local officers suspended action on the final proof offered by Cameron and on September 27, 1899, transmitted said proof and said protest to your office where, on December 28, 1899, a decision was rendered wherein it was "held that Christiansen, as an insane person, was and is incapable of making a default, and that his entry could not be canceled for any alleged default occurring while insane," and by said decision Fette's affidavit of contest was rejected and his said protest was dismissed, and it was ordered that final certificate issue upon the proof offered by Cameron and that the claim be passed to patent. Fette has appealed to this Department.

The final proof offered by Cameron shows that Christiansen is a single man; that he established his residence on the land soon after making his entry and resided there continuously till he was removed to the insane asylum, which was done in 1892, under an order of the judge of the superior court of Spokane county, Washington. A certified copy of said order is on file with said proof.

Christiansen built a house, cleared seven acres of the land and broke five acres on which he raised a crop each season till he was committed to said asylum. He also made various other improvements not necessary to describe or enumerate. Suffice it to say, they are estimated to be worth about \$500.00 and are found to be amply sufficient to meet the requirements of the homestead law as to improvements.

The ground upon which it is insisted that said final proof should be rejected, said entry canceled and Fette allowed to make entry for the land, is that said proof was not offered within the time required by the homestead law.

Cameron moved onto the land in March, 1893, and has resided on it ever since.

It is said, in argument for Fette, that Christiansen is an unmarried man and has no known heirs, and that Cameron's object in offering proof on the claim is to get the land for his own benefit; and it is insisted that this case is not entitled to equitable consideration, but should be decided upon the strict rules of the statute and that inasmuch as Christiansen failed to make final proof within the time allowed by the statute, the proof offered by Cameron, as guardian, should be rejected and the entry canceled. In your said decision consideration was given to the correspondence between your office and the local office relative to said entry; the reports made by the local officers, the notices issued by them in reference to the making of the final proof, etc., and it was held, in substance, that these were proceedings by the United States looking to the cancellation of the entry, and that inasmuch as these proceedings were had prior to the filing of the contest affidavit by Fette that therefore the matter is entirely between the government and the entryman, or his representative, and that Fette acquired no interest in it by filing his contest affidavit, his application to make entry for the land, or his protest against the final proof offered by Cameron. It is practically conceded that Christiansen fully complied with the law as to residence, etc., from the time of making his entry till he was, by the order of the court, committed to the insane asylum; that he is, and ever since 1892 has been, insane and therefore incapable of looking after his interests, and that no one was legally authorized to represent him till the appointment of Cameron as his guardian. Under these circumstances can it be said upon principles of justice or equity, that because of his affliction and because he had no relative or friend to look after his interest and see that his proof was made in the time fixed by the statute, that therefore he should forfeit his entry and lose the fruits of all the labor expended by him in improving his claim?

By the act of Congress approved June 8, 1880 (21 Stat., 166), it is provided:

That in all cases in which parties who regularly initiated claims to public lands as settlers thereon according to the provisions of the preemption or homestead laws, have become insane, or shall hereafter become insane before the expiration of the time during which their residence, cultivation or improvement of the land claimed by them is required by law to be continued in order to entitle them to make the proper proof and perfect their claims, it shall be lawful for the required proof and payment to be made for their benefit by any person who may be legally authorized to act for them during their disability, and thereupon their claims shall be confirmed and patented, provided, it shall be shown by proof satisfactory to the Commissioner of the General Land Office that the parties complied in good faith with the legal requirements up to the time of their becoming insane, and the requirement in homestead entries of an affidavit of allegiance by the applicant in certain cases as a prerequisite to the issuing of the patents shall be dispensed with so far as regards such insane parties.

In the case of *Dyche v. Becele* (24 L. B., 494), it was held (syllabus):

A contest against the entry of an insane homesteader must fail if it appears that the entryman had complied with the law up to the time when he became insane.

By General Land Office circular of July 11, 1899 (p. 269), providing for the adjudication of certain claims under sections 2450 to 2457 of the Revised Statutes, in addition to the class of claims formerly provided for by said sections, the following are included:

All homestead and timber culture entries in which good faith appears, and a substantial compliance with law, and in which there is no adverse claim, but in which full compliance with law was not affected, or final proof made within the period prescribed, or residence established on the land, in homestead entries, within the time fixed therefor by statute, or official regulation based thereon, and in which such failure was caused by ignorance of the law by accident or mistake, by sickness of the party or his family, or by any other obstacle which he could not control.

But it is insisted that this case does not come within the purview of the above rule on account of the adverse claim of Fette. If Fette has any valid adverse claim, that fact would have the effect to take this case out of the above category. In the case of *Fargher et al. v. Parker* (14 L. D., 83), it is held (syllabus):

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

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

Such, in effect, has been the holding of this Department in various other cases.

In the case at bar a formal notice to show cause why the entry should not be canceled for failure to offer final proof within the statutory period, was issued by the local officers on May 31, 1896, and the issuance of said notice was clearly the initiation of proceedings by the government looking to the cancellation of the entry. Said notice

appears to have been sent by registered mail, and after the lapse of forty days from the date of its receipt, the local officers reported to your office the fact of the issuance and sending of said notice, and that they had been informed that Christiansen was confined in said insane asylum.

The matter was thus pending before your office on said report of the local officers, when, on October 18, 1898, because of the reported insanity of Christiansen and presumably because it was thought that owing to his insanity, said notice had not been properly served, you directed the local officers to notify the superintendent of said asylum that the proof might be made by Christiansen's legal representative, this was merely another step taken by your office in the proceedings which had been initiated by the issuance of said notice, and on October 26, 1898, a notice was served on said superintendent in accordance with your directions. Whether said notice informed the superintendent that the entry would be canceled unless the proof should be made, or what were the contents of the notice beyond informing the superintendent of the right of a representative to make the proof in behalf of Christiansen, does not appear, but whatever may have been the character of the notice, its issuance and service was another step taken in the proceedings originally initiated by the issuance of said first-named notice. On January 28, 1899, the local officers transmitted to your office proof of service of said notice on said superintendent. This was, so far as the record shows, the last step taken in said proceedings prior to the filing of the contest affidavit by Fette on February 19, 1899. But at that time (February 19, 1899) all of the foregoing proceedings had been had pursuant to the original purpose to cancel the entry unless good cause to the contrary should be shown, which, up to that time, had not been done, and the matter was still pending before your office undisposed of when said affidavit of contest was filed by Fette.

The filing of the contest affidavit at this stage of the proceedings did not have the effect to confer upon Fette any rights, nor to interfere in any way with the matter then pending before your office relative to the cancellation of the entry.

Henry Cameron was, by the superior court of Spokane county, Washington, appointed guardian for Christiansen on March 20, 1899, and on the next day he filed notice of his intention to offer final proof on said entry, as such guardian. Publication was duly made, and said proof was offered accordingly.

On March 31, 1899, the local officers reported that:

In response to the former notices served by this office Mr. Henry Cameron appeared at the office today and filed notice of application to make final proof on said homestead as guardian of said Louis Christiansen.

On October 6, 1896, the local officers reported that having learned that Henry Cameron was residing on the land they notified him at the time of issuing the first notice above mentioned.

It is now insisted for Fette that it was error to accept the proof offered by Cameron in response to notice issued previous to his appointment as guardian, and that such notices were not legal, nor were they properly served, and, hence, were not "proceedings" against the entry within the meaning of the law.

When Cameron was appointed guardian he was clothed with authority to represent Christiansen in offering said final proof and it was not incumbent on him to wait until he was notified by the local officers of the necessity of offering such proof, if he knew that the interest of his ward required that it should be done, and acted upon such knowledge, it does not matter how, from what source or when he obtained the information.

In the case of Fargher *et al v.* Parker (*supra*) which was similar in many respects to the case at bar, it was held that—

The presumption is that claimant, or if deceased, his heirs, were cognizant of the date when the entry expired by limitation, hence the notice is simply a preliminary step on the part of the government looking toward the cancellation of the entry, and should it subsequently appear that the claimant, or the claimant and his heirs, have complied with the law, the entry may be submitted to the board of equitable adjudication.

The final proof in this case was not offered within the statutory period, and there seems to be no statutory provision for extending the time within which it may be offered; therefore it shall appear from the proof that Christiansen has fulfilled all the requirements of the law, except in that since his commitment to said asylum, he has not resided upon, cultivated and improved the land, the case will be a proper one for reference to the board of equitable adjudication.

But before such reference should be had, it should be shown that nothing remains to be done by, or for, Christiansen to entitle him, under the law and upon principles of equity, to patent for the land.

While a homestead claim may be initiated by an alien who has made proper declaration of his intention to become a citizen of the United States; before patent can issue upon an entry made by such a person, the law requires that he shall *become* a citizen of the United States.

The proof shows that Christiansen had made the requisite declaration of his intention to become such citizen, and he was therefore qualified to make entry for the land; but inasmuch as it is not shown that he has ever been admitted to such citizenship, it was error to hold that patent should issue to him for the land in the absence of such showing.

