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AND
GENERAL LAND OFFICE
IN
CASES RELATING TO THE PUBLIC LANDS

FROM JUNE 1, 1904, TO JUNE 30, 1905.

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¹ On page 647, after "will," in line 4 of syllabus, insert "not."

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DECISIONS
RELATING TO
THE PUBLIC LANDS.

OPENING OF CEDED LANDS OF SISSETON, WAHPETON, AND CUT-HEAD
BANDS OF SIOUX INDIANS OF DEVILS LAKE RESERVATION, NORTH
DAKOTA.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas by an agreement between the Sisseton, Wahpeton, and Cut-Head bands of the Sioux tribe of Indians on the Devils Lake Reservation, in the State of North Dakota, on the one part, and James McLaughlin, a United States Indian Inspector, on the other part, amended and ratified by act of Congress approved April 27, 1904 (33 Stat., 319), the said bands of the said Indian tribes ceded, conveyed, transferred, relinquished, and surrendered, forever and absolutely, without any reservation whatsoever, expressed or implied, unto the United States of America, all their claim, title, and interest of every kind and character in and to the unallotted lands embraced in the following-described tract of country now in the State of North Dakota, to wit:

All that part of the Devils Lake Indian Reservation now remaining unallotted, including the tract of land at present known as the Fort Totten Military Reserve, situated within the boundaries of the said Devils Lake Indian Reservation, and being a part thereof; except six thousand one hundred and sixty acres required for allotments to sixty-one Indians of said reservation entitled to allotments.

The unallotted and unreserved land to be disposed of hereunder approximates 88,000 acres.

And whereas, in pursuance of said act of Congress ratifying the agreement named, the lands necessary for church, mission, and agency purposes, and for the Fort Totten Indian school, and for a public park, are by this proclamation, as hereinafter appears, reserved for such purposes, respectively:

And whereas, in the act of Congress ratifying the said agreement, it is provided:

SEC. 4. That the lands ceded to the United States under said agreement, including the Fort Totten abandoned military reservation, which are exclusive of six

thousand one hundred and sixty acres which are required for allotments, excepting sections sixteen and thirty-six or an equivalent of two sections in each township, and such tracts as may be reserved by the President as hereinafter provided, shall be disposed of under the general provisions of the homestead and townsite laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish war, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged: *And provided further*, That the price of said lands entered under the provisions of this act shall be four dollars and fifty cents per acre, payable as follows: One dollar and fifty cents when the entry is made, and the remainder in annual installments of fifty cents per acre until paid for: *Provided further*, That in case any entryman fails to make such payments, or any of them, within the time stated, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited and the entry shall be canceled: *And provided further*, That the lands embraced within such canceled entry shall, after the cancellation of such entry, be subject to entry under the provisions of the homestead law at four dollars and fifty cents per acre up to and until provision may be made for the disposition of said land by proclamation of the President as hereinafter provided: *And provided further*, That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry, as now provided by law, where the price of the land is one dollar and twenty-five cents per acre: *And provided further*, That aliens who have declared their intention to become citizens of the United States may become purchasers under this act, but before proving up and acquiring title must take out their full naturalization papers: *And provided further*, That when, in the judgment of the President no more of the land herein ceded can be disposed of at said price, he may by proclamation, to be repeated in his discretion, sell from time to time the remaining lands subject to the provisions of the homestead law or otherwise as he may deem most advantageous, at such price or prices, in such manner, upon such conditions, with such restrictions, and upon such terms as he may deem best for all interests concerned: *And provided further*, That the President is hereby authorized to reserve, in his proclamation for the opening of the said lands, so much of the tracts heretofore reserved for church, mission, and agency purposes, as he may deem necessary, not to exceed nine hundred acres, and also not exceeding two and one-half sections for the Fort Totten Indian school, and the United States stipulates and agrees to pay for said reserved lands at the rate of three dollars and twenty-five cents per acre. The President is also authorized to reserve a tract embracing Sully's Hill, in the northeastern portion of the abandoned military reservation, about nine hundred and sixty acres, as a public park.

SEC. 5. That sections sixteen and thirty-six of the lands hereby acquired in each township shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at three dollars and twenty-five cents per acre, and the same are hereby granted to the State of North Dakota for such purpose; and in case any of said sections, or parts thereof, of the land in the said Devils Lake Indian Reservation or Fort Totten abandoned military reservation

should be lost to said State of North Dakota by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized to locate other lands not occupied, in the townships where said lands are lost, provided sufficient lands are to be had in the said townships, otherwise the selections to be made elsewhere within the ceded tract, which shall be paid for by the United States, as provided in article two of the treaty as herein amended, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

And whereas, all of the conditions required by law to be performed prior to the opening of said tracts of land to settlement and entry have been, as I hereby declare, duly performed;

Now, Therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power vested in me by law, do hereby declare and make known that all of the lands so as aforesaid ceded by the Sisseton, Wahpeton, and Cut-Head bands of the Sioux tribe of Indians belonging to the Devils Lake Reservation, saving and excepting sections 16 and 36 in each township, and all lands located or selected by the State of North Dakota as indemnity school or educational lands, and saving and excepting 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. 14, and the $SE\frac{1}{4}$ of the $NE\frac{1}{4}$ of Sec. 15, T. 152 N., R. 66 W., of the fifth principal meridian, which are hereby reserved for the use of the Raven Hill Presbyterian Church; and saving and excepting the $N\frac{1}{2}$ of the $NW\frac{1}{4}$ of Sec. 14, the $NE\frac{1}{4}$ of the $NE\frac{1}{4}$ of Sec. 15, the $SE\frac{1}{4}$ of the $SW\frac{1}{4}$ of Sec. 11, and the $S\frac{1}{2}$ of the $SE\frac{1}{4}$ of the $SE\frac{1}{4}$ of the $SE\frac{1}{4}$ of Sec. 10, T. 151 N., R. 64 W., of the fifth principal meridian, which are hereby reserved for the use of the Wood Lake Presbyterian Church; and saving and excepting the $SE\frac{1}{4}$ of the $SW\frac{1}{4}$ and Lot 8 of Sec. 8, the $NE\frac{1}{4}$ of the $NW\frac{1}{4}$, the $NW\frac{1}{4}$ of the $NE\frac{1}{4}$ and a tract of 4.43 acres in the southwest corner of Lot 1, Sec. 17, T. 152 N., R. 65 W., of the fifth principal meridian, which are hereby reserved for the use of the Mission of Sisters of Charity from Montreal; and saving and excepting the $N\frac{1}{2}$ of the $SE\frac{1}{4}$, the $NE\frac{1}{4}$ of the $SW\frac{1}{4}$, Lot 5, and a tract of 1.60 acres in Lot 6, Sec. 17, T. 152 N., R. 64 W., of the fifth principal meridian, which are hereby reserved for the use of St. Michael's Church, Bureau of Catholic Indian Missions; and saving and excepting the $W\frac{1}{2}$ of the $NW\frac{1}{4}$ of Sec. 15, T. 152 N., R. 66 W., of the fifth principal meridian, which is hereby reserved for the use of St. Jerome's Church, Bureau of Catholic Indian Missions; and saving and excepting the $W\frac{1}{2}$ of Sec. 21, the $W\frac{1}{2}$ of the $NE\frac{1}{4}$ of Sec. 21, the $E\frac{1}{2}$ of Sec. 20, the $NW\frac{1}{4}$ of Sec. 20, and Lots 6, 7, and 8 and the $SE\frac{1}{4}$ of the $SW\frac{1}{4}$ of Sec. 16 (excepting 7 acres thereof, which are hereby reserved for the use of the Protestant Episcopal Church), and Lots 6, 7, 8, and 9 of Sec. 17, T. 152 N., R. 65 W., of the fifth principal meridian, which are hereby reserved for the use of the Fort Totten School; and saving and excepting the $SE\frac{1}{4}$ of the $NE\frac{1}{4}$ and Lot 1 (excepting 4.43 acres of said Lot 1,

reserved for the use of the Mission of Sisters of Charity from Montreal), Sec. 17, and Lot 1 of Sec. 16, T. 152 N., R. 65 W., of the fifth principal meridian, which are hereby reserved for the use of the Fort Totten School, Grey Nuns Department; and saving and excepting the NW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Sec. 8, the E $\frac{1}{2}$ of the NE $\frac{1}{4}$, the SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the SE $\frac{1}{4}$ of Sec. 7, T. 151 N., R. 65 W., of the fifth principal meridian, which are hereby reserved for the Fort Totten school and for the Grey Nuns Department for meadow purposes; and saving and excepting those portions of Lot 2 of Sec. 16 and Lots 2 and 3 of Sec. 17, T. 152 N., R. 65 W., fifth principal meridian not embraced in Allotment #585 of Jesse G. Palmer, which are hereby reserved for use for agency purposes; and saving and excepting Lots 4, 5, 6, and 7 of Sec. 10, the NW $\frac{1}{4}$, the W $\frac{1}{2}$ of the SW $\frac{1}{4}$ and Lots 5 and 6 of Sec. 15, Lots 1 and 2 of Sec. 9, the E $\frac{1}{2}$ of the NE $\frac{1}{4}$, the SE $\frac{1}{4}$ of the SE $\frac{1}{4}$ and Lots 3, 4, and 5 of Sec. 16, T. 152 N., R. 65 W., of the fifth principal meridian, which are hereby reserved for public use as a park to be known as Sully's Hill Park, will, on the sixth day of September, 1904, at 9 o'clock A. M., in the manner herein prescribed, and not otherwise, be opened to entry and settlement and to disposition under the general provisions of the homestead and townsite laws of the United States.

Commencing at 9 o'clock A. M., Monday, August 8th, 1904, and ending at 6 o'clock P. M., Saturday, August 20th, 1904, a registration will be had at Devils Lake and Grand Forks, State of North Dakota, for the purpose of ascertaining what persons desire to enter, settle upon, and acquire title to any of said lands under the homestead law, and of ascertaining their qualifications so to do. To obtain registration each applicant will be required to show himself duly qualified, by written application to be made only on a blank form provided by the Commissioner of the General Land Office, to make homestead entry of these lands under existing laws, and to give the registering officer such appropriate matters of description and identity as will protect the applicant and the Government against any attempted impersonation. Registration cannot be effected through the use of the mails or the employment of an agent, excepting that honorably discharged soldiers and sailors entitled to the benefits of section 2304 of the Revised Statutes of the United States, as amended by the act of Congress approved March 1, 1901 (31 Stat., 847), may present their applications for registration and due proofs of their qualifications through an agent of their own selection, having a duly executed power of attorney, but no person will be permitted to act as agent for more than one such soldier or sailor. No person will be permitted to register more than once or in any other than his true name.

Each applicant who shows himself duly qualified will be registered and given a nontransferable certificate to that effect, which will entitle him to go upon and examine the lands to be opened hereunder; but

the only purpose for which he can go upon and examine said lands is that of enabling him later on, as herein provided, to understandingly select the lands for which he will make entry. No one will be permitted to make settlement upon any of said lands in advance of the opening herein provided for, and during the first sixty days following said opening no one but registered applicants will be permitted to make homestead settlement upon any of said lands, and then only in pursuance of a homestead entry duly allowed by the local land officers, or of a soldier's declaratory statement duly accepted by such officers.

The order in which, during the first sixty days following the opening, the registered applicants will be permitted to make homestead entry of the lands opened hereunder, will be determined by a drawing for the district publicly held at Devils Lake, North Dakota, commencing at 9 o'clock A. M., Wednesday, August 24th, 1904, and continuing for such period as may be necessary to complete the same. The drawing will be had under the supervision and immediate observance of a committee of three persons whose integrity is such as to make their control of the drawing a guaranty of its fairness. The members of this committee will be appointed by the Secretary of the Interior, who will prescribe suitable compensation for their services. Preparatory to this drawing the registration officers will, at the time of registering each applicant who shows himself duly qualified, make out a card, which must be signed by the applicant, and giving such a description of the applicant as will enable the local land officers to thereafter identify him. This card will be subsequently sealed in a separate envelope which will bear no other distinguishing label or mark than such as may be necessary to show that it is to go into the drawing. These envelopes will be carefully preserved and remain sealed until opened in the course of the drawing herein provided. When the registration is completed, all of these sealed envelopes will be brought together at the place of drawing and turned over to the committee in charge of the drawing, who, in such manner as in their judgment will be attended with entire fairness and equality of opportunity, shall proceed to draw out and open the separate envelopes and to give to each enclosed card a number in the order in which the envelope containing the same was drawn. The result of the drawing will be certified by the committee to the officers of the district and will determine the order in which the applicants may make homestead entry of said lands and settlement thereon.

Notice of the drawings, stating the name of each applicant and number assigned to him by the drawing, will be posted each day at the place of drawing, and each applicant will be notified of his number, and of the day upon which he must make his entry, by a postal card mailed to him at the address given by him at the time of registration. The result of each day's drawing will also be given to the press to be pub-

lished as a matter of news. Applications for homestead entry of said lands during the first sixty days following the opening can be made only by registered applicants and in the order established by the drawing. At the land office for the district at Devils Lake, North Dakota, commencing Tuesday, September 6th, 1904, at 9 o'clock A. M., the applications of those drawing numbers 1 to 50, inclusive, must be presented and will be considered in their numerical order during the first day, and the applications of those drawing numbers 51 to 100, inclusive, must be presented and will be considered in their numerical order during the second day, and so on at that rate until all of said lands subject to entry under the homestead law, and desired thereunder, have been entered. If any applicant fails to appear and present his application for entry when the number assigned to him by the drawing is reached, his right to enter will be passed until after the other applications assigned for that day have been disposed of, when he will be given another opportunity to make entry, failing in which he will be deemed to have abandoned his right to make entry under such drawing.

To obtain the allowance of a homestead entry, each applicant must personally present the certificate of registration theretofore issued to him, together with a regular homestead application and the necessary accompanying proofs, and make the first payment of one dollar and fifty cents per acre for the land embraced in his application, together with the regular land office fees, but an honorably discharged soldier or sailor may file his declaratory statement through his agent, who can represent but one soldier or sailor as in the matter of registration. The production of the certificate of registration will be dispensed with only upon satisfactory proof of its loss or destruction. If at the time of considering his regular application for entry it appear that an applicant is disqualified from making homestead entry of these lands, his application will be rejected, notwithstanding his prior registration. If any applicant shall register more than once hereunder, or in any other than his true name, or shall transfer his registration certificate, he will thereby lose all the benefits of the registration and drawing herein provided for, and will be precluded from entering or settling upon any of said lands during the first sixty days following said opening.

Any person, or persons desiring to found, or to suggest establishing, a townsite upon any of said ceded lands, at any point, may, at any time before the opening herein provided for, file in the land office a written application to that effect, describing by legal subdivisions the lands intended to be affected, and stating fully and under oath the necessity or propriety of founding or establishing a town at that place. The local officers will forthwith transmit said petition to the Commissioner of the General Land Office with their recommendation in the premises.

Such Commissioner, if he believes the public interests will be subserved thereby, will, if the Secretary of the Interior approve thereof, issue an order withdrawing the lands described in such petition, or any portion thereof, from homestead entry and settlement and directing that the same be held for the time being for townsite settlement, entry, and disposition only. In such event the lands so withheld from homestead entry and settlement will, at the time of said opening, and not before, become subject to settlement, entry, and disposition under the general townsite laws of the United States. None of said ceded lands will be subject to settlement, entry, or disposition under such general townsite laws except in the manner herein prescribed until after the expiration of sixty days from the time of said opening.

All persons are especially admonished that under the said act of Congress approved April 27, 1904, it is provided that no person shall be permitted to settle upon, occupy, or enter any of said ceded lands except in the manner prescribed in this proclamation until after the expiration of sixty days from the time when the same are opened to settlement and entry. After the expiration of the said period of sixty days, but not before, any of said lands remaining undisposed of may be settled upon, occupied, and entered under the general provisions of the homestead and townsite laws of the United States in like manner as if the manner of effecting such settlement, occupancy, and entry had not been prescribed herein in obedience to law, subject, however, to the payment of four dollars and fifty cents per acre for the land entered, in the manner and at the times required by the said act of Congress above mentioned.

The Secretary of the Interior shall prescribe all needful rules and regulations necessary to carry into full effect the opening herein provided for.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 2nd day of June, in the year of our Lord 1904, and of the Independence of the United States the one hundred and twenty-eighth.

THEODORE ROOSEVELT.

By the President:

JOHN HAY,
Secretary of State.

REGULATIONS CONCERNING OPENING OF CEDED LANDS OF SISSETON,
WAHPETON, AND CUT-HEAD BANDS OF SIOUX INDIANS OF DEVILS
LAKE RESERVATION, NORTH DAKOTA.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June 3, 1904.*

Register and Receiver,

United States Land Office, Devils Lake, North Dakota.

GENTLEMEN: The following regulations are hereby prescribed for the purpose of carrying into effect the opening of the ceded lands of the Sisseton, Wahpeton, and Cut-Head bands of the Sioux tribe of Indians of the Devils Lake Reservation in North Dakota, provided for in the act of Congress of April 27, 1904 (33 Stat., 319), and in the President's proclamation of June 2, 1904, thereunder:

First. Applications either to file soldiers' declaratory statement or make homestead entry of these ceded lands must, on presentation, in accordance with proclamation opening said lands to entry and settlement, be accepted or rejected, but local officers may, in their discretion, permit amendment of a defective application during the day only on which same is presented.

Second. No appeal to General Land Office will be allowed or considered unless taken within one day, Sundays excepted, after the rejection of the application.

Third. After rejection of an application, whether an appeal be taken or not, the land will continue to be subject to entry as before, excepting that any subsequent applicant for the same land must be informed of the prior rejected application and that the subsequent application, if allowed, will be subject to the disposition of the prior application upon the appeal, if any is taken from the rejection thereof, which fact must be noted upon the receipt or certificate issued upon the allowance of the subsequent application.

Fourth. Where an appeal is taken the papers will be immediately forwarded to the General Land Office, where they will be at once carefully examined and forwarded to the Secretary of the Interior with appropriate recommendation, when the matter will be promptly decided and closed.

Fifth. Applications to contest entries allowed for these lands filed during the sixty days from date of opening will also be immediately forwarded to the General Land Office, where they will be at once carefully examined and forwarded to the Secretary of the Interior with proper recommendation, when the matter will be promptly decided.

Sixth. These regulations will supersede, during the sixty days from the opening of these ceded lands, any rule of practice or other regulation

governing the disposition of applications with which they may be in conflict, and will apply to all appeals taken from the action of the local officers during said period of sixty days.

Seventh. The purpose of these regulations is to provide an adequate and speedy method of correcting any material errors in local offices, and at the same time to discourage groundless appeals and put it out of the power of a disappointed applicant to indefinitely tie up the land or force another to pay him to withdraw his appeal.

Give all possible publicity, through the press and otherwise, to these regulations.

W. A. RICHARDS,

Commissioner of the General Land Office.

Approved:

THOS. RYAN,

Acting Secretary.

CEDED LANDS OF THE SISSETON, WAHPETON, AND CUT-HEAD BANDS
OF SIOUX INDIANS OF DEVILS LAKE RESERVATION—HOMESTEAD
ENTRY—QUALIFICATIONS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

WASHINGTON, D. C., *June 3, 1904.*

The following persons are not qualified to make homestead entry of the ceded lands of the Sisseton, Wahpeton, and Cut-Head bands of the Sioux tribe of Indians of the Devils Lake Reservation in North Dakota:

1. Any person who has made a prior homestead entry and is not entitled to make a second homestead entry. Under the act of June 5, 1900 (31 Stat., 267), any person who prior to June 5, 1900, made a homestead entry, but from any cause had lost, forfeited, or commuted the same, is entitled to make a second homestead entry; under the act of May 22, 1902 (32 Stat., 203), any person who made final five-year proof, prior to May 17, 1900, on lands to be sold for the benefit of Indians and paid the price provided by law opening the land to settlement, and who would have been entitled under the "free homestead" law to have received title without such payment, had not proof been made prior thereto, is entitled to make a second homestead entry; under the act of April 28, 1904 (33 Stat., 527), any person who prior to April 28, 1904, made homestead entry but was unable to perfect the entry on account of some unavoidable complication of his personal or business affairs, or on account of an honest mistake as to the character of the land, provided he made a bona fide effort to comply with the homestead law and did not relinquish his entry for a consideration,

is entitled to make a second homestead entry; under section 2 of said act any person who has made a homestead entry of a quantity of land containing less than 160 acres, contiguous to the ceded lands of said reservation, and is still owning and occupying the same, may enter a sufficient quantity of said lands to make up the full amount of 160 acres; under section 6 of the act of March 2, 1889 (25 Stat., 854), any person who has made a homestead entry for less than 160 acres, and has received the receiver's final receipt therefor, is entitled to enter enough additional land, not necessarily contiguous to the original entry, to make 160 acres.

2. A married woman, unless she has been deserted or abandoned by her husband.

3. One not a citizen of the United States, and who has not declared his intention to become such.

4. Anyone under 21 years of age, not the head of a family, unless he served in the army or navy of the United States for not less than fourteen days during actual war.

5. Anyone who is the proprietor of more than 160 acres of land in any State or Territory.

6. One who has acquired title to, or is now claiming under any of the agricultural public land laws, in pursuance of settlement or entries made since August 30, 1890, an amount of land which, with the tract now sought to be entered, will exceed in the aggregate 320 acres.

W. A. RICHARDS,
Commissioner.

Approved:

THOS. RYAN,
Acting Secretary.

TIMBER AND STONE ENTRIES—CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

INSTRUCTIONS.

Timber and stone entries under the act of June 3, 1878, are within the intent and operation of the confirmatory provisions of the act of March 3, 1891.

The general departmental order of November 18, 1902, suspending action in all timber and stone entries in the States of California, Oregon and Washington, pending investigation, is not a contest or protest within the meaning of section 7 of the act of March 3, 1891, and does not bar the operation of the confirmatory provisions of said section.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, June 3, 1904.* (J. R. W.)

The Department is in receipt of your office letter of December 3, 1903, calling attention to the departmental direction of November 18, 1902, to suspend action in all timber and stone entries in the States of

California, Oregon, and Washington, and asking instructions whether, first, such entries are within the confirmatory provisions of section 7 of the act of March 3, 1891 (26 Stat., 1095, 1099), and, second, is the departmental action of November 18, 1902, such a protest or contest as will bar the running of the statute.

Section 7 of the act of March 3, 1891, *supra*, is limited by a proviso, viz:

Provided, That after the lapse of two years from the date of the receiver's receipt upon the final entry of any tract of land under the homestead, timber culture, desert land or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent.

Timber and stone entries under the act of June 3, 1878 (20 Stat., 89), are not in terms referred to in the act of March 3, 1891, and the question is, whether entries under that act are within the intent and operation of its confirmatory proviso.

The term "preemption" in the act of 1891 soon after its passage was construed by the Department as generic and to include any entry under a law whereby, by a preliminary declaration or other act, one intending and desiring to purchase, acquired a preference right. Thus in *Johnson v. Burrow* (12 L. D., 440), May 1, 1891, it was construed as including an Osage entry under the act of May 28, 1880 (21 Stat., 143). In *Fleming v. Bowe* (13 L. D., 78), July 21, 1891, reviewing many decisions of the Department and the courts, upon a very full consideration of the subject, "preemption" was held to include an entry for Otoe and Missouri Indian reservation lands subject to sale under the act of August 15, 1876 (19 Stat., 208), and its amendments. This was not a new interpretation of the term but merely followed the construction long before given and then well established. *Fraser v. Ringgold* (3 L. D., 69, 71); *Jefferson v. Winter* (5 L. D., 694); *Sears v. Almy* (6 L. D., 1); *Mary Stanton* (7 L. D., 227).

The cases last above cited have especial force upon the construction of the word from the fact that they construe the word "preemption" as used in the act of May 14, 1880 (21 Stat., 140), giving a preference right of entry to the successful contestant of "any preemption, homestead, or timber culture entry." In construction of this act "preemption" has been held to include a desert land entry, *Fraser v. Ringgold, supra*; Kansas Indian trust land entries, *Bunger v. Dawes* (9 L. D., 329, 331-2); mineral entries, *Dornen v. Vaughn* (16 L. D., 8, 11); Sioux half-breed scrip locations, *McGee v. Ortlely* (14 L. D., 523, 524); *Hobe v. Strong* (25 L. D., 92, 94); coal land entries, *Garner v. Mulvane* (12 L. D., 336, 342); and townsite entries, *Brummett v. Winfield* (28 L. D., 530, 534). By analogy of reasoning, because the act of 1880, *supra*, was remedial in character and aimed at the prevention and defeat of fraudulent entries, its benefit was extended to successful

contestants of State swamp land selections, *Ringsdorf v. State of Iowa* (4 L. D., 497, 498); *Mallet v. Johnston* (14 L. D., 658, 662-3).

This generic use of preemption in the act of 1880 has been construed to extend the benefit of that act to contests of timber and stone entries under the act of June 3, 1878, under which the entries now in question were made (*Olmstead v. Johnson*, 17 L. D., 151, 152), and this construction of the word in the act of 1891 is also held by the Department to extend to graduation cash entries made under the act of August 4, 1854 (10 Stat., 574), so as to bring such entries within its confirmatory operation. *A. J. Wolf* (29 L. D., 525, 527).

Congress knew the construction given to "preemption" in the practice of the land department established long before the act of 1891, and under a familiar rule of statutory construction must be presumed to have used the word in the sense that it had so acquired.

The acts of 1880 and 1891 are moreover correlative to each other, relating to the same subject matter, are strictly *in pari materia*, and the terms common to each should receive like interpretation in both. The act of 1880 is aimed at the prevention and defeat of fraud in the entry of public land. The proviso in the act of 1891 is intended as a statute of repose and to fix a time within which an entry must be attacked and fraud charged. It is eminently just and expedient that at some time the validity of an entry of public land should be deemed established by acquiescence of the government and of interested adverse parties. It manifestly tends to discourage and prevent entries if no limitation exists against their validity being drawn in question and the entryman may be required always to stand ready to prove his good faith. It is quite as necessary that some period of repose should be fixed as that fraud should be defeated. One act is the proper correlative to the other, and giving the term preemption the same signification in both acts effects that object and confirms by the act of 1891 all entries for successful contest of which a reward is offered by the act of 1880. It is therefore held that entries under the act of June 3, 1878 (20 Stat., 89), are within operation of the confirmatory provisions of the act of March 3, 1891.

The departmental action of November 18, 1902, was general in its terms, applying to all entries, for the purpose of investigating the facts. It was not a proceeding against any specific entry nor yet against all entries within the district of its operation looking to their cancellation. To be either a contest or a protest there must be a charge of specific facts which if true would defeat the entry and upon which the entryman, or party affected may take issue and demand a hearing. In cases investigated by special agents of your office, where the agent has reported sufficient facts to justify cancellation of the entry, such report is a proceeding that prevents confirmation of an entry under the act. Instructions, July 9, 1902 (31 L. D., 368, 371).

But if no such report has been filed, or no contest has been initiated, so that nothing is charged against the entry upon which issue may be taken and the entryman demand to meet his accuser or that hearing be had, the entry will be regarded as confirmed by the statute and will be passed to patent.

SWAMP GRANT—FORT SABINE MILITARY RESERVATION.

STATE OF LOUISIANA.

Until the legal title to public lands passes from the government, inquiry as to all equitable rights comes within the cognizance of the land department, and the Secretary of the Interior, as the head of that department, may take such action with reference thereto as to him seems in accordance with law.

Until patent issues for lands claimed by the several States under the swamp land grant of September 28, 1850, the United States has not been divested of the legal title, and until that time the land department has full jurisdiction over such lands, regardless of the fact that lists regularly submitted, and duly approved, have been transmitted to the proper officer of the State.

Where a land grant to a State or Territory does not convey the fee simple title to the lands granted, or require patents to be issued therefor, the title thereto does not pass until the approved list of selections of such lands has been certified to the State by the Commissioner of the General Land Office.

A controversy involving a claim to public lands is never finally settled until it receives such adjudication as removes the land involved from the jurisdiction of the land department, and one Secretary of the Interior has no authority to bind his successor to either a rule of administration or interpretation of a statute involving the disposition of the public lands.

Lands in reservation for any purpose are not public lands within the operative effect of a subsequent grant of Congress, although not in terms excepted from the grant.

Swamp and overflowed lands within the Fort Sabine military reservation, in the State of Louisiana, at the dates of the swamp land grants of March 2, 1849, and September 28, 1850, did not pass to the State by virtue of said grants.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) June 6, 1904. (G. B. G.)

This proceeding involves 6,497.40 acres of land situated in the New Orleans land district, Louisiana, more particularly described in what is known as Louisiana swamp land list No. 51.

The equitable title to these lands is claimed by the State by virtue of the grants of swamp and overflowed lands made by the acts of March 2, 1849 (9 Stat., 352), and September 28, 1850 (id., 519), and the legal title because of certain proceedings in the land department, which will be hereinafter more specifically set out.

It appears from the papers in the case, from the files and records of your office, and from prior decisions of the Department in reference to these lands, that on December 7, 1850, the State of Louisiana filed in the district land office, at Opelousas, under said act of 1849,

swamp land list No. 4, which embraced more than one million acres of land, including the land now in controversy. Upon the face of this list No. 4 the surveyor-general indorsed the following: "Part of this township is subject to a military reservation. See letter from the Commissioner of the General Land Office, dated Dec. 21, 1838." The reservation referred to was the Fort Sabine military reservation, established by executive order of December 20, 1838, and abandoned March 25, 1871, by virtue of the provisions of the act of February 24, 1871 (16 Stat., 430). Your office afterwards submitted a clear list of swamp lands, No. 1, Opelousas series, made up from selection list No. 4, but did not embrace any lands lying within this reservation, and this list was, on May 5, 1852, approved by the then Secretary of the Interior, Mr. Stuart. Notwithstanding this purposed omission of all lands within this reservation from approval, there was later submitted to the Department by your office a list of swamp and overflowed lands, No. 26, also made up from said selection list No. 4, embracing nearly all the lands within this reservation, except those now in controversy, and this list No. 26 was approved by Acting Secretary Joslyn, July 1, 1884, but in seeming ignorance of the fact that the lands listed for approval were reserved lands. From the inspection of said list the following facts appear:

The certificates attached thereto state affirmatively that "said list is found free from conflict by sale or otherwise," but made no reference to the military reservation, nor did they contain a statement in substance or effect that the tracts described in the list had been found or decided to be swamp and overflowed lands by field-notes of surveyors or by "personal examination by experienced and faithful deputies," as required by statute, or in any other manner.

September 13, 1893, your office held for rejection the State's claim to all of the remaining lands covered by the State's said selection list No. 4 which appeared to be within the aforesaid military reservation, upon the ground that they were not granted to the State by the acts of 1849 and 1850, and because of the act of February 24, 1871 (16 Stat., 430), which specifically provided for other disposition thereof.