The act of becoming a citizen, like that of declaring his intention to do so, is one which must be performed by the party in person, and can not be done through or by another for him, but the fact of his admission to such citizenship—if such be the fact—may be shown by anyone authorized to make proof for him.

Your said decision is therefore modified, the case will be remanded to the local office, and you are directed to cause Cameron, as guardian

of Christiansen, to be notified that unless he shall furnish satisfactory evidence, within a time to be fixed by you, showing that Christiansen has been admitted as a citizen of the United States, said entry will be canceled without further notice, and in case such proof shall be made within the time to be specified by you, then this cause will be referred to the board of equitable adjudication for appropriate action.

SECOND HOMESTEAD ENTRY—ACT OF DECEMBER 29, 1894.

GEORGE T. MARSHALL.

The right to make a second homestead entry under the act of December 24, 1894, is not defeated by the fact that the first entry was relinquished, if the cancellation of said entry would have been ordered, on a disclosure of the facts to the Land Department.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 30, 1900.* (L. L. B.)

December 26, 1893, George T. Marshall made homestead entry for the SW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$ , Sec. 1, T. 20 N., R. 28 W., Harrison, Arkansas. April 26, 1899, this entry was canceled upon his relinquishment.

August 10, 1899, Marshall made application to enter the W.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 2 of the same township and range.

He filed with his said application his affidavit, corroborated by two witnesses, to the effect that after he made his entry in 1893, he cut a set of house logs (presumably for use in making a house on the land embraced in his entry), when the weather became so bad that he could not work out doors for six weeks, during which time he became afflicted with carbuncles, which disabled him from work for about six months; that on this account and being a poor man he was absolutely unable to comply with the law and support his family, was unable to build his house and improve the land, and that from the above facts, and for no other cause, he has failed to comply with the law under his said entry, and he now asks to be allowed to make a second entry under the act of December 29, 1894 (28 Stat., 599).

It appears that the local officers took no action upon his application, but forwarded the papers to your office.

On an examination of the record, by your office decision of November 11, 1899, his application was rejected, for the following reasons stated in said decision:

It does not appear by the records of this office that Marshall's entry has ever been attacked for invalidity. The case does not fall under the remedial provisions of the act of December 29, 1894 (28 Stat., 599), because the entryman never established residence on the land and was not a settler in the proper meaning of the term. Marshall does not satisfactorily show that circumstances beyond his control prevented him from complying with the law for the five years and more intervening from date of entry to the date of his application for a second privilege.

Marshall has appealed to this Department.

The act of December 29, 1894 (*supra*), is an amendment to section 3 of the act of March 2, 1889 (25 Stat., 854). Said section 3 is as follows:

That whenever it shall be made to appear to the register and receiver of any public land office, under such regulations as the Secretary of the Interior may prescribe, that any settler upon the public domain under existing law is unable by reason of a total or partial destruction or failure of crops, sickness, or other unavoidable casualty, to secure a support for himself, herself, or those dependent upon him or her upon the lands settled upon, then such register and receiver may grant to such settler a leave of absence from the claim upon which he or she has filed for a period not exceeding one year at any one time, and such settler so granted leave of absence shall forfeit no rights by reason of such absence: *Provided*, That the time of such actual absence shall not be deducted from the actual residence required by law.

The act of December 29, 1894 (*supra*), adds the following:

That if any such settler has heretofore forfeited his or her entry for any of said reasons, such person shall be permitted to make entry of not to exceed a quarter section on any public land subject to entry under the homestead law, and to perfect title to the same under the same conditions in every respect as if he had not made the former entry.

The word "forfeited," as used in this amended act, does not necessarily mean that the entry has been canceled through a contest or by a decision of the land department.

In this case, by the failure of Marshall to reside upon or cultivate the land embraced in his entry, he thereby forfeited his entry, and his rights thereunder.

In other words, a relinquishment by the entryman does not necessarily exclude him from the benefits of this amendment, in cases where cancellation would be ordered, upon examination of the facts by the land department.

In the case of Patrick H. Guthrey (26 L. D., 549-552), it is said:

Although accompanied with a relinquishment his parting with his right to the land was not voluntary, but forced, owing to unforeseen vicissitudes, and his relinquishment was not made for the purpose of gain, but was made at a sacrifice to secure means of a livelihood.

It is evident from the record in this case that the applicant when he relinquished his entry did so because he believed that he would not be allowed to go on and perfect it by reason of his failure to establish residence on the land within the time required by law. Being honestly of that opinion, he relinquished it, and now if he cannot make a second entry he will be deprived, unless Congress comes to his aid, of exercising his homestead right. It is a case of great hardship. Marshall is a poor man, without a home or means of support. There is no adverse claimant. It is believed that he comes within the spirit of the said act of December 29, 1894. See Charles A. Garrison (22 L. D., 179). You will direct that his entry be allowed.

The decision appealed from is accordingly reversed.

## MINING CLAIM—APPLICATION FOR SURVEY.

## TIPTON GOLD MINING COMPANY.

If, after the issue of an order for the survey of a mining claim, a relocation is made, embracing ground not included in the original order, a new order of survey must be obtained, which should bear its proper number in the current series.

The signature to an application for the survey of a mining claim should be in the handwriting of the claimant, his agent, or attorney.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 30, 1900.* (W. A. E.)

December 21, 1896, on the application of The Tipton Gold Mining Company, the U. S. surveyor-general for the State of Colorado issued an order, No. 11,681, for the survey of the American Flag and other lode mining claims, in the Pueblo, Colorado, land district.

January 29, 1897, the field notes of the survey were filed in the office of the surveyor-general by Edward S. Snell, United States deputy mineral surveyor.

February 3, 1897, the field notes were returned because the lines of the American Flag claim, as described therein, differed very materially from the description given in the certified copy of the location certificate, upon which the order for survey was based. In connection with the return of the field notes, it was required that an amended location of the claim be made and a new application for survey filed, together with a certified copy of said amended location certificate, and the proper certificate of deposit of five dollars for additional office work.

April 16, 1897, a certified copy of amended location certificate, an application for amended survey, and a certificate of deposit were filed as required by the surveyor-general.

April 17, 1897, these papers were returned to the mineral claimant for the reasons: (1) that there was a serious discrepancy between the original and the amended locations, the latter including three hundred feet of apparently new ground and making a difference of three hundred feet in length of lode line; and (2) that the signatures to the application were written in type, instead of being in the handwriting of the applicant's agent or attorney. It was held by the surveyor-general that in view of the discrepancies between the original and amended locations, the old number 11,681 would have to be abandoned, and that upon receipt of an application properly signed an amended order for survey would issue with a number in the current series.

From this action the company appealed to your office and by your office decision of September 30, 1897, the action of the surveyor-general was affirmed, whereupon further appeal was taken to the Department.

Numerous specifications of error are alleged, the substance of which is that the appellant has complied with the rules and regulations of the Department; that the survey of said claim has been properly and

correctly made under the order of the surveyor-general, and has been designated as survey No. 11,681; that there is no law or regulation which requires the appellant to abandon this number and take a new and higher number; and that the signature to the application for survey is sufficient, there being no rule or regulation requiring that such signature should be in the handwriting of the applicant's agent or attorney.

The action of the surveyor-general, requiring the abandonment of the original number of survey and the substitution of a new number in the current series, was based upon paragraph 12, appendix A, of the manual of instructions for the survey of mineral lands, issued by your office October 25, 1895. This paragraph reads as follows:

If, after having obtained an order for survey, you should find that the record of location does not practically describe the location as staked upon the ground, you should file a certified copy of an amended location certificate, correctly describing the claim, and obtain an amended order for survey. If a relocation of the claim is made embracing ground not included in the original order, or other material change is made, you will abandon the original number of the order for survey, and a new order will be issued in which a number in the current series will be substituted.

The American Flag lode mining claim was located January 1, 1896, and the location notice filed for record January 23, 1896, describes the claim as follows:

Beginning at corner No. 1, whence Straub Mt. bears N. 75° E., Big Bull Mt. N. 53° E. and Squaw Mt. bears N. 32° E., thence S. 43° E. 1200 ft. to Cor. No. 2; thence S. 47° W. 300 ft. to Cor. No. 3; thence N. 43° W. 1200 ft. to Cor. No. 4; thence N. 47° E. 300 ft. to Cor. No. 1, the place of beginning.

The amended location notice, filed for record March 25, 1897, describes the claim as follows:

Beginning in corner No. 1, whence the S. E. Cor. Sec. 36, T. 15 S., R. 70 W. of the 6th P. M. bears N. 55° 28' E., 3821.78 feet; thence S. 14° 7' E. 1500 ft. to Cor. No. 2; thence N. 85° 19' E. 295.63 ft. to Cor. No. 3; thence N. 14° 7' W. 1500 ft. to Cor. No. 4; thence S. 85° 19' W. 295.63 ft. to Cor. No. 1, the place of beginning.

This being the same lode originally located on the 1st day of January, 1896, and recorded on the 23rd day of January, 1896, in Book 59, page 430, in the office of the recorder of Fremont county. This further additional and amended certificate of location is made without waiver of any previously acquired rights, but for the purpose of correcting any errors in the original location, description or record, and of taking in and acquiring all forfeited or abandoned, overlapping ground, and of taking in any part of any overlapping claim which has been abandoned, and of securing all the benefits of said section 2409 of the General Statutes of Colorado.

The field notes of survey are not with the record.

Taking corner No. 1 of both location notices as identical, the two locations lie across each other at an angle of about twenty-eight degrees; the amended location includes considerable ground not covered by the original location notice; and the lode line is three hundred feet longer in the amended location than in the original location.

It is alleged by the appellant that the location as marked upon the ground was not amended nor was a relocation of the claim made

embracing ground not included in the original order, or other material change made in the location. If this be true, there was a serious discrepancy between the location as marked on the ground and the location notice upon which the order for survey was based, and the deputy-surveyor should not have proceeded with the survey after the discrepancy became apparent. In the case of Rose No. 1 and Rose No. 2 Lode Claims (22 L. D., 83), it was held that the official survey of a mining claim must be in accordance with the recorded notice of location as of record at the time of the order authorizing the survey. Slight discrepancies between the location notice and the location as marked on the ground are not material, as they may be explained by the lack of proper facilities for making an accurate survey at the time of location, but the disagreements in this case are of too serious a character to be so explained. The survey not being made of the ground indicated by the order of the surveyor-general was in effect made "in accordance with the dictation of the parties in interest," a practice expressly forbidden by the circular of November 20, 1873 (Copp's United States Mineral Lands, 68).

The paragraph above quoted from Appendix A of the manual of instructions for the survey of mineral lands is clear in its terms and needs no construction. A relocation of this claim was made embracing ground not included in the original order, and under said paragraph and the established practice in such cases the surveyor-general properly required the abandonment of the original number of the order for survey and the issuance of a new order in which a number in the current series would be substituted.

Paragraph 1, Appendix A, of the manual of instructions for the survey of mineral lands, requires that the application for survey shall be "signed by the claimants, their agent or attorney." Webster defines the verb sign, "to subscribe in one's own handwriting." It appears to be the general practice to require the signature to an application for survey to be in the handwriting of the claimant, his agent, or attorney. This practice is in accordance with the accepted definition of the words "sign" and "signature," and no reason is shown why this practice should be changed. It is, therefore, held that the typewritten name, attached to the amended application for survey in this case, is not sufficient.

Your office decision is hereby affirmed.

## HOMESTEAD—RESIDENCE—NON-CONTIGUITY OF TRACTS.

DE SIMAS *v.* PEREIRA.

The cancellation of a homestead entry, on account of an adverse right, as to the particular tract on which the entryman actually lived, does not affect the sufficiency of his residence as to the remainder of the tracts, if his entry was made in good faith, and embraced contiguous sub-divisions open to appropriation at such time, as shown by the records of the local office.

A homestead entry, embracing non-contiguous tracts, may be referred to the board of equitable adjudication where the non-contiguity is caused by the cancellation of a part of the entry on account of a prior adverse right; and the original entry is made in ignorance of such adverse claim.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 30, 1900.* (E. F. B.)

This controversy arose upon the protest of Manuel J. de Simas against the acceptance of the final proof of Manuel Pereira for the NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 32, SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 29 and S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 28, T. 44 N., R. 8 W., M. D. M., Redding, California.

Your office by decision of July 20, 1899, dismissed the protest of de Simas and held for cancellation his homestead entry for lot 3 (SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 28), which was improperly allowed while the tract was segregated by the entry of Pereira. The entry of Pereira was held for cancellation for conflict with the State's selection as to the SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 29, NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 32, except as to lot 4, and the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 28, except as to lot 3. As to the tracts excepted from the order of cancellation, the local officers were directed as follows:

Should this decision become final, and after the cancellation of H. E. 4052 of Manuel de Simas for lot 3, Sec. 28, and the cancellation of Pereira's entry as above indicated, you will upon the payment of the legal commissions issue final papers to Manuel Pereira for lot 3, Sec. 28, and lot 4, Sec. 32, Tp. 44 N., R. 8 W., M. D. M.

From said decision de Simas appealed, alleging substantially the following grounds of error:

(1) Because one hundred and twenty acres of the land applied for had been selected by the State of California at the date of Pereira's entry. (2) Because lots 3 and 4 are non-contiguous and were made so by a segregation of other tracts prior to the entry. (3) Because the entry of Pereira did not operate to segregate the land described therein. (4) Because there is no authority to allow a homestead entry for non-contiguous tracts. (5) Because protestant has improvements on lot 3 on which he resides, and Pereira has no improvements thereon or worthy of mention.

The conflict of Pereira's entry with the State selections is due to conflicting surveys in the township. In 1856 a survey was made by C. C. Tracy, of the NE.  $\frac{1}{4}$  Sec. 31, the N.  $\frac{1}{2}$  of Sec. 32, and the NW.  $\frac{1}{4}$  of Sec. 33, which was approved October 6, 1856. According to the plat of that survey, the State of California selected the NW.  $\frac{1}{4}$  of Sec. 33, the NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 32, which was approved March 14, 1866. Subsequently, in 1880, the entire town-

ship was surveyed by W. F. Benson and the plat of said survey was approved January 22, 1881. The north and south section lines of the Benson survey were located a distance of 20 chains, or a quarter quarter-section, west, and the east and west section lines were located approximately the same distance south of the corresponding section line of the survey of Tracy in 1856, so that the lands selected by the State under the survey of 1856 are designated, approximately, by the Benson survey as the SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  Sec. 28, the SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 29, the N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 32, and the N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 33.

October 25, 1887, Pereira made homestead entry of the NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 32, the SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 29 and the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 28. It will be seen that there is no conflict between the entry of Pereira and the State selections according to the description given by the State.

May 6, 1896, the local officers, referring to the conflicting claims to lands covered by both surveys, recommended that an official plat be prepared by the surveyor-general and said—

One party in particular, Manuel Pereira, is very anxious about the matter, he having a homestead upon which more than 8 years have expired since date of entry, and upon which he can not make proof until he knows how much and what government land is embraced in his entry. As a matter of fact all of his homestead is in conflict with the State selections, except lot No. 3 of Sec. 28, containing 34.80 acres.

Thereupon an official plat or diagram was prepared under instructions from your office and approved June 1, 1896, showing the relative position of the land selected under the survey of 1856, with regard to the survey of Benson in 1881. A plat or diagram showing the relative position of the lines of the two surveys had been prepared and approved in 1890.

July 17, 1897, Pereira was called upon to show cause why his entry should not be canceled for failure to make proof within the statutory period. In response thereto he filed his affidavit stating that he applied to make proof in April, 1896, but was informed that owing to the conflict in the two surveys the whole matter had been referred to your office for decision. In taking action thereon the local officers were directed by letter of March 7, 1898, to inform Pereira that the records of your office and the plat or diagram which was prepared and approved in 1890, do not show any conflict between the State's selections and his entry and, as there appeared to be no reason why he should not be allowed to make proof in support thereof, they were directed to permit him to make final proof and if it was satisfactory, to issue final papers with a view to submitting the case to the Board of Equitable Adjudication. The State selections are not indicated on the diagram of 1890, above referred to, and the diagram of 1896 was apparently overlooked; otherwise the conflict between Pereira's entry and the State selections would have been noticed.

Pereira, accordingly, submitted final proof, which shows that he

settled on the land in 1879 or 1880; that he had resided upon it continuously with his family, and has improvements on the land of the value of \$1,500 or \$2,000. As to the land in conflict with the State's selections, he states that he has a certificate of purchase from the State and is willing to acquire title from the State, and waive the same to the United States, if such course is necessary to complete his entry. The local officers transmitted said proof without issuing final certificate, for the reason that on February 3, 1898, de Simas has been allowed to make homestead entry of lot 3, in conflict with Pereira's entry.

There are only two material questions presented by the appeal: (1) Whether the establishment and maintenance of residence by Pereira on that portion of his homestead that was canceled is a legal and sufficient residence on every subdivision for which entry can be perfected, and (2) whether the entry can be perfected to lots 3 and 4, which are rendered non-contiguous by the cancellation of the tracts in conflict with the State selections.

As to the first proposition, it may be stated that residence upon any part of the land embraced in a homestead entry is residence upon the whole. If the entry was made, in good faith, of contiguous, legal subdivisions, appearing from the records of the local office to be subject to entry, the mere fact that the particular subdivision upon which the residence was actually established and maintained was subsequently found not subject to entry, can not effect the constructive residence that was maintained upon the other legal subdivision. It is a question to be determined by the *bona fides* of the entryman and not by his actual occupancy of a particular subdivision. *Sanderson v. Taylor* (14 L. D., 489).

The second question is determined by the decision of the Department in the case of *Akin v. Brown*, in which it was held (syllabus; 15 L. D., 119):

that a homestead entry embracing non-contiguous tracts may be referred to the board of equitable adjudication where the non-contiguity is caused by the cancellation of a part of the entry on account of the prior adverse right of another, and the original entry is made in ignorance of said adverse right.

See also *Lannon v. Pinkston* (9 L. D., 143).