Upon the State's appeal from your said office decision the Department, by decision of October 31, 1895 (21 L. D., 357, 359), held that the acts of 1849 and 1850 granted to the State of Louisiana all of the swamp and overflowed lands—

lying within the Fort Sabine military reservation as established by the President's executive order of December 20, 1838, subject, however, to the right of the United States to use the same for military purposes during pleasure, or so long as might be necessary in the judgment of the military authorities; and that when said military reservation was abandoned by operation of the act of February 24, 1871 (16 Stat., 430), the title and right of possession of the State of Louisiana under the acts of 1849 and 1850, aforesaid, attached at once in fee simple to the swamp and overflowed lands

embraced within said reservation. The act of 1871 aforesaid can not be construed as intending to make any disposition of said swamp and overflowed lands, inconsistent with the title previously granted to the State of Louisiana as aforesaid.

It was thereupon directed that: "The tracts of land hereinbefore specified and described will be certified to the State of Louisiana under the swamp land grants."

Following this decision your office presented for the approval of the Department, preliminary to the conveyance of the legal title, the aforesaid swamp land list No. 51, which included the lands the subject of departmental decision of October 31, 1895, *supra*, and, on December 10, 1895, the Secretary of the Interior, Mr. Smith, in his certificate of approval attached to the list, recited that it was given "under the act of March 2, 1849, as supplemented and enlarged by the act of September 28, 1850, subject to any valid adverse rights that may subsist to any of the tracts of land therein described." This list was then returned to your office as a basis for the further action to be taken towards passing title to the lands embraced therein to the State, in accordance with the established practice in such cases.

January 30, 1896, no action having in the meantime been taken by your office under such approval, the then register of the State land office, assuming to act under the authority of an act of the State legislature, protested to the Secretary of the Interior against the patenting of the lands embraced in the approved list, because the selection and listing did not describe the lands in accordance with the latest approved survey thereof, and afterwards sought, upon affidavits filed, to change the descriptions contained in the list. Failing in this, the then register recalled the protest of his predecessor, and asked that the list be forwarded to that office to take the usual course for such lists of approvals. May 20, 1901, your office, questioning the right of the State to these reserved lands, addressed a communication to the Department asking to be advised whether they "should be certified and patented to the State," and by letter of June 3, 1901, the Department, after noting the importance of the question presented, directed your office to notify the proper officer of the State thereof, to the end that the Department might have the benefit of suggestions or argument in support of the State's claim, before giving final directions in the premises. In response to the notice so given, there has been filed a petition of intervention in behalf of the North American Land and Timber Company, Limited, setting forth as to part of the lands involved, that said company is the assignee of the State in good faith, and a joint brief has been filed upon behalf of the State and its alleged assignee.

The petition of intervention in nowise complicates the case. If the legal title to these lands has gone out of the United States, the land department has been divested of all jurisdiction over the land, and the claimed rights of the American Land and Timber Company are

matters of adjustment between that company and the State, with which the United States has no concern. If, on the other hand, the legal title to these lands is still in the United States, the assignment thereof by the State can not affect the jurisdiction of the land department, and offers no obstacle to the exercise of that jurisdiction in the performance of the duties of the Secretary of the Interior in reference thereto. The State's contention is:

First. That said lands so embraced in said list No. 51 were granted to the State by the swamp land grant of March 2, 1849 (9 Stat., 352), and that that matter stands *res judicata*.

Second. That on the approval of said list No. 51, on December 10, 1895, the fee simple title to the lands embraced thereby vested absolutely in the State of Louisiana, and that instantly upon such approval all power and jurisdiction of the land department over said land ceased and determined.

The second proposition involves the jurisdictional question, and should be considered first; and upon this question it may be set down as settled law that until the legal title to public lands passes from the government, inquiry as to all equitable rights comes within the cognizance of the land department, and the Secretary of the Interior, as the head of that department, may take such action with reference thereto as to him seems in accordance with law. *Knight v. U. S. Land Association* (142 U. S., 161, 181); *Michigan Land and Lumber Co. v. Rust* (168 U. S., 589, 592-3); *Parcher v. Gillen* (26 L. D., 34, 41); *Harkrader v. Goldstein* (31 L. D., 87, 91-2).

It is also well settled that until patent issues for lands claimed by the several States under the swamp land grant of 1850, the United States has not been divested of the legal title, and until that time the land department has full jurisdiction over such lands, regardless of the fact that lists regularly submitted, and duly approved, have been transmitted to the proper officer of the State. *Brown v. Hitchcock* (173 U. S., 473); *Gray Eagle Oil Company v. Clarke* (30 L. D., 570, 579).

In one view this would seem conclusive of the question here presented. These lands were originally selected under the act of 1849, but subsequently to the passage of the act of 1850. The list submitted to the Secretary of the Interior, list 51, was made up in the General Land Office from the State's original selection list No. 4, it is true, but was submitted for approval as a selection under both the acts of 1849 and 1850, and was approved, as has been seen, "under the act of March 2, 1849, as supplemented and enlarged by the act of September 28, 1850." So that it was really an approval under the act of 1850, and was not intended as the final action of the land department. The nature of the approval is not open to question. It was clearly not intended as passing title under the act of 1849, and was not so treated by the State, for, as before shown, the State sought to correct the description before the patent of the United States was to be issued upon said approval.

It may be because of the exceptions in the act of 1849, not found in the act of 1850, that some of these lands were not granted by the act of 1849, even though they may have been swamp and overflowed lands, yet it may have been believed that they *were* granted by the act of 1850. From the recited facts herein it appears that it was not only understood by the land department, but understood by the register of the State land office that the approval was made under the act of 1850, and that a patent was necessary to complete the State's title. But assuming for the sake of the argument that the approval was intended to be given under the act of 1849 alone, the act of approval, so far as it passed the title, was not complete until the approved list had been certified by the Commissioner of the General Land Office, *i. e.*, a copy of the list had been certified by that officer and transmitted to the proper officer of the State. There must be a delivery of the instrument which conveys title before jurisdiction is divested. In the case of a patent to public lands, the recording of the instrument is the equivalent of its delivery. *United States v. Schurz* (102 U. S., 378). By analogy it would seem that in the case of an approved list the certification is the equivalent of delivery, and until certification the title remains in the United States. In other words, until the list is formally certified by the officer charged with that duty, it in law remains in the hands of the Secretary of the Interior, and that officer may revoke his approval. But this conclusion need not rest alone upon the analogies of law. The Congress of the United States, by the act of August 3, 1854 (10 Stat., 346), leaves no room for argument upon this question. That act provides:

That in all cases where lands have been, or shall hereafter be, granted by any law of Congress to any one of the several States and Territories; and where said law does not convey the fee simple title of such lands, or require patents to be issued therefor; the lists of such lands, which have been, or may hereafter be certified by the Commissioner of the General Land Office, * * * shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby.

It thus appears that Congress has in terms provided that when the law making the grant does not convey the fee simple title to the lands granted, or require patents to be issued therefor, the certificate of the Commissioner of the General Land Office shall be regarded as conveying the fee simple title. This legislation was in clear recognition of the prevailing methods of the land department in administering grants of the character specified. A suggestion that inasmuch as the grant of 1849 is *in presenti*, and inasmuch as the act making that grant provided that the fee simple title should vest in the State upon the *approval* of its lists of selections by the Secretary of the Interior, therefore the Congress was without authority to change its terms, is without force. The act of 1849 provided for the selection of the lands

granted by the Secretary of the Treasury (Interior), and his approval was to pass the fee simple title. Until such approval there was in fact no selection, and the title remained in the United States. It was clearly therefore within the power of Congress to provide a different means of administering the grant as to land not already approved. The act of 1854 furnished a rule of administration, if, indeed, congressional legislation recognizing a uniform practice in this particular was necessary, and does not add to or take from the act of 1849 any material provision. It is not perceived that any right of the State, either legal or equitable, is invaded thereby.

Upon the contention that the question as to whether these lands were intended to be granted by the acts of 1849 and 1850 is *res judicata*, it is enough to say that a controversy involving a claim to public lands is never finally settled until it receives such adjudication as removes the land involved from the jurisdiction of the land department, and one Secretary of the Interior has no authority to bind his successor to either a rule of administration or interpretation of a statute involving the disposition of the public lands. See *Morrow et al. v. State of Oregon et al.*, and cases cited (28 L. D., 390).

The only remaining question, therefore, is whether the lands in controversy were granted to the State of Louisiana by the acts of 1849 and 1850, and for the purposes of this decision it will be assumed that they are swamp and overflowed lands within the meaning of said acts. They therefore passed to the State, unless the grant was defeated by reason of the fact that they were on each of these dates in reservation for the military purposes of the United States.

The general rule is undoubtedly correctly stated in the case of the State of Louisiana (30 L. D., 276, 277), wherein the Department, upon the authority of the decisions of the Supreme Court in the cases of *Wilcox v. Jackson* (13 Peters, 498, 513), *Leavenworth, Lawrence and Galveston Railroad Company v. United States* (92 U. S., 733), and *Newhall v. Sanger* (id., 761), said:

When a tract of land has been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and no subsequent law or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it.

The facts in the case cited were that a section sixteen in said State had by the act of March 3, 1811 (2 Stat., 662, 665), been reserved for the support of schools. There had not been at the date of the swamp land grants to the State of Louisiana a substantive grant of school lands to the State, but it was held that although the land may have been swamp and overflowed at the dates of the swamp land grants, it was in reservation for school purposes, and notwithstanding the fact that there was in the swamp land grants no exception of school lands, those grants did not include the land, because it was then in reservation.

A careful review of the decisions of the Supreme Court cited con-

firms beyond question that whatever may be said of the facts in those cases by way of differentiation, the broad principle decided by them is, that lands in reservation for any purpose are not public lands within the operative effect of a subsequent grant of Congress, and that this is so without regard to the fact that such lands are not in terms excepted from the operation of such grant.

In the case of *Spaulding v. Martin* (11 Wis., 274), the land involved was part of a section thirty-three, within the limits of a grant of odd sections by Congress to the State of Wisconsin for the purpose of improving Fox River. The governor selected the tract and the President of the United States approved the selection. This tract was also within the limits of a military reservation, and the court held that the grant, selection, and approval did not operate to give to the State the title to said land, but that the same was liable to be sold by the land department of the government when the same had become useless for military purposes. At page 285 of the decision it was said:

The title to this section was in the United States at the time of the grant, it was within the general limits of the grant, and it was within the letter of the selection and approval of the odd sections. It undoubtedly passed to the State, unless the fact that it was at the time, a military reservation, occupied as such by the United States, prevented that effect. And we think it did.

Discussing the question, at pages 286-287 of the decision, it is further said:

But on the other hand the government of the United States has need of specific portions of land in various portions of the country, usually small tracts, for military or other purposes, necessary for the actual transaction of the business of the government. It has provided by law for the reservation of such tracts. They are known as "reservations," and there is a significance in the word. Reserved from what? Obviously reserved from disposition in the manner and for the purposes for which the general body of the public lands are disposed of. The very necessities of the government with respect to their reservations, take them out of the main body of public lands, and of the policy applicable thereto.

When the government, therefore, obviously in pursuance of its general policy in respect to its public lands held for sale, makes a grant to the state of large quantities, reaching through an extensive tract of country, where it has large bodies of those lands, it is impossible to believe they intended to grant those tracts which had been set apart for public use. On the contrary such a grant can be reasonably construed as referring only to those lands within the policy which induced it. And it must be assumed that these reservations were not specifically excepted in the grant, for the reason that they were so obviously outside of its scope and intent, that such exception was not supposed to be necessary. And this view is sustained by the only authorities that have ever passed upon the question.

At page 745 of the decision of the Supreme Court in the case of *Leavenworth, Lawrence and Galveston Railroad Company v. United States*, *supra*, referring to the cases of *Wilcox v. Jackson* and *Spaulding v. Martin*, *supra*, it is said:

In *Wilcox v. Jackson*, 13 Pet., 498, the President, by proclamation, had ordered the sale of certain lands, without excepting therefrom a military reservation included

within their boundaries. The proclamation was based on an act of Congress supposed to authorize it; but this court held that the act did not apply, and then added, "We go further, and say, that whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, proclamation, or sale would be construed to embrace or operate upon it, although no reservation were made of it." It may be urged that it was not necessary in deciding that case to pass upon the question; but, however this may be, the principle asserted is sound and reasonable, and we accept it as a rule of construction. The supreme courts of Wisconsin and Texas have adopted it in cases where the point was necessarily involved. *State v. Delesdenier*, 7 Tex., 76; *Spaulding v. Martin*, 11 Wis., 274.

There are some decisions of the Department and the courts relied upon by the State. These have all been carefully examined, and without undertaking to analyze them here, it will suffice to say that some of them are not in point, some of them do not hold what is claimed for them, and in so far as any of them support the State's contention they are at variance with the precise and forceful authorities hereinbefore referred to and relied upon, and for that reason should not be followed.

In principle the position that swamp and overflowed lands in the several States within a military reservation at the dates of the swamp land grants were intended to be or were granted thereby is utterly indefensible. These grants were *in presenti* and operated as of their respective dates, if at all, to transfer the equitable title to such lands. The identification of the lands and the transfer of the legal title were mere matters of administration, which could not either enlarge or diminish the grant. If, then, it was the intention of Congress to grant lands having such status, the equitable title passed immediately, and the State was entitled to the possession at once and to the legal title in due course of administration without regard to the fact that they were being used for the military purposes of the government. In the case now under consideration it meant the abandonment of the reservation by the military authorities.

It is not doubted that Congress might have passed the title to swamp and overflowed lands within a military reservation subject to governmental use and occupation. In some of the grants of Congress affecting lands in what is known as "Indian Country," the fee simple in such lands has been granted in aid of the construction of railroads, subject to the Indian right of occupancy, due provision being made for the subsequent extinguishment of such right, but there is no intention manifested in the acts of 1849 and 1850 to pass the title in lands reserved for any purpose.

It is believed that the swamp and overflowed lands embraced in list 51 were not granted to the State of Louisiana, and that the State has no right, title, or interest therein by virtue of said acts. My predecessor's approval of said list is hereby recalled and vacated, and these lands will be held for disposition as provided by law.

Referring to a further provision of the act of August 3, 1854, *supra*, which prescribes that where lands embraced in certified lists were "not intended to be granted" by the act under which the lists thereof have been certified; "said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, or interest shall be conveyed thereby," and to the brief of counsel for interveners, wherein it is said:

To give force and effect to the approval of said List No. 26 and to withhold it from List No. 51, is to deny to these interveners, claiming as vendees of the State, the equal protection of the law. They are here asking that their rights as vendees of the State are entitled to recognition, and asking that so far as they are concerned the executed grant made by the act of March 2, 1849, be not attempted to be disturbed, but that they may have absolute repose of title—

it is sufficient to say that the purchasers of lands *certified* under the act of 1854 appear to have been given equal consideration and protection with purchasers of patented lands. See sections 2 and 3, act of March 2, 1896 (29 Stat., 42), and while said last named act refers to lands certified or patented under a railroad grant, this legislation would seem to fix the status of all purchasers of lands certified under any act of Congress.

CONTEST—HOMESTEAD ENTRY—HEIRS—ALIEN—PREFERENCE RIGHT.

McCraney v. Heirs of Hayes.

Contests are in all cases against the entry, and not the entryman, and in the event of the death of the entryman pending the contest, his heirs may be made parties thereto.

In case of the death of a homestead entrywoman, leaving surviving her, an alien-born and unnaturalized husband and two minor children born in this country, the children are entitled to complete the entry and take title, as her heirs, under section 2291, Revised Statutes.

No such right is acquired by a contest against a homestead entry by one having no claim to the land, but who is seeking merely to secure a preference right, prior to the cancellation of the entry, as will prevent the acceptance of final proof on such entry, even though not submitted until after the expiration of the statutory period, and the submission of the case to the Board of Equitable Adjudication for appropriate action.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 6, 1904.* (E. F. B.)

This appeal involves the right to the SW. $\frac{1}{4}$, Sec. 4, T. 132 N., R. 56 W., Fargo, North Dakota, which was entered as a homestead by Tillie M. Hayes, June 14, 1892.

A contest was filed against said entry by George M. McCraney January 14, 1902, charging abandonment. Subsequently the contestant was allowed to proceed against the heirs of Tillie M. Hayes and filed a

supplemental affidavit alleging that the said Tillie M. Hayes was married to Thomas J. Kelley in June, 1897; that she died December, 1898, leaving her husband and two children as her only heirs; that said Thomas J. Kelley is the guardian of said minor children; that claimant during her life made no improvements on the land except to build a shanty and break about thirty acres and to cultivate eighty acres that were broken prior to her entry; that the said Thomas Kelley has cultivated said land from year to year since the death of the entryman but has not made final proof on said entry, nor has anyone in behalf of the heirs, although the statutory period has elapsed within which to make such proof.

Notice was issued upon said contest and was served upon Thomas J. Kelley, who had, prior to the service of said notice, but after it had been issued, filed notice of his intention to make final proof upon said entry, which was made and is a part of the record.

Upon the testimony taken at the hearing, considered with the final proof, the local officers found as follows:

The testimony submitted does not show conclusively that Tillie M. Hayes made this tract her home continuously from date of entry until June 2, 1897, the date of her marriage. It does show that she abandoned this tract as her home on the 2nd day of June, 1897, and made her home with her husband, Thomas Kelley, from that date till the time of her death. Her heirs have lost whatever rights they may have had in the same by not offering any final proof prior to the year 1902, long after the time allowed by law in such cases, and after the initiation of the contest by McCraney, and no good reason is shown for such failure.

We are of opinion that the final proof of Kelley should be rejected and the entry of Tillie M. Hayes should be canceled, and we so recommend.

Your office affirmed the decision of the local officers rejecting the final proof and held that Tillie M. Hayes had not earned a patent to the land prior to her death and that Thomas J. Kelley had shown no sufficient reason for not making proof upon said entry within the statutory period, the only excuse being that he could not get his final citizenship papers on account of poverty, which is not sustained by the facts brought out at the hearing. From that decision the heirs of Tillie M. Hayes have appealed.

An appeal has also been taken by Oscar W. Wicklund, who filed a second contest against said entry January 15, 1902, the day following the filing of the original contest, containing substantially the same charge that was made by McCraney in his amended affidavit. He appeared at the hearing and asked to be allowed to intervene, insisting that there was no contest against the heirs of Tillie M. Hayes until his affidavit was filed and that McCraney's amendment could only be accepted as the basis for a new and different contest. The local officers denied the motion to intervene and that decision was affirmed by your office. From that ruling Wicklund has appealed.

The contest in every case is against the entry, not the person.

Proper parties can always be made. There was no error in refusing to allow Wicklund to intervene and proceed upon his contest. But independently of this, the view taken by the Department in this case makes it unnecessary to consider any question as to the rights of these contestants between themselves.

There are three questions presented in this case. First, whether the right of the heirs of Tillie M. Hayes to complete this entry is affected by the failure of the entryman to comply with the law up to the time of her death; second, who are the beneficiaries entitled to complete this entry under section 2291, Revised Statutes; and third, whether the rights of the minor heirs of the entryman were forfeited by the failure of their guardian to submit final proof within the time required by law.

Section 2291, Revised Statutes, provides that if at the expiration of the time for making final proof the entryman be dead, his widow, or in case of her death, his heirs or devisee, or in case of a widow making such entry, her heirs or devisee, if she be dead, shall be entitled to a patent upon making proof that they have resided upon or cultivated the land for the term of five years immediately succeeding the time of filing the affidavit and upon making other proofs not necessary to mention. The right of heirs and devisees to complete an entry made by an unmarried person is not specifically provided for by the statute but the spirit and purpose of the act was to confer that right upon the heirs or devisees of every qualified entryman and to give them the same status as the heirs or devisees of the class of entrymen specifically named.

In *Heirs of John Stevenson v. Elizabeth Cunningham* (32 L. D., 650) it is held that the heirs of a deceased entryman may entitle themselves to a patent by residing upon or cultivating the land for the prescribed period, but are not required to do both, and that the right to complete the entry of a deceased homesteader which was subsisting at the death of the entryman and was not then under contest is not dependent upon the entryman's compliance with the law during his or her life; that such entry comes to the persons named in the statute free from any taint or default on account of the failure of the entryman to comply with the law; and that the widow and the heirs and devisees are not required to cure such default but are simply required to reside upon or to cultivate the land for the prescribed period. It is therefore immaterial whether the entryman did or did not comply with the law during her life. It is sufficient that she died in December, 1898, leaving her entry intact and free from contest; that the father of her minor children, as their guardian, had continuously cultivated and improved the land from the death of the entryman up to the date of the hearing, and has thus complied with the letter and spirit of the statute which entitles the heirs of the entryman to a patent for the land.

Tillie M. Hayes was a citizen of the United States at the date of her entry and at the time of her death. Her husband was alien born and unnaturalized at the time of the death of his wife. Her two children having been born in this country were her surviving heirs and were entitled to the benefit of the entry under the order of succession provided by the statute, irrespective of any claim that might be asserted on the part of the husband.

The only question remaining for consideration is whether the rights of these minor heirs were forfeited by the failure of their guardian to submit final proof within the time required by law. The mere fact that an entryman fails to submit proof within the statutory period does not of itself cause a forfeiture of the entry or deprive the beneficiary of such entry of the right to make proof thereafter with a view to the submission of the entry to the Board of Equitable Adjudication for confirmation, upon making a sufficient showing or excuse for such failure, if there be no adverse claim to the land. The entry was then subject to forfeiture by the government because of the failure of the claimant to make proof, but it is the usual practice of the land department to notify such claimants that they will be allowed thirty days in which to show cause why their entry should not be canceled. (*Walker v. Snider*, 19 L. D., 467.)

If the Secretary in the absence of a contest can allow final proof to be made after the expiration of the statutory period with a view to the submission of the entry to the Board of Equitable Adjudication, he can surely allow such proof to be submitted in the face of a contest prosecuted solely for the purpose of acquiring a preference right, unless by the filing of the contest the contestant acquires such a vested right as to give him the status of an adverse claimant to the land within the meaning of the law providing for the equitable adjudication of claims under entries of the public lands.

Where a contest is filed by a person having no claim to the land, but seeking merely to secure a preference right under the act of May 14, 1880 (21 Stat., 140), the contestant acquires no vested right to make entry of the land until he has procured the cancellation of the entry. Hence, if the Secretary has the power in any case to allow final proof to be made after the statutory period, the filing of a contest in which the contestant alleges no claim to the land but seeks merely to secure a preference right of entry would not defeat that power, and deprive the Secretary of the right to accept such proof and to adjudicate the case equitably with a view to its submission to the Board of Equitable Adjudication, as the preference right given by the act of May 14, 1880, is not a vested right and does not constitute an adverse claim to the land, but is merely in the nature of a reward offered to an informer, which may be defeated by a remission of the penalty by competent authority. (*Strader v. Goodhue*, 31 L. D., 137.)

Especially would such power be exercised where the default of the entrymen or the person charged with the submission of such proof is not as to any matter upon which the contestant has furnished information, but upon matters that appear from the records of the local office and of your office and as to which they failed to give the usual notice as required the circular. (*Walker v. Snider*, 19 L. D., 467, 469.)

In the important matters relating to the disposition of the public domain "the Secretary of the Interior is the supervisory agent of the government to do justice to all claimants and to preserve the rights of the people of the United States." (*Knight v. Land Association*, 142 U. S., 161, 178). Although he can only dispose of the public lands according to the laws made and provided, he may in matters of administration and in the absence of statutory direction, prescribe rules and regulations for the purpose of aiding in the execution of the laws pertaining to the public lands. "The rules prescribed are designed to facilitate the Department in the dispatch of business, not to defeat the supervision of the Secretary." (*Ibid.*)

This latitude of supervision in the administration of the public land laws is broadly stated by the court in the case last cited (page 181) in quoting from *Williams v. United States* (138 U. S., 514, 524)—

It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the land department, matters not foreseen, equities not anticipated, and which are, therefore, not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice.

Without passing upon the question whether the right and fee to the land embraced in this entry did not inure absolutely to these children upon the death of their mother, under section 2292, Revised Statutes, because of the alienage of their father at that time, they are at least clearly entitled to a patent for the land under section 2291, Revised Statutes, their guardian having complied with the law by continuous cultivation of the land since the death of the entryman, and their mother having resided upon it prior to her marriage with Kelley for a sufficient period, which added to the period of cultivation by the guardian of her children after her death, makes the full period required by the statute. You will therefore return the case to the local officers with instructions to accept said final proof and to issue final certificate for the benefit of said minor heirs, and the case will then be submitted to the Board of Equitable Adjudication for confirmation.

Your decision is reversed.

MILITARY RESERVATION—FORT ELLIOTT—SALE OF LANDS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 8, 1904.

Register and Receiver, Woodward, Oklahoma Territory.

GENTLEMEN: The Secretary of the Interior having approved the reappraisal of the lands in the Fort Elliott abandoned military reservation, in Texas, you will, on the date fixed for the sale, proceed to the ground with the necessary papers, and after offering the flag-staff, you will proceed with the offering of the lands by quarter sections of one hundred and sixty acres each in the order in which they appear on the inclosed list which shows the appraised valuation of said lands. If the flag-staff is not sold separately you will again offer it with the land on which it is situated.

When the NW $\frac{1}{4}$ of Sec. 55 is reached, you will notify the bidders that so much of the NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of this subdivision as is occupied as a cemetery, about one acre, and inclosed with a barbed wire fence with iron posts, is reserved and will not be sold.

These lands are to be sold to the highest bidders, at not less than the appraised price.

Upon payment by the purchaser of the amount of his bid, the receiver will issue his receipt in duplicate, and the register will issue a cash certificate, such certificates and receipts to be numbered in consecutive order beginning with No. 1, designating them on the papers and abstracts as Fort Elliott reservation series. In issuing receipt and certificate for the NW $\frac{1}{4}$, Sec. 55, you will be careful to make the exception of the one acre reserved above.

The sale concluded, you will make a report to this office of the result thereof.

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

Notices of the offering have been sent to The Bulletin, Woodward, O. T., The St. Louis Globe Democrat, St. Louis, Mo., and the Sunday edition of The Record, Fort Worth, Texas, for publication, the date of the offering being fixed for September 8, 1904.

Very respectfully,

W. A. RICHARDS, *Commissioner.*

Approved:

E. A. HITCHCOCK, *Secretary.*

MILITARY RESERVATION—FORT ABRAHAM LINCOLN—ACT OF APRIL 23, 1904.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 9, 1904.

Register and Receiver, Bismarck, North Dakota.

GENTLEMEN: Your attention is invited to section three of the act of April 23, 1904 (33 Stat., 306), entitled "An act to amend an act entitled 'An act to provide for the opening of certain abandoned military reservations, and for other purposes', approved August twenty-third, eighteen hundred and ninety-four," which provides—

That all persons now having, or who may hereafter file, homestead applications upon any of the lands situate within the abandoned Fort Abraham Lincoln Military Reservation, in Morton County, State of North Dakota, shall be entitled to a patent to the land filed upon by such person upon compliance with the provisions of the homestead law of the United States and proper proof thereof, and shall not be required to pay the appraised values of such lands in addition to such compliance with the said homestead law.

In view of the above law, you will in all cases where entrymen in the reservation mentioned, have not already paid the appraised price, permit them to make final proof under section 2291, Revised Statutes, on payment of the usual fee and commissions on double minimum lands; these lands being within the forty-mile limit of the grant to the Northern Pacific railway.

In case of commutation under section 2301, Revised Statutes, a payment of \$2.50 per acre must be made.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved:

E. A. HITCHCOCK, *Secretary.*

SWAMP GRANT—ADJUSTMENT—SETTLEMENT CLAIM.

STATE OF MINNESOTA *v.* LINDBERG.

In order to bring a case within the exception named in paragraph one of the departmental regulations of March 16, 1903, providing for the adjustment of the swamp land grant in the State of Minnesota, it is necessary to show that it involves an actual *bona fide* settlement claim, which can not be done without proof of residence actually begun upon the land.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) June 10, 1904. (F. W. C.)

The Department has considered the appeal by the State of Minnesota from your office decision of December 18 last, wherein it was held that the contest between the State of Minnesota and Johan August

Lindeberg, involving lots 2 and 3 of Sec. 31, T. 57 N., R. 8 W., 4th P. M., Duluth land district, Minnesota, should be disposed of under rule 1 announced in departmental decision of March 16, 1903 (32 L. D., 65), providing for the adjustment of the swamp land grant in the State of Minnesota, and, adjudicating the case upon the record made, finding that the lots in question were excepted from the State's grant.

Upon consideration of the protest by the State of Minnesota against the manner of disposing of contests involving lands claimed under the swamp land grant, this Department on January 14, 1902, directed your office to suspend all proceedings looking to the determination of the character of lands claimed by the State under the swamp land grant of March 12, 1860 (12 Stat., 3), otherwise than by an examination of the field notes of survey, until the Department had considered and given final determination to questions involved in the further adjustment of the swamp land grant to that State.

After full and thorough consideration of the matter, the departmental decision of March 16, 1903, *supra*, was rendered, in which certain rules were laid down for the adjustment of controversies affecting the swampy or non-swampy character of lands within the State of Minnesota claimed under the swamp land grant.

By rule 1 it was provided—

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

The facts with regard to the contest and claim of the State under the swamp land grant, affecting the tract here in question, are as follows:

The plat of survey of the township in question was filed in the local land office February 18, 1903, and upon the field notes of survey the surveyor-general certified the lots here in question to be swamp and overflowed lands passing to the State under the swamp land grant. Upon the following day Lindeberg tendered at the local land office his homestead application covering lots 2 and 3 here in question, and in addition thereto the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of the same section, and in his homestead affidavit alleged that "I settled upon said tract of land July 25, 1902, and have the following improvements: a log house and one-half acre cleared." Because of the suspension of January 14, 1902, before referred to, no action was taken upon Lindeberg's homestead application, because of the conflict with the State's claim as to lots 2 and 3, until the promulgation of departmental decision of March 16, 1903, *supra*, and the issuance of circular letter thereunder by your office, dated April 4, 1903 (32 L. D., 88). Because of Lindeberg's allegation of settlement and improvements upon the land the local officers on April 30, 1903, issued notice for a hearing between Linde-

berg and the State. This hearing was duly held and upon the record made the local officers made the following finding with regard to Lindeberg's settlement and improvements upon the tract in question:

We find that he visited this land when it was in its unsurveyed condition on the 26th of July, 1902. He looked over the land and went to his home at Two Harbors without doing anything whatever and yet in his homestead application he alleges that at that time he effected a settlement. He did not return to this land until January, 1903, when he was there a day and a half. Between his two visits, he had caused to be constructed a cabin on the land with a bark roof, but he never inhabited said cabin unless he slept there one night in January, 1903. During all the time from his first visit to the land until some time in May, 1903, he slept on the land one night. Can it be said that when he applied, or on April 4, 1903, he had a *bona fide* settlement on this land? We cannot so find; it seems to us that these two casual visits could not constitute the establishment of a residence or, in the language of the circular, a *bona fide* residence on the land in controversy. The operations of the contestant in May and June, 1903, when he claims to have been some two weeks on the land and to have built a cabin, and then returned to his employment at Two Harbors, are not so closely connected with his prior operations as to make such prior operations a sufficient indication of settlement. The times are too widely separated.

We conclude, therefore, that the defendant on April 4, 1903, did not have a *bona fide* settlement on this land, and was not a settler thereon in good faith. In view of this finding, his showing by oral testimony that in fact the land is not swamp-land becomes wholly immaterial and the oral evidence is incompetent because, under the circular, the State's claim to the land can be attacked by persons who have no settlement only by evidence of the field notes of survey showing that the land is not swamp.

It appears that notice of said decision was given counsel for Lindeberg, personally, on September 14, 1903. On September 29, 1903, Lindeberg filed a relinquishment of all his right, title and interest under his homestead application tendered on February 19, 1903, as to the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of said section 31, stating in said relinquishment that he elected to retain his homestead application as to lots 2 and 3 of section 31, the tracts here in question.

This is the only paper filed on behalf of Lindeberg prior to your office decision, and can not be considered as an appeal from the decision of the local officers. Therefore, under rule 48 of practice, the decision of the local officers must be considered final as to the facts found by them and their decision will be disturbed only as follows: First, where fraud or gross irregularity is suggested on face of papers; second, where the decision is contrary to existing laws or regulations; third, in event of disagreeing decisions by the local officers; and fourth, 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.

In considering this case your office decision appealed from reviewed and reversed the decision of the local officers because it was held that said decision was contrary to existing laws or regulations, the local officers having construed the term settlement, as used in paragraph 1 of the regulations before referred to, as being synonymous with the term residence, and without disturbing the finding of the local officers

as to the acts performed by Lindeberg with regard to this land, concluded that those facts clearly establish a settlement claim to this land prior to the circular of April 4, 1903.

In the appeal by the State it is urged that this is not an existing contest or controversy within the meaning of those terms as used in paragraph 1 of the regulations issued by this Department governing the adjustment of the swamp land grant to the State of Minnesota, because the contest was begun during the period of suspension ordered January 14, 1902.

Upon this branch of the case attention is invited to the circular of March 12, 1904 (32 L. D., 499), which is as follows:

For the protection of *bona fide* settlers, who allege settlement prior to the issuance of Minnesota swamp land circular, dated April 4, 1903 (32 L. D., 88), direction numbered (1), page 6, of the said circular (32 L. D., 70), may be so construed as to class such cases among existing controversies between the State and an actual and *bona fide* homestead settler; provided such settler, within ninety days after the filing of the plat, made proper homestead application for the land involved, accompanied with proper swamp land affidavit, respecting such of the tracts involved as the plats show to be swamp.

It is clear therefore that if Lindeberg is shown by the facts found by the local officers in their decision rendered in this case, to have been an actual *bona fide* homestead settler upon this land prior to the issuance of the circular of April 4, 1903, *supra*, he is entitled to the protection afforded by paragraph 1 of said circular.

While it is true that this Department has, in the disposition of conflicting claims to public lands, recognized settlement rights in advance of residence, yet where proof of settlement has been required in establishing a claim to public lands, this Department has uniformly construed the term settlement as the equivalent of residence. See decision in case of Anna Bowes and cases therein cited (32 L. D., 331, 338).

In order to bring a case within the exception named in paragraph one of the regulations under consideration, it is necessary to show that it involves an actual *bona fide* settlement claim, and there can be no such claim without proof of residence actually begun upon the land.

It is the opinion of this Department therefore that the local officers correctly construed the regulations and made proper disposition of the case upon the facts found and their decision must be and is hereby affirmed, and your office decision is set aside and reversed.

MINING CLAIM—LOCATION—INVALID ENTRY.

ADAMS ET AL. v. POLGLASE ET AL. (ON REVIEW).

A location under the mining laws made upon land not at the time regularly subject thereto, because covered by a subsisting though invalid mineral entry, may nevertheless, if maintained in good faith, and the land subsequently becomes subject to such location, be permitted to remain intact, as having attached on such date, if at that time there be no adverse claim.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) June 11, 1904. (G. J. H.)

The Department is in receipt of a motion, filed on behalf of Adams *et al.*, for review of its decision of March 5, 1904 (32 L. D., 477), in the above entitled case, dismissing the protest of Adams *et al.* against the application of Polglase *et al.* for patent to the Ramsdell lode mining claim, Helena land district, Montana.

The contention of the protestants, as stated in the decision sought to be reviewed, was, in substance—

that the location upon which the Ramsdell application is based is absolutely void because made upon land at that time segregated from the public domain by the then-subsisting Maud S. entry.

In the course of its decision the Department said:

It may be conceded . . . that while the Maud S. entry stood uncanceled of record, the lands covered thereby were not properly subject to location. But when that entry was canceled the lands from such date became subject to location, and the prior location by the Ramsdell lode claimants became from such time effective, if rights thereunder were then being, and were thereafter asserted according to the mining law. On this question there does not seem to be any doubt. See Noonan *v.* The Caledonia Gold Mining Company (121 U. S., 393).

It is urged in support of the motion for review, among other things, in substance and effect, that it was error to cite the case of Noonan *v.* Caledonia Gold Mining Company, *supra*, as authority for the holding above quoted, in view of the later decision of the supreme court of the United States in the case of Kendall *v.* San Juan Mining Company (144 U. S., 658), citing and explaining the Noonan decision, for the reason that the Ramsdell lode claimants did not make a new location or re-record notice of their old location after the cancellation of the Maud S. entry and prior to the location made by protestants.

Both the Noonan and the Kendall case, *supra*, involved mining locations made upon lands embraced within Indian reservations, and at such time not subject to the mining laws, which subsequently, upon extinguishment of the Indian reservations, became subject to the operation of said laws. The land here involved was not embraced within any Indian reservation, but was public land of the United States subject to the mining laws, although at the time the location in question was made covered by an invalid mineral entry. The Noonan case was cited in the decision sought to be reviewed only for the reason that the holding therein is in line with the long-established ruling of the Department, in cases similar to the present one, to the effect that mining locations or entries under the public land laws, made upon lands not at the time regularly subject thereto, may nevertheless, if maintained in good faith, and the land subsequently becomes subject to such location or entry, be permitted to remain intact, as having attached on such date, if at that time there be no adverse claim. (See

Rob Roy Lode, 1 Brainard, 173; Dobbs Placer Mine, 1 L. D., 565, 568; Gunnison Crystal Mining Co., 2 L. D., 722, 724-5; Myer *et al. v. Hyman*, 7 L. D., 336; Moss Rose Lode, 11 L. D., 120; Colomokas Gold Mining Co., 28 L. D., 172, 174.)

There being no claim to the land here involved adverse to that of the Ramsdell lode claimants at the date of the cancellation of the Maud S. entry, the Department is of opinion that the holding in the cases cited is clearly applicable in the present case.

All the other matters set up in support of the motion were fully considered when the decision sought to be reviewed was rendered. It is not believed that there was any error in the conclusion reached in said decision, and the motion for review is therefore denied.

SECOND CONTEST—WAIVER OF RIGHT UNDER FIRST.

GOODMAN ET AL. *v.* HESS.

The filing of a second affidavit of contest, alleging a cause of action separate and distinct from that set up in the first, and not inconsistent therewith, does not constitute a waiver by the contestant of his right to proceed under the first, where the first affidavit charges a complete cause of action and is otherwise regular and valid.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 11, 1904.* (G. B. G.)

This case is before the Department upon the respective appeals of Doc R. Goodman and James D. Richmond from your office decision of September 23, 1903, dismissing the contest of Goodman and sustaining the contest of Richmond against the homestead entry of Mattie Hess, made October 5, 1901, for the NE. $\frac{1}{4}$ of Sec. 3, T. 3 N., R. 18 W., Lawton land district, Oklahoma.

At the date set for the hearing upon the contest of Goodman, he defaulted, his contest was dismissed, and a motion to reinstate it was afterwards denied by the local officers. Upon a careful consideration of these proceedings, it is believed that there was no prejudicial error in this action, and it will not be necessary to again refer to this branch of the case.

Richmond's affidavit of contest was filed October 18, 1901, alleging that he was the prior settler upon the land, and, on the same day that the affidavit was filed, he filed his homestead affidavit, in which the usual statements as to his qualifications to enter the land under the homestead law were made. Afterwards, upon his application to the local officers, it was ordered that he be permitted to take testimony before Kendrick G. Brown, United States commissioner, a commission being at the same time issued authorizing the said com-

missioner to take testimony in the case. Richmond submitted testimony before said commissioner, which was reduced to writing, but the entrywoman was not present at the taking of this testimony, although she had had due notice thereof. The testimony so taken was returned to the local office, where it was opened on April 23, 1902, in the presence of the parties in interest, when the case was called for final hearing. The entrywoman was present, in person and by her attorney, but offered no evidence in support of her claim to the land in controversy, but moved to dismiss the cause for sundry alleged irregularities, among which were the execution of the homestead affidavit by Richmond before the clerk of the district court, the issuance of the commission to the United States commissioner to take proof before that officer, and the refusal of the local officers to consolidate the two contests. It also appears that on the 18th day of April, 1902, Richmond had filed a second affidavit of contest against said entry, charging abandonment, and that the local officers treated the second affidavit as supplementary and amendatory of the first one, and decided the case upon the testimony taken and submitted by Richmond upon the proceedings had upon his first affidavit. This was also made a ground of motion by the entrywoman to dismiss the proceeding.

All of these things are alleged as error on appeal from the decision of your office. There was no such irregularity in the granting of the commission to take testimony or in the submission of such testimony before the United States commissioner as to invalidate these proceedings, or to warrant further notice by the Department.

Upon the question of the alleged irregularity in the filing of Richmond's homestead affidavit before the clerk of the district court, it will be enough to say at this time that the sufficiency of that affidavit is not now in question, except in so far as it may be considered as tending to prove Richmond's qualifications as a homestead settler, and for that reason entitled to make a homestead entry. For this purpose, it being a sworn statement, it will be received, in the absence of any evidence to the contrary, as a sufficient showing of Richmond's qualifications to enter land under the homestead law.

The contention that the filing by Richmond on April 18, 1902, of a second contest affidavit against Hess's entry, charging her with abandonment, is in law a waiver of all rights to proceed under his previous contest, initiated October 19, 1901, alleging prior settlement, has been carefully considered. In the cases of *Holdridge et al. v. Clark* (4 L. D., 382); *Waters v. Sheldon* (7 L. D., 346), and *Hansing v. Royston* (29 L. D., 16), it was held by the Department that the institution of a second contest by one who has theretofore filed affidavit of contest against the same party is a waiver of any right upon the part of such contestant to proceed under the first charge. A careful reading of these cases will show that in each of them the first affidavit of contest

was prematurely filed or had on account of some inherent vice, without reference to the question of the effect of the filing of the second affidavit of contest therein, and the original contest affidavit in those cases might have been dismissed because of its insufficiency and because of an intervening contestant before the filing of the second affidavit of contest.

There would seem to be no reason to apply such doctrine in this case. Here, the first affidavit of contest was not prematurely filed; it charged a complete cause of action, and has been prosecuted to a final hearing and decision. The second affidavit of contest alleged another and distinct cause of action not inconsistent with the first, and not existing at the time the first was initiated, and there would seem to be no good reason why a contestant may not file such a second affidavit of contest. As in the case of a third party who had had no previous connection with the case, this second affidavit of contest would be held to await the final decision upon the first one, and afterwards such proceedings would be had upon it as the final judgment upon the first one justified.

The evidence in this case has been examined, and it appearing beyond all question that Richmond was the prior settler upon the land in controversy, and that he has since maintained his residence thereon, making extensive and valuable improvements in furtherance of his intention to complete title to the same under the homestead law, it is directed that upon his presentation of a sufficient application to enter the land under the homestead law, the entry of Hess be canceled, and that his application be allowed.

The decision appealed from is affirmed.

TIMBER LAND—ACT OF JUNE 3, 1878.

SONTAG *v.* REID.

Lands covered by a growth of trees whose existence and maintenance operate to preserve the waters of a stream for irrigation purposes, but which are of no commercial value when severed from the soil, are not subject to disposal under the act of June 3, 1878, as lands "chiefly valuable for timber."

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 13 1904.* (A. C. C.)

August 16, 1902, Edward P. Reid filed, in due form, his application to purchase, under the act of June 3, 1878 (20 Stat., 89), lots 2, 3, 4, and 5, Sec. 17, T. 1 N., R. 7 W., S. B. M., Los Angeles, California, as chiefly valuable for timber. Notice was duly given, and November 6, 1902, was fixed as the time and the local office as the place for the submission of applicant's proofs.

October 10, 1902, Hugo Sontag filed his corroborated protest, in which he alleged, in substance, that the trees upon the lands applied for had no value except as a protection to the waters of a stream which flowed through the lands; that the application was not made in good faith; that there were mineral locations and mining improvements on portions of the lands; and that the lands are more valuable for mineral than for any other purpose.

November 4, 1902, applicant submitted his proofs, whereupon a hearing was had upon the protest, at which both parties appeared and submitted evidence. December 7, 1902, the local officers, from the evidence, found in favor of the applicant, and recommended that the protest be dismissed. Upon appeal by protestant, your office, by decision of November 4, 1903, found, in effect, that the lands are unfit for cultivation; that they are uninhabited; that they have no mining or other improvements thereon; that they are non-mineral in character; that there is no timber thereon of commercial value; that there is a stream flowing through said lands, the waters of which are utilized to irrigate and make productive lands along and adjacent thereto, lying below the lands in question; that they have a growth of small trees thereon, the existence and maintenance of which are necessary to preserve the waters of said stream; that it is to the interest of the applicant that the waters of the stream be preserved for the purpose of irrigating and making productive the lands along and adjacent to said stream, lying below the lands in question; and that the applicant was seeking to obtain the title to the lands applied for in order to prevent the destruction of trees thereon, and thus preserve the waters of said stream for irrigation purposes. In view of the findings your office rejected Reid's application to purchase, whereupon he appealed to the Department. The protestant did not appeal.

From the examination of the evidence the Department is of the opinion that the same supports the findings. The only question, therefore, presented for consideration and determination is, whether under the findings the application to purchase was properly rejected. The solution of this question depends upon whether public lands may be disposed of under the act of June 3, 1878 (20 Stat., 89), the chief value of which consists in trees thereon whose existence and maintenance are necessary to preserve the waters of a stream for irrigation purposes, but which have no value for commercial purposes.

By the first section of the act only such public lands as are "valuable chiefly for timber," or "valuable chiefly for stone" may be sold, etc.

Lands in the arid region of the country, where those in question are situated, upon which there is a growth of trees whose existence and maintenance are necessary to preserve the waters of streams for irrigation purposes are valuable. In addition, if they are unfit for cultivation and non-mineral in character, they may be regarded as

chiefly valuable for such trees. It is common knowledge that the agricultural and live stock interests in that region depend almost entirely upon irrigation; that the waters for irrigation purposes are taken from streams which are supplied and fed from the melting snows which fall in the mountains; that the trees in the mountains and along the streams prevent the snows from suddenly disappearing at the approach of warm weather and so preserve them that they gradually melt during the spring and summer months, thereby supplying the streams with water for irrigating purposes when most needed; and that by the destruction of these trees the snows would entirely disappear during the spring or early in the summer, thus causing the streams to become dry at the time when their waters are absolutely necessary for irrigation purposes. It is indisputable that the welfare and prosperity of the inhabitants of the arid region depend largely upon the preservation of the trees which protect the waters of streams upon which irrigation is dependent. And Congress, by the act of June 4, 1897 (30 Stat., 11, 35), has expressly recognized the necessity of preserving trees "for the purpose of securing favorable conditions of water flows." It does not follow, however, that lands may be disposed of under the act of June 3, 1878, *supra*, whose chief value consists in the trees thereon which can not be converted into a commercial commodity, but are valuable only for the preservation of the waters of streams. The purpose of the first, second and third sections of the act manifestly are to provide a method by which title to lands chiefly valuable for "*timber*" may be acquired. The word "*timber*," as used in the first section, was evidently employed in its ordinary and popular sense. In its popular and ordinary sense, *timber* means such trees as, when severed from the soil, have some commercial or marketable value for agricultural, manufacturing, or domestic purposes. It would seem, therefore, that lands containing a growth of trees of no commercial value when severed from the soil, can not be disposed of under the act of June 3, 1878, *supra*, as "valuable chiefly for timber."

As will be seen by reference to the fourth section of the last named act, the twenty-fourth section of the act of March 3, 1891 (26 Stat., 1095, 1103), and the provisions of the act of June 4, 1897 (30 Stat., 11 *et seq.*, pages 34 and 35), Congress has recognized that it is the duty of the government to preserve trees upon public land, the existence and maintenance of which are essential for any useful or beneficial purpose. Neither by the act of June 3, 1878, nor by any other act, did Congress contemplate that this duty might be shifted to individuals by permitting them to purchase public lands upon which the trees are situated.

Your office decision is accordingly affirmed.

MINING CLAIM—SCHOOL GRANT—CHARACTER OF LAND.

MAHOGANEY No. 2 LODE CLAIM.

A mineral location, made prior to the admission of the State of Utah into the Union, was not of itself sufficient to establish the mineral character of the land located so as to defeat the grant to the State for school purposes made by section 6 of the act of July 16, 1894; but where the State was specially notified of the pendency of an application for patent under such location, and made no objection by way of protest or otherwise to the allowance of the mineral entry, it is bound by the record made upon such application, and a hearing for the purpose of determining the character of the land is unnecessary.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 13, 1904.* (A. C. C.)

November 1, 1902, the Argentine Mining Company made entry for the Mahogany No. 2 lode mining claim, survey No. 4007, embracing parts of sections 32 and 33, T. 3 S., R. 3 W., Salt Lake City, Utah. Subsequently the record was, by the local officers, forwarded to your office. By decision of January 15, 1904, your office directed the local officers to notify the company that its entry would be held for cancellation unless within sixty days from notice it applied for a hearing to determine whether the part of section 32 covered by the entry was of known mineral character at the time of the admission of Utah into the Union as a State; whereupon the company appealed to the Department.

By section 6 of the act of July 16, 1894 (28 Stat., 107, 109), it is provided, among other things, that upon the admission of Utah into the Union as a State, "sections numbered two, sixteen, thirty-two, and thirty-six in every township are granted to said State for the support of common schools," unless such sections "have been sold or otherwise disposed of by or under the authority of any act of Congress." Under the provisions of this section the right of the State to the lands mentioned does not attach unless and until identified by the government survey. *State of Colorado* (6 L. D., 412); *Barnhurst v. State of Utah* (30 L. D., 314). And if at that time they are of known mineral character they are reserved from the grant to the State. See *State of Utah v. Allen et al.* (27 L. D., 53); *State of Utah* (32 ib., 117).

Utah was admitted into the Union as a State January 4, 1896. See President's proclamation (29 Stat., 876). Subsequently thereto and prior to August 8, 1896, the section 32 in question was surveyed in the field, and the survey was approved March 21, 1899. The location upon which the entry is based was made January 5, 1894, and the application for patent was filed August 20, 1901. In accordance with the practice prevailing at the time of the filing of the application, the local officers notified the State of the pendency of the same, and no

response to the notice being made by the State, and no objections otherwise appearing, entry was allowed.

The decision of your office in question was based upon Rule I of the circular of instructions approved by the Department March 6, 1903 (32 L. D., 39), which provides, in part, that—

Applications presented under the mining laws covering parts of a school section will be disposed of in the same manner as other contest cases.

The mineral location, made prior to the admission of the State, was not of itself sufficient to establish the mineral character of the land located so as to defeat the grant to the State; and, so far as shown by anything appearing upon the land office records at the date of identification of the school section in question by the lines of the government survey, the presumption is that it passed to the State under its grant. The record made upon the application by the mining company shows, however, that the State was specially notified of its pendency in addition to the usual notice given by publication, and that the State interposed no objection by way of protest or otherwise to the allowance of the mineral entry. Under these circumstances there would seem to be no necessity for a hearing in order to determine the character of the land in question, inasmuch as the State has already had full opportunity to be heard upon this question, and as to the right of the applicant to make mineral entry, and is clearly bound by the record made upon that application.

Your office decision requiring claimants under this mineral entry to apply for a hearing is therefore reversed and the entry, if otherwise regular, should be passed to patent.

ARID LANDS—RECLAMATION—LANDS WITHDRAWN—ACT OF JUNE
17, 1902.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 15, 1904.

Registers and Receivers, United States Land Offices in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming.

GENTLEMEN: You are hereby directed to notify all persons who apply to make entry of lands within the irrigable area of any project commenced or contemplated under the reclamation act of June 17, 1902 (32 Stat., 388), that they will be required to comply fully with the homestead law as to residence, cultivation and improvement of the

land, and that the failure to supply water from such works in time for use upon the land entered will not justify a failure to comply with the law and to make proof thereof within the time required by the statute.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved: June 15, 1904.

E. A. HITCHCOCK, *Secretary.*

PRACTICE—APPEAL—CERTIORARI—RULE 83.

ORBISON *v.* STATE OF UTAH.

The writ of certiorari provided for by rule 83 of the Rules of Practice is designed as a remedy in cases in which the Commissioner of the General Land Office formally decides that a party has no right of appeal, and is not intended to perform the office of an appeal in case a party fails to appeal within the time prescribed by the Rules of Practice.

While the Department may, and in a proper case should, review the proceedings of the General Land Office in respect to the public lands, in the absence of an appeal, it will not ordinarily exercise this power upon the application of a party to the proceedings, in the absence of a clear and concise designation of the errors complained of by him.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) June 15, 1904. (A. C. C.)

May 2, 1904, the State of Utah filed a petition in which it asks for an order to direct your office to certify to the Department the proceedings in respect to the contest instituted by James E. Orbison against the State of Utah's selection list No. 152, for reservoir purposes, to the extent that said list embraces the W. $\frac{1}{2}$ SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 10, and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 13, T. 14 S., R. 6 E., Salt Lake City, Utah.

May 16, 1904, Orbison filed a motion to dismiss the petition.

From the petition and the decision of your office of March 26, 1904, a copy of which is filed therewith, it appears, among other things, in substance, that by decision of your office of December 17, 1903 (a copy of which is not but should have been filed with the petition), said list to the extent that it included the tracts of land above-mentioned, was held for cancellation, and James E. Orbison was given permission to make entry therefor under the coal land laws; that notice of said decision was duly served upon the State December 23, 1903; that March 7, 1904, the State presented an appeal to the local officers which was by them forwarded at once to your office; and that by decision of March 26, 1904, your office refused to permit the appeal to be filed because it was not timely presented.

The petitioner, in general terms, alleges, in substance and effect, that error was committed by your office in its decision of December 17, 1903, and that "one of the questions involved is of vital importance to the State." No specific error is alleged, nor is the "question of vital importance" pointed out. If any errors were committed by your office in the decision in question, the petitioner's remedy to have the decision reviewed and the errors corrected was by appeal. The time for presenting appeals from the decisions of your office are regulated by rules 86 and 87 of the Rules of Practice (31 L. D., 527, 539-540), which are as follows:

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.

It is not claimed by the petitioner that its appeal from your office decision of December 17, 1903, was presented for filing within the time prescribed by either of these rules; it does not allege any reason whatever why the appeal was not so presented; it specifies no error in your office decision; nor does it point out in what manner it will be injured if the decision complained of is allowed to stand.

The petition is based on rule 83 of the Rules of Practice, which provides that—

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.

In passing upon this rule the Department, in *The Currency Mining Co.* (20 L. D., 178), held that it was "designed to provide a remedy only in cases in which" your office should "formally decide that a party has no right of appeal," and in this connection said:

It was never intended that certiorari should take the place of appeal, or stand as a concurrent remedy. That which can be, or may have been, accomplished by the reasonable exercise of the right of appeal, can not be asserted through certiorari, which is merely supplemental in its nature and functions.

In the present case your office did not decide that the petitioner had no right of appeal. It refused to receive an appeal presented for filing when the time for taking the same had expired. Such refusal was authorized by the holding of the Department in *St. Paul, M. & M. Ry. Co. et al. v. Vannest* (5 L. D., 205, 206), which is to the effect that unless an appeal is "presented within the time prescribed by the Rules of Practice" your office may refuse to receive the same.

While the Department may, and in a proper case should, review the proceedings of your office in respect to the public lands, in the

absence of an appeal (see Pueblo of San Francisco, 5 L. D., 483, 494; Knight v. Land Association, 142 U. S., 161, 178), yet, ordinarily, it will not exercise this power upon the application of a party to the proceedings, in the absence of a clear and concise designation of the errors complained of by him.

As the appeal from the decision complained of was not presented until the time allowed for taking the same had expired; as no reason is alleged why the appeal was not presented within the specified time; as the errors complained of are not designated; and as it is not pointed out in what manner petitioner would be injured if the decision complained of is allowed to stand; its request is denied and its petition is dismissed.

HOMESTEAD—CULTIVATION—GRAZING.

ELNORA C. JETES.

In grazing countries or districts, the use of land embraced in a homestead entry for grazing purposes, where the land is suitable for that purpose only, is equivalent to cultivation; and where the land is rented to another and used by him for such purpose, such use constitutes a compliance with law on the part of the entryman in the matter of cultivation.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 16, 1904.* (A. W. P.)

On May 7, 1901, Elnora C. Jetes made homestead entry No. 4229, for the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 27, T. 25 N., R. 44 W., Alliance, Nebraska, land district, and on September 9, 1902, submitted commutation proof thereon, for which cash certificate issued September 18, 1902.

By decision of July 1, 1903, your office held that proof as submitted was insufficient as to cultivation, and therefore called upon claimant to show by affidavit to what extent and by whom the land had been used for grazing, and how many cattle had been grazed thereon.

In response thereto the local officers transmitted the affidavit of claimant, in which she states—

that said tract was rented by herself for grazing only, to one C. W. Hicks, for the year 1901, and he used it to pasture his horses; he had the use of the land that year for building her house, and the year 1902 rented the land for grazing purposes to Simonson Bros., who had about 50 cattle grazing for three months.

Upon consideration of this affidavit in connection with the proof your office held, by decision of January 29, 1904, that:

The proof submitted in this case is not satisfactory, as it does not show residence on or cultivation of the land entered, and her affidavit does not show good faith, as other parties have used the land for the years 1901 and 1902, it is therefore rejected, and the entry held for cancellation, subject to appeal within the usual time.

The case is now before the Department upon appeal, wherein it is set out that on or about August 15, 1903, almost a year after the issuance of the cash certificate, claimant sold the land for a valuable con-

sideration to A. J. Simonson, who, on September 1, 1903, sold and conveyed the same, for a valuable consideration, to Joseph Creswell and E. G. Kindred, of Denver, Colorado; and that said Joseph Creswell, as such transferee, and as an innocent purchaser, intervenes, and appeals from your office decision, alleging, in substance, that you erred in holding that the proof did not show good faith on the part of the claimant; that claimant did not reside upon and cultivate the land; and that the affidavit does not show good faith, as other parties used the land for grazing.

From an examination of the proof submitted it appears that during the month of May, 1901, shortly after making entry of the tract, claimant erected what is described as a comfortable fourteen by sixteen frame house, painted, and covered with shingle roof, at which time she established residence on the land; that she erected a twelve by sixteen frame barn; sunk a well, supplied with pump; and partly fenced the tract—all of which improvements were valued at \$250.

In response to question six, as to periods of absence from the land, claimant answers as follows:

I have to support myself and have been away to work for my living and to get means to improve my place. I can not give the dates of my absences all of them, but I have spent a good part of the time on the land. I have never been away more than three weeks at a time, and away from place about one-half or more of the time. I have lived there more than one-sixth of the time.

In this same connection one of the witnesses living near the land states that:

She has been absent for the purpose of employment in Alliance, Nebraska, to maintain herself for short periods. I do not know the exact periods, but I saw her on the land every few weeks. I judge that she was actually present on the land between one-fourth and one-fifth of the time.

Relative to compliance with the law as to cultivation it appears that the tract is situate in what is known as the "Sand Hills of Nebraska," and is not adapted to agriculture, but is suitable for grazing purposes only. In reply to question seven claimant stated that she had not cultivated any of the tract, but had used it for grazing. As hereinbefore stated, your office held that while cultivation is not essential in all cases, it is necessary that the proof should clearly show for what purpose the land has been used, and as you did not deem this answer sufficiently specific you called for further showing by affidavit as to what extent and by whom the land had been so used. The showing as to residence was not questioned, nor was there any intimation therein that the said proof was otherwise insufficient. Upon receipt of this affidavit, however, you found, on consideration of the entire showing, that proof as to residence was unsatisfactory, and that the affidavit did not show good faith in the matter of compliance with the requirement of the law as to cultivation, as other parties had used the land for grazing purposes, and not the claimant.

The Department has long held that stock grazing in grazing countries, or localities where the land was suitable only for that purpose, was equivalent to cultivation. The land in question appears to come within that category; hence in this respect it only remains to be considered as to whether renting the land to another for grazing purposes is a good faith compliance with the law in the matter of cultivation. The Department has held that the execution of a lease by a homesteader of the land embraced in his entry and the occupancy and cultivation of said land by his tenant will not defeat the right of the entryman to perfect title under his entry, if he continue to reside on and improve the land (*Thomason v. Patterson*, 18 L. D., 241). Such a holding is in all respects logical, and is not materially different from the employment of assistance in the cultivation of an entry. In fact, to hold otherwise would seriously limit the possibility of cultivation by the entryman, who has neither farming implements and horses nor the means to acquire them. Such being the case in the matter of cultivation by tilling the soil, it follows that such practice must be recognized in complying with the law in this respect in grazing countries. It does not appear in this case that the claimant was possessed of either horse or herd, and hence to have failed to lease the land to other parties for such purpose would have resulted in failure to comply with the requirements of the homestead law as to cultivation. The Department can not therefore concur in the reasoning of your office as to lack of good faith because of the rental of the tract for grazing purposes to other parties.

In fact, upon careful consideration of the showing in this case as to cultivation, improvement, and residence, the Department is of the opinion that, inasmuch as there is no charge or showing that the entry was made in bad faith or for speculation, the proof should be approved and the entry passed to patent, and in the absence of other objection it is accordingly so directed.

The decision of your office is therefore reversed.

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

LAFAYETTE LEWIS.

Lands relinquished to the United States under the exchange provisions of the act of June 4, 1897, while within a forest reserve, but subsequently excluded from such reserve, do not become public land subject to entry until the title tendered has been accepted and approved.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 17, 1904.* (J. R. W.)