The records of the local office, according to the approved plat of survey under which the lands in said township were disposed of at the date of Pereira's entry, showed these tracts to be public lands subject to settlement and entry. It was not until a plat was prepared and approved showing the relative position of the State's selections with reference to the two surveys, and their proper designation by the survey of 1881, that the extent of the conflict could be determined. The right and title of the State was not affected by the second survey and the entry of Pereira was therefore subject to cancellation to the extent of the conflict. But as the entry was made in good faith, of contiguous lands that appeared upon the tract books to be subject to entry, and

as the entryman has complied with the law as to residence and improvement upon the tracts embraced in his entry, it may be perfected as to the tracts not in conflict, and submitted to the board of equitable adjudication for confirmation, as was done in the case of *Akin v. Brown, supra*.

In the case of *Jenkins v. Seibel* (18 L. D. 141), relied on by protestant, the claimant was presumed to have notice of the existence of a subsisting mining location at the date of his entry. In this respect it was distinguished from the case of *Lannon v. Pinkston, supra*, where the discovery of mineral and location of the mining claim was subsequent to the homestead entry.

Your decision is affirmed.

REVISED RULES OF PRACTICE, APPROVED JANUARY 27, 1899.

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DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., January 10, 1899.*

SIR: I have the honor to submit herewith for your consideration, and approval if found satisfactory, a revised draft of the rules of practice in cases before the district land offices, the General Land Office, and the Department of the Interior.

It will be observed, upon examination, that no change or modification of the present rules has been made, but where rules have been amended from time to time such rules as last amended have been placed in their proper numerical order in the body of the rules of practice instead of in chronological order in an appendix, as has heretofore been the custom.

Very respectfully,

BINGER HERMANN,  
*Commissioner.*

The SECRETARY OF THE INTERIOR.

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DEPARTMENT OF THE INTERIOR,  
*Washington, January 27, 1899.*

SIR: I have examined the revised draft of the rules of practice in cases before the district land offices, the General Land Office, and the Department of the Interior, submitted with your inclosure of January 10, 1899, and return the same herewith duly approved.

Very respectfully,

THOS. RYAN, *Acting Secretary.*

The COMMISSIONER OF THE GENERAL LAND OFFICE.

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DEPARTMENT OF THE INTERIOR,  
*Washington, January 27, 1899.*

The following rules of practice for the government of proceedings in this Department and subordinate offices in land cases, together with regulations governing the recognition of agents, attorneys, and other persons to represent claimants, are hereby prescribed, to take effect this day.

None of said rules shall be construed to deprive the Secretary of the Interior of the exercise of the directory and supervisory powers conferred upon him by law.

Proceedings under former rules of practice will not be prejudiced by anything herein contained.

THOS. RYAN, *Acting Secretary.*

# RULES OF PRACTICE.

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## I.

### PROCEEDINGS BEFORE REGISTERS AND RECEIVERS.

#### 1.—Initiation of contests.

RULE 1.—Contests may be initiated by an adverse party or other person against a party to any entry, filing, or other claim under laws of Congress relating to the public lands, for any sufficient cause affecting the legality or validity of the claim.

RULE 2.—In every case of application for a hearing an affidavit must be filed by the contestant with the register and receiver, fully setting forth the facts which constitute the grounds of contest. When the contest is against the heirs of a deceased entryman, the affidavit shall state the names of all the heirs. If the heirs are non-resident or unknown, the affidavit shall set forth the fact and be corroborated with respect thereto by the affidavit of one or more persons.

RULE 3.—Where an entry has been allowed and remains of record the affidavit of the contestant must be accompanied by the affidavits of one or more witnesses in support of the allegations made.

#### 2.—Hearings in contested cases.

RULE 4.—Registers and receivers may order hearings in all cases wherein entry has not been perfected and no certificate has been issued as a basis for patent.

RULE 5.—In case of an entry or location on which final certificate has been issued the hearing will be ordered only by direction of the Commissioner of the General Land Office.

RULE 6.—Applications for hearings under Rule 5 must be transmitted by the register and receiver, with special report and recommendation, to the Commissioner for his determination and instructions.

#### 3.—Notice of contest.

RULE 7.—At least thirty days' notice shall be given of all hearings before the register and receiver unless by written consent an earlier day shall be agreed upon.

RULE 8.—The notice of contest and hearing must conform to the following requirements:

1. It must be written or printed.
2. It must be signed by the register and receiver, or by one of them.
3. It must state the time and place of hearing.
4. It must describe the land involved.
5. It must state the register and receiver's number of the entry and the land office where and the date when made, and the name of the party making the same.
6. It must give the name of the contestant and briefly state the grounds and purpose of the contest.
7. It may contain any other information pertinent to the contest.

4.—Service of notice.

RULE 9.—Personal service shall be made in all cases when possible if the party to be served is resident in the State or Territory in which the land is situated, and shall consist in the delivery of a copy of the notice to each person to be served. When the contest is against the heirs of a deceased entryman, the notice shall be served on each heir. If the heirs of the entryman are non-resident or unknown, notice may be served upon them by publication as hereinafter provided. If the person to be personally served is an infant under fourteen years of age or a person who has been legally adjudged of unsound mind, service of notice shall be made by delivering a copy of the notice to the statutory guardian or committee of such infant or person of unsound mind, if there be one; if there be none, then by delivering a copy of the notice to the person having the infant or person of unsound mind in charge.

RULE 10.—Personal service may be executed by any officer or person.

RULE 11.—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.

RULE 12.—When it is found that the prescribed service can not be had, either personal or by publication, in time for the hearing provided for in the notice, the notice may be returned prior to the time fixed for the hearing, and a new notice issued fixing another time of hearing, for the proper service thereof, an affidavit being filed by the contestant showing due diligence and inability to serve the notice in time.

## 5.—Notice by publication.

RULE 13.—Notice by publication shall be made by advertising the notice at least once a week for four successive weeks in some newspaper published in the county wherein the land in contest lies; and if no newspaper be published in such county, then in the newspaper published in the county nearest to such land. The first insertion shall be at least thirty days prior to the day fixed for the hearing.

RULE 14.—Where notice is given by publication a copy thereof shall, at least thirty days before the date for the hearing, be mailed, by registered letter, to each person to be so notified at the last address, if any, given by him as shown by the record, and to him at his present address named in the affidavit for publication required by Rule 11, if such present address is stated in such affidavit and is different from his record address. If there be no such record address and if no present address is named in the affidavit for publication, then a copy of the notice shall be so mailed to him at the post-office nearest to the land. A copy of the notice shall also be posted in the register's office for a period of at least thirty days before the date for the hearing and still another copy thereof shall be posted in a conspicuous place upon the land for at least two weeks prior to the date set for the hearing. When notice of proceedings commenced by the government against timber and stone entries is given by publication the posting of notices upon the land will not be required.

## 6.—Proof of service of notice.

RULE 15.—Proof of personal service shall be the written acknowledgment of the person served or the affidavit of the person who served the notice attached thereto, stating the time, place, and manner of service.

RULE 16.—When service is by publication, the proof of service shall be a copy of the advertisement, with the affidavit of the publisher or foreman attached thereto, showing that the same was successively inserted the requisite number of times, and the date thereof.

## 7.—Notice of interlocutory proceedings.

RULE 17.—Notice of interlocutory motions, proceedings, orders, and decisions, shall be in writing and may be served personally or by registered letter mailed to the last address, if any, given by or on behalf of the party to be notified, as shown by the record, and if there be no such record address, then to the post-office nearest to the land; and in all those contest cases where notice of contest is given by registered mail under Rule 14, and the return registry receipt shows such notice to have been received by the contestee, the address at which the notice was so received shall be considered as an address given by the contestee, within the meaning of this rule.

**RULE 18.**—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.

8.—Rehearings.

**RULE 19.**—Orders for rehearing must be brought to the notice of the parties in the same manner as in case of original proceedings.

9.—Continuances.

**RULE 20.**—A postponement of a hearing to a day to be fixed by the register and receiver may be allowed on the day of trial on account of the absence of material witnesses, when the party asking for the continuance makes an affidavit before the register and receiver showing—

1. That one or more of the witnesses in his behalf is absent without his procurement or consent;

2. The name and residence of each witness;

3. The facts to which they would testify if present;

4. The materiality of the evidence;

5. The exercise of proper diligence to procure the attendance of the absent witnesses; and

6. That affiant believes said witnesses can be had at the time to which it is sought to have the trial postponed.

Where hearings are ordered by the Commissioner of the General Land Office in cases to which the United States is a party, continuances will be granted in accordance with the usual practice in United States cases in the courts, without requiring an affidavit on the part of the government.

**RULE 21.**—One continuance only shall be allowed to either party on account of absent witnesses, unless the party applying for a further continuance shall at the same time apply for an order to take the depositions of the alleged absent witnesses.

**RULE 22.**—No continuance shall be granted when the opposite party shall admit that the witnesses would, if present, testify to the statement set out in the application for continuance.

10.—Depositions on interrogatories.