Lafayette Lewis filed a motion for review of departmental decision of March 25, 1904 (unreported), rejecting his application under the act

of June 3, 1878 (20 Stat., 89), for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 6, T. 27 N., R. 14 E., W. M., Seattle, Washington, because it is land once patented and relinquished to the United States under the exchange provisions of the act of June 4, 1897 (30 Stat., 36), while within a forest reserve, by one claiming to be its owner, but such relinquishment and selection therefor had not been finally approved.

The motion alleges error in said decision that it failed to find that the land belonged to the United States and was subject to entry; that further delay in approval of the selection for which the tract in question is the base is an injustice to the rights of the applicant, and to longer hold the land excluded from the legal application of a qualified entryman is against the spirit and intent of the laws governing entries of public lands.

The motion is in substance a mere criticism upon the celerity and efficiency of the land department in disposal of the selection.

A selection under the act of June 4, 1897, is essentially an exchange. Equitable title and right to the lands exchanged necessarily vest at the same time. In *Cosmos Exploration Company v. Gray Eagle Oil Company* (190 U. S., 301, 312, 313) the court held that:

There must be a decision made somewhere regarding the rights asserted by the selector of land under the act, before a complete equitable title to the land can exist. The mere filing of papers can not create such title. . . . It is certain, . . . there must be some decision upon that question before any equitable title can be claimed—some decision by an officer authorized to make it.

In the present instance there had been no decision upon the selection. The mere filing for record of the deed of relinquishment, as remarked by the court (190 U. S., 312), "does not show necessarily that he was owner of the land." It is his mere assertion. The land has once passed out of the administrative jurisdiction of the land department by issue of the patent upon the original entry. A reconveyance by some one claiming to be owner may or may not vest title in the United States. Whether it does vest title in the United States depends, first, upon the question whether he is in fact complete owner free of any lien, incumbrance, or other claim of title; for the United States will not accept conveyances of title under the exchange provisions of the act unless title is free of adverse claim. It will not exchange public lands for those concerning which it may have to litigate with its citizens as to its right. Lands conveyed to the United States under this act do not become public lands subject to entry until the title tendered has been accepted and approved. It is due the proponent, as good faith on the part of the United States to whom he tenders title, that no act should be done or permitted by the government which can impair or cloud his right until the title he tenders is found satisfactory and is accepted. *Maybury et al. v. Hazletine* (32 L. D., 41, 42). This is so clearly the requirement of good faith on part of the United States that argument on that head is unnecessary. It necessarily fol-

lows that the land in question was not public land subject to entry at the time of Mr. Lewis's application.

This being clear, nothing remains of the motion but a criticism upon the failure of the land department to conclude a negotiation of exchange to which Mr. Lewis is not a party and in which he has no interest or concern. So long as the interested party does not complain, it is not the province of Mr. Lewis, a stranger to the negotiation, to intermeddle in it as a volunteer seeking to appropriate the land tendered to the government, but not yet accepted.

The motion therefore presents no reason to recall, vacate, or modify said decision, and none appearing otherwise the motion is denied and the decision is adhered to.

HOMESTEAD—CULTIVATION—HEIRS.

SCHOOLEY *v.* HEIRS OF VARNUM.

The heirs of a deceased homesteader sufficiently comply with the law in the matter of cultivation if they cultivate the land during the proper season each year.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 20, 1904.* (A. S. T.)

On April 21, 1897, Loren W. Varnum made homestead entry for the NE. $\frac{1}{4}$ of Sec. 10, T. 146 N., R. 72 W., Bismarck land district, North Dakota. He died on October 30, 1899, and said entry was subsequently suspended upon the report of a special agent of your office charging that he had never established his residence on the land.

A hearing was had on the application of Zeph Varnum, the father of the entryman; whereupon the local officers recommended the cancellation of the entry. Zeph Varnum appealed to your office, where a decision was rendered affirming the action of the local officers and holding the entry for cancellation, and on further appeal to this Department your said decision was affirmed by departmental decision of May 15, 1903 (not reported). A motion for review of the last named decision having been filed and entertained, this Department on August 25, 1903, rendered a decision (not reported) vacating its former decision and holding the entry intact.

On November 16, 1903, said Zeph Varnum, claiming to be the sole heir of Loren W. Varnum, deceased, offered final proof in support of said entry, whereupon final certificate was issued to the heirs of Loren Varnum, deceased.

On November 27, 1903, Pearl Blanch Schooley filed an affidavit of contest against said entry, charging, among other things not necessary to be stated, that Loren W. Varnum died on October 30, 1899; "that Zeph Varnum, as the father of said entryman, offered final five years' proof in support of said entry on November 16, 1903; and that said Zeph Varnum wholly failed to either cultivate or improve

said tract or any part thereof since the death of said entryman, after the crop season of 1901." The local officers forwarded said affidavit to your office where, on March 4, 1904, a decision was rendered wherein it was held that "the charges made are not deemed sufficient to warrant this office in ordering a hearing," and said affidavit of contest was rejected, from which decision the contestant has appealed to this Department.

In said departmental decision of August 25, 1903, it was said that—the proceedings in this case did not involve any charge that the heir of the deceased entryman has not complied with the law; his connection with the land was not inquired into at the hearing or considered by your office or this Department and any conclusion as to that matter would be reached by inference only, and it is manifestly improper to decide that matter upon the present record.

That case involved only the question as to the entryman's compliance with the law during his lifetime. In order for his heirs to preserve their right to the entry it was necessary that they should, within a reasonable time after the death of the entryman, proceed to cultivate and improve the land and continue such cultivation and improvement for such period of time as, when added to the time during which the entryman had complied with the law, would make five years' compliance with the law.

The final proof was offered on November 16, 1903; the entry was then six years and seven months old. The affidavit of contest does not charge that the entryman failed to comply with the law up to the time of his death, when the entry was two years and eight months old, and assuming that he had done so, it was necessary for the heirs to continue such compliance by cultivation and improvement of the land for two years and four months from the date of his death, or till March 1, 1902.

The heirs of a deceased entryman are not required to cultivate the land constantly, *i. e.*, every day or every month after the death of the entryman, but it is sufficient if they cultivate it during the proper season each year. The affidavit of contest in this case charges that Zeph Varnum failed to cultivate the land in question after the crop season of 1901. It is not charged that he is the sole heir of Loren W. Varnum, but, assuming that he is such, it was necessary that he should cultivate the land at the proper season each year till the expiration of said period of two years and four months from the death of the entryman. After the crop season of 1901, it was not incumbent upon him to do any further cultivation of the land till the crop season of 1902. The two years and four months expired on March 1, 1902, which was before the usual crop season in that latitude, and therefore he was not required to cultivate the land after the crop season of 1901.

Said affidavit, therefore, fails to show a sufficient cause of action against the heirs of Loren W. Varnum and your said decision rejecting the same is affirmed and said affidavit is rejected.

GAMBLE *v.* STATE OF MINNESOTA.

Motion for review of departmental decision of April 14, 1904, 32 L. D., 593, denied by Secretary Hitchcock, June 20, 1904.

SWAMP LAND GRANT—ADJUSTMENT—FIELD NOTES OF SURVEY.

COOK *v.* STATE OF MINNESOTA.

Where the field notes of survey are the basis of adjustment of the swamp land grant to a State, and the intersections of the lines of swamp or overflow with those of the public surveys alone are given, those intersections may be connected by straight lines; and all legal subdivisions, the greater part of which are shown by these lines to be within the swamp or overflow, will be certified to the State; the balance will remain the property of the government.

Where only one line is intersected by swamp, or for any other reason the above rule can not be applied in the adjustment, the plats of survey may be used to supplement the field notes, but they are referred to only in such cases, and in no case can they be considered as overcoming or controlling the field notes of survey.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 21, 1904.* (F. W. C.)

The Department has considered the appeals by Wirt H. Cook and the Duluth and Iron Range Railroad Company from your office decision of February 24 last, wherein it was adjudged that the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 9, the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 10, and the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 15, T. 55 N., R. 11 W., 4th P. M., Duluth land district, Minnesota, are of the character of lands granted to the State of Minnesota by the swamp land grant of March 12, 1860 (12 Stat., 3), and that the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 9, and the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 23, T. 55 N., R. 11 W., are established by the field notes not to be of the character of lands granted by said act.

Cook initiated contest against the State of Minnesota, involving all the above described lands, upon which hearing was regularly ordered and held December 5, 1901, the State defaulting, but the Duluth and Iron Range Railroad Company entered an appearance, claiming the land through the State. The record made at said hearing was never completed, in this, that the witnesses did not sign their testimony given at said hearing prior to the order of January 14, 1902, suspending action upon all contests involving the swampy or non-swampy character of the lands, except where the field notes of survey alone were relied upon.

Following the promulgation of circular of April 4, 1903 (32 L. D., 88), the local officers disposed of the case under the decision rendered by your office in the case of *Brown v. State of Minnesota*; that is,

upon consideration of the testimony taken at the hearing before referred to. Upon appeal your office overruled the action of the local officers and held that the contest must be disposed of without regard to said testimony and upon the field notes of survey alone.

Because of the admission by the contestant that a careful survey of the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 9, and the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 10, might show the same to be swamp lands, your office affirmed the recommendation of the local officers that the contest be dismissed as to said tracts, further finding, however, that each of said tracts is shown by the field notes to be of the character contemplated by the swamp land grant. Your office also found that the field notes of survey show that the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 15, is of the character contemplated by the swamp land grant, to that extent reversing the decision of the local officers, which was based, as before stated, upon the testimony offered at the hearing.

With regard to the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 9, and the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 23, your office decision found, after careful examination of the field notes of survey, following the rule announced in First Lester, 543, where the field notes are made the basis for the adjustment of the State's claim, that the greater part of each of these subdivisions is by the field notes of survey shown to be dry land, and to this extent the decision of the local officers, based upon the testimony taken at the hearing, was affirmed.

From your office decision both Cook and the Duluth and Iron Range Railroad Company appealed.

Considering the appeal by Cook, the Department is of opinion that your office decision properly held that his contest with the State of Minnesota must be disposed of according to the field notes of survey; because he did not claim to be an actual *bona fide* settler upon the land involved, nor had his contest proceeded to a hearing and decision prior to the issue of the circular of April 4, 1903, *supra*, and as he does not question your reading of the field notes of the survey, your decision, in so far as it dismisses his contest, is affirmed.

The appeal by the Duluth and Iron Range Railroad Company questions the correctness of the adjudication made by your office in so far as it rejected the claim of the State under the swamp land grant to the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 9, and the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 23, finding that they were, by the field notes of survey, shown not to be of the character of lands granted to the State, and alleges that your office did not give proper consideration to the plat of survey of the township, which, it is urged, is a part of the field notes of survey and shows that both tracts are of the character granted.

Your said office decision relies upon the rule announced many years ago and reported in First Lester at page 543, which is as follows:

Where the field notes are the basis, and the intersections of the lines of swamp or overflow with those of the public surveys alone are given, those intersections may

be connected by straight lines; and all legal subdivisions, the greater part of which are shown by these lines to be within the swamp or overflow, will be certified to the State; the balance will remain the property of the government.

It is learned upon inquiry at your office that this rule has been uniformly followed for many years in adjusting claims to swamp land under the grants made to the several States.

The plat of the township and the field notes of the survey have been examined in the consideration of this appeal and it is found, following the rule above announced, that your office properly adjudged the two tracts last described not to be of the character of lands granted to the State by the act of March 12, 1860, *supra*.

With regard to the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 9, the field notes of survey show on the line between sections 8 and 9, running northward, that the surveyor left the swamp at 66 chains, thus leaving 14 out of the 20 chains on the west line of the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section, dry land. On the opposite side of the section on the line between sections 9 and 10, running northward, the surveyor left the swamp at 61 chains, 19 chains from the northeast corner of the section. Connecting these points where the surveyor left the swamp on each side of the section by a straight line excludes the greater part of the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section 9, from the swamp, and thus establishes the character of the said tract to be dry land, no swamp being encountered on the north line of the section. When referring to the plat of survey of this township it is seen that the swamp lines indicated thereon do not agree with the field notes of survey in this, that the north boundary of the swamp, or the points at which the surveyor left the swamp when running the east and west lines of the section, are shown upon the plat to be farther north than called for by the field notes. Thus, if the plat were followed, instead of supplementing the field notes it would correct the field notes. This is not permissible. The markings upon the plat can only be looked to as to the showing within the interior of the section and not to the points of intersection along the run or surveyed lines.

With regard to the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 23, the field notes of survey show on the line between sections 22 and 23, running northward, that the surveyor intersected a lake 41 chains, just one chain above the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section, and when running the line between sections 14 and 23, running west, a lake was intersected at a point 53 chains from the NE. $\frac{1}{4}$ of said section, or at a point 7 chains to the east of the northeast corner of the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section. Connecting the points where the lake was intersected on the west and north sides of said section by a straight line excludes from the lake the greater part of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section.

It is true that the plat of survey of the township indicates that the configuration of the lake within the section is such that the greater

part of the tract in question is shown to be within the lake, and that the body of water was not meandered, nevertheless, as the rule before referred to has been uniformly followed for many years and is always relied upon where there are such showings along the surveyed lines of the section as to permit of its applications, the Department adheres to the adjudication made in this instance, which excludes the greater part of the legal subdivisions, and in this connection calls attention to the fact that the State has, under the application of this rule of adjustment, received title to lands not shown by the plats of survey to be swamp or overflowed lands, and thus the matter equalizes itself.

Where only one line is intersected by swamp, or for other reason the rule can not be applied in the adjustment, the plats of survey may be used to supplement the field notes, but they are referred to only in such cases, but in no case can they be considered as overcoming or controlling the field notes of survey.

Upon careful review of the entire matter, therefore, the Department also affirms that portion of your office decision which adjudged the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of Sec. 9, and the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of Sec. 23, not to be of the character of lands granted by the act of March 12, 1860, *supra*.

SURVEY—ARTIFICIAL LAKE—MEANDER.

CITY OF BEAVER DAM ET AL.

The land department has no authority to meander an artificial lake which was not established until subsequently to the approval of the survey of the township and after a large part of the lands therein had been disposed of by the government according to the official plat.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 21, 1904.* (J. R. W.)

The State of Wisconsin, the City of Beaver Dam, and Beaver Dam Cotton Mills have each appealed from your office decision of March 7, 1904, denying the petition of the City of Beaver Dam and the Beaver Dam Cotton Mills and four hundred and thirty-three others, citizens of Beaver Dam, for the meandering of Beaver Dam Lake.

The city's petition sets forth that it is a municipal corporation, situate upon parts of Secs. 3, 4, 5, T. 11, and 27, 28, 29, 32, 33, 34, T. 12 N., R. 14 E., Wisconsin, upon the border and outlet of Beaver Dam Lake, "a public body of water," and navigable, ten to twelve miles long and one to two wide, which has existed in its present form since 1842, then created by a dam built across the Beaver Dam River at that point, then a village, for a water power, and that the lake covers about 6,600 acres, and now furnishes power for large mills and factories; that the city was incorporated in 1856, and has a population of 5,128

by the census of 1900; that the maintenance of the lake is of vital interest to the city, and to settle "certain property interests" a survey by the government is necessary of that part of the townships comprising the lake-bed, as the official plats of the original survey in 1835 and 1836 do not show that any lake exists, for which reason many questions arise and much litigation ensues making it a great benefit to the city, the shore-owners, and the manufacturing interests to have the lake meandered.

The citizens' petition, to the same general purport, further refers to an order by your office, August 15, 1850, to the United States surveyor-general, Dubuque, Iowa, directing a meander of "Beaver Dam swamp," in townships 12, ranges 13 and 14, never executed, and asked that such order be now carried out.

February 16, 1904, the Attorney-General of Wisconsin, on behalf of the State, by letter, supported the petitions, asserted an interest of the State, and asked that the order of August 15, 1850, might be carried out.

The records of your office show that the subdivision surveys of these townships were made in 1835, and the surveyor's field-notes and return show that the area of the present lake was then a marsh, not subject to meander as a lake, the lake being artificially formed in 1842 by construction of the dam, referred to in the petitions, after approval of surveys in 1835 and 1836; that some of the lands represented upon the official plats as marsh were disposed of by the United States prior to the passage of the swamp land grant of September 28, 1850 (9 Stat., 519), the State having been admitted into the Union May 29, 1848 (9 Stat., 233), and that far the greater part of the lands in the present lake area, not previously disposed of, were in 1854 approved to the State as swamp and overflowed lands under the act of 1850, *supra*.

The reason why the above order of August, 1850, for meander of the lake, was not then carried out is stated by your office to be that no funds were then available for the purpose, and it is probable that further examination disclosed that meander of the lake at that time would, or might, affect rights vested by previous disposal of lands within the marsh.

Your office, March 7, 1904, held that the lake so made by erection of the dam can not properly be surveyed and meandered after approval of the surveys of the townships and disposal of lands therein by the government according to such official plats, and denied the petition.

April 29, 1904, the State of Wisconsin by its Attorney-General; also the City of Beaver Dam by its city attorney, and Beaver Dam Cotton Mills, one of the citizen petitioners, by E. C. McFetridge, its president, filed appeals from your office decision. The last two named are without date. The first two named were served, respectively,

May 5, and April 25, 1904, on "Charles Haffemeister, who has made homestead entry No. 10660 of the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, all in section 31, town 12 N., range 14 E."

April 18, 1904, before such service, counsel for Charles Haffemeister addressed to the Secretary of the Interior a letter, in the nature of a protest against granting the petitions for meander of Beaver Dam Lake, claiming that when Haffemeister made his homestead entry "nearly all of the 160 acres was dry land, yet at the present time it is nearly all covered with water," due to increased precipitation and a husbanding of the water and arresting its natural flow by those controlling and managing the dam.

The authority of the land department to make surveys arises from the legislation of Congress, codified as Chapter 1 of Title 23 of the Revised Statutes, as incidental merely to the general purpose of administering the public lands and facilitating their sale and individual appropriation. No general power or authority is given to make surveys of lands not property of the United States. When lands are surveyed and disposed of, the plats and field-notes become part of the purchaser's muniments of title "as much as if such descriptive features were written out on the face of the deed or grant" or patent (*Cragin v. Powell*, 128 U. S., 691), which even the courts have no power to correct, but only to conserve and protect (*ib.*, 699).

The lake did not exist when these townships were surveyed, nor until a large part of the lands therein was disposed of. There is no suggestion or claim that the surveys as originally made were not in everything correct. If any public lands remain in the township which might authorize the land department to make a resurvey of them for correction of errors in the former survey, if such error existed, they are of small comparative area. A survey for the purpose would not authorize the land department to resurvey the lands disposed of and to establish for them and upon them new lines of boundary of the land or of the meander of the present lake to affect rights of their owners.

As to the rights of the State under the swamp land grant to claim ownership of the lands entered by Haffemeister, or other lands not patented by the United States, no record is here presented upon which action can be taken. If the State has valid claim to any swamp lands which were such September 28, 1850, its rights will be determined when such claim is made and presented.

As to other lands not swamp lands at that date now under the body of the waters of the lake, the equity of the State, if any has arisen by the long appropriation of such lands to such use, is proper matter for consideration of Congress, which has plenary power in the disposal of public lands.

Your office decision is affirmed.

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

JAMES H. HARTE.

A relinquishment under the exchange provisions of the act of June 4, 1897, of a fractional portion of a legal subdivision, will not be accepted unless the fraction is all of the full regular subdivision that the party then owns.

It is essential to the right to make a selection under the act of June 4, 1897, that title to a proper base should first have been relinquished to the United States.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 22, 1904.* (J. R. W.)

James H. Harte, as attorney in fact for J. J. Rapp, appealed from your office decision of October 12, 1903, rejecting his application, filed January 24, 1902, number 5189, your office series, under the act of June 4, 1897 (30 Stat., 36), to select the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 14, T. 44 N., R. 1 E., B. M., Coeur d'Alene, Idaho, in lieu of the S. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 23, and the S. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 24, T. 5 N., R. 24 W., S. B. M., in the Pine Mountain and Zaca Lake Forest Reserve, Ventura county, California.

The abstract of title of Rapp to the land relinquished, September 28, 1901, to the United States, showed that May 27, 1901, patent issued to Rapp for the entire N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 23, and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 24. There was no showing that the fractions of government subdivisions so relinquished were at that time all of the land in those subdivisions that Rapp then owned. The unvarying practice of the land department is to regard government subdivisions as units which it will not break in making disposal of public lands, and in accepting relinquishments under the act of 1897 it is the invariable requirement that such fractional relinquishments will not be accepted unless the fraction is all of the full regular subdivision that the party then owns. The present instance is in direct violation of such practice, and if permitted will necessarily tend to confusion and embarrassment of business. Your office decision is affirmed.

February 23, 1904, since the above appeal, Harte, as attorney in fact for Edward B. Perrin, filed an application to select the same tract, assigning as base certain lands in the San Francisco Forest Reserve, Coconino county, Arizona, relinquished to the United States by deed of Perrin, executed December 19, 1902, recorded January 31, 1903, after Rapp's selection was filed, Harte's power of attorney being executed February 17, 1904, subsequent to Rapp's appeal.

Counsel makes reference to departmental decision of May 26, 1902, in F. A. Edwards (not reported), and suggests that the cases are similar. In that case Edwards selected two forty-acre tracts of public land—viz., the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 26 and the SW. $\frac{1}{4}$ of the

SE. $\frac{1}{4}$ of Sec. 24, assigning as a base therefor one regular forty acre tract, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 8, and two half-forty acre tracts, the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 8. The whole selection was rejected by the Department, May 8, 1901. On review, May 28, 1902, the selection was allowed to stand as to one forty acre tract, to be designated by the selector and based on the full forty acre tract relinquished. The remainder of the selection was rejected. That decision has no relevance here, except as a precedent for rejection of the entire selection, for no complete government subdivision is here assigned as base for the selection made.

It is essential to the right to make a selection under the act of 1897 that title to a proper base should first have been relinquished to the United States. Perrin's relinquishment, made December 19, 1902, can not support a selection attempted to be made January 24, 1902. It can have effect against an adverse claim at most only from its presentation, February 23, 1904. It has no relation to Rapp's application, and can be considered only as a distinct one.

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

GEORGE WELDRICK.

A selection of lieu lands under the exchange provisions of the act of June 4, 1897, can not be allowed where there has been conveyed out of the tract assigned as base for the selection a right of way for a pipe and flume line and for a power canal and also the right to enter upon said land "at all times after said pipe and flume line is completed for the purpose of keeping the same in good repair."

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 23, 1904.* (J. R. W.)

George Weldrick, attorney in fact for John F. Campbell, appealed from your office decision of September 30, 1903, rejecting his application, number 5230, your office series, under the act of June 4, 1897 (30 Stat., 36), to select the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 19, T. 30 N., R. 12 W., W. M., Seattle, Washington, in lieu of lot 1 (NW. $\frac{1}{4}$ NW. $\frac{1}{4}$) of Sec. 18, T. 1 S., R. 1 W., S. B. M., in the San Bernardino Forest Reserve California.

The only question presented by the appeal is the sufficiency of title to the tract last described, assigned as base for the selection.

March 20, 1902, Campbell filed for record his deed of quitclaim relinquishing title to the United States to lot 1, section 18, stated to contain 40.12 acres, which deed bore date March 20, and a certificate of acknowledgment dated March 20, 1902. Campbell's signature to this deed, the original of which is filed, was written with a lead pencil. Campbell's title was deraigned from G. H. Walker, through a deed by

Walker to R. E. Bledsoe, recorded March 2, 1901. January 30, 1899, while Walker held title, he conveyed by deed to the Redlands Electric Light and Power Company, a corporation, "the right of way for a pipe and flume line over and across" the premises, more fully described by the field-notes thereto attached and made part of the deed. The deed further conveyed to the grantee "also a right of way . . . for Power Canal Number Three of the Redlands Electric Light and Power Company" across the premises, also shown by field-notes attached. The field-notes show that the first described right of way enters the tract about fifty-three feet west of its northeast corner and leaves it about nineteen feet north of its southwest corner, having a total length of tangents and semi-tangents and curves of 3,104.63 feet. The right of way for the Power Canal Number Three enters the tract about twenty-five feet north of its southeast corner and leaves it at the same point as the former, having a length of 1,170.8 feet. The width of the ground to be used is not given and the area supposed to be affected can not be ascertained. By the rights of way the tract is severed into three fragments. In addition to such rights of way, the deed granted to the power company the right to enter said lot—

during the construction of the work, and erect on said lot hoists and tramways, to establish camps, for making cement pipes, flumes, or mixing concrete, and the right to establish temporary buildings and other necessary adjuncts to carry on the work of construction and also the right to enter upon said lot one in said section at all times after said pipe and flume line is completed for the purpose of keeping the same in good repair.

Your office held:

It is thus apparent that the title tendered by the selector is encumbered with the perpetual easement vested in the Redlands Electric Light and Power Company by the said deed of January 30, 1899, and it is, therefore, not such a clear, unincumbered title as can be accepted under the law in exchange for other land (30 L. D., 15). . . .

The selector's tender of relinquishment can not, therefore, be accepted, and his application to select, based thereon, must be rejected.

No part of the land is free from servitude, nor, were there some part not so encumbered, is there any means of ascertaining the quantity and segregating it from the remainder of the tract.

Your office decision is affirmed.

SWAMP LAND—FIELD NOTES OF SURVEY—PLAT—ACT OF SEPTEMBER
28, 1850.BOYLES *v.* STATE OF WISCONSIN.

Where it is not clearly shown by the field notes of survey that a tract of land was at the date of survey swamp land, and the State has never made formal claim to such tract under the swamp land grant, although lists of lands selected as swamp and overflowed within the township where the tract is located were filed many years ago, and it is shown by the testimony adduced at a hearing had on a contest involving the character of the land that such tract is not swamp land, the markings upon the plat of survey showing the extension of a swamp within the section, not based upon an actual survey, but upon a casual observation of the land and deduction from the conditions shown along the the survey line, will not be deemed sufficient to establish the character of the land as swamp and overflowed within the meaning of the act of September 28, 1850.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 25, 1904.* (F. W. C.)

The Department has considered the appeal of the State of Wisconsin from your office decision of February 23 last, wherein it was adjudged that the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 36, T. 21 N., R. 5 E., Wausau land district, Wisconsin, was not swamp and overflowed land within the meaning of the swamp land grant of September 28, 1850.

The township in question was surveyed in 1851 and on April 18, 1854, the surveyor-general of the State filed a list of the lands selected as swamp and overflowed lands within this township, which list was duly examined and from which a clear list was made and approved by your office November 13, 1854, upon which patent was subsequently issued. The tract in question was not included in the list of lands selected by the surveyor-general.

February 26, 1880, the governor of the State submitted certain supplemental lists of lands claimed under the swamp land grant. The tract in question was not included within these lists and so far as shown by the records no formal claim to this land under the swamp land grant was ever presented. It does appear, however, that the tract in question was included in what is known as the commission's report of swamp lands filed in your office August 13, 1881, which list was supposed to have been made up from the field notes of survey on file in your office.

January 31, 1899, Oliver Boyles was permitted to make homestead entry covering the land in question, together with adjoining lands, and thereafter he filed a formal affidavit attacking the claim to this land under the swamp land grant as presented in the commission's report, before referred to, upon which a hearing was ordered. Appearance was entered on behalf of the State at the appointed time but the State introduced the field notes of public survey together with the plat of the township and objected to the introduction of oral testi-

mony in order to establish the character of this land. Boyles was permitted, however, to introduce his testimony over the protest of the State, and upon the record thus made the local officers decided that from this testimony it appeared conclusively that there was not and never had been a foot of swamp land within the tract involved and therefore were of the opinion that any claim that the State might urge to this land under the swamp land grant should be rejected.

The State appealed; again objecting to the consideration of the testimony offered at the hearing and asking for an adjudication of its claim under the field notes of survey alone.

In your office decision appealed from it is admitted that the plat of survey indicates that the greater part, if not all, of the tract in question falls within a swamp, but it calls attention to the fact that the field notes of survey do not show that on any of the lines touching section 36 a swamp was encountered, except on the line between sections 35 and 36, and that from the field notes it can not be ascertained how far into the section (36) the swamp encountered on said line extended. In your said office decision it is said:

It is evident that the surveyor-general did not consider the tract to be swamp land when he reported a list of selections in the township on April 18, 1854, which list included 240 acres of land in section 35. It is true that the commission certifies that the plats and field notes of survey show the tracts reported by them to be swamp land, but, in this case, they must have relied more upon the plat than on the field notes—

and said decision therefore affirmed the decision of the local officers and rejected any claim the State might urge to this land under the swamp land grant. The State has further appealed to this Department.

From the above recitation it seems clear that the swamp land grant within the township in question was practically adjusted as early as 1854 and that no formal claim has ever been made to the tract in question under the swamp land grant by the State. It can not be adjudged from the field notes of survey alone that the tract in question was, at the date of survey, swamp land, and, under the circumstances of this case, especially in view of the showing made by Boyles, the markings upon the plat of survey showing the extension of a swamp within the section, not based upon an actual survey, but upon a casual observation of the land and deduction from the conditions shown along the surveyed line, is not deemed sufficient to establish the character of this land as swamp and overflowed land within the meaning of the act of 1850.

The commission's report, filed in your office in 1881, as to the tract in question, must therefore be rejected. Your office decision is accordingly affirmed and Boyles's entry will be permitted to stand subject to compliance with law.

AMENDMENT TO CIRCULAR OF MARCH 20, 1903, UNDER ACT OF
JANUARY 31, 1903, RELATIVE TO COMPULSORY ATTENDANCE OF
WITNESSES.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June 27, 1904.*

*Registers and Receivers and Special Agents,
General Land Office.*

GENTLEMEN: Your attention is called to the following amendment to Circular Instructions of March 20, 1903 (32 L. D., 132), to carry into effect the provisions of the act of January 31, 1903 (32 Stat., 790), entitled "An act providing for the compulsory attendance of witnesses before registers and receivers of the land office."

Said act is set out in full in the circular of which this is an amendment, to which reference is hereby made. The second section of said act provides in part that "the fees and mileage of witnesses shall be the same as that provided by law in the district courts of the United States in the district in which such land offices are situated."

The fourth section of the act provides:

That whenever the witness resides outside the county in which the hearing occurs any party to the proceeding may take the testimony of such witness in the county of such witness's residence in the form of depositions by giving ten days' written notice of the time and place of taking such depositions to the opposite party or parties.

The general law fixing the fees of witnesses for attendance upon United States Courts to which reference must be had in determining the fees and mileage allowed under the act of January 31, 1903, is found in section 848, Revised Statutes, which is as follows:

SEC. 848. For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning. When a witness is subpoenaed in more than one cause between the same parties, at the same court, only one travel fee and one per diem compensation shall be allowed for attendance. Both shall be taxed in the case first disposed of, after which the per diem attendance fee alone shall be taxed in the other cases in the order in which they are disposed of.

When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of one dollar a day.