**RULE 23.**—Testimony may be taken by deposition in the following cases:

1. Where the witness is unable, from age, infirmity, or sickness, or shall refuse, to attend the hearing at the local land office.

2. Where the witness resides more than fifty miles from the place of trial, computing distance by the usually traveled route.

3. Where the witness resides out of or is about to leave the State or Territory, or is absent therefrom.

4. Where from any cause it is apprehended that the witness may be

unable or will refuse to attend, in which case the deposition will be used only in event that the personal attendance of the witness can not be obtained.

**RULE 24.**—The party desiring to take a deposition under Rule 23 must comply with the following regulations:

1. He must make affidavit before the register or receiver, setting forth one or more of the above-named causes for taking such deposition, and that the witness is material.

2. He must file with the register and receiver the interrogatories to be propounded to the witness.

3. He must state the name and residence of the witness.

4. He must serve a copy of the interrogatories on the opposing party or his attorney.

**RULE 25.**—The opposing party will be allowed ten days in which to file cross-interrogatories.

**RULE 26.**—After the expiration of the ten days allowed for filing cross-interrogatories, a commission to take the deposition shall be issued by the register and receiver, which commission shall be accompanied by a copy of all the interrogatories filed.

**RULE 27.**—The register and receiver may designate any officer, authorized to administer oaths within the county or district where the witness resides, to take such deposition.

**RULE 28.**—It is the duty of the officer before whom the deposition is taken to cause the interrogatories appended to the commission to be written out and the answers thereto to be inserted immediately underneath the respective questions, and the whole, when completed, is to be read over to the witness, and must be by him subscribed and sworn to in the usual manner before the witness is discharged.

**RULE 29.**—The officer must attach his certificate to the deposition, stating that the same was subscribed and sworn to by the deponent at the time and place therein mentioned.

**RULE 30.**—The deposition and certificate, together with the commission and interrogatories, must then be sealed up, the title of the cause indorsed on the envelope, and the whole returned by mail or express to the register and receiver.

**RULE 31.**—Upon receipt of the package at the local land office, the date when the same is opened must be indorsed on the envelope and body of the deposition by the local land officers.

**RULE 32.**—If the officer designated to take the deposition has no official seal, a proper certificate of his official character, under seal, must accompany his return.

**RULE 33.**—The parties in any case may stipulate in writing to take depositions before any qualified officer, and in any manner.

**RULE 34.**—All stipulations by parties or counsel must be in writing, and be filed with the register and receiver.

## 11.—Oral testimony before officers other than registers and receivers.

**RULE 35.**—In the discretion of registers and receivers testimony may be taken near the land in controversy before a United States commissioner, or other officer authorized to administer oaths, at a time and place to be fixed by them and stated in the notice of hearing.

2. Officers taking testimony under the foregoing rule will be governed by the rules applicable to trials before registers and receivers. (See Rules 36 to 42, inclusive.)

3. Testimony so taken must be certified to, sealed up, and transmitted by mail or express to the register and receiver, and the receipt thereof at the local office noted on the papers, in the same manner as provided in case of depositions by Rules 29 to 32, inclusive.

4. On the day set for hearing at the local office the register and receiver will examine the testimony taken by the officer designated, and render a decision thereon in the same manner as if the testimony had been taken before themselves. (See Rules 50 to 53, inclusive.)

5. No charge for examining testimony in such cases will be made by the register and receiver.

6. Officers designated to take testimony under this rule will be allowed to charge such fees as are properly authorized by the tariff of fees existing in the local courts of their respective districts, to be taxed in the same or equivalent manner as costs are taxed by registers and receivers under Rules 54 to 58, inclusive.

7. When an officer designated to take testimony under this rule, or when an officer designated to take depositions under Rule 27, can not act on the day fixed for taking the testimony or deposition, the testimony or deposition, as the case may be, will be deemed properly taken before any other qualified officer, at the same place and time, who may be authorized by the officer originally designated, or by agreement of parties, to act in the place of the officer first named.

## 12.—Trials.

**RULE 36.**—Upon the trial of a cause, the register and receiver may in any case, and should in all cases when necessary, personally direct the examination of the witnesses, in order to draw from them all the facts within their knowledge requisite to a correct conclusion by the officers upon any point connected with the case.

**RULE 37.**—The register and receiver will be careful to reach, if possible, the exact condition and status of the land involved by any contest, and will ascertain all the facts having any bearing upon the rights of parties in interest.

**RULE 38.**—In preemption cases they will particularly ascertain the nature, extent, and value of alleged improvements; by whom made, and when; the true date of the settlement of persons claiming; the

steps taken to mark and secure the claim, and the exact status of the land at that date as shown upon the records of their office.

RULE 39.—In like manner, under the homestead and other laws, the conditions affecting the inception of the alleged right, as well as the subsequent acts of the respective claimants, must be fully and specifically examined.

RULE 40.—Due opportunity will be allowed opposing claimants to confront and cross-examine the witnesses introduced by either party.

RULE 41.—No testimony will be excluded from the record by the register and receiver on the ground of any objection thereto; but when objection is made to testimony offered the exceptions will be noted, and the testimony, with the exceptions, will come up with the case for the consideration of the commissioner. Officers taking testimony will, however, summarily put a stop to obviously irrelevant questioning.

<sup>1</sup> RULE 42.—Upon the day originally set for hearing, and upon any day to which the trial may be continued, the testimony of all the witnesses present shall be taken and reduced to writing. When testimony is taken in shorthand, the stenographer's notes must be written out and the written testimony then and there subscribed by the witness and attested by the officer before whom the same is taken.

### 13.—Appeals.

RULE 43.—Appeals from the final action or decisions of registers and receivers lie in every case to the Commissioner of the General Land Office. (Revised Statutes, sections 453, 2478.)

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### <sup>1</sup> RULE 42 AMENDED.

WASHINGTON, D. C., *April 18, 1899.*

REGISTERS AND RECEIVERS,  
*United States Land Offices.*

GENTLEMEN:

In order to avoid the expense and trouble of detaining witnesses at your offices after the close of hearings in contest cases, or of causing their subsequent return for the purpose of signing their testimony, written out from shorthand notes, the parties to the contest may, by proper stipulation in writing, waive that provision of Rule of Practice No. 42 which requires the testimony to be signed by the witnesses.

In all cases where such a stipulation is filed, you should let the record be accompanied by the stipulation, and your certificate that each of the witnesses was duly sworn before testifying, and also by the affidavit of the stenographer to the effect that the testimony, as transcribed, is a true and complete transcription of the shorthand notes of the testimony given in the case, which was faithfully reported in shorthand by him, as delivered by the several witnesses.

Very respectfully,

BINGER HERMANN,  
*Commissioner.*

Approved:

E. A. HITCHCOCK,  
*Secretary.*

In cases dismissed for want of prosecution the register and receiver will by registered letter notify the parties in interest of the action taken, and that unless within thirty days a motion for reinstatement shall be made, the default of the plaintiff will be final, and that no appeal will be allowed; which notice shall be given as provided in circular of October 28, 1886 (5 L. D., 204).

If such motion for reinstatement be made within the time limited, the local officers shall take action thereon, and grant or deny it, as they deem proper. If granted, no appeal shall lie. If overruled, the plaintiff shall have the right of appeal, the time for which shall be thirty days, and run from the date of written notice to the plaintiff.

**RULE 44.**—After hearing in a contested case has been had and closed, the register and receiver will, in writing, notify the parties in interest of the conclusions to which they have arrived, and that thirty days are allowed for an appeal from their decision to the Commissioner, the notice to be served personally or by registered letter through the mail to their last known address.

**RULE 45.**—The appeal must be in writing or in print, and should set forth in brief and clear terms the specific points of exception to the ruling appealed from.

**RULE 46.**—Notice of appeal and copy of specification of errors shall be served on appellee within the time allowed for appeal, and appellee shall be allowed ten days for reply before transmittal of the record to the General Land Office.

**RULE 47.**—No appeal from the action or decision of the register and receiver will be received at the General Land Office unless forwarded through the local officers.

**RULE 48.**—In case of a failure to appeal from the decision of the local officers, their decision will be considered final as to the facts in the case and will be disturbed by the Commissioner only as follows:

1. Where fraud or gross irregularity is suggested on the face of the papers.

2. Where the decision is contrary to existing laws or regulations.

3. In event of disagreeing decisions by the local officers.

4. Where it is not shown that the party against whom the decision was rendered was duly notified of the decision and of his right of appeal.

**RULE 49.**—In any of the foregoing cases the Commissioner will reverse or modify the decision of the local officers or remand the case, at his discretion.

**RULE 50.**—All documents once received by the local officers must be kept on file with the cases, and the date of filing must be noted thereon; and no papers will be allowed under any circumstances to be removed from the files or taken from the custody of the register and receiver, but access to the same, under proper rules, so as not to interfere with necessary public business, will be permitted to the par-

ties in interest, or their attorneys, under the supervision of those officers.

#### 14.—Reports and opinions.

**RULE 51.**—Upon the termination of a contest, the register and receiver will render a joint report and opinion in the case, making full and specific reference to the postings and annotations upon their records.