A special rate for mileage in certain States and Territories is provided for by the act of August 3, 1892 (27 Stat., 347), which is as follows:

The jurors and witnesses in the United States courts in the States of Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho, and Colorado, and in the Territories of New Mexico, Arizona, and Utah, shall be entitled to and receive fifteen cents for each mile necessarily traveled over any stageline or by private conveyance, and five cents for each mile over any railway in going to and returning from said

court: *Provided*, That no constructive or double mileage fees shall be allowed by reason of any person being summoned as a witness in two or more cases pending in the same court and triable at the same term thereof.

By section 877 of the Revised Statutes it is provided that—

Witnesses who are required to attend any term of a circuit or district court on the part of the United States shall be subpoenaed to attend to testify generally on their behalf, and not to depart the court without leave thereof or of the district attorney; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney.

1. No witness can be compelled to appear, either before your office or any other officer, outside the county in which the subpoena may be served, and no mileage fees should be demanded or paid for any distance traveled by the witness outside of the county in which the hearing is held or in which his deposition is taken, nor should an attendance fee be allowed or paid a witness for the time occupied by him in going to and returning from the place at which the hearing is held or the deposition is taken.

2. Where the same person appears as a witness in more than one case at the same time, between the same parties, you should tax the mileage fees to be received by him as costs in the first case in which action is taken, after which the per diem attendance fee alone shall be taxed in the other cases in the order in which they are disposed of.

3. In the application of the provisions of section 848 of the Revised Statutes to the act of January 31, 1903, a witness is entitled to receive one dollar and fifty cents for each day's attendance before the officer taking the testimony and five cents for each mile actually and necessarily traveled by him within the county in which the hearing is held or in which the deposition is taken, in going to and returning from the hearing, in each case in which he may have been in attendance pursuant to law, regardless of the fact that he may have been in attendance as a witness in more than one case before the same officer at the same time. This is a general rule applicable in all cases and to all parties. In cases where a witness is required to attend any term of a circuit or district court on the part of the United States, it is provided by section 877 of the Revised Statutes that such witness shall be subpoenaed to testify generally on their behalf, and not to depart the court without leave thereof or of the district attorney. This provision is designed to restrain the officers in the issuing of subpoenas in different cases in order to avoid the unnecessary expense of more than one travel fee and one per diem compensation to the same witness in attending upon the same court. The provisions of that section should be strictly observed and applied by local officers and special agents in issuing subpoenas for witnesses to appear and testify in behalf of the United States in proceedings under the act of January 31, 1903. Therefore in all instances

where the testimony of a person is desired on behalf of the Government as a witness in more than one case set for hearing at the same time and place, or on successive days, before the same officer, such witness should be subpoenaed to appear and testify generally, and he should be notified either in the subpoena, or otherwise, not to depart without leave of the officer, or officers, before whom the hearing is had or the deposition is taken.

4. Any witness who attends any hearing or the taking of any deposition at the request of any party to the controversy, or at the request of the attorney or duly authorized agent of such party, without having been subpoenaed to so attend, should receive the same mileage and attendance fees to which he would have been entitled if he had been first duly subpoenaed as a witness on behalf of such party.

Care should be taken that payments to clerks and other officers of the United States for necessary expenses in going, returning, and attendance at the hearing are made under the provisions of section 850 of the United States Revised Statutes.

The register and receiver alone are authorized by this office to employ a stenographer where one becomes necessary to reduce the testimony to writing. Where a commission is issued to an officer to take depositions it is his duty to provide for the necessary clerical services to comply with such commission, at his own expense, and he is entitled to the fees allowed by law for taking depositions.

The voucher of the officer taking a deposition must cite the statute and page under which he claims fees for his services.

The receiver will report in his account the date set for each hearing, and the date, or dates, when the hearing was actually held, and all vouchers or fees paid by him to witnesses should show the witness's post-office address, the dates he was actually in attendance at the hearing, the number of miles actually and necessarily traveled in going to and returning from the place of hearing or the place at which the depositions were taken, and the number traveled over any stage line or by private conveyance, in the States and Territories named in the act quoted above. And the receiver should attach to each account his certificate to the effect that he has, after proper examination, satisfied himself as to the correctness of the amounts paid out by him to the witnesses.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved: June 27, 1904.

E. A. HITCHCOCK, *Secretary.*

PRIVATE CLAIM—SMALL HOLDINGS—SURVEY.

HIPOLITO DOMINGUEZ ET AL.

There is no limitation upon the time within which the preferred right of entry accorded a "small holding" claimant by the 17th section of the act of March 3, 1891, must be exercised, but the 18th section of said act, as amended by the act of February 21, 1893, requires that notice of the claim must be filed with the surveyor general within two years from the first day of December, 1892; and the effect of such notice filed within that time is to withhold from entry under the public land laws all tracts covered by the claimant's occupancy and possession until the claim is finally adjudicated or rejected.

A claimant who has filed notice of his claim within the time required by the act, does not forfeit his right to make proof of his possession and occupancy by his failure to apply for a survey.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 27, 1904.* (E. F. B.)

The Department has considered the appeal of Hipolito Dominguez and Juan Garcia from the decision of your office of March 23, 1904, rejecting their joint application for the survey of their "small holding claims" for certain lands located either in township 17 or township 18 N., range 10 E., Sante Fe, New Mexico.

These claims arose under the 17th section of the act of March 3, 1891 (26 Stat., 854), as amended by the act of February 21, 1893 (27 Stat., 470). In their joint application Dominguez and Garcia allege that their claims were presented to the surveyor general in 1893 and were received and filed in that office and were numbered 1210 and 1239, respectively, that said claims have never been surveyed, and that the lands are in danger of being filed upon by others unless they are segregated from the public domain.

The surveyor general in his letter transmitting said application states that "Small Holding Claim" 1210 was filed in that office February 17, 1893, and that claim No. 1239 was filed February 28, 1893, since which time two contracts for the survey of valid small holding claims in said townships have been awarded to John H. Walker, deputy surveyor, and both of said contracts have been executed, one in September, 1894, and the other in February, 1895; that these claims were not surveyed "presumably" because the claimants failed to make the proper proof before the deputy, inasmuch as his field notes make no mention of these two claims. The surveyor general recommended that the application be rejected.

Upon the receipt of said letter your office instructed the surveyor general to call upon applicants for a statement as to why they failed to present their proof to the deputy at the time of the survey of small holding claims in said township.

In response to said notice the applicants filed a statement under oath

to the effect that if the small holding applications of other parties in said townships were surveyed in 1895 by Walker or any one else, they knew nothing about it; that they live and have lived all their lives on their claims and never were called upon by anyone either in writing or otherwise to make proof of their claims; that they never heard of the survey by Walker of the claims of others until January 21, 1904, when informed by the surveyor general; that they are not able to read or write in English or Spanish, and if notices of said surveys were published in either of said languages, they had no notice of it. They also stated that they have been informed that one Ramon Jimenez has filed a homestead application for all or nearly all the land covered by their "small holding applications," and when they presented to the local officers the receipts given by the surveyor general at the time they filed notice of their claim, they were informed that the surveyor general had not officially notified the local office of said claims.

The answer of applicants was transmitted to your office by the surveyor general, who adhered to his recommendation that the applications be rejected for the reason that the survey of other claims in said townships would have excited such interest in the community as to make it almost impossible for residents to know nothing of it. He discredited the sworn statement of applicants upon a mere supposition.

Your office approved the recommendation of the surveyor general and rejected the application. You held that from the facts set forth the claimants have failed to perform the acts which would legally entitle them to the benefits of the act; that the filing of their applications in February, 1893, which is the initiatory notice to the government of their claim to the land, is evidence of their knowledge of the existence of the law and that it was incumbent upon them to take the necessary steps to protect their rights so initiated.

At the time claimants filed in the surveyor general's office notice of their claim, these townships had been surveyed. As to such townships in the States and Territories named in the act of March 3, 1891, the 17th section of the act, as amended by the act of February 21, 1893, provides that—

all persons who, or whose ancestors, grantors, or their lawful successors in title or possession, became citizens of the United States by reason of the treaty of Guadalupe-Hidalgo, or the terms of the Gadsden purchase, and who have been in the actual continuous adverse possession of tracts, not to exceed one hundred and sixty acres each, for twenty years next preceding such survey, shall be entitled, upon making proof of such facts to the satisfaction of the register and receiver of the proper land district, and of the Commissioner of the General Land Office, . . . to enter without payment of purchase money, fees, or commissions, such subdivisions, not exceeding one hundred and sixty acres, as shall include their said possessions.

If the tract claimed is in such shape that the claimant cannot secure his interest by legal subdivisions, the act authorizes a segregation survey of said claim and directs that before commencing such survey the

deputy shall post a notice in both the English and Spanish language, calling on all persons entitled to lands in the township in which any such claims are situated to submit to him, within a reasonable time, proofs of their rights in the land, by affidavit or otherwise. No penalty is provided by the act for failure to respond to such notice.

By the 18th section of the act as amended by the act of February 21, 1893, claims arising under said section 17 are required to be filed within two years next after December 1, 1892, and it provides that "no tract of such land shall be subject to entry under the land laws of the United States."

By the circular of September 18, 1895 (21 L. D., 157), the local officers were instructed that—

In case of townships already surveyed, you should be furnished a list of those claims that have been filed with the surveyor-general, that conform to legal subdivisions, and where it is necessary to survey the claims, the list should be furnished you as soon as the surveys of said claims are approved.

When this information has been received, you will notify each of the claimants that he will be allowed ninety days to submit proof of his possession and occupation in accordance with the following instructions:

The instructions that follow relate to the character and the manner of making proof; but on March 25, 1896, the local officers were instructed in all cases where proof was thereafter submitted to require the claimant in each case to publish notice of his intention to submit proof of his occupation and possession under the same terms as govern publication of notice in homestead cases. (22 L. D., 523.) These instructions were modified May 1, 1896, so as not to require publication of notice where the aggregate area claimed is less than forty acres (Ib., 524).

While the right secured by the 17th section of the act of March 3, 1891, is only a preferred right to enter the land which the claimant has been in continuous possession of, by himself or his lawful predecessors in title or possession, for twenty years next preceding the township survey, there is no limitation in the act as to the time in which such right must be exercised, except in that provision of the 18th section, as amended, that requires notice of such claims to be filed with the surveyor general within two years from the first day of December, 1892. Such notice was filed by these claimants within that time and the effect of it was to withhold from entry under the public land laws all tracts covered by such occupancy and possession until the claim is finally adjudicated or rejected. (*Cantrel v. Burrus*, 27 L. D., 278.)

A claimant who had filed notice of his claim within the time required by the act, and had by such notice protected the land from entry under the public land laws, does not forfeit his right to make proof of his possession and occupancy by his failure to apply for a survey. The material question upon which his right depends is whether his occupancy and possession of the land is of such a character as to entitle

him to the land, and that fact must be made to appear to the satisfaction of the register and receiver and the Commissioner of the General Land Office. The survey of the claim is only a means to aid in perfecting the right secured by the filing of the claim and the making of proof in support thereof.

After a claim of the character described shall have been filed as directed in section eighteen of this act, and it shall appear that a tract claimed as aforesaid is of such shape that the claimant cannot readily secure his interests by an entry by legal subdivisions of the public surveys, the Commissioner of the General Land Office may cause such claim to be surveyed at the expense of the United States.

Such is the language of the act, from which it will be seen that the segregation survey is allowed only where the claimant cannot readily secure his interest by legal subdivisions.

In *Apodaca v. Mulligan* (27 L. D., 604, 608) the Department, referring to the act of March 3, 1891, said that the history of that legislation shows that the homes and lands of small holding claimants were the objects of the special solicitude of Congress, and that it was the intention of the act to afford them full protection, and provide a simple and easy means by which they could secure and perfect their title against all possibility of successful claim under the public land laws of the United States.

In that case the Department said that the act should be liberally construed in furtherance of the purpose to secure to the claimants the homes which they and their ancestors or predecessors in title had possessed and enjoyed. In this case the claimants have practically been denied the right to make proof of such possession simply because of alleged laches in not applying for a survey of their claim, although it does not appear that any survey other than the subdivisational township survey is necessary. Furthermore, if the sworn statement of these claimants is true, and there is nothing in the record to discredit it, the surveyor general's office failed, so far as these claims are concerned, to observe the instructions of September 18, 1895, which require notice to be given to the local office by the surveyor general of all such claims that have been filed in his office, and for that reason notice was not sent to these claimants by the local office of their right to submit proof of their possession and occupancy. Hence there was no foundation for the charge of laches on the part of claimants.

So far as appears from the record of the case, there is no warrant for the statement of the surveyor general that these claims were not surveyed "presumably" because the claimants failed to make the proper proofs before the deputy. On the contrary, the failure of the deputy surveyor to make any mention of these claims, although they were on file in the surveyor general's office, affords a reasonable presumption that he took no notice of these claims whatever. When that is supported by the positive, uncontradicted sworn statement of the

claimants that they have lived on the land all their lives; that they had no notice whatever of the survey of any other small holding claims in the township in which these claims are located; that they received no notice whatever from the local office that they would be allowed to submit proof of their occupancy and possession, as required by the circular of instructions; and that the local officers had informed them that no notice had been received by that office from the surveyor general of the filing of such claims, the conclusion is irresistible that the failure to perfect these claims is due more to the fault of the officers of the land department in not observing the instructions than to any laches of the claimants themselves.

Your decision is reversed. You will instruct the local officers to give notice to these claimants that they will be required to submit proof in support of their claims in accordance with circular of instructions applicable thereto, and if their claims can be reasonably adjusted to the legal subdivisions so as to save their improvements, they should be required to conform thereto, and entry should be allowed according to such subdivisions if sufficient proof of occupancy and possession as required by the act is submitted. If the claims cannot be so adjusted, a segregation survey should be allowed as provided for by the act.

CONTEST—NOTICE—SECOND CONTEST—ACT OF JUNE 4, 1897.

GESNER *v.* HAMMOND.

A stranger to a contest will not be heard to question the sufficiency of the service of notice of the contest.

A second or junior contest against a homestead entry is no bar to the selection of the land under the exchange provisions of the act of June 4, 1897, upon the filing by the successful senior or first contestant of a relinquishment of his preference right.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 27, 1904.* (J. R. W.)

October 29, 1895, one Axdel made homestead entry, at Oregon City, Oregon, for the NE. $\frac{1}{4}$ of Sec. 8, T. 5 N., R. 10 W., W. M. May 22, 1899, W. G. Howell filed a contest against the entry, and November 23, 1899, Charles F. Gesner filed a junior one, making no charge against Howell or the good faith of his contest. Notice of Howell's contest was not personally served, and upon proper showing service by publication, posting of notice on the land, and in the local office were proven. There were two hearings, the first being upon insufficient notice, and after new service of notice the last hearing was October 23, 1899. At both hearings defendant made default. November 20, 1899, the local office found in favor of contestant and recommended cancellation of the entry. There was no testimony to show

that Axdel's absence was not due to military or naval service in time of war. December 14, 1899, contestant filed *ex parte* evidence that Axdel's absence was due to his going to Alaska in the spring of 1897 in employ of a canning company, thus curing the defect of proof under rule of practice 100 (Instructions, 31 L. D., 318).

February 12, 1900, Gesner, junior contestant, filed a motion to dismiss Howell's contest, because notice was never posted on the land; and no proof was made that the entryman's absence was not due to military or naval service. The motion was supported as to the first ground by two affidavits that November 9, 1899, the affiants saw "a contest notice" in the case, which was posted on the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 9, T. 5, R. 10, and that said contest notice was not posted on the land in contest. Your office held that this motion called for no action, affirmed the action of the local office, canceled Axdel's entry, and closed the case October 25, 1900, giving Howell thirty days' preference right as successful contestant.

November 22, 1900, Howell filed in the local office a relinquishment of his preference right, and A. B. Hammond presented his application, number 3541, your office series, under the act of June 4, 1897 (30 Stat., 36), to select the land in lieu of land relinquished to the United States in a forest reserve. On the same day Gesner filed his protest against allowance of Hammond's application, and referring to his own contest claimed that upon Howell's waiver of preference right Hammond "can not make such entry in the face of junior contestant's rights." The local office disregarded the protest and received Hammond's application.

November 27, 1900, Gesner filed application for homestead entry, which was rejected for conflict with Hammond's application. From this Gesner did not appeal, but December 5, 1900, filed a "supplemental affidavit of contest," which made reference to the prior contest, and averred that Gesner—

filed junior contest against said entry on November 23rd, A. D. 1899, and that he desired to take said claim as a homestead in case he was allowed to make entry of the same.

That on February 12th, 1900, Robert A. Miller, my attorney, filed a motion to dismiss the contest of Wm. G. Howell, filed in the above case, for want of jurisdiction, accompanied by duly corroborated affidavits of two witnesses, to the effect that "Notice of Contest" was not posted on the land in question as by law required. Also that insufficient showing was made as whether entryman had served in the army or navy of the U. S.

Contestant further alleges that the said contest of Wm. G. Howell was collusive and speculative, and that his contest against the homestead claim of Ole Peter S. Axdel, No. 11631, was made in the interest of A. B. Hammond and not for himself. That said Wm. G. Howell was not and is not a qualified homestead entryman, and for this reason he relinquished his preference right to file on the above claim that was awarded him, and personally and in the interest of one A. B. Hammond did on the 22nd day of November, A. D. 1900, make a scrip location for the above described tract in the interest and in the name of A. B. Hammond.

That said scrip location so made by Wm. G. Howell (after he had waived his preference right to said tract), in the name of A. B. Hammond was collusive and speculative and was made in derogation of this contestant's rights.

That said scrip location was erroneously allowed as against the record claim of this contestant.

That my attorney, Robert A. Miller, filed on November 22, 1900, a motion and showing directed to the Hon. Register and Receiver of the Oregon City land office asking that said scrip location of A. B. Hammond be rejected by said officials.

That I now ask that notice of contest issue as against the said scrip location of A. B. Hammond and Wm. G. Howell to the end that I be allowed to prove my charges at such a time as may be allowed and named by the Register and Receiver, I paying the cost of such contest, and to the end that I be allowed the preference right of entry upon the cancellation of said scrip location.

This was transmitted to your office, which, November 14, 1903, held that Gesner gained no right by virtue of his junior contest, and as he made no charge of collusion between Howell and Axdel, or that Howell's contest was fraudulent, Gesner was a stranger to that contest; that the land upon filing of Howell's waiver of preference right was subject to entry by the first legal applicant, and being subject to selection under the act of 1897, Hammond was the first legal applicant, and that the averments of Gesner's affidavit were insufficient to warrant the order for a hearing, and denied the application to contest. Gesner appealed to the Department. The appeal assigns error in said decision:

1. In not holding that Gesner's motion of February 12, 1900, attacked the jurisdiction of the prior contest, and barred Howell's preference right, and in not ordering a hearing to test the question of jurisdiction so raised.

2. In not holding Gesner's homestead application a bar to Hammond's selection, and not ordering a hearing thereon.

Gesner was not a party in Howell's contest, nor had he any interest in its subject matter. His only right was to proceed with his contest should the prior contest fail. But he was a stranger to the prior contest. None but Axdel and those in privity with him could object to the sufficiency of the service. *Barksdale v. Rhodes* (28 L. D., 136); *Burdick v. Robinson* (11 L. D., 199); *Hopkins v. Daniels* (4 L. D., 126).

The proof of service was good and showed the posting of notice on the land. This proceeding is a collateral action, and where the record shows service, it is conclusive against collateral attack. *John Shafer* (5 L. D., 283).

The affidavits themselves failed to show defective service, even if the motion had been filed by Axdel. The local office hearing was October 23. The fact that a notice of the contest was seen by two witnesses posted on the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 9, on November 9, does not negative the affidavit that a copy of the notice was on September 13, posted on the front of Axdel's cabin on the tract in contest, as shown in the record. Both affidavits might be true.

The cancellation of the entry was not due to evidence adduced by

Gesner, nor could he demand that the cancellation of it should be set aside to permit him to prove the same facts which Howell furnished to the government, and thus defeat Howell of his reward for first adducing the same facts. The preference reward is given to one who furnishes the proof leading to cancellation of an improperly existing entry, and if on information furnished an entry is canceled, no one can question the regularity of the proceeding except the entryman or one in privity with him seeking reinstatement of the entry. Gesner's second contest, in which he contributed nothing to the cancellation of Axdel's entry, was no bar to Howell's preference right, so that there was no error in not ordering a hearing.

The cancellation having been effected, the land was open to appropriation by the first legal applicant. Gesner being a junior contestant his desire to contest and to make a homestead entry was no bar to appropriation by selection or entry by any other qualified applicant. Armenag Simonian (13 L. D., 696); Edwin M. Wardell (15 L. D., 375). The right is fixed by priority of application, except that settlement upon the land at the time the prior entry was canceled would have given Gesner the statutory period of three months' preference right, as against any one except the successful contestant; or occupancy of the land by him would have excluded it from selection by Hammond. No such fact is alleged.

It is argued by Gesner's counsel that it is shown that "Howell was working in the interest of Hammond," and decisions are cited to the effect that no preference right arises to a speculative contestant, or to one whose contest is instituted in collusion with the entryman, and for protection of the entry pretended to be attacked. Nothing in the record indicates that Howell's contest was instituted in Hammond's interest, or with any speculative purpose, unless the fact that Howell waived his preference right tends to do so. The fact that Howell at the end of his contest waived his preference right does not of itself alone show that a contest regularly brought and diligently prosecuted to a successful issue was fraudulent or speculative.

Your office decision is affirmed.

FOREST RESERVE—MINING CLAIM—ACT OF JUNE 4, 1897.

JANETTE W. RILEY.

No right or title is acquired by a mining location or mineral discovery made upon land held in private ownership, and such location and discovery do not constitute a cloud upon the title such as will bar the acceptance of a relinquishment for the land, when situated within a forest reserve, as a basis for the selection of other lands in lieu thereof under the exchange provisions of the act of June 4, 1897; but in such case proof will be required that at the date of the filing for record of the deed of relinquishment there were no known valuable mineral deposits upon the land.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 27, 1904.* (J. R. W.)

Janette W. Riley appealed from your office decision of February 18, 1904, requiring further evidence as to her title to, and as to the character of, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 28, T. 5 N., R. 15 W., S. B. M., in the Santa Barbara Forest Reserve, assigned with other lands as base for her application, No. 4246, your office series, under the act of June 4, 1897 (30 Stat., 36), for the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 9, and other lands in Sec. 23, aggregating one hundred and sixty acres, T. 21 N., R. 7 E., M. D. M., Marysville, California.

July 9, 1894, title to the two forty-acre tracts passed by patent of the United States to Thomas A. Delano, who, October 6, 1898, conveyed to Janette W. Riley, who, February 2, 1901, relinquished the land to the United States under the exchange provisions of the act of 1897, with view to selection of land in lieu thereof. The abstract of title submitted showed that May 4, 1900, James G. Cortelyou, A. A. Duncan, and six others, all of whom have since conveyed to the two named, filed a notice of location of the Way Up Oil and Placer Mining claim, upon the NE. $\frac{1}{4}$ of Sec. 28, alleging discovery and location on April 25, 1900; June 18, 1900, J. G. Pitney and seven others filed notice of location to the Bonanza Placer claim on the same land June 9, 1900; May 22, 1900, Edwin D. Kinchline and seven others filed notice of the location, April 25, 1900, of the Ora Graco Placer mining claim on the NW. $\frac{1}{4}$ of Sec. 28.

Your office held that these locations under the United States mining laws—

were made and recorded prior to the execution and recording of the selector's deed of relinquishment to the United States and, as shown by the abstract, while the title to the land was in private ownership. But they constitute a record assertion of right or claim adverse to the title tendered, and in addition are a forcible suggestion that the said tracts were in fact known to be mineral land at and prior to the date when the selector's deed of relinquishment was placed of record. . . . the selector is therefore required to show to the satisfaction of this office that there is no right or claim now asserted under or on account of said mineral locations, and that at the date when her deed of relinquishment was recorded the said tracts were not known to be mineral land. Whatever competent evidence the selector may submit will be considered, and if she should so desire, and will undertake to secure proper service of notice on each of the mineral claimants of record, a hearing to determine the facts will be ordered before the District Land Office at Los Angeles, Cal., in which district the land is situated. It is suggested that such hearing, on the application of the selector, would probably furnish the most ready and satisfactory means of reaching a conclusion. . . . should she fail to furnish the required evidence, or to proceed as herein suggested, or to appeal, within sixty days from notice, her tender of relinquishment will be rejected as to said SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 28, T. 5 N., R. 15 W., S. B. Mer., and she will be required in that event to designate a tract of 80 acres to be eliminated from her selection.

The validity of a location or claim under the mining laws of the United States must be determined by those laws. As no law of the United States attempts to authorize the location of a mining claim on any but public lands, no location upon land held in private ownership can have any validity. A mineral discovery subsequent to grant of the title by the United States does not affect the title or give the discoverer any right. *Shaw v. Kellogg* (170 U. S., 312, 332-3); *Colorado Coal Co. v. United States* (123 U. S., 307, 328). The inclusion of these forty acre tracts within the mining locations presumably was under a mistaken assumption that they were public lands. But, at all events, as the mining locations were under laws operative only over public lands, they do not constitute an assertion of title or right to these tracts, which were then private lands, excluded from operation of the laws under which the locations were made.

The locations were, however, an assertion of the then mineral character of such lands, based upon the allegation of an actual discovery made by a prospector exploring the land. Mistake as to the ownership and the fact that the title was not in the United States do not affect this assertion of actual discovery of the mineral character of these lands and justify the requirement of proof that at the date of the filing for record of the deed of relinquishment there were no known valuable mineral deposits upon the land.

In view of the Department, your office erred in requiring the applicant to remove, as clouds upon the title, the mining locations made under the United States mining laws at a time when the land was in private ownership. It was held in *Deffeback v. Hawke* (115 U. S., 392, 407), that:

There can be no color of title in an occupant who does not hold under any instrument, proceeding, or law purporting to transfer the title or to give him the right of possession.

Your office decision is modified accordingly.

HOMESTEAD—NEBRASKA LANDS—AGENTS—ACT OF APRIL 28, 1904.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., June 27, 1904.

Registers and Receivers, United States Land Offices, Nebraska.

Where parties desire to file declaratory statements as agents of more than one soldier, you will allow such person to make one entry in his individual character, if he so desires, and to file one declaratory statement in his representative character as agent, if he is such, and then

require him to go to the foot of the line and await his turn before filing again, and thus to proceed until all filings desired by him shall be made. The duty will devolve on you to make and enforce such rules and regulations, not inconsistent with printed instructions, as may be necessary and proper to secure a fair and orderly course of procedure on part of all applicants.

J. H. FIMPLE,
Acting Commissioner.

Approved, June 28, 1904.

M. W. MILLER, *Acting Secretary.*

HOMESTEAD—CONTEST—DEATH OF ENTRYMAN—HEIRS.

HOUKOM *v.* DUNHAM.

The death of a homestead entryman subsequent to hearing and decision in the local office on a contest against his entry, does not, in the absence of notice thereof to the land department, call for any change of parties defendant, or in any way affect the jurisdiction of that department to pass upon the record as made before the local office.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 28, 1904.* (D. C. H.)

A. M. Christianson, as attorney for the contestee, Niels J. Dunham and his heirs, has filed a motion for a rehearing and reconsideration of departmental decision of January 30, 1904 (unreported), affirming the decision of your office rendered August 14, 1903, wherein you affirmed the findings and conclusions of the local officers and held for cancellation the homestead entry of the said Niels J. Dunham for the SE. $\frac{1}{4}$ of Sec. 3, T. 152 N., R. 78 W., Devils Lake, North Dakota.

The ground upon which the motion for rehearing is based is that since the hearing and decision by the local officers, and before the decisions of your office and of the Department were rendered, the said entryman died, leaving heirs, and that said heirs have not been made parties to the contest.

It is urged in support of this motion that the heirs, after the death of the entryman, should have been made parties to the case, and that if the present motion is favorably considered the heirs are possessed of new and important testimony bearing on the merits of the case. It is to be observed, in the first instance, that the date of the entryman's death is not furnished, but that the motion in itself admits that it occurred after the decision rendered by the local office. So it would seem that the case was regularly heard during the lifetime of the entryman before the local office, at which hearing he appeared and submitted testimony in his own defense, and it was upon this testimony that the decision of the local office was rendered. The subsequent death

of the entryman, in the absence of notice thereof to the land office or the Department, did not call for any change of parties defendant, or in any way affect the jurisdiction of the Department to pass upon the case as submitted to the local office. Again, even if the heirs had prior to the decision in the local office made known the death of the defendant and been heard there, as well as before the Department, there is nothing now appearing in the present motion that would justify the Department in reopening the case.

An examination of the record heretofore made discloses the fact that the entryman never established a *bona fide* residence upon the land, and there is no new evidence now offered in the record that would modify the conclusion based on the former record.

The showing made being wholly insufficient to justify the granting of the motion for a rehearing, said motion must be, and is hereby, denied.

FOREST RESERVE—MINING LOCATION—ACT OF JUNE 4, 1897.

JOHN W. BLAIR.

The mere location of a mining claim upon land subsequently patented to a railroad company under its grant as non-mineral, and as to which land there has been no assertion of mineral character or right for eighteen years, does not constitute a cloud upon the title, or suggest the mineral character of the land, so as to prevent its acceptance under the exchange provisions of the act of June 4, 1897, as a basis for the selection of other land in lieu thereof.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 28, 1904.* (J. R. W.)

John W. Blair appealed from your office decision of February 9, 1904, rejecting title to the SW. $\frac{1}{4}$ of Sec. 9, T. 27 S., R. 31 E., M. D. M., Kern county, California, in the Sierra Forest Reserve, as base for selection of land in lieu thereof under the exchange provisions of the act of June 4, 1897 (30 Stat., 36), and ruling him to designate tracts of an aggregate area of one hundred and sixty acres to be eliminated from his selection, number 2731, your office series, for lands at Helena, Montana.

April 30, 1900, Blair presented at the local office his application to select tracts aggregating 640.90 acres, assigning as base therefor section 9, relinquished by him to the United States by deed dated November 14, 1899, filed for record February 13, 1900.

There were defects in authentication of the acknowledgments of two deeds in the chain of title, but these have been perfected, and the abstract of title now shows that title to section 9 passed by patent, December 1, 1891, to the Southern Pacific Railroad Company under its grant, and that such title by mesne conveyances came to Blair,

who relinquished to the United States, and your office found no defect in the title, except that, April 4, 1886, a notice of location of mining claim "Maude" was filed on the SW. $\frac{1}{4}$ of Sec. 9, by James Harslow and others, recorded April 5, 1886, book 2, of mining records, page 258, Kern county.

This was held by your office to be a cloud upon the title, and also to suggest that the land is mineral, and, April 27, 1903, a hearing was ordered, to be held at the local office, Visalia, California, in which district the base land was situate. The selector endeavored to comply with such order, but the local office in Visalia, California, reported, October 6, 1903, that service could not be obtained upon the mineral locators without publication, as their whereabouts could not be found. Your office recalled the order for hearing and required the selector within sixty days to remove the cloud from the title and to satisfactorily show the non-mineral character of the land. Served with this order, the selector took no action, and February 9, 1904, your office rejected the SW. $\frac{1}{4}$ of Sec. 9 as not good base for selection under the act of 1897, and the selector appealed.

The issue of a patent to the railroad company precludes any presumption that the land so patented was of mineral character. Northern Pacific Railway Company (32 L. D., 342, 344). The mineral location is so old that, in view of the fact that search for the mineral locators failed to discover their whereabouts, and that the character of the land was a subject of inquiry and must have been determined adversely to its mineral character at the issue of patent to the railway company, the mineral location may, in view of the Department, be disregarded.

It is no doubt true that the issue of patent upon a non-mineral claim to land does not conclusively establish its non-mineral character for purposes of exchange under the act of 1897. Such a patent may be inadvertently or erroneously issued for land known to be mineral, or the mineral character of the land may be discovered after issue of such non-mineral patent. If the land be known to be mineral at date of its relinquishment, it is not good base for exchange under the act of 1897. It is, however, a fact well known in the mineral districts that hopeful prospectors not infrequently make location of claims upon insufficient discoveries or mere suspicion of presence of mineral, which claims they afterward abandon.

In the case of H. H. Goetjen (32 L. D., 209), cited by your office, there had been a continuous claim of mineral character through a period of thirteen years. The mineral claims had been the subject of frequent conveyances for values recited to have been paid, and these mineral titles had been the subject of litigation for reformation of the contracts concerning them. Although none of these mineral deeds and contracts bore date later than the non-mineral patent under which

Goetjen deraigned title, they so nearly approached that date that your office held them to be such recent and so-long continued assertions of the mineral character of the land and of mineral right in the claimants that the termination of such mineral title must be shown, and the Department concurred in that decision.

In the present case there seems to have been no assertion of mineral character or mineral right for eighteen years, or for seventeen years prior to the closing of the abstract. Five years after the assertion of mineral character the land was claimed by the railroad company under its grant to be non-mineral. That claim was deemed well founded, and a non-mineral patent was issued and was duly recorded twelve years ago, and no rights have been asserted by the mineral claimant against such title. The mineral locators can not be found. Under such circumstances the mere location of a mineral claim, without for so long a time any assertion of right thereunder, may, in view of the Department, be disregarded as not longer constituting an assertion of right adverse to the non-mineral title, or a suggestion of mineral character of the land.

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

MINERAL LAND—CLASSIFICATION—ACT OF FEBRUARY 26, 1895.

NORTHERN PACIFIC RAILWAY COMPANY.

Directions given relative to carrying into effect the departmental decision of May 10, 1904 (32 L. D., 611), relating to the classification of certain lands in the Coeur d'Alene land district, Idaho, under the provisions of the act of February 26, 1895.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 29, 1904.* (G. B. G.)

This is a motion on behalf of the Northern Pacific Railway Company asking certain modifications of departmental decision of May 10, 1904 (32 L. D., 611), which decision vacated the proceedings had at a hearing in the Coeur d'Alene land office, Idaho, upon a protest by said company against the classification of certain lands in that district as mineral under the act of February 26, 1895 (28 Stat., 683), as follows:

Your office is accordingly directed to vacate and set aside the same [the hearing on said protest], together with all proceedings thereunder. Should the railway company apply for a new hearing, notice of the same, when allowed, should be given as required by the statute and the rules and regulations made in pursuance thereof, and a special agent of your office should be detailed to make a thorough examination of said lands with regard to their mineral character with the view of furnishing evidence at such hearing, and a proper officer of the Department will be detailed to be present and to represent the Government thereat.

Notify all parties who have appeared herein of the action taken and instruct the local officers to see that notice of any future hearing is specially given to these parties and any others who may file notice of claim to any of these lands.

It is submitted on behalf of the Northern Pacific Railway Company that the acreage involved in the classification is large, and that in preparing for the former hearing the railway company put into the field a force of men who spent the entire summer in making an examination of these lands at great expense to the company; that the witnesses used by the company at that time are now scattered, one being in Alaska, and all but one of the others being in unknown places; and that in order to prepare for the rehearing under existing instructions it would be necessary for the company to organize a new party to examine the lands, keep that party in the field until snow covers the ground, and involve an expense and loss to the company of many thousand dollars. In order to avoid the expense of a re-examination, and the loss of valuable testimony already submitted, it is suggested that the company should be permitted to introduce at a rehearing the testimony taken at the former hearing, with the privilege accorded to any one to show the mineral character of particular tracts, and the company be given the right to offer testimony in rebuttal; that in order to save the necessity of examining all the lands involved in preparing for such rebuttal, the mineral claimants should be required to set forth in advance of the hearing what particular lands they claim to be mineral, and thereby enable the company to examine those lands and save great time, expense, and trouble.

In view of the fact that the defect in the former notice of hearing was not in any sense the fault of the company, but was entirely due to abuse of discretion by the local officers in the designation of a newspaper not of general circulation in the land district in which the land is situated, and it appearing that the hearing was actually held upon a date or dates agreed upon between the attorney for the Northern Pacific Railway Company and the attorney representing the interests of the United States, that the attorney for the government was present at the hearing and cross-examined claimant's witnesses, it is fair to conclude, even if such stipulation and representation did not waive defect of notice so far as the government is concerned, that the rights of the government were not prejudiced by such defective notice, and the company should not be put to the expense of a re-examination of these lands, in the absence of some individual claim asserted thereto.

To the end, therefore, that this matter may be speedily adjusted and that the rights of the parties be fully protected, it is directed:

(1) That upon the company's application for a rehearing, and the publication of notice of the hearing in accordance with law, all persons seeking to show the mineral character of any of the land involved shall be required to file in the local land office, at least thirty days

before the date set for the hearing, which should not be fixed for a date less than sixty days from the date of the first publication, such an accurate description of the lands claimed by them to be mineral as the circumstances of the case will permit, where record will be made of the same and may be inspected by interested parties, but no other or further notice need be served on the railway company.

(2) That the company be permitted to submit as evidence at such rehearing the record of the testimony taken at the former hearing, the same to be considered as between the company and the government only.

With these modifications, and upon the application of the company for a rehearing, your office will proceed to carry into effect the directions given in said departmental decision of May 10, 1904, with the least possible delay.

FOREST RESERVE—EXCHANGE—TITLE—ACT OF JUNE 4, 1897.

THOMAS F. ARUNDELL.

One proposing to exchange lands in a forest reserve for public lands, under the provisions of the act of June 4, 1897, must show that he holds both the legal and equitable title to the land, and the abstract of title submitted by him must connect back to the passing of title from the United States.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 30, 1904.* (J. R. W.)

Thomas F. Arundell appealed from your office decision of November 16, 1903, requiring further evidence of title to lands relinquished by him to the United States as basis for his application, number 3264, your office series, under the act of June 4, 1897 (30 Stat., 36), to select the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 20, T. 4 N., R. 19 W., S. B. M., Los Angeles, California. The base tract was the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 36, T. 2 N., R. 2 W., S. B. M., in the San Bernardino forest reserve.

September 20, 1882, on filing of the township plat in the local office, title passed to the State as part of its public school grant under the act of March 3, 1853 (10 Stat., 244). Legal title passed November 28, 1899, to James J. Doyle by patent of the State issued upon a certificate of purchase March 4, 1891, under which by a connected chain of mesne conveyances Arundell deraigned legal title, which he relinquished to the United States. The abstract was limited to examination of the records "of date subsequent to the fourth day of March, 1891, . . . assuming by direction that on said date James J. Doyle received a good and unincumbered title to said premises by virtue of the certificate of purchase issued on said date."

March 30, 1903, your office held the abstract insufficient, and required Arundell to show that the State, after obtaining title, had not pre-

viously sold, or agreed to sell or convey, the premises to any other person. Arundell furnished a supplemental abstract, compiled and certified by the Pioneer Abstract and Title Guaranty Company, authenticated by certificates of the county recorder and county auditor as "a correct abstract of everything affecting the title to said premises prior to and including" March 4, 1891. This showed a tax sale, March 15, 1890, to the State of California, for \$15.66, not redeemed. Your office deemed this insufficient, and required Arundell—

to furnish the further evidence of title required by this office in its former action . . . or an unlimited abstract, properly authenticated, to show full redemption of the land from the tax sale above referred to.

This holding is alleged to be erroneous. Counsel in argument say an impossible and unnecessary requirement is that calling for "competent evidence that the State within said intervening period (Sept. 30, 1882, to March 4th, 1891) had not sold, agreed to sell or convey to any other person or persons the land in question." It is alleged as error to demand evidence of what the State may have done regarding transfer of its interest in the land to parties other than Doyle, as full title passed by the patent; in discrediting the State patent as not evidence of title absolute.

While a patent by the United States, or by a State if it has title, is often spoken of even by the courts as conclusive evidence of title, this is only generally, not universally, true. In *Burfenning v. Chicago, St. Paul, Minneapolis and Omaha Railway Company* (163 U. S., 321), a patent issued by the United States, regular upon its face, was twelve years afterward, in an action of ejectment for possession, held "to transfer no title" to the patentee. The same was held in *Morton v. Nebraska*, also an action in ejectment (21 Wall., 660). It is necessary to the passing of legal title by patent that the land should be subject to disposal under the law and form of entry pursuant to which the patent is issued; otherwise the patent is void for want of power to issue it.

There is another more frequent infirmity in titles which actually pass by patent that they are subject to a superior equitable title in another to whom patent should have issued and for whom the patentee holds legal title as a mere dry trustee. Such an instance is *Midway Company v. Eaton* (183 U. S., 602), wherein a patent issued by the United States conveyed legal title, but the whole beneficial ownership, and right to possession, and right to demand legal title, was held by the court to be in another than the patentee. Very many such instances might be cited. In *Webster v. Luther* (163 U. S., 331), and *Midway Company v. Eaton, supra*, rules of decision long adhered to by the land department in adjudicating the rights of many claimants of public lands were shown by the court to be erroneous.

The executive officers of the States, in administration of State

lands, are no more infallible than are those of the land department of the United States. Instances have occurred wherein two patents have been issued for the same land, and others, more frequent, where patent has issued to a second purchaser when the right of a prior one was not well foreclosed, forfeited, or barred.

By the act of June 4, 1897, the United States offers exchange to the "owner" of lands in the forest reserves. It is a reasonable construction of that statute that by "owner" is meant one who has both the legal and equitable title. The land department therefore requires that an abstract of title shall connect back to the passing of title from the United States. If adverse claims are made to lands the title to which has passed from its jurisdiction, it requires the proponent of title to settle his right and in some manner to terminate that adverse claim before it will accept his tender, though legal title may be in him, for it has no power to adjudicate between him and the adverse claimant. A presumption, it is true, exists that official duty is correctly performed; and that the holder of a patent is owner of the land so patented, but, as above shown, that is a presumption only, and is not always true. One wishing to exchange lands under the act of 1897 must show that he is in the broad sense owner, not mere holder of the legal title.

The fact that a tax was levied upon the land in 1889, which resulted in a sale, March 15, 1890, is, to say the least, suggestive that some one was then purchaser and equitable owner. It is certainly sufficient to justify a prudent purchaser in requiring a showing whether there was such a purchaser, and if there was, the production of evidence that his right is well barred. But independently of such suggestion, the requirement of your office is a reasonable one.

Your office decision is affirmed.

SOLDIERS' ADDITIONAL RIGHT—AREA OF ENTRY.

CHARLES P. MAGINNIS.

Where the homestead entry of a soldier was erroneously canceled by the land department as to a part thereof, under the mistaken belief that such portion was not subject to entry, he is entitled to make an additional entry of so much land as added to the uncanceled portion of his entry will amount to one hundred and sixty acres.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) June 30, 1904. (A. S. T.)

Charles P. Maginnis, as assignee of Benjamin H. Self, Jr., administrator of the estate of Benjamin H. Self, deceased, has applied to make soldiers' additional homestead entry for the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 11, T. 54 N., R. 16 W., 4th P. M., Duluth land district, Minnesota, containing one hundred and twenty

acres, based on the military service of Benjamin H. Self in the army of the United States during the war of the rebellion, and on homestead entry made by him, on August 16, 1867, for the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 2, and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 3, T. 13 S., R. 5 W., Huntsville land district, Alabama, which entry was canceled on January 11, 1873, as to the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 3, on account of conflict with the claim of the Tennessee and Alabama Central Railroad, afterward known as the South and North Alabama Railroad. This left the entry intact as to the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 2, containing forty acres, and on July 10, 1875, it was canceled for failure to submit final proof within the statutory period. The SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 3 was selected by the railroad company on September 18, 1873, and the selection was approved May 19, 1875.

Your office held, by decision of March 16, 1904, that all the land embraced in Self's original entry was subject to entry at the time the entry was made, the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 3 not then having been selected by the railroad company, and therefore that his entry was valid as to the entire eighty acres embraced therein; wherefore he was only entitled to an additional entry for eighty acres, and as he had assigned an alleged right of additional entry for one hundred and twenty acres, and Maginnis had applied to locate the same upon one hundred and twenty acres of land, you rejected the application *in toto*. Maginnis has appealed from said decision to this Department.

The assignee of the soldier is entitled to all the rights as to additional entry that the soldier himself would have if applying in person for an additional entry. The case is just as if the soldier had come to the Department and said: "I made an entry in 1867 for eighty acres of land. You canceled my entry as to forty acres, and took from me forty acres of the land, leaving me only forty acres. I was entitled to one hundred and sixty acres, and I now ask for one hundred and twenty acres as an additional entry." Your said decision, in substance, says in response to the soldier: "You shall have only eighty acres as an additional entry, because we *wrongfully* took from you forty acres of your original entry." This is unjust to the soldier, and this Department can not sanction it.

Your office cites the case of Edgar A. Coffin, *ex parte*, decided by this Department on June 30, 1902 (not reported), wherein it was held that where an entry had been made by a soldier for eighty acres prior to the adoption of the Revised Statutes, and had been wrongfully canceled because of a supposed conflict with a prior railroad claim, when in fact no such conflict existed, the entryman was entitled to an additional entry for eighty acres, as if his former entry had not been canceled. This was simple justice to the soldier. It was simply saying that he should not suffer loss because of the mistake of the land department in canceling his former entry. The same measure of justice in the case at bar requires that the soldier shall not be deprived of any

portion of his right of additional entry because of the mistake of the Department in canceling a portion of his former entry.

In the case of Edgar A. Coffin, *supra*, cited by your office, the soldier, whose entire entry had been canceled for supposed conflict with the railroad claim, would, if he had applied to do so, have been allowed to make a new entry for one hundred and sixty acres on the ground that no portion of his homestead right was exhausted by said canceled entry; but, because his entry was valid and was wrongfully canceled, he chose to treat it as an exhaustion of his homestead right to the extent of eighty acres, and, instead of applying for a new entry for one hundred and sixty acres, he only asked for an additional entry for eighty acres, and this he was clearly entitled to, and the Department so decided. While in the case at bar the soldier acquiesced in the cancellation of forty acres of his entry on account of said conflict, and as he was only allowed to retain forty acres of the land, he claimed that his homestead right was only exhausted to the extent of forty acres, and hence that he was entitled to an additional entry for one hundred and twenty acres, and such claim is manifestly just.

The result is that your said decision is reversed, and, if there be no other objection, said application will be allowed.

OPENING OF CEDED LANDS IN FORT HALL INDIAN RESERVATION—ACT OF MARCH 30, 1904.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 30, 1904.

REGISTER AND RECEIVER, *Blackfoot, Idaho.*

GENTLEMEN: In accordance with the terms of the act of March 30, 1904 (33 Stat., 153), the lands named in the schedule annexed, which is hereby approved, will be opened to settlement and entry at and after the hour of 9 a. m. (mountain standard time), on the 6th day of September, 1904, under the conditions named in the act, and you will be governed by the instructions herein given.

[33 Stat., 153.]

AN ACT relating to ceded lands on the Fort Hall Indian Reservation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all lands in the former Fort Hall Indian Reservation, in the State of Idaho, within five miles of the boundary line of the town of Pocatello, offered for sale at public auction on and after July seventeenth, nineteen hundred and two, in accordance with the provisions of the act of June sixth, nineteen hundred (Thirty-first Statutes, page six hundred and seventy-two), and the proclamation of the President of May seventh, nineteen hundred and two, thereunder, and which remain unsold after such offering, shall be subject to entry under and in accordance

with the provisions of section five of said act and at the prices therein fixed, at a time and in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided*, That the improvements made by certain Indians upon the following described lands, namely: Lot four, section one, township seven south, range thirty-four east, and the southeast quarter of the northeast quarter, section eighteen, township seven south, range thirty-five east, and the east half of the southeast quarter of section twenty-one, township six south, range thirty-four east, and which have heretofore been appraised, shall be paid for at the said appraised value, at the time of and by the person making entry of the respective tracts upon which such improvements are situated.

Approved March 30, 1904.

You will observe that said lands are subject to disposition only under the homestead, town site, stone and timber, and mining laws as provided in section 5 of the act of June 6, 1900, which reads as follows:

SEC. 5. That on the completion of the allotments and the preparation of the schedule provided for in the preceding section, and the classification of the lands as provided for herein, the residue of said ceded lands shall be opened to settlement by the proclamation of the President, and shall be subject to disposal under the homestead, town site, stone and timber, and mining laws of the United States only, excepting as to price and excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes and be subject to the laws of Idaho: *Provided*, That all purchasers of lands lying under the canal of the Idaho Canal Company, and which are susceptible of irrigation from the water from said canal, shall pay for the same at the rate of ten dollars per acre; all agricultural lands not under said canal shall be paid for at the rate of two dollars and fifty cents per acre, and grazing lands at the rate of one dollar and twenty-five cents per acre, one-fifth of the respective sums to be paid at time of original entry, and four-fifths thereof at the time of making final proof; but no purchaser shall be permitted in any manner to purchase more than one hundred and sixty acres of land hereinbefore referred to; 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.

The classification as to agricultural and grazing lands shall be made by an employee of the General Land Office, under the direction of the Secretary of the Interior.

No lands in sections sixteen and thirty-six now occupied, as set forth in article three of the agreement herein ratified, shall be reserved for school purposes, but the State of Idaho shall be entitled to indemnity for any lands so occupied: *Provided*, That none of said lands shall be disposed of under the town-site laws for less than ten dollars per acre: *And provided further*, That all of said lands within five miles of the boundary line of the town of Pocatello shall be sold at public auction, payable as aforesaid, under the direction of the Secretary of the Interior, for not less than ten dollars per acre: *And provided further*, That any mineral lands within said five-mile limit shall be disposed of under the mineral-land laws of the United States, excepting that the price of such mineral lands shall be fixed at ten dollars per acre, instead of the price fixed by the said mineral-land laws.

All applicants to enter these lands must possess the qualifications required by the law under which they desire to make entry. The homestead applicant must, at the time of making his original entry, pay one-fifth of the purchase price of the land in addition to the regular fee and commissions, and at the time of making his final proof

four-fifths of the purchase price thereof. The price of agricultural land is \$2.50 per acre, and grazing land is \$1.25 per acre.

A homesteader may commute his entry under section 2301, Revised Statutes, by paying the remaining four-fifths of the purchase price for the land. The commissions in the original and final entry will be computed at the rate of \$1.25 per acre, the ordinary minimum price of the public lands under the general provisions of section 2357, Revised Statutes. (See secs. 2238 and 2290, Revised Statutes.)

You will use the ordinary homestead, town-site, stone and timber, and mineral blanks, continuing your regular series of numbers, indicating upon the entry papers and abstracts that the entries are made under the act of March 30, 1904, Fort Hall Indian Reservation lands.

Upon the receipt of the first payment of one-fifth of the purchase price from homestead claimants the receiver will issue a cash receipt for the money, noting thereon "First payment Fort Hall 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 purchase money paid.

When commutation proof is submitted and payment made, the regular cash certificate and receipt should issue. Make report and account for the payments in your regular monthly and quarterly accounts.

Special Agent H. V. A. Ferguson, who made the classification of the lands opened under the said act of June 6, 1900, certifies that the "Idaho canal" has never been constructed into or upon any part of the said ceded lands, and that there are no lands lying thereunder which require classification. This renders of no effect that portion of the act which reads:

That all purchasers of lands lying under the canal of the Idaho Canal Company shall pay for the same at the rate of ten dollars per acre.

The persons who may make entry of the lands mentioned in the act of March 30, 1904, upon which certain Indians made improvements, must pay for the improvements at the appraised value at the time of making entry.

Timber and stone entries must be paid for in full at time of entry and at the usual rate of \$2.50 per acre, as provided in the timber and stone laws.

The lands to be opened embrace, approximately, 41,000 acres, or about 270 homestead entries.

Notice of the opening has been sent to the "Southern Idaho Mail," Blackfoot, Idaho, and the "Tribune," Pocatello, Idaho.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved, June 30, 1904.

E. A. HITCHCOCK, *Secretary.*

[Schedule omitted.]

SUSPENSION OF APPLICATIONS TO PURCHASE LANDS IN YAKIMA
INDIAN RESERVATION UNDER ACT OF JUNE 3, 1878.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 1, 1904.

REGISTER AND RECEIVER, *North Yakima, Washington.*

GENTLEMEN: I am in receipt of your letter of May 6, 1904, relative to the application of Isadora E. S. Dowden, to purchase under the act of June 3, 1878 (20 Stat., 89), lots 1, 2, 5 and 6, Sec. 31, T. 8 N., R. 13 E., W. M., made February 8, 1904, and notices for publication issued the same day, May 4, 1904, being set therein for the submission of proof, and the applicant having appeared and submitted his proof in accordance therewith.

By my letter "C" of April 22, 1904, you were advised of the pendency before Congress of a bill (H. R. No. 13522) providing for the disposition of the surplus or unallotted lands of the Yakima Indian reservation, and also recognizing title of the Indians to the disputed tract of land adjoining said reservation on the west, excluded by erroneous boundary survey and containing approximately 293,837 acres, according to the finding after examination of Mr. E. C. Barnard, topographer of the Geological Survey, whose conclusions were approved by the Department April 1, 1900, and of the withdrawal by the Department on that day (April 22, 1904) of the lands described therein (including the lands above described) from settlement, entry, filing, selection, or other appropriation, pending action by Congress upon said bill, and until further directed by this office.

You state that you have suspended action in the case cited and as other claims have been advertised for final proof which involve tracts embraced in said withdrawal, you request to be instructed as to the action to be taken by your office in connection therewith.

You are advised that all pending applications to purchase under said act should be suspended, in view of the decisions in the cases of the Kaweah Cooperative Colony Co. *et al.* (12 L. D., 326) and Board of Control, *etc. v. Torrence* (32 L. D., 472), until further notice.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved:

E. A. HITCHCOCK, *Secretary.*

SOLDIERS' HOMESTEAD—SECTION 2307, REVISED STATUTES—
RESIDENCE.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 7, 1904.

REGISTERS AND RECEIVERS, *United States Land Offices.*

SIRS: The Department held December 7, 1903, in the Anna Bowes case (32 L. D., 331), as follows:

The widow or minor orphan children of a deceased soldier or sailor, making homestead entry under section 2307 of the Revised Statutes, must comply with the requirements of the homestead laws as to residence and cultivation to the same extent as a soldier or sailor making entry under section 2304.

The right to make entry under section 2307 is not transferable, and any contract entered into either before or after entry, which contemplates the sale thereof, is in violation of law.

Directions given that all persons having uncompleted homestead entries made under section 2307 be immediately notified, by registered letter to the last known address of the party making the entry, as shown by the records of the local office, that if they desire to retain such entries they will be required to begin actual residence upon the land within six months from the issuance of such notice, or, if they so elect, they will be permitted to relinquish their entries, without prejudice to their homestead rights, by giving notice of such election within the same time.

1. You are therefore directed to at once notify, by registered letter addressed to the last known address of the entryman as shown by your office records, each person having an uncompleted homestead entry made under section 2307 of the Revised Statutes—

(a) That he is required under his existing entry to comply with the requirements of the homestead law as to residence and cultivation to the same extent as is required of a soldier or sailor making entry under section 2304 of the Revised Statutes; that is, for such period as, when added to the military or naval service relied upon, shall equal the required period of five years, with this exception, that where a soldier, whose service is depended upon, died during his term of enlistment, the whole term of his enlistment will be credited upon the period of residence and cultivation required under the homestead laws.

(b) That the right to make homestead entry under section 2307 of the Revised Statutes is not transferable and that any contract entered into, prior to the completion of final entry, which contemplates the sale of the land is in violation of law.

(c) That under departmental ruling he is allowed six months from date of your letter of notification within which to begin actual residence upon the land heretofore entered, and that should he fail to begin such residence prior to the expiration of such period of six months and thereafter maintain same, his entry will be subject to contest and cancellation for abandonment.

(d) That should he so elect he will be permitted to relinquish his existing entry without prejudice to his right to make another, provided he shall file in your office, within the above-mentioned period of six months, a relinquishment of all right, title, and interest under his existing entry.

2. Upon the filing in your office of such a relinquishment you will immediately cancel the entry and hold the land formerly covered by such entry subject to disposal as in other cases made and provided for.

3. Until the expiration of the period of six months no existing entry under section 2307 of the Revised Statutes will be subject to contest upon the ground of abandonment.

4. At the expiration of said period of six months you will report each case separately to this office with proof of service of notice as above required upon the entryman, for filing with the papers relating to such case and for such further action as the facts of the case may warrant.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved:

THOS. RYAN, *Acting Secretary.*

CONTEST--DISMISSAL--NOTICE--SECOND CONTEST--WAIVER.

COOK *v.* SEYMORE.

A contestant is entitled to notice of the dismissal of his contest for want of prosecution; and where he is not served with notice of such action, his rights are in no wise prejudiced or affected thereby, and an intervening contest against the same entry by another party is no bar to the reinstatement of his contest.

The mere filing of a second affidavit of contest, which is immediately withdrawn before any action is taken thereon, except to note the filing on the records of the local office, does not constitute a waiver by the contestant of his right to prosecute the contest theretofore initiated.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *July 11, 1904.* (A. S. T.)

On September 21, 1889, Joseph H. Seymore made homestead entry for the SW. $\frac{1}{4}$ of Sec. 27, T. 14 N., R. 7 W., Kingfisher land district, Oklahoma.

On April 10, 1890, James M. Cook filed an affidavit of contest against said entry, alleging abandonment.

A hearing was had, the contestant appearing and offering testimony; the defendant did not appear; the local officers recommended the cancellation of the entry. Your office, on November 29, 1890, remanded the case because of insufficient service of the notice of contest. On April 16, 1891, the local officers again forwarded to your office the papers in the case, and reported that on December 26, 1890, Cook had acknowledged service of notice of your said decision of November 29,

1890, and that on the same day they had issued notices setting the case for trial on February 13, 1891, on which day they had dismissed the case for want of prosecution and closed the case of record. Your office on receipt of said record and report made the following notation upon your record:

May 5/91, case closed under Cir. Jan. 10/90, 10 L. D. p. 2, this entry intact. See 91, 49447—90—120130 W. C. V., Div. "H."

No letter was written closing the case.

On April 27, 1903, at 9:25 A. M., Vintson Stambaugh filed an affidavit of contest against said entry, alléging abandonment, and three minutes later James M. Cook filed an affidavit of contest against said entry on the ground of abandonment, but, finding that Stambaugh's said affidavit had been filed first, he (Cook), at 3 P. M., on the same day, withdrew his said affidavit of contest and filed a motion for reinstatement of his former contest. The local officers denied the motion, and from their action Cook appealed to your office, where, on December 19, 1903, a decision was rendered reversing the action of the local officers, reinstating Cook's said contest, and directing the local officers to fix a day for hearing and allow Cook to proceed in the premises in accordance with the rules governing contests, and your office suspended action on Stambaugh's contest to await final determination of Cook's rights, and from that decision Stambaugh has appealed to this Department.

Cook's said motion to reinstate his entry is based on the ground that he is, and ever since April, 1890, has been, an actual settler and resident on said land, claiming it as his homestead; that the order of the local officers dismissing his contest was a final order from which he was entitled to an appeal to your office; that he was entitled to notice of said order, and that no such notice was served on him or his attorney; that the case was reported to your office, where no final action had been taken, and reported to the local officers and entered upon their records, and he (Cook) had received no notice of any such final action by your office; and that his said contest was still pending in the local office, undisposed of, and is the first and prior contest against said entry of Seymore.

With his appeal to your office, Cook filed his corroborated affidavit, wherein he alleged that Seymore abandoned the land in September, 1889; that he (Cook) established his residence on the land in April, 1890, with his family, and has resided there ever since; that he employed counsel to prosecute his said contest and paid him large fees therefor; that he relied on his said attorney to prosecute said contest and protect his rights in the premises, and was assured by his said attorney that all his rights were fully protected, and he would in due time get title to the land; that he was ignorant of the law and rested in fancied security, relying upon said assurance of his attorney, and not knowing that it was necessary for him to take any further steps

than he had taken in the prosecution of said contest; that he had no knowledge of the dismissal of his contest till April 25, 1903, when he learned the facts from one of his neighbors, who had visited the local land office; that he went at once to Kingfisher and employed an attorney to look after the matter for him, and while his said attorney was preparing papers for the protection of his rights, Stambaugh, who had heard of his dilemma and difficulty, came post-haste to the land office and filed an affidavit of contest against said entry of Seymore; that he (Cook) has resided on the land, with his wife and seven children, ever since April, 1890; that he has made the following improvements on said land: two dwelling houses, three granaries, a stable, a hen house, a smoke house, planted 175 apple trees, 300 peach trees, also apricot and pear trees, 100 shade trees, 100 cottonwood trees, broke and cultivated about ninety acres, fenced and cross-fenced the entire tract; that he has no other home or means of making a living; that he is fifty years of age, and by his own exertions had converted said tract from a wild prairie into a fertile farm and had expected to spend the remainder of his life there; that Stambaugh had full knowledge of his (Cook's) occupancy and improvement of said land, and sought by a technicality to take from him the fruits of thirteen years of hard labor.

The principal ground relied upon in support of Cook's motion for reinstatement of his contest is, that neither he nor his attorney was ever served with notice of the action of the local officers in dismissing his contest. He neither admits nor denies that he had notice of your office decision of November 29, 1890, remanding the case; the only evidence tending to show that he had such notice is the report of the local officers, to the effect that he had signed an acknowledgment of service of such notice on the records of their office. They reported that "notices were issued and case set for trial February 13, 1891," but no evidence is found in the record showing that Cook received notice of the setting of the case for trial on February 13, 1891, and unless he had such notice it was error for the local officers to dismiss his contest for want of prosecution, and his rights were not prejudiced by their action; but, as before stated, he bases his motion on the ground that he was not served with notice of the dismissal of his contest.