**RULE 52.**—The register and receiver will promptly forward their report, together with the testimony and all the papers in the case, to the Commissioner of the General Land Office, with a brief letter of transmittal, describing the case by its title, the nature of the contest, and the tract involved.

**RULE 53.**—The local officers will thereafter take no further action affecting the disposal of the land in contest until instructed by the Commissioner.

In all cases, however, where a contest has been brought against any entry or filing on the public lands, and trial has taken place, the entryman may, if he so desires, in accordance with the provisions of the law under which he claims and the rules of the Department, submit final proof and complete the same, with the exception of the payment of the purchase money or commissions, as the case may be; said final proof will be retained in the local land office, and should the entry finally be adjudged valid, said final proof, if satisfactory, will be accepted upon the payment of the purchase money or commissions, and final certificate will issue, without any further action on the part of the entryman, except the furnishing of a nonalienation affidavit by the entryman, or, in case of his death, by his legal representatives.

In such cases the party making the proof, at the time of submitting the same, will be required to pay the fees for reducing the testimony to writing.

#### 15.—Taxation of costs.

**RULE 54.**—Parties contesting preemption, homestead, or timber-culture entries and claiming preference rights of entry under the second section of the act of May 14, 1880 (21 Stat., 140), must pay the costs of contest.

**RULE 55.**—In other contested cases each party must pay the costs of taking testimony upon his own direct and cross-examination.

**RULE 56.**—The accumulation of excessive costs under Rule 54 will not be permitted; but when the officer taking testimony shall rule that a course of examination is irrelevant and checks the same, under Rule 41, he may, nevertheless, in his discretion, allow the same to proceed at the sole cost of the party making such examination. This rule will apply also to cross-examination in contests covered by the provisions of Rule 55.

**RULE 57.**—Where parties contesting preemption, homestead, or timber-culture entries establish their right of entry under the preemption or homestead laws of the land in contest by virtue of actual settlement and improvement, without reference to the act of May 14, 1880, the cost of contest will be adjudged under Rule 55.

**RULE 58.**—Registers and receivers will apportion the cost of contest in accordance with the foregoing rules, and may require the party liable thereto to give security in advance of trial, by deposit or otherwise, in a reasonable sum or sums, for payment of the cost of transcribing the testimony.

**RULE 59.**—The cost of contest chargeable by registers and receivers are the legal fees for reducing testimony to writing. No other contest fees or costs will be allowed to or charged by those officers directly or indirectly.

**RULE 60.**—Contestants must give their own notices and pay the expenses thereof.

**RULE 61.**—Upon the termination of a trial, any excess in the sum deposited as security for the costs of transcribing the testimony will be returned to the proper party.

**RULE 62.**—When hearings are ordered by the Commissioner or by the Secretary of the Interior, upon the discovery of reasons for suspension in the usual course of examination of entries, the preliminary costs will be provided from the contingent fund for the expenses of local land offices.

**RULE 63.**—The preliminary costs provided for by the preceding section will be collected by the register and receiver when the parties are brought before them in obedience to the order of hearing.

**RULE 64.**—The register and receiver will then require proper provision to be made for such further notification as may become necessary in the usual progress of the case to final decision.

**RULE 65.**—The register and receiver will append to their report in each case a statement of costs and the amount actually paid by each of the contestants, and also a statement of the amount deposited to secure the payment of the costs, how said sum was apportioned, and the amount returned, if any, and to whom.

16.—Appeals from decisions rejecting applications to enter public lands.

**RULE 66.**—For the purpose of enabling appeals to be taken from the rulings or action of the local officers relative to applications to file upon, enter, or locate the public lands the following rules will be observed:

1. The register and receiver will indorse upon every rejected application the date when presented and their reason for rejecting it.
2. They will promptly advise the party in interest of their action and of his right to appeal to the Commissioner.

3. They will note upon their records a memorandum of the transaction.

**RULE 67.**—The party aggrieved will be allowed thirty days from receipt of notice in which to file his appeal in the local land office. Where the notice is sent by mail, five days additional will be allowed for the transmission of notice and five for the return of the appeal.

**RULE 68.**—The register and receiver will promptly forward the appeal to the General Land Office, together with a full report upon the case.

**RULE 69.**—This report should recite all the facts and the proceedings had, and must embrace the following particulars:

1. A statement of the application and rejection, with the reasons for the rejection.

2. A description of the tract involved and a statement of its status, as shown by the records of the local land office.

3. References to all entries, filings, annotations, memoranda, and correspondence shown by the record relating to said tract and to the proceedings had.

**RULE 70.**—Rules 43 to 48, inclusive, and Rule 93 are applicable to all appeals from decisions of registers and receivers.

## II.

### PROCEEDINGS BEFORE SURVEYORS-GENERAL.

**RULE 71.**—The proceedings in hearings and contests before surveyors-general shall, as to notices, depositions, and other matters, be governed as nearly as may be by the rules prescribed for proceedings before registers and receivers, unless otherwise provided by law.

## III.

### PROCEEDINGS BEFORE THE COMMISSIONER OF THE GENERAL LAND OFFICE AND SECRETARY OF THE INTERIOR.

#### 1.—Examination and argument.

**RULE 72.**—When a contest has been closed before the local land officers and their report forwarded to the General Land Office, no additional evidence will be admitted in the case, unless offered under stipulation of the parties to the record, except where such evidence is presented as the basis of a motion for a new trial or in support of a mineral application or protest; but this rule will not prevent the Commissioner, in the exercise of his discretion, from ordering further investigation when necessary.

**RULE 73.**—After the Commissioner shall have received a record of testimony in a contested case, thirty days will be allowed to expire

before any action thereon is taken, unless, in the judgment of the Commissioner, public policy or private necessity shall demand summary action, in which case he will proceed at his discretion, first notifying the attorneys of record of his proposed action.

RULE 74.—When a case is pending on appeal from the decision of the register and receiver or surveyor-general, and argument is not filed before the same is reached in its order for examination, the argument will be considered closed, and thereafter no further arguments or motions of any kind will be entertained except upon written stipulation duly filed or good cause shown to the Commissioner.

RULE 75.—If before decision by the Commissioner either party should desire to discuss a case orally, reasonable opportunity therefor will be given in the discretion of the Commissioner, but only at a time to be fixed by him upon notice to the opposing counsel, stating time and specific points upon which discussion is desired; and except as herein provided, no oral hearings or suggestions will be allowed.

### 2.—Rehearing and review.

RULE 76.—Motions for rehearing before registers and receivers, or for review or reconsideration of the decisions of the Commissioner or Secretary, will be allowed, in accordance with legal principles applicable to motions for new trials at law, after due notice to the opposing party.

RULE 77.—Motions for rehearing and review, except as provided in Rule 114, must be filed in the office wherein the decision to be affected by such rehearing or review was made or in the local land office, for transmittal to the General Land Office; and, except when based upon newly discovered evidence, must be filed within thirty days from notice of such decision.

RULE 78.—Motions for rehearing and review must be accompanied by an affidavit of the party, or his attorney, that the motion is made in good faith, and not for the purpose of delay.

RULE 79.—The time between the filing of a motion for rehearing or review and the notice of the decision upon such motion shall be excluded in computing the time allowed for appeal.

RULE 80.—No officer shall entertain a motion in a case after an appeal from his decision has been taken.

### 3.—Appeals from the Commissioner to the Secretary.

RULE 81.—No appeal shall be had from the action of the Commissioner of the General Land Office affirming the decision of the local officers in any case where the party or parties adversely affected thereby shall have failed, after due notice, to appeal from such decision of said local officers.

Subject to this provision, an appeal may be taken from the decision

of the Commissioner of the General Land Office to the Secretary of the Interior upon any question relating to the disposal of the public lands and to private land claims, except in case of interlocutory orders and decisions and orders for hearing or other matter resting in the discretion of the Commissioner. Decisions and orders forming the above exception will be noted in the record, and will be considered by the Secretary on review in case an appeal upon the merits be finally allowed.

**RULE 82.**—When the Commissioner considers an appeal defective, he will notify the party of the defect, and if not amended within fifteen days from the date of the service of such notice the appeal may be dismissed by the Secretary of the Interior and the case closed.

**RULE 83.**—In proceedings before the Commissioner in which he shall formally decide that a party has no right of appeal to the Secretary, the party against whom such decision is rendered may apply to the Secretary for an order directing the Commissioner to certify said proceedings to the Secretary and to suspend further action until the Secretary shall pass upon the same.

**RULE 84.**—Applications to the Secretary under the preceding rule shall be made in writing, under oath, and shall fully and specifically set forth the grounds upon which the application is made.

**RULE 85.**—When the Commissioner shall formally decide against the right of an appeal, he shall suspend action on the case at issue for twenty days from service of notice of his decision, to enable the party against whom the decision is rendered to apply to the Secretary for an order, in accordance with Rules 83 and 84.

**RULE 86.**—Notice of an appeal from the Commissioner's decision must be filed in the General Land Office and served on the appellee or his counsel within sixty days from the date of the service of notice of such decision.

**RULE 87.**—When notice of the decision is given through the mails by the register and receiver or surveyor-general, five days additional will be allowed by those officers for the transmission of the letter and five days for the return of the appeal through the same channel before reporting to the General Land Office.

**RULE 88.**—Within the time allowed for giving notice of appeal the appellant shall also file in the General Land Office a specification of errors, which specification shall clearly and concisely designate the errors of which he complains.

**RULE 89.**—He may also, within the same time, file a written argument, with citation of authorities, in support of his appeal.

**RULE 90.**—A failure to file a specification of errors within the time required will be treated as a waiver of the right of appeal, and the case will be considered closed.

**RULE 91.**—The appellee shall be allowed thirty days from the expiration of the sixty days allowed for appeal in which to file his argument.

RULE 92.—The appellant shall be allowed thirty days from service of argument of appellee in which to file argument strictly in reply, and no other or further arguments or motions of any kind shall be filed without permission of the Commissioner or Secretary and notice to the opposite party.

RULE 93.—A copy of the notice of appeal, specification of errors, and all arguments of either party shall be served on the opposite party within the time allowed for filing the same.

RULE 94.—Such service shall be made personally or by registered letter.

RULE 95.—Proof of personal service shall be the written acknowledgment of the party served or the affidavit of the person making the service, attached to the papers served, and stating time, place, and manner of service.

RULE 96.—Proof of service by registered letter shall be the affidavit of the person mailing the letter, attached to a copy of the post-office receipt.

RULE 97.—Fifteen days, exclusive of the day of mailing, will be allowed for the transmission of notices and papers by mail, except in case of notice to resident attorneys, when one day will be allowed.

RULE 98.—Notice of interlocutory motions and proceedings before the Commissioner and Secretary shall be served personally or by registered letter, and service proved as provided in Rules 94 and 95.

RULE 99.—No motion affecting the merits of the case or the regular order of proceedings will be entertained except on due proof of service of notice.

RULE 100.—Ex parte cases and cases in which the adverse party does not appear will be governed by the foregoing rules as to notices of decisions, time for appeal, and filing of exceptions and arguments, as far as applicable. In such cases, however, the right to file additional evidence at any stage of the proceedings to cure defects in the proof or record will be allowed.

RULE 101.—No person hereafter appearing as a party or attorney in any case shall be entitled to a notice of the proceedings who does not at the time of his appearance file in the office in which the case is pending a statement in writing, giving his name and post-office address and the name of the party whom he represents; nor shall any person who has heretofore appeared in a case be entitled to a notice unless within fifteen days after being requested to file such statement he shall comply with said requirement.

RULE 102.—No person not a party to the record shall intervene in a case without first disclosing on oath the nature of his interest.

RULE 103.—When the Commissioner makes an order or decision affecting the merits of a case or the regular order of proceedings therein, he will cause notice to be given to each party in interest whose address is known.

## 4.—Attorneys.

RULE 104.—In all cases, contested or ex parte, where the parties in interest are represented by attorneys, such attorneys will be recognized as fully controlling the cases of their respective clients.

RULE 105.—All notices will be served upon the attorneys of record.

RULE 106.—Notice to one attorney in a case shall constitute notice to all counsel appearing for the party represented by him, and notice to the attorney will be deemed notice to the party in interest.

RULE 107.—All attorneys practicing before the General Land Office and Department of the Interior must first file the oath of office prescribed by section 3478, United States Revised Statutes.

RULE 108.—In the examination of any case, whether contested or ex parte, the attorneys employed in said case, when in good standing in the Department, for the preparation of arguments, will be allowed full opportunity to consult the records of the case, the abstracts, field notes, and tract books, and the correspondence of the General Land Office or of the Department not deemed *privileged* and *confidential*; and whenever, in the judgment of the Commissioner, it would not jeopardize any public or official interest, may make verbal inquiries of chiefs of divisions at their respective desks in respect to the papers or status of said case; but such inquiries will not be made to said chiefs or other clerks of divisions except upon consent of the Commissioner, Assistant Commissioner, or chief clerk, and will be restricted to hours between 11 a. m. and 2 p. m.

RULE 109.—Any attorney detected in any abuse of the above privileges, or of gross misconduct, upon satisfactory proof thereof, after due notice and hearing, shall be prohibited from further practicing before the Department.

RULE 110.—Should either party desire to discuss a case orally before the Secretary, opportunity will be afforded at the discretion of the Department, but only at a time specified by the Secretary or fixed by stipulation of the parties, with the consent of the Secretary, and in the absence of such stipulation or written notice to opposing counsel, with like consent, specifying the time when argument will be heard.

RULE 111.—The examination of cases on appeal to the Commissioner or Secretary will be facilitated by filing in printed form such arguments as it is desired to have considered.

## 5.—

RULE 112.—Decisions of the Commissioner not appealed from within the period prescribed become final, and the case will be regularly closed.

RULE 113.—The decision of the Secretary, so far as respects the action of the Executive, is final.

RULE 114.—Motions for review or rehearing before the Secretary must be filed with the Commissioner of the General Land Office within

thirty days after notice of the decision complained of, and will act as a supersedeas of the decision until otherwise directed by the Secretary.

Any such motion must state concisely and specifically the grounds for review or rehearing, one or both as the case may be, upon which it is based, and may be accompanied by an argument in support thereof.

Upon its receipt, the Commissioner of the General Land Office will forward the motion immediately to this Department, where it will be treated as "special." If the motion does not show proper grounds for review or rehearing, it will be denied and sent to the files of the General Land Office, whereupon the Commissioner will remove the suspension and proceed to execute the decision before rendered. But if, upon examination, proper grounds are shown, the motion will be entertained and the moving party notified, whereupon he will be allowed thirty days within which to serve the same, together with all argument in support thereof, on the opposite party, who will be allowed thirty days thereafter in which to file and serve an answer, but consideration of the motion will not be deferred for further argument.

**RULE 115.**—None of these rules shall be construed to deprive the Secretary of the Interior of either the directory or supervisory power conferred upon him by law.

## REGULATIONS GOVERNING THE RECOGNITION OF AGENTS AND ATTORNEYS BEFORE DISTRICT LAND OFFICERS.

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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.

After an application to practice has been filed in due form, the register and receiver will 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, or unless otherwise instructed by the Commissioner or Secretary.

Registers and receivers must keep a record of the names and residences of all attorneys and agents recognized as entitled to represent clients in their several offices.

Every attorney must, either at the time of entering his appearance

for a claimant or contestant or within thirty days thereafter, file the 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.

An attorney in fact will be required to file a power of attorney of his principal, duly executed, specifying the power granted and stating the party's present residence, occupation, and post-office address.

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.

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 attorney or agent of entrymen when he is only 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 subjected 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 of this Department, it will be sufficient reason for his disbarment from practice, and registers and receivers are authorized to refuse to further recognize any person as agent or attorney who shall be known to them or be proven before them to be guilty of improper and unprofessional conduct as above stated.

An attorney or agent who has been admitted to practice in any particular land district 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 or receiver before whom he was admitted to practice that he is an attorney or agent in good standing.

Any unprofessional conduct on the part of an attorney or agent should be reported to the Commissioner at once, together with the action of the local land officers in the premises.

Appeals from the action of the register and receiver in refusing to admit to practice or in refusing to further recognize an agent or attorney will lie to the Commissioner and Secretary, as in other appealable cases. (Circular approved March 19, 1887, 5 L. D., 508.)

LAWS AND REGULATIONS GOVERNING THE RECOGNITION OF  
AGENTS, ATTORNEYS, AND OTHER PERSONS TO REPRESENT  
CLAIMANTS BEFORE THE DEPARTMENT OF THE INTERIOR  
AND THE BUREAUS THEREOF.

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1.—Laws.

The following statutes relate to the recognition of attorneys and agents for claimants before this Department:

“That the Secretary of the Interior may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his Department, and may require of such persons, agents, or attorneys, before being recognized as representatives of claimants, that they shall show that they are of good moral character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their claims; and such Secretary may, after notice and opportunity for a hearing, suspend or exclude from further practice before his Department any such person, agent, or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud in any manner deceive, mislead, or threaten any claimant or prospective claimant by word, circular, letter, or by advertisement. (Act July 4, 1884, sec. 5; 23 Stats., 101.)

“Every officer of the United States, or person holding any place of trust or profit, or discharging any official function under, or in connection with, any Executive Department of the Government of the United States, or under the Senate or House of Representatives of the United States, who acts as an agent or attorney for prosecuting any claim against the United States, or in any manner, or by any means, otherwise than in discharge of his proper official duties, aids or assists in the prosecution or support of any such claim, or receives any gratuity, or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim, shall pay a fine of not more than five thousand dollars, or suffer imprisonment not more than one year, or both.” (Section 5498, Revised Statutes.)

"It shall not be lawful for any person appointed after the first day of June, one thousand eight hundred and seventy-two, as an officer, clerk, or employé in any of the departments, to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of said departments while he was such officer, clerk, or employé, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employé." (Section 190, Revised Statutes.)