It is insisted in behalf of Stambaugh that prior to June 1, 1895, there was no rule of practice requiring that notice should be served on a contestant of the dismissal of his contest for want of prosecution, and several cases are cited in which final action was taken by the Department without proof of such service, and it is argued that inasmuch as this contest was dismissed in 1891, Cook was not entitled to notice of its dismissal. Rule 43 of practice in force at that time provided that—
appeals from the final action or decision of registers and receivers lie in every case to the Commissioner of the General Land Office.

By circular of June 1, 1895 (20 L. D., 487), the rule was amended by adding thereto a provision, to the effect that where cases were dismissed for want of prosecution notice thereof should be given to the interested parties by registered letter, and allowing the plaintiff thirty days in which to move for reinstatement of his case, in default of which no appeal would be allowed.

It is now argued that your said decision was rendered upon the assumption that said rule, as amended, was in force at the time said contest was dismissed.

By circular of July 6, 1887 (6 L. D., 12), local officers were instructed to thereafter—

forward no contest case to this [your] office without your [the local officers'] report as to whether appeal was taken from your decision, nor without the acknowledgment of service of notice of the decision, or the affidavit of the person serving the notice, nor, in case of notice by registered letter, without the receipt for the registered letter or the return letter, as the case may be.

This rule was in force on February 13, 1891, when Cook's contest was dismissed, and the local officers failed to comply with it, and forwarded the case to your office without evidence of service of notice of their action, and when no such notice had in fact been given. The circular requires that such notice shall be given and evidence of its service furnished in every case thereafter forwarded to your office. Cook was therefore entitled to notice of the dismissal of his contest, and as no such notice was served on him, his rights were not prejudiced or in any wise affected by the action of the local officers.

It is argued in behalf of Stambaugh that Cook waived and forfeited whatever rights he may have had under his first contest by filing a second affidavit of contest. Said second affidavit was immediately withdrawn before any action was had thereon, except to note the filing on the records of the local office, and under the circumstances of this case this Department will not hold that by presenting such affidavit Cook lost and forfeited his right to prosecute his contest previously initiated, and on which a hearing had been had and a decision rendered favorable to him.

The rules of practice are intended to promote the administration of justice, and this Department will not permit any of said rules to be used as a means of inflicting injustice on any one.

The equities of this case are all in favor of Cook, and it would be manifestly unjust to allow Stambaugh upon a mere technicality to deprive him of the fruits of thirteen years of hard labor and render him and his family homeless in his old age.

Your said decision is affirmed; Cook's said contest is reinstated, and he will be allowed to proceed therein as directed in your said decision.

RAILROAD GRANT—SETTLEMENT CLAIMS—ACTS OF JULY 2, 1862, AND
JUNE 22, 1874.

SOUTHERN PACIFIC RAILROAD COMPANY.

A relinquishment under the act of June 22, 1874, confers no right upon the railroad company if the land covered thereby was in fact excepted from the grant.

The filing of a map of general route and the withdrawal of lands thereunder do not bar the initiation of settlement or other claims to lands brought within the limits of the grant by the definite location of the road; and it is only upon definite location that the initiation of such claims or rights is terminated.

Settlers upon unsurveyed lands which after survey and upon definite location of the line of the Union Pacific railroad fell within odd-numbered sections within the limits of the grant made to aid in the construction of said road by the act of July 2, 1862, are entitled to three months from date of receipt at the district land office of the approved plat of survey of the township within which to place their claims of record; and where the road was definitely located prior to the expiration of that period, and the settlement claims were subsequently regularly and in due time placed of record and title thereto completed without protest or objection on the part of the company, under which titles the lands have been held for more than thirty years, the company has no claim to the lands involved which upon relinquishment will support the selection of other lands in lieu thereof under the provisions of the act of June 22, 1874.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, July 12, 1904.* (F. W. C.)

The Department has considered the appeal by the Union Pacific Railroad Company from the action taken by your office March 18, last, rejecting its application to select 1235.12 acres within the North Platte land district, Nebraska, under the provisions of the act of June 22, 1874 (18 Stat., 194), upon the basis of an equal amount of lands, forming parts of odd-numbered sections within the limits of its grant in the State of Utah, to which it relinquishes all claim under its grant.

Your office decision states that—

The lands selected by the company, as shown by the tract books of this office, are within the limits of the company's grant and free from adverse claim. The lands in Utah surrendered and designated as bases for the tracts selected, viz: SW. $\frac{1}{4}$, Sec. 11, NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ & SW. $\frac{1}{4}$, Sec. 13, NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ & SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, and N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 15, NE $\frac{1}{4}$ SW. $\frac{1}{4}$ & NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 17, T. 6 N., R. 2 W., are also within the limits of the grant, and, as appears by the records, were all, prior to the date of the grant and before survey, settled on, occupied and improved by preemption claimants, who within the requisite period asserted their respective claims to same, made satisfactory proof of compliance with the requirements of the law, and received their patents for the tracts without opposition or protest.

These facts are not questioned in the appeal, but it is claimed that the lands relinquished were not excepted from, but were a part of, the lands granted by the acts of July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 356), first, because at the date of the definite location of

the line of road opposite thereto, to wit, April 28, 1869, these lands were free from any claim of record, the mere occupancy of the land without claim of record being insufficient to defeat the grant, and second, that the preemption law was extended to Utah by act approved July 16, 1868, and that long prior to that date these lands were withdrawn upon the map of general route of the Union Pacific railroad, filed June 28, 1865, and as a consequence no settlement claim could have been lawfully initiated to these lands prior to the definite location of the road.

This Department has repeatedly ruled that a relinquishment confers no right under the act of June 22, 1874, *supra*, if the land covered thereby was in fact excepted from the grant, and it therefore becomes necessary to inquire as to whether the lands relinquished, and upon which the selections in question are based, were in fact excepted from the railroad grant.

With regard to the withdrawal on the map of general route, filed in 1865, it is sufficient to say that no rights were vested under the grant in any lands upon the filing of such map, and that the more recent decisions of the supreme court hold that maps of general route and withdrawals made thereunder do not bar the initiation of settlement rights or other claims to lands brought within the limits of the grant by the definite location of the road, and that it is only upon definite location that the initiation of such claims or rights is terminated. *Northern Pacific R. R. Co. v. Sanders* (166 U. S., 620); *Nelson v. Northern Pacific Ry. Co.* (188 U. S., 108).

It is true that the third section of the act of July 2, 1862, *supra*, grants in aid of the construction of the Union Pacific railroad—

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.

In the matter of the tracts relinquished it is also true that the records of the land department showed no claim thereto at the date of definite location of the road, but it must be remembered that where settlements were made upon unsurveyed lands, the settlers were by the act of May 30, 1862 (12 Stat., 409, 410), given three months from the date of the receipt at the district land office of the approved plat of the township within which to file their declaratory statements, and that the approved plat of the township in question was only filed in the district land office about two months prior to the definite location of the road.

The claimants to the lands relinquished were nowise in default in the matter of the placing of their claims of record nor in the completion of full title to the lands settled upon. As stated in the decision appealed from, they completed their titles without protest or

objection on the part of the grantee claimant and more than thirty years ago.

In *Tarpey v. Madsen* (178 U. S., 215, 220), it was said:

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

Can it be doubted, therefore, that the claims of these settlers would have prevailed had the company contested them in the courts?

The company did not choose to adopt such a course, but after this great lapse of time seeks to relinquish what it never had, or if it had has long ago lost, in order to support its claim to other lands. This is the real case, and after most careful consideration of the appeal and argument in support thereof, the Department affirms your action rejecting the selections.

MINING CLAIM—PATENT DESCRIPTIONS—LOCUS OF CLAIM.

SINNOTT v. JEWETT.

In case of variance between the *locus* of a patented mining claim as indicated by the tie line described in the patent, from a corner of the claim to a corner of the public survey or a United States mineral monument, and as defined upon the ground, the land department will regard as constituting the patented claim, and will not receive further application for patent to, the tract of land embraced in the survey and bounded by the lines actually marked, defined, and established on the ground by monuments substantially within the requirements under the law and official regulations and corresponding to the description thereof in the patent.

Although the notice of an application for patent to a mining claim does not contain data sufficient to indicate the situation of the claim with substantial accuracy, nevertheless, so far as that objection is concerned, the patent subsequently issued is voidable merely, not void, and until vacated by appropriate judicial proceedings is of full force and effect.

The decisions of the courts and of the Department are to the effect that when patent once issues the land therein embraced passes beyond the jurisdiction and control of the land department, but they do not question the latter's right to determine, at least in the first instance, what public lands have been patented and what remain subject to its jurisdiction and control.

An adverse claim is the appropriate recourse of one claiming under a possessory title only, against a valid application for patent to land subject to appropriation under the mining laws, and the provisions of sections 2325 and 2326, Revised Statutes, with respect to that remedy, have no relation to or bearing upon the question of the effect and scope of a patent.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) July 12, 1904. (F. H. B.)

December 14, 1886, Delia Sinnott, Alice L. Prentice, and Eva M. Playter made entry, No. 2817, for the Emma Nevada lode mining

claim, survey No. 4348, Leadville, Colorado, land district. Patent (No. 14,990) issued for the claim June 4, 1889.

April 28, 1902, W. Kennon Jewett filed, in the same local land office, application for patent to the Silver Monument lode mining claim, survey No. 15,714. During the ensuing period of publication of notice thereof no adverse claim was filed.

However, June 30, 1902 (during the aforesaid period), Delia Sinnott, Jr., claiming as the grantee of the patented Emma Nevada claim, filed protest against Jewett's application, in which, under oath and with corroboration, it is alleged, in substance and effect, that the patented Emma Nevada claim embraces the greater portion of the land included in the application for patent to the "so-called Silver Monument lode." Attached to and made part of the protest is a plat or diagram, made on behalf of protestant by one George Holland (a United States deputy mineral surveyor) and stated by him, under oath, to have been prepared from surveys on the ground made June 20 and 21, 1902, and to correctly represent the conflict between the Emma Nevada and Silver Monument claims; and, in that connection, affiant Holland alleges that the Silver Monument survey, "as made, covers a large portion of the Emma Nevada lode as marked and staked upon the ground."

Upon the expiration of the period of publication Jewett tendered the purchase price for the land embraced in his application and applied to make entry. The local officers refused to permit entry to be made and rejected the tender, because of the pending protest and the allegations therein contained of protestant's ownership of the land concerned under patent from the United States. Upon appeal by the applicant, Jewett, from the action of the local officers, the latter forwarded the record to your office, August 18, 1902, and recommended that, if it should be found to be the fact that the Silver Monument covers the patented Emma Nevada claim as staked upon the ground, the application for patent to the former be rejected.

By decision of April 22, 1903, your office found, among other things, in substance, as follows: That by the official survey of the Emma Nevada, approved September 2, 1886, the *locus* of the claim is fixed in the W. $\frac{1}{2}$ of Sec. 7, T. 9 S., R. 78 W., 6th P. M., and the southwest corner of said section is stated to bear from corner No. 1 (the southwest corner) of the claim, S., $23^{\circ} 27'$ W., 2329.2 feet; that in the published and posted notices of the application for patent the length of said bearing or tie line was given as 2339.2 feet; that in the patent issued for the claim the designation of the *locus* of the latter is identical with that contained in the approved field notes of survey; that by the field notes of survey (approved April 21, 1902) of the Silver Monument claim the southwest corner of said section 7 is stated to bear S., $51^{\circ} 49' 35''$ W., 2424 feet, from corner No. 1 (the south-

west corner) of the claim, and the south quarter-corner of the section to bear S., 26° 15' E., 1673 feet, therefrom; and that, platted from their respective connecting or tie lines, as disclosed by the official records and as the Emma Nevada is described in the patent, the two claims do not conflict with one another: Wherefore, citing the case of The Mono Fraction Lode Mining Claim (31 L. D., 121) and several unreported decisions to the same effect, your office reversed the action of the local officers, dismissed the protest, and held that, in the absence of other objection, entry for the Silver Monument would be allowed.

Protestant thereupon prosecuted the pending appeal.

From certain data with the record it would appear that both course and distance of the tie line of the Emma Nevada claim, as given in the approved field notes of survey thereof and in the patent therefor, are erroneous; and the question arises: If there is in fact a variance between the *locus* of that claim as indicated by the connecting or tie line described in the patent, from a corner of the claim to a corner of the public survey, and as fixed by the location of the claim upon the ground and its demarcation thereon by monuments referred to and described in the patent, should the land department regard the former or the latter designation, if either, as controlling? To support their respective contentions with respect to it, counsel for the contending parties have filed extensive briefs.

The general rule respecting discrepancies between courses and distances and the monuments mentioned in instruments of conveyance, when applied to the subject matter for the purpose of its ascertainment, is discussed in a number of authorities cited in the brief of counsel for appellant, and is sufficiently set forth in the following extracts.

In Tyler on Ejectment (p. 569) it is stated thus:

What is most material and most certain in a description shall prevail over that which is less material and less certain. Thus, course and distance shall yield to natural and ascertained objects, as a river, a stream, a spring, or a marked tree. Indeed, it seems to be a universal rule that course and distance yield to natural, visible and ascertained objects. *Newsom v. Pryor's Lessee*, 7 Wheat., 10; *Preston v. Bowmar*, 6 Wheat., 582; *Jackson v. Camp*, 1 Cow., 605; *Doe v. Thompson*, 5 Cow., 371; *Jackson v. Moore*, 6 Cow., 706.

In *Preston's Heirs v. Bowmar* (6 Wheat., 580, 582) it is said by the United States Supreme Court that—

It may be laid down as an universal rule, that course and distance yield to natural and ascertained objects.

In *McIver's Lessee v. Walker* (9 Cranch, 173, 177-8) Chief Justice Marshall, speaking for the court, said:

It is undoubtedly the practice of surveyors, and the practice was proved in this cause, to express in their plats and certificates of survey, the courses which are designated by the needle; and if nothing exists to control the call for course and distance, the land must be bounded by the courses and distances of the patent,

according to the magnetic meridian. But it is a general principle that the course and distance must yield to natural objects called for in the patent. All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to that actual survey; consequently if marked trees and marked corners be found conformably to the calls of the patent, or if water-courses be called for in the patent, or mountains or any other natural objects, distances must be lengthened or shortened, and courses varied so as to conform to those objects.

The reason of the rule is, that it is the intention of the grant to convey the land actually surveyed, and mistakes in courses or distances are more probable and more frequent than in marked trees, mountains, rivers or other natural objects capable of being clearly designated and accurately described.

In the case of *Higuera v. United States* (5 Wall., 827, 835-6) the court adopted almost literally a part of the language of Washburn on Real Property (2nd Ed., 673), saying:

But ordinarily surveys are so loosely made, and so liable to be inaccurate, especially when made in rough or uneven land or forests, that the courses and distances given in the instrument are regarded as more or less uncertain, and always give place, in questions of doubt or discrepancy, to known monuments and boundaries referred to as identifying the land. Such monuments may be either natural or artificial objects, such as rivers, streams, springs, stakes, marked trees, fences, or buildings.

The principle was observed by Mr. Justice Washington, on circuit, in the case of *McPherson v. Foster* (4 Wash. C. C., 45; Fed. Cas., No. 8,921), and is stated in the syllabus as follows:

There is no principle of land law more firmly settled in this, and probably most of the states, in respect to country lands than this: that where the calls of a deed or other instrument are for natural, or well known artificial objects, both course and distance, when inconsistent with such calls, must give way and be disregarded.

The Supreme Court of California, in the case of *Adair v. White et al.* (85 Cal., 313; 24 Pac. Rep., 663, 664), determining the location of the southern boundary line of the Rancho Santa Paula y Staticoy, under a patent of the United States issued upon a confirmed Mexican grant, held that a discrepancy as to course and distance given in the patent should be disregarded, in favor of the monuments therein called for, and said:

The above is in accord with the well-settled rule that, in applying a conveyance to the tract of land described in it, course and distance must yield to natural objects or monuments called for. Such monuments are more certain and less liable to mistake or error than course and distance, and therefore monuments, as more certain, prevail over course and distance, partaking more or less of uncertainty.

Authorities to the same general effect might be multiplied. The principle is thus stated to be settled and universal, that where boundaries of a tract are described in the conveyance thereof by courses and distances and by reference to natural objects or fixed and known artificial monuments, the latter element controls in the event of disagreement between the two. No authorities to the contrary are cited by counsel for the Silver Monument applicant (appellee here), and none exist so far as the Department is able to ascertain.

Counsel for appellee contends, however, that the "general proposition" and decisions cited by counsel for appellant (protestant) "relate to the matter of determining *boundaries*, under certain conditions," and adds that not a single decision is cited in which it is held "that the *locus* of the *initial* point of a survey may be ignored, where such *initial* point has been determined and fixed by actual survey of a tie line connecting it with an established corner of the public surveys." But the brief of counsel for appellant contains a citation of and quotation at some length from the decision of the Supreme Court of Colorado in the case of *Cullacott et al. v. Cash Gold and Silver Mining Co.* (8 Colo., 179; 6 Pac. Rep., 211), in which the same principle was applied to a patented mining claim, the course and distance of the connecting or tie line of which, as given in the patent, were so far erroneous as to appear to establish the *locus* of the claim wholly without the boundaries as they had been laid and marked upon the ground. Within those boundaries a relocation was attempted by other parties, upon the assumption that the ground therein embraced was not the ground conveyed by the patent. At the trial the claim as actually located upon the ground was identified, by the monuments called for and, also, by its outcropping lode, its discovery shaft, shaft house, and surface improvements, as the premises described and contemplated by the patent; and it was therefore held that the entry thereon by those who sought to relocate was unwarranted and unlawful.

In *Lindley on Mines* (2nd Ed., Vol. II, Sec. 778), upon the authority of cases cited in the notes, it is said:

It may be announced as a general rule that a patent is conclusive evidence as to the limits of a location, and that it cannot be assailed by showing that its actual boundaries were different from those described in the patent.

* * * * *

This rule is, of course, subject to the qualifications that where there is a variance between the calls of the patent for courses and distance and the monuments specified therein the monuments control, where the monuments are clearly ascertained.

In *Snyder on Mines* (Vol. I, Sec. 744) the rule is stated thus:

In cases of variance between calls of patent and monuments on the ground, the latter control. The field-notes of the surveyor are presumed to be made with reference to the monuments on the ground, and, when so made, of course they should correspond; and when the patent is issued it should describe the land with reference to the field-notes of the surveyor on file. It sometimes happens, however, that the calls in the patent do not agree with the monuments on the ground, and whenever there is a discrepancy of this nature the monuments on the ground must prevail. Of course this rule has reference to monuments which have always remained on the ground since first placed there; and where it appears that they have not remained in place, or where there is as much doubt as to where the monuments were first located as there is whether the course is correct, it has no application.

Counsel for appellee argues, however, that in view of "the uniform, carefully prepared, specific, and paramount requirements contained in all" the official mining regulations, to the effect that a mining claim

must by actual survey be tied to a corner of the public survey or United States mineral monument, and the strict and specific instructions to surveyors on this point, with the presumption always that the surveyor properly performs his duty, the surveyed tie line, definitely fixing the *locus* of the claim, can not be disregarded. But other requirements, as well, are prescribed in the law and official regulations.

By section 2324 of the Revised Statutes it is required, with respect to every mining claim, that—

The location must be distinctly marked on the ground so that its boundaries can be readily traced.

Section 2325 of the Revised Statutes provides, in part, that any authorized locator or locators of a mining claim, who has or have complied with the terms of the mining laws—

may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground.

And, among other prescribed proofs, it is therein required that the claimant shall file a certificate of the 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.

The requirement under section 2324, above set forth, relates to the location of the claim, and contemplates its definition and identification on the ground during the period in which it is held under a possessory title, simply. The precise manner in which it shall be marked is not specified, although the result must be that "its boundaries can be readily traced." But under section 2325, when proceedings for the acquisition of patent are initiated, the requirement is particular. Plat and field notes of survey of the claim must accompany the application, in which the boundaries are to be accurately shown; and at this juncture the claim must "be distinctly marked by *monuments* on the ground." Proceeding, the section requires authentication of the plat, upon which in practice the claim is protracted and described by courses and distances, and "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."

Paragraph 34 of the mining regulations (31 L. D., 474, 479), with respect to "procedure to obtain patent to mineral lands," reads in part as follows:

The claimant is required, in the first place, to have a correct survey of his claim made under authority of the surveyor-general of the State or Territory in which the claim lies, such survey to show with accuracy the exterior surface boundaries of the

claim, which boundaries are required to be distinctly marked by monuments on the ground.

By paragraph 36 thereof it is—

required in all cases that the plat and field notes of the survey of a claim must, in addition to the reference to permanent objects in the neighborhood, describe the locus of the claim with reference to the lines of public surveys by a line connecting a corner of the claim with the nearest public corner of the United States surveys, unless such claim be on unsurveyed lands at a distance of more than two miles from such public corner, in which latter case it should be connected with a United States mineral monument. . . . The connecting line or traverse line must be surveyed by the deputy mineral surveyor at the time of his making the particular survey, and be made a part thereof.

By paragraph 38 the following, among other, particulars are required to be observed in the survey of every mining claim:

(2) The intersection of the lines of the survey with the lines of conflicting prior surveys should be noted in the field notes and represented upon the plat.

(3) Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

Paragraph 48 of the regulations provides, in part, pursuant to the requirements of section 2325, Revised Statutes, that the claimant shall furnish a certificate of the surveyor-general—

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.

Paragraphs 143, 144, 145, 146, and 154, with respect to the “survey—how made,” are as follows:

143. Corners may consist of—

First.—A stone at least 24 inches long set 12 inches in the ground, with a conical mound of stone $1\frac{1}{2}$ feet high, 2 feet base, alongside.

Second.—A post at least 3 feet long by 4 inches square, set 18 inches in the ground and surrounded by a substantial mound of stone or earth.

Third.—A rock in place.

A stone should always be used for a corner when possible, and when so used the kind should be stated.

144. All corners must be established in a permanent and workmanlike manner, and the corner and survey number must be neatly chiseled or scribed on the sides facing the claim. The *exact* corner point must be permanently indicated on the corner. When a rock in place is used its dimensions above ground must be stated and a cross chiseled at the exact corner point.

145. In case the point for the corner be inaccessible or unsuitable a witness corner, which must be marked with the letters W. C. in addition to the corner and survey number, should be established. The witness corner should be located upon a line of the survey and as near as possible to the true corner, with which it must be connected by course and distance. The reason why it is impossible or impracticable to establish the true corner must always be stated in the field notes; and in running the next course it should be stated whether the start is made from the true place for corner or from witness corner.

146. The identity of all corners should be perpetuated by taking courses and distances to bearing trees, rocks, and other objects, as prescribed in the establishment of location monuments, and when no bearings are given it should be stated that no bearings are available. Permanent objects should be selected for bearings whenever possible.

* * * * *

154. It should be stated particularly whether the claim is upon surveyed or unsurveyed public lands, giving in the former case the quarter section, township, and range in which it is located, and the section lines should be indicated by full lines and the quarter-section lines by dotted lines.

The foregoing requirements under the law and official mining regulations are principally with respect to the designation of the *locus* of a mining claim for patent purposes; and it is to be observed that for such purposes at least two elements of description are always to be provided: (1) by course and distance from a corner of the claim to a corner of the public survey or to a United States mineral monument, and the definition of the boundaries by courses and distances; and (2) by reference to and description of the "monuments on the ground," by which the "boundaries are required to be distinctly marked." It obviously is contemplated under those requirements that the different elements of description, whereby the *locus* of a claim is to be fixed, shall coincide; but it undoubtedly is true that the cases are many in which they are at variance. With such variance always possible, the mining claimant who disregards the foregoing requirements and fails to mark distinctly upon the ground, before the survey of his claim, the boundaries thereof with monuments of fixed and enduring character, such as are contemplated under the law and official regulations, or zealously thereafter to preserve them intact and in place as they are described in his patent, risks the consequences of his omission. This is the more apparent, since the probability of discrepancies between the several elements of the patent descriptions has had legislative recognition, and the considerations for the guidance of the land department in the determination of alleged or apparent conflicts between mineral applications and outstanding patents are declared, in the act of Congress, approved April 28, 1904 (33 Stat., 545), whereby section 2327 of the Revised Statutes is amended to read as follows:

The description of vein or lode claims upon surveyed lands shall designate the location of the claims with reference to the lines of the public survey, but need not conform therewith; but where patents have been or shall be issued for claims upon unsurveyed lands, the surveyors-general, in extending the public survey, shall adjust the same to the boundaries of said patented claims so as in no case to interfere with or change the true location of such claims as they are officially established upon the ground. Where patents have issued for mineral lands, those lands only shall be segregated and shall be deemed to be patented which are bounded by the lines actually marked, defined, and established upon the ground by the monuments of the official survey upon which the patent grant is based, and surveyors-general in executing subsequent patent surveys, whether upon surveyed or unsurveyed lands,

shall be governed accordingly. The said monuments shall at all times constitute the highest authority as to what land is patented, and in case of any conflict between the said monuments of such patented claims and the descriptions of said claims in the patents issued therefor the monuments on the ground shall govern, and erroneous or inconsistent descriptions or calls in the patent descriptions shall give way thereto.

Counsel for appellee points out the discrepancy in the length of the tie line of the Emma Nevada claim as given in the published notice of the application for patent thereto and as given in the patent itself; and contends that, on the one hand, if the published notice did not correctly describe the *locus* of the claim the patent was issued without authority of law and is void, and that, on the other hand, if the notice did accurately describe the *locus*, the patent was properly issued and is conclusive upon the land department, so that the latter is without jurisdiction "now *again* to determine the *locus* of that claim." In answer to the first branch of the contention it is sufficient to say, that even if it be true (a question not here involved) that the notice, taken as a whole, did not contain data sufficient to have indicated the situation of the claim with substantial accuracy (see Hallett and Hamburg Lodes, 27 L. D., 104), yet, that ground alone considered, the patent subsequently issued is voidable merely, not void, and until vacated by appropriate judicial proceedings is of full force and effect (see Smelting Co. v. Kemp, 104 U. S., 636, 644-8). So far as the second branch of the contention is concerned, the decisions of the courts and of the Department unquestionably are to the effect that when patent once issues the land therein embraced passes beyond the jurisdiction and control of the land department; but, obviously, they do not question the latter's right to determine, at least in the first instance, what public lands have been patented and what remain subject to its jurisdiction and control.

Counsel for appellee further contends that the failure of appellant to file an adverse claim, under sections 2325 and 2326, Revised Statutes, during the period of publication of notice of the Silver Monument application constituted a waiver of any claim she might have had to the land involved and a forfeiture of all right now to be heard on the question of ownership. But the mining laws are in themselves too plain and are too well understood to require argument or citation of authorities to show that an adverse claim is the appropriate recourse of one claiming under a possessory title only, against a valid application for patent to land subject to appropriation under those laws, and that the provisions referred to have no relation to or bearing upon the question of the effect and scope of a patent.

The Mono Fraction case, *supra*, does not hold the descriptions, in mineral patents, by courses and distances to prevail over those by reference to natural objects or permanent monuments, or *vice versa*, but that while such patents remain outstanding the land department may

not "deal with lands included within the descriptions contained in the patents as unpatented lands" and "is without the jurisdiction or authority to correct any mistakes that may have been made in the surveys." Inasmuch as the question presented in that case is again presented in the similar case of Drogheda and West Monroe Extension Lode Claims, decided by the Department August 30, 1902 (unreported), now pending on motion for review, and the facts of each case differ from those of the case at bar, no discussion with respect to the Mono Fraction case will be here indulged.

The patent here in question (a duly certified copy of which, prepared in your office, is with the record now before the Department) defines the position and boundaries of the Emma Nevada claim by course and distance from a corner of the claim to a corner of the public survey and in like manner from corner to corner of the claim, by reference to and description of monuments as marking its corners on the ground, and by designation of points of intersection of boundary lines of other surveyed claims; the represented relative positions on the ground of the Emma Nevada and surveyed intersecting and adjoining claims appearing on a plat attached to and made part thereof. The claim is stated therein to embrace a portion of Sec. 7, T. 9 S., R. 78 W., 6th P. M. The monuments are described as follows: "at corner No. 1, a granite stone, 24 x 12 x 6 inches, marked 1-4348, in mound of stones;" at "corner No. 2, a granite stone, 28 x 10 x 6 inches, marked 2 x 4348, in mound of stones;" at "corner No. 3, a granite stone, 40 x 10 x 4 inches, marked 3 x 4348, in mound of stones;" and at "corner No. 4, a granite stone, 27 x 10 x 10 inches, marked 4 x 4348, in mound of stones." The stone described as marking corner No. 3 is further stated to be "situate on line 4-1" of adjoining "survey No. 2929 [Iola lode claim], the same being line 2-3 of survey No. 2928, the Tip-Top lode claim."

Whilst it is not specifically admitted by or on behalf of appellee that the Silver Monument and Emma Nevada claims actually conflict with one another as laid upon the ground, yet by the allegations of Holland and those contained in the protest, and by some of the plats filed in the case, that situation would appear and is not disputed; and, indeed, the argument of appellee's counsel proceeds upon this assumption. This, however, is one of the questions of fact presented in the case, among which are those respecting the situation of the Emma Nevada claim as actually surveyed for patent, and as at present claimed and bounded, the existence on the ground of the monuments described in the patent, the definite and substantial character of such monuments as contemplated by the law and official regulations, the existence of any other visible evidences of the actual position of the claim, and, if ascertained, the true course and distance of its tie line. These questions remain to be determined, as far as may be, inasmuch as, under the provisions of the act above given, the land department

should regard as constituting the patented claim, and should not receive further application for patent to, the tract of land embraced in the survey and "bounded by the lines actually marked, defined, and established on the ground" by monuments substantially within the requirements under the law and official regulations and corresponding to the description thereof in the patent, if such there be. If the land is in fact so defined and any portion thereof is embraced in the Silver Monument application, the latter, to the extent of such conflict, must be rejected.

The record is therefore returned to your office, with directions that a hearing be ordered before the local officers, in the usual manner, upon application therefor by appellant within a time to be fixed by your office, at which full opportunity will be afforded both parties to submit such evidence as they may have touching the before-mentioned questions, as to the relative actual situations of the claims and as to the identity of the patented claim. If the hearing shall be had, the case will be regularly adjudicated according to the showing there made, agreeably to the views hereinabove expressed; otherwise, in the absence of an application for such hearing, the Silver Monument application will be allowed to proceed, provided no other or further objection appears.

The decision of your office is modified accordingly.

SWAMP LANDS—CONFIRMATION—ACT OF MARCH 12, 1860.

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

Lands which have been finally adjudged by the land department to be of the character granted to the State by the act of March 12, 1860, and to have passed to the State under said grant, are not thereafter subject to other disposition.