"Any person prosecuting claims, either as attorney or on his own account, before any of the departments or bureaus of the United States, shall be required to take the oath of allegiance, and to support the Constitution of the United States, as required of persons in the civil service." (Section 3478, Revised Statutes.)

"The oath provided for in the preceding section may be taken before any justice of the peace, notary public, or other person who is legally authorized to administer an oath in the State or district where the same may be administered." (Section 3479, Revised Statutes.)

The act of May 13, 1884, sec. 2, (23 Stats., 22), provides that the oath above required shall be that prescribed by section 1757, Revised Statutes, which is as follows:

I, A B, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

## 2.—Regulations.

1. Under the authority conferred on the Secretary of the Interior by the fifth section of the act of July 4, 1884, it is hereby prescribed that an attorney at law who desires to represent claimants before the Department or one of its bureaus shall file a certificate of the clerk of the United States, State, or Territorial court, duly authenticated under the seal of the court, that he is an attorney *in good standing*.

2. Any person (not an attorney at law) who desires to appear as agent for claimants before the Department or one of its bureaus must file a *certificate from a judge* of a United States, State, or Territorial court, *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 claimants valuable service, and otherwise competent to advise and assist them in the presentation of their claims.

3. The Secretary may demand additional proof of qualifications, and reserves the right to decline to recognize any attorney, agent, or other person applying to represent claimants under this rule.

4. The oath of allegiance required by section 3478 of the United States Revised Statutes must also be filed.

5. In the 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.

6. Unless specially called for, the certificate above referred to will not be required of any attorney or agent heretofore recognized and now in good standing before the Department.

7. An applicant for admission to practice under the above regulations must address a letter to the Secretary of the Interior, 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 attorney or agent before this Department or any bureau thereof, and, if so, whether he has ever been suspended or disbarred from practice. *He must also state whether he holds any office of trust or profit under the Government of the United States.*

8. No person who has been an officer, clerk, or employee of this Department within two years prior to his application to appear in any case pending herein shall be recognized or permitted to appear as an attorney or agent in any such case as shall have been pending in the Department at or before the date he left the service: *Provided*, This rule shall not apply to officers, clerks, or employees of the Patent Office, nor to cases therein.

9. Whenever an attorney or agent is charged with improper practices in connection with any matter before a bureau of this Department, the head of such bureau shall investigate the charge, giving the attorney or agent due notice, together with a statement of the charge against him, and allow him an opportunity to be heard in the premises. When the investigation shall have been concluded, all the papers shall be forwarded to the Department, with a statement of the facts and such recommendations as to disbarment from practice as the head of the bureau may deem proper, for the consideration of the Secretary of the Interior. During the investigation the attorney or agent will be recognized as such, unless for special reasons the Secretary shall order his suspension from practice.

10. If any attorney or agent in good standing before the Department shall knowingly employ as subagent or correspondent a person who has been prohibited from practice before the Department, it will be sufficient reason for the disbarment of the former from practice.

11. Upon the disbarment of an attorney or agent, notice thereof will be given to the heads of bureaus of this Department, and to the other Executive Departments; and thereafter, until otherwise ordered, such disbarred person will not be recognized as attorney or agent in any claim or other matter before this Department or any bureau thereof.

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**Mining Claim.**

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Section 8, act of June 10, 1896, authorizing mineral entries of lands formerly embraced in Fort Belknap Indian Reservation contemplates that such entries shall be made in accordance with the procedure set out in sections 2325 and 2326 of the Revised Statutes.....

The act of May 10, 1872, prescribes the only method by which a patent can be secured for a mining claim located prior to its passage, and for which an application for patent was not pending at said date, and also the only method by which the owner of such claim can prevent an adverse but junior claimant from obtaining a patent therefor.....

Section 2332, R. S., is not intended to be an independent provision for the patenting of a, but should be construed with other sections of the Revised Statutes upon the same subject, and when so construed held to mean that evidence of the possession and working of a, for a period equal to the time prescribed by the local statute of limitations shall be considered as establishing the location of the claim and the applicant's right thereunder, "in the absence of any adverse claim," but that whatever else said section was intended to dispense with, it does not dispense with the requirements of section 2325, whereby the existence of an adverse claim is made known to the Land Department, and protection accorded to adverse claimants.....

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The statutory expenditure required as a pre-requisite to mineral patent must be shown to have been made upon, or for the benefit of, the claim as presented for patent.....	156, 315
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Annual assessment work is not a condition to obtaining patent, but only a condition to the continued right of possession to an unpatented claim as against other and adverse claimants, and a failure to perform such work furnishes no reason for the cancellation of an entry, in the absence of an adverse claim legally asserted.....	164
A hearing should not be ordered on questions involving annual expenditure on a mining claim, and the alleged relocation thereof by reason of failure to perform such expenditure.....	470
An allegation of failure to perform the annual assessment work will not be considered on the protest of one who has no standing as an adverse claimant under the statute.....	230
A failure to do the required annual assessment work on a mining claim can not be taken advantage of by a claimant under the agricultural land laws, but only by a mineral	

claimant who, after such failure and before resumption of work, relocates the land according to the mining laws ..... 359

A co-owner, who is entitled under section 2324, R. S., to succeed to the interest of a delinquent co-owner, on his failure after notice to contribute his proportion of the annual expenditures, does not lose such right by the sale of his own interest in the mining claim before the completion of proceedings begun by him under said section ..... 611

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An official survey of a placer, must be furnished, if the description of the lands, for which patent is asked, can not be made to conform to legal subdivisions of the public land surveys ..... 368

To hold land lawfully included in a location the lines of survey may be laid upon the surface of conflicting and excluded claims under subsequent locations ..... 156

To include land properly subject to location the survey of a mining claim may be extended entirely across a prior excluded location, and the end line established at a point within a junior excluded location.... 256

In the case of an application for mineral patent that embraces more than one location, the survey and plat must so exhibit the boundaries as to clearly define each location ..... 585

Land below high-water mark of a meandered stream (Missouri River) should not be included within the survey of a mining claim ..... 585

**NOTICE.**

The notice of application required to be posted on a mining claim is an integral and essential part of the notice of such application, which the statute requires to be contemporaneously posted for sixty days on the claim, and in the local land office, and to be published in a newspaper. If any one of these three notices is insufficient, they are all rendered valueless ..... 467.

A mineral entry regularly canceled should not be reinstated in the absence of posted and published notice of the application therefor, in the same manner, and for the same time, that notice of an original application for patent is required to be given, and then only if it appears that no adverse claim exists, or if adverse proceedings have been instituted that they terminated favorably to the applicant ..... 470

An error occurring in the published notice of application for mineral patent will not be held sufficient to require new notice, where

it is of a character not to mislead, and the different forms of notice, as published and posted, when taken together show with accuracy the location and boundaries of the land included within the application ..... 558

A published notice of application for mineral patent that shows no connection of the claim with a mineral monument, or corner of the public survey, is fatally defective... 592

A published notice of application for mineral patent is sufficient, in the matter of describing the claim, if the notice, taken as a whole, designates the situation of the applicant's claim on the ground with substantial accuracy ..... 491.

Clerical errors in posted and published notice of application for mineral patent will not be regarded as materially affecting the validity of the notice, where said errors are not calculated to mislead or deceive, and no prejudice thereby is shown or alleged, and it appears that such notice, taken as a whole, meets the requirement of the law ..... 230

It is not necessary to give the names of all adjoining and conflicting claims in the notice of an application for patent under section 2325, R. S., but only such as are shown in the plat of survey ..... 250

Will not be permitted to pass to patent, where in the description thereof, as appearing in the surveyor's certificate and the notice of application, the name of the county, in which the claim is situated, is incorrectly given ..... 154, 289

The mining regulations do not require that the notice of application for mineral patent, as posted or published, shall contain a description of the lode line, reference being made in these notices to the official plat of survey on which is indicated the general course or direction of the vein ..... 662

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The statutory provisions limiting the time within which an adverse claim may be filed are mandatory, and the Land Department is without authority to extend said period.... 467

Upon the acceptance of an adverse claim by the local officers they become chargeable with the fees required by law to be paid, but the time of the actual payment thereof to said officers is not necessarily material as affecting the question of the validity of the filing of said claim ..... 413

Section 2325 of the Revised Statutes is a statute of repose only so far as to bar the assertion of adverse mining claims not filed within the period of publication, and does not relieve the Land Department from the duty of ascertaining whether the land sought to be patented is mineral in character, and therefore subject to disposition under the mining laws ..... 12

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vided by section 2326, R. S., presents no question for the consideration of the Department, except in so far as the claim of ownership may operate as an inducement to accord the protestant the right to be heard on appeal under the rules of practice.....	230.
A protest filed as the basis of adverse proceedings is sufficient, if it clearly and definitely notifies the mineral applicant of the nature, boundaries, and extent of the alleged adverse right.....	460
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2. The time with reference to which the character of the land selected, whether vacant and not-mineral, is to be determined, is the date of the selection, and not the date of the approval of the survey of the claim.

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\* For "1896," in line 34, page 339, read 1866.

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\* For "for," in line 27, page 148, read *from*.

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