Departmental decision of March 16, 1903, in case of *Morrow et al. v. State of Oregon et al.*, 32 L. D., 54, modified.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, July 12, 1904.* (J. R. W.)

The State of Oregon and Warner Valley Stock Company, its grantee, appealed from your office decision of March 31, 1904, rejecting the swamp land claim to the NE. $\frac{1}{4}$ of Sec. 8, T. 40 S., R. 24 E., W. M., Lakeview, Oregon, covered by Lewis N. Frakes's pre-emption entry.

This tract is included among those subject of the decision in *Morrow et al. v. State of Oregon* (32 L. D., 54), which determined them to be "swamp lands subject at times to be entirely overflowed and at all seasons were thereby rendered unfit for cultivation," March 12, 1860, granted to the State by the act of that date (12 Stat., 3). The land was surveyed in 1887, was claimed by the State in its swamp

land list 61, presented in December, 1888. Frakes's declaratory statement was filed March 12, 1889, and the receipt issued him thereon was noted "subject to the claim of State under the swamp land claim." Before the survey the State had, in 1883 and 1884, claimed to own and had sold and conveyed the lands, as was shown in the record in *Morrow v. Oregon* (32 L. D., 265, 266), so that Frakes's claim by filing his declaratory statement was not only last in time, but was five or six years after the State claimed to own and had for value sold and conveyed the land as inuring to it under the act of March 12, 1860. The history of the long controversy concerning these lands is further set out in *Morrow et al. v. Oregon* (28 L. D., 390; 32 L. D., 54, and *ib.*, 265), and is referred to without repetition here. In disposing of the main controversy as to the general character of the lands the record before the Department included the pre-emption of Amos Boyd, upon which his heirs, July 16, 1895, made final proof and received final certificate, prior to the order of May 13, 1899 (28 L. D., 390, 395), for a hearing. Respecting the land involved in Boyd's entry, it was held (32 L. D., 64):

This perfection of the entry constitutes a sale and disposal of the lands embraced therein . . . and being made under a law . . . enacted prior to March 12, 1860, and also made prior to the confirmation of title in the State under the swamp land act . . . the lands embraced in such entry are excluded from that grant and the entry should be passed to patent if it be otherwise regular. If any other pre-emption entries shall be regularly perfected prior to the issuance of patent to the State, the lands covered by such entries will likewise be excluded from the grant to the State.

Under the last sentence above quoted, Frakes gave notice, April 7, 1903, of intention to offer final proof. The Warner Valley Stock Company filed a protest against submission or acceptance of the proof, alleging the swamp character of the land in 1860, that it is now owner of it by grant of the State, and that the pre-emptor was given ample opportunity to submit proof at the hearing in *Morrow v. Oregon*, ordered May 13, 1899 (28 L. D., 395). The local office, September 21, 1903, dismissed the protest, accepted the final proof, and issued final certificate. March 31, 1904, upon appeal by the Live Stock Company, your office affirmed that action.

The question presented is: When does the title of the State become "confirmed" within the meaning of the act, so that its right is established to receive legal title by issue of a patent? This must be determined by the character and terms of the grant. That the swamp land grant was a grant of title *in presenti*, as of the date of the act, of all lands then of that character, has been so clearly and unvaryingly held as not to require citation of authority. But such grant being indeterminate as to the description and identification of the particular lands it was provided that lands disposed of pursuant to any law theretofore

enacted, prior to confirmation of the title under this act, should be excepted from its operation.

In *Arant v. State of Oregon* (1 L. D., 515; adhered to in 2 L. D., 641), it was held that:

The confirmation to be made was the adjudication and approval to the State by the Secretary of the Interior of lands found to be swamp in the manner provided by the act of 1850.

In the case of *Crowley v. State of Oregon*, the Secretary of the Interior held that the proviso of the act of 1860 was not intended to continue the disposal under general laws of land found to be swamp, or to dispose of lands in the face of an asserted and undetermined claim of the State, and the Secretary expressly declared that "to this extent only is it here intended to construe this proviso."

The act that is indicated and intended by the statutes as a disposal or sale of public land is thus defined, respecting the school land grant, in *Ham v. State of Missouri* (18 How., 126, 133):

The language and plain import of the 6th section of the act of the 3d of March, 1820, confer a clear and positive and unconditional donation of the sixteenth section in every township; and, when these have been sold or otherwise disposed of, other and equivalent lands are granted. Sale, necessarily signifying a legal sale by a competent authority, is a disposition, final and irrevocable, of the land.

It is that final and irrevocable act by which the right of a person, purchaser, or grantee, attaches, and the equitable right becomes complete to receive the legal title by a patent or other appropriate mode of transfer. Until that act the land is not disposed of, and in absence of any provision saving or preferring any particular inchoate equity, as that of a settler, disposal by Congress is absolute to the displacing of inchoate rights (*Yosemite case*, 15 Wall., 77), and as between two claimants the one prior in time prevails as prior in right.

These principles were upheld in the decision of *Morrow et al. v. Oregon et al.*, as shown by the extract above quoted. Both of these claimants were parties to that controversy. The result of it was that the character of this tract was then by that decision adjudged to be such as passed by the grant, and it was identified as land which passed thereby, unless before that time disposed of. It was error of that decision to say that—

If any other pre-emption entries *shall be* in future regularly perfected prior to issuance of patent to the State, the lands covered by such entries will likewise be excluded from the grant to the State.

Having then finally ascertained and identified the character of this particular tract to be such that it passed by the grant March 12, 1860, the power of the land department to make disposal of the land subsequently to another than the State was gone. Some time might be required to eliminate and perfect the list and draw and issue patent therefor, but the right of the State became perfect. All that remained to be performed were the ministerial acts necessary to passing of legal

title. In *Railroad Company v. Smith* (9 Wall., 95, 100), the court held that—

though the States might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the States to them could not be defeated by that delay.

The whole question is fully reviewed by the court in *Wright v. Roseberry* (121 U. S., 488), in a case arising under a statute differing as to the mode of identification of the granted land, but the principle is adhered to that, upon identification of what lands were swamp and granted, the right of the State is fixed and no subsequent act of the land department can divest it. It follows necessarily that the acceptance of Frakes's final proof and issue of final certificate to him after identification of the land as swamp, March 12, 1860, by the decision of March 16, 1903, was without authority of law and in violation of the grant.

No doubt the jurisdiction of the land department continues until title is passed to correct its identification of the land as swamp. But that question is not presented in the case. The land was identified by the decision of March 16, 1903, to be swamp and such as passed by the grant. The accuracy of that identification is not now assailed or brought into question. Had the decision provided that "If any other pre-emption entries *have been* regularly perfected the lands covered by such entries will likewise be excluded from the grant to the State," it would have been accurate, but in so far as it appears to authorize disposal of any of such lands after their identification as swamp, it clearly violates the right arising from the grant and exceeds the power of the land department.

The decision of March 16, 1903 (32 L. D., 54), is modified accordingly, the decisions of your office and the local office are reversed, Frakes's final certificate will be canceled and his final proof rejected.

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

INSTRUCTIONS.

Congress having by the act of June 17, 1902, expressly provided that lands susceptible of irrigation under projects contemplated under said act shall be withdrawn from entry "except under the homestead laws," the Secretary of the Interior has no power to withhold such lands from disposition under the homestead laws pending sufficient progress in the construction of the works to assure a sufficiency of water for the irrigation of the land.

Acting Secretary Ryan to the Director of the Geological Survey,
(F. L. C.) *July 12, 1904.* (E. F. B.)

Your letter of May 4, 1904, recommending that all the public lands under the Shoshone irrigation project, in the State of Wyoming, be

absolutely withdrawn from entry of every character, has been considered with a letter from Hon. F. W. Mondell on the same subject.

The lands in question are embraced in a list of selections approved to the State of Wyoming under the act of August 18, 1894 (28 Stat., 372, 422), known as the Carey Act, and are also within the limits of a withdrawal made under the act of June 17, 1902 (32 Stat., 388), providing for the reclamation of arid lands. In view of the fact that these lands will be susceptible of reclamation from the irrigation works which it is contemplated will be constructed by the United States under the reclamation act, the State of Wyoming proposes to surrender all its right, title, and interest acquired under its contract for the reclamation of these lands, entered into with the Secretary of the Interior by authority of the Carey Act, and has tendered to the United States a relinquishment of its right, title, and interest in and to said lands, upon condition that the United States will undertake the reclamation of them under the act of June 17, 1902.

Assuming that upon the acceptance of the relinquishment of the State the withdrawal made under the reclamation act will become effective immediately as to such lands, and that they will be subject to homestead entry under the provisions of that act, you call attention to certain conditions that in your opinion make it imperative that these lands be withdrawn from entry of every character whatever, as a matter of public policy and in the interest of sound administration.

The conditions to which you call attention are, that extensive efforts are being made by interested parties to bring settlers to these lands as soon as they are open to entry, because of the favorable location of this project; that it is presumed each settler will enter one hundred and sixty acres, although it is certain that the limit of area per entry will be restricted in nearly all cases to eighty acres and in some cases less; that as it will require two years or more to complete the preliminary work and bring construction to such a stage that water can be furnished for irrigation, and as it will be impossible for the settler to live on the land in the meantime, it will result in great distress where the settler attempts to reside on the land and otherwise comply with the law, and will tend to induce speculation on the part of those entrymen who make no effort to live on the land, but merely rely on their entries to preserve their rights. To avoid the evil consequence that must inevitably result from the allowance of entries upon these lands in advance of sufficient progress in the construction of the works to reasonably assure a sufficiency of water for the irrigation of the land, you recommend that the land shall be withheld from entry of every character, and you express the opinion that such withdrawal can be made by the Secretary of the Interior under his general power and authority of supervision over the public lands.

The conditions described in your letter exist to a greater or less

extent as to all lands under every irrigation project that has been approved for construction under the reclamation act. It can not be questioned that great confusion and dissatisfaction must necessarily result from the indiscriminate allowance of homestead entries for lands lying under these various projects, and that it would be in the interest of sound administration—if the executive branch of the government had such power—to withhold from entry of every character all such lands until sufficient progress has been made in the construction of the works to assure the Secretary that water for the irrigation of the lands can be had within a reasonable time. But the act of June 17, 1902, under authority of which these works are to be constructed, has expressly provided for a withdrawal of lands thereunder, fixing its extent and condition, which prohibits the withdrawal from homestead entry of the lands that may be susceptible of irrigation from such works.

The Secretary of the Interior has no arbitrary power to reserve lands or to withhold them from the operation of the general land laws. By virtue of his supervisory power and authority in the disposal and control of the public lands, he may from time to time reserve from sale and set apart portions of the public domain for public uses as the exigencies of the public service may require. *Grisar v. McDowell* (6 Wall., 363). And where he entertains a doubt as to the extent and operation of a grant, he may withdraw lands from entry in order that the rights of the grantee might not be impaired, although it was not contemplated by the act, as was done in the case of the grant to improve the navigation of the Des Moines river (*Wolsey v. Chapman*, 101 U. S., 755), and, in the absence of statutory denial, may withdraw lands for the purpose of effectuating the proper adjustment of grants to railroad companies (*Buttz v. Northern Pacific Railroad Company*, 119 U. S., 55), although the order covered more land than was in the grant. *Spencer v. McDougal* (159 U. S., 62). He may also withhold lands from entry temporarily as an inherent power under his authority to regulate the time, place, and manner of making entries of the public lands, so that all persons duly qualified may have equal advantages in acquiring rights to public lands. Such action can be taken, however, only as a means to accomplish some end in the performance of a duty enjoined upon the Secretary in matters affecting the public lands and with reference solely to such object. But if the duty to be performed has been specifically provided for by a particular act, he must look to that act for his power, and he can not in the exercise of the general power and authority confided to him in his supervision over the public lands infringe any limiting provision of the particular act. If the legislature has in such act provided for a withdrawal expressing and directing the extent and condition of such withdrawal, "it must be taken to have been exhaustively

expressed, and that direction implies that no other should be made." Northern Pacific Railroad Company v. Miller (7 L. D., 100, 112); same v. Jennie Davis (19 L. D., 87). The decisions of the Department in the cases cited were referred to with approval by the supreme court in Southern Pacific Railroad Company v. Bell (183 U. S., 675), in which the same principle was involved. See also Hewitt v. Schultze (180 U. S., 139).

Your office was advised by letter of February 11, 1903 (32 L. D., 6), as to the extent and condition of the withdrawals authorized by the act of June 17, 1902. It was there stated that there is nothing in the act that prohibits a general withdrawal by the Secretary of the Interior of all lands in any particular locality for the purpose of having an examination made with a view to determine whether an irrigation project is practicable. Such a withdrawal is evidently contemplated by the act, and in order to make it effective it must be an absolute withdrawal from entry of every character of all lands, whether they may be needed for construction or may be susceptible of irrigation from the works. When the examination has been made and the Secretary determines that the project is practicable, his duty is expressly prescribed by the act. He is directed to withdraw from public entry the lands that may be required for the construction and operation of the works, and to restore to public entry any of the lands so withdrawn when in his judgment such lands are not required for the purposes of the act. He is also authorized "to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works."

The feasibility of the Shoshone project has been determined and authority has been given to carry into effect the provisions of the act. The direction of the statute is that the lands that may be susceptible of irrigation shall be withdrawn from entry, "*except under the homestead laws.*" Congress evidently had a purpose in making that exception and in limiting the power of the Secretary to suspend by withdrawal the operation of the homestead law as to those lands. Whether such limiting provision in the statute was wise is not for the executive branch of the government to determine. An attempt to withdraw such lands from homestead entry or to suspend such laws for any period under the guise of the exercise of the supervisory power and authority over the public lands would be in direct contravention of the statute, and can not be justified upon any ground whatever. It would be the exercise of a power expressly forbidden by the statute, and its practical effect would be to strike from the statute the words "*except under the homestead laws.*"

In a letter under date of April 25, 1904, Mr. Mondell gives expression to the same views entertained by you as to the necessity of withholding these lands absolutely from entry of every character until the

time when the Secretary of the Interior is authorized to fix the limit of area per entry under the provisions of the reclamation act. He is of the opinion that these lands should be settled upon in tracts of not to exceed eighty acres, and that no opportunity should be given to make entries of them in tracts of one hundred and sixty acres. He assumes that upon the acceptance of the State's relinquishment of these lands, they will be subject to the operation of the general land laws, and in order to prevent their general disposal it will be necessary to withdraw them immediately under the terms of the reclamation act.

In order to avoid any question and resulting complications that might arise as to these lands falling within the withdrawal heretofore made under the act of June 17, 1902, for the Shoshone project, upon the acceptance of the State relinquishment a specific order of withdrawal will be issued to take effect contemporaneously with the acceptance of the relinquishment. While there is no power to refuse a homesteader the right to make entry of these lands, subject to the provisions, limitations, charges, and conditions of the act of June 17, 1902, after they have been withdrawn under the provisions of said act, and although it is not deemed advisable at this time to determine absolutely the limits of area per entry for lands lying under said project, the local officers can be instructed to notify all persons who apply to make entry of said lands that entries will probably be limited to eighty acres, and in some cases to a less quantity, in accordance with your recommendation, as was done with reference to lands lying under the Minidoka project. They will also at the same time have their attention called to the general instructions of May 17, 1904, requiring the local officers to notify all persons making homestead entry of lands within the irrigable area of any project commenced or contemplated under the provisions of the act of June 17, 1902, that they will be required to fully comply with the requirements of the homestead law as to residence, cultivation, and improvement, and that failure to supply water from the irrigation works in time for use upon the land entered will not justify a failure to comply with the law and to make proof thereof within the time required by the statute (32 L. D., 633). It is believed that in this way the settler can be sufficiently advised as to the conditions he will be required to meet, if he persist in his application to make entry, as soon as the lands are subject to such entry, and thus in a great measure accomplish what is contemplated by your recommendation.

FOREST RESERVE—LIEU SELECTION—NON-MINERAL AFFIDAVIT—ACT OF JUNE 4, 1897.

JACOB H. COOK.

Where the non-mineral affidavit filed with an application to select lands under the exchange provisions of the act of June 4, 1897, taken as a whole, and considering all its parts, clearly shows that each of the tracts is non-mineral, is subject to homestead entry, contains no deposit of coal, or other minerals, and is not subject to entry under the coal or other mineral laws, the fact that in one portion of the affidavit the statement that the land contains no mineral deposits is qualified by the word "valuable," does not render the affidavit defective.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) July 13, 1904. (J. R. W.)

Jacob H. Cook appealed from your office decision of January 25, 1904, calling for further proof of the non-mineral character of the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 8, and the N. $\frac{1}{2}$ and SW. $\frac{1}{4}$ of Sec. 20, T. 24 N., R. 4 E., M. D. M., Marysville, California, embraced in his application, number 5870, your office series, under the act of June 4, 1897 (30 Stat., 36), in lieu of land relinquished to the United States in the San Bernardino Forest Reserve, California.

April 14, 1902, Cook presented his application and accompanying papers at the local office. December 24, 1902, the land was temporarily withdrawn with view to its inclusion within a proposed forest reserve, which order is yet in force. The printed form of non-mineral affidavit used read that:

there is not, to affiant's knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land, to affiant's knowledge, any placer, cement, gravel, or other valuable mineral deposit.

The blanks above indicated were filled by writing therein the word *valuable*. Your office held that the affidavit when so filled was a qualified one, whereas an unqualified one is necessary, and that it is therefore fatally defective in substance, so that no right was acquired, but provided that the selector may—

furnish an unqualified non-mineral affidavit, and, in the event that the withdrawal is not made permanent, the application will be considered, otherwise the selection will be rejected.

If the foregoing was all of the affidavit that referred to the non-mineral character of the land, the question whether "valuable" so qualifies the non-mineral affidavit as to render it unacceptable would be important in the present instance, because to so hold inevitably imposes delay upon the selector until the question of including the land in a forest reserve is determined, depriving him of his property,

and, if the land be ultimately included in a reserve, necessitates rejection of the selection. The affidavit, however, further states— that each of said tracts of land is vacant, uninhabited, unoccupied, surveyed, non-mineral and is subject to homestead entry; that the said tract of land applied for is agricultural in character and contains no deposit of coal or other minerals and is not subject to entry under the coal or other mineral laws.

The affidavit taken together, considering all its parts, is unqualified and unqualifiedly states that each of the tracts is non-mineral, is subject to homestead entry, contains no deposit of coal, or other minerals, and is not subject to entry under the coal or other mineral laws. It goes further, and by iteration is more emphatic than the ordinary form in unqualifiedly asserting the non-mineral character of the land.

It is therefore unnecessary to follow counsel into the discussion of section 2318 of the Revised Statutes and the decisions in *Deffeback v. Hawke* (115 U. S., 392, 404) and *Colorado Coal Company v. United States* (123 U. S., 307, 328), that the word "valuable," though omitted from the usual form of affidavit, is implied, and that use of it only expresses what the law implied and does not weaken or qualify the affidavit.

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

DESERT LAND ENTRY—AMENDMENT.

ELLA POLLARD.

Where a desert-land entryman does not include in his entry the full area allowed by law, for the reason that there is no vacant land adjoining that entered which is susceptible of irrigation and reclamation, he may, if adjoining land of the character subject to desert land entry thereafter becomes vacant, enlarge his original entry so as to include therein the full area allowed by law.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *July 13, 1904.* (D. C. H.)

Ella Pollard has appealed from your office decision of April 13, 1903, rejecting her application to amend her desert land entry made October 5, 1901, for the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 20, and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 29, T. 43 N., R. 80 W., Buffalo, Wyoming, so as to include therein the NW. $\frac{1}{4}$ of Sec. 29, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 30, in said township and range.

It appears from the record that on December 19, 1898, Frank P. Pollard made desert land entry for 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. 29, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 30, that the entry was canceled on relinquishment February 10,

1903, and that on the same day Ella Pollard applied to have her entry amended as aforesaid, alleging that at the time her original entry was made there was no vacant land adjoining that claimed by her which could be irrigated and reclaimed, and that she has since ascertained that there is now vacant land, desert in character, adjacent to her said entry. The local officers transmitted Pollard's said application to your office on February 12, 1903, and recommended that the amendment be allowed. Your office, by decision of April 13, 1903, rejected said application and allowed applicant sixty days in which to furnish her first yearly proof in support of her original entry, due in October, 1902, and in which to appeal from your action, and held that, failing in which, Pollard's application for amendment would stand rejected, and her said entry would be canceled.

Pollard has appealed to the Department.

The grounds upon which your office rejected said application are: (1) That at the time Ella Pollard made her original entry the land embraced in her application to amend was covered by a former existing entry and could not, therefore, whatever its character, have been included in her said entry; and (2) that the claim, if amended as applied for, will be non-compact in form.

(1) While it is true that the land described in Ella Pollard's application to amend was, at the time her original entry was made, covered by the entry of Frank P. Pollard, and could not, therefore, have been included in her said entry, yet when Frank P. Pollard's entry was relinquished and canceled, the land embraced therein became vacant and again subject to entry, and while Pollard's petition technically cannot be treated as an application to amend her said entry, yet inasmuch as the law gives the desert land applicant the right to enter 320 acres of land and its policy is to encourage the reclamation and improvement of lands which are desert in character, and there being no adverse claim to the land applied for, no reason is seen why, under the wise and liberal administration of the law, the said applicant should not be allowed to enlarge her original entry so as to include therein the land applied for.

(2) Although it appears from the plats filed with the record that if the entry should be enlarged by the proposed addition, the Powder River will flow through the entire length of the claim, it is not believed that said river is of any controlling importance in determining the question involved, as the proof is clear that the land is desert in character, and it further appears that the natural flow of water from said river is not sufficient to irrigate the claim, and that in order to secure necessary and proper artificial irrigation the water will have to be conducted from said river a distance of two miles from the claim.

In the case of Julia B. Keeler (31 L. D., 354), it is said that:

The requirement of compactness of form will be held to be complied with on surveyed lands, when a section, or part thereof, is described by legal subdivisions compact with each other, as nearly in the form of a technical section as the situation of the land and its relation to other lands will admit of, although parts of two or more sections be taken to make up the quantity or equivalent of one section.

From an examination of the record and the plat filed therewith, together with the affidavit of the applicant accompanying the appeal, it appears that the claim, if enlarged as aforesaid, will be as compact in form as the situation of the said land and its relation to other adjacent lands capable of being irrigated and reclaimed will admit of, and that the rule as to compactness of form will not be violated by the allowance of the proposed addition. As it appears from the report of the local officers to your office, under date of August 5, 1903, that Pollard had, on February 10, 1903, filed first and second years' proof on her entry, said entry will therefore not be canceled but will be allowed to stand, subject to future compliance with the law. It further appearing that the signature of the officer before whom the affidavits in support of Pollard's aforesaid application were sworn to and subscribed is omitted therefrom, the said papers will be returned for the purpose of having the signature of said officer attached thereto, and then, if there be no objection, other than those herein specified, Pollard will be allowed to include in her original entry the land applied for by her.

The decision of your office is accordingly reversed.

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SOLDIERS' ADDITIONAL HOMESTEAD CERTIFICATE—ACT OF AUGUST
18, 1894.

F. W. McREYNOLDS.

The provision in the act of August 18, 1894, validating certain soldiers' additional homestead certificates therein described, applies only to such certificates in existence at the date of the passage of the act.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *July 15, 1904.* (V. B.)

F. W. McReynolds has filed, and the Department has considered, a motion for review of its unreported decision of February 23, 1904, affirming that of your office which refused to certify to him and in his name the alleged unused portion of the certificate of additional right of homestead entry, issued August 13, 1881, to Jonathan Tice, for 52.20 acres, said unused portion being 12.80 acres.

No specification of errors is filed with said motion, but an elaborate argument by counsel is presented which will be treated as a specification, the only question involved being one of law.

The essential facts of this case are that on April 4, 1872, Tice, hav-

ing served in the army of the United States, made homestead entry at Ionia, Michigan, for 107.20 acres. March 12, 1879, he made an additional homestead entry of 40 acres at Taylors Falls, Minnesota. This last entry, being of land within the Mille Lac Indian reservation, was canceled by order of the Secretary on May 21, 1879. October 15, 1880, on application made in behalf of Tice, a certificate of right was issued to him for 52.80 acres. On August 7, 1882, the Secretary ordered that the Taylors Falls entry be reinstated. September 24, 1891, the attorney of Tice, being called upon, surrendered the certificate of right theretofore issued, which had not been located, and it was canceled. The additional entry of 40 acres was reinstated and on October 3, 1891, patent was issued therefor.

Subsequently, McReynolds, as assignee, filed an application in your office for a recertification to him and in his name of the unused portion of said certificate of additional right, which application was, as before stated, rejected by you.

It is contended by the movant that the said certificate of right was confirmed by the act of August 18, 1894 (28 Stat., 397), which is as follows:

That all soldiers' additional homestead certificates heretofore issued under the rules and regulations of the General Land Office . . . shall be and are hereby declared to be valid notwithstanding any attempted sale or transfer thereof.

The question thus presented, and this is the only one in the case, has been before the Department in several cases and decided adversely to the present contention, the Department holding that the act only confirmed certificates which were in existence at the date of its passage. As this certificate had been canceled long prior to the passage of the act, it was held, and must be now held, that the act has no application whatever to it. The correctness of the view of the Department is fully confirmed by the decision of the Supreme Court in the analogous case of *Parsons v. Venzke* (164 U. S., 89, 91). That case arose under the confirmatory provisions of section 7 of the act of March 3, 1891 (26 Stat., 1095), which provided—

that all entries made under the pre-emption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificates issued and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to *bona fide* purchasers or incumbrancers, for a valuable consideration, shall, unless, upon an investigation by a Government agent, fraud on the part of a purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the land department of such sale or incumbrance.

It was sought to apply the confirmatory provisions of that act to an entry which had been canceled before its passage. The court said, on page 91:

We think that statute inapplicable. It was passed long after the action of the land department in cancelling the entry and restoring the land to the public domain, and

when there was no subsisting entry to be confirmed. The theory of the plaintiff in error is that the act applies to all entries which had ever been made prior thereto, whether subsisting or cancelled. But clearly it refers to only subsisting entries.

Again, on page 92, the court says:

The term used in the section, "confirmed," implies existing contracts which, though voidable, have not been avoided, and not contracts which once existed but have long since ceased to be.

With the motion for review is filed the affidavit of Tice, wherein he swears that he never authorized the surrender of the original certificate or its cancellation. This statement, in view of the record facts in the case, will not affect the judgment of the Department.

For the reasons stated, and upon consideration of said motion and the argument of counsel therewith, no reason is seen for disturbing the departmental decision, and, none appearing otherwise, the motion for review is denied.

REGULATIONS CONCERNING THE LOCATION AND PATENTING OF COAL
LANDS IN THE DISTRICT OF ALASKA.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., July 18, 1904.

The following instructions, issued under the act of Congress approved April 28, 1904 (33 Stat., 525), entitled "An act to amend an act entitled 'An act to extend the coal-land laws to the district of Alaska,' approved June 6, 1900" (31 Stat., 658), are for the guidance of the local officers in their administration of the law and for the information of those concerned in its provisions.

Section 1 of said act provides, among other things—

That any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty, eighty, or one hundred and sixty acres, with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments, so that the boundaries thereof may be readily and easily traced.

Persons or associations of persons locating coal lands in the district of Alaska under this provision of the act are required to possess the qualifications of persons or associations making entry under the general coal-land laws of the United States, and the requirements in this particular are to be found in the coal-land circular approved July 31, 1882 [1 L. D., 687; paragraphs 30 and 31 amended, 32 L. D., 382].

The requirement of the statute with respect to the form of the tract

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

The permanent monuments to be placed at each of the four corners of the tract located may consist of—

First. A stone at least 24 inches long, set 12 inches in the ground, with a conical mound of stone $1\frac{1}{2}$ feet high, 2 feet base, alongside.

Second. A post at least 3 feet long by 4 inches square, set 18 inches in the ground and surrounded by a substantial mound of stone or earth.

Third. A rock in place; and, whenever possible, the identity of all corners should be perpetuated by taking courses and distance to bearing trees, rocks or other objects, permanent objects being selected for bearings whenever possible.

It is further provided by the first section of the act that within one year from the date of the passage of the act, or within one year from making the location, the locators shall file for record in the recording district and with the register and receiver of the land district in which the land is located or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same. In other words, the notice should contain a complete description in every particular of the claim as it is marked and monumented upon the ground.

By the second section of the act the locator or his assigns is allowed three years from the date of filing the notice prescribed in the first section of the act within which to file an application with the local land officers for a patent for the land claimed. It will thus be seen that persons or associations of persons claiming coal lands in that district at the date of the passage of the act have four years from location within which to present their applications to purchase the same, and persons or associations of persons locating thereafter have the same period of time within which they may apply for patent; and patents may be issued to the locators or their assigns who are citizens of the United States.

Persons or associations of persons who fail to record their notices within the time prescribed by the first section of the act, or fail to file application for patent in the time prescribed by the second section, will be considered as having forfeited their rights, providing a

valid adverse right has intervened, and parties who file after the time prescribed do so at their own risk.

With the application for patent the claimant must file a certified copy of the plat of survey and field notes thereof made by a United States deputy surveyor or a United States mineral surveyor, duly approved by the surveyor-general for the district of Alaska. Under this clause of the act it will be allowable for the claimant, at his own expense, to procure the making of a survey by one of the officials mentioned without first making application to the surveyor-general, but the survey when made is to be submitted to and approved by the surveyor-general, and by him numbered serially.

The survey must be made in strict conformity with or be embraced within the lines of the location as appears from the record thereof in the recording district, and must be made in accordance with the rules laid down in the circular relative to mining claims, approved December 18, 1903 [31 L. D., 453; 32 L. D., 367], and covered by paragraphs 115 to 169 thereof, so far as the same may be applicable.

Upon the presentation of an application for patent, as provided by section 2, if no reason appears for rejecting the application, the same will be received by the register and receiver and the claimant required to publish a notice of such application for the period of sixty days in a newspaper in the district of Alaska published nearest the location of the particular lands, and the register will post a copy of such notice in his office for the same period. When the notice is published in a weekly newspaper, 9 consecutive insertions are necessary. When in a daily newspaper, the notice must appear in each issue for 61 consecutive issues. In both cases the first day of issue must be excluded in estimating the period of sixty days.

The notice so published and posted must embrace all the data given in the notice posted upon the claim. In addition to such data, the published notice must further indicate the locus of the claim by giving the connecting line as shown by the field notes and plat between a corner of the claim and a United States mineral monument or a corner of the public survey, if there is one, and fix the boundaries of the claim by courses and distances.

At the same time the claimant will be required to cause a copy of such notice, together with the certified copy of the official plat of survey, to be posted upon the land applied for in a conspicuous place.

The publication in the newspaper and the posting upon the land and in the local land office must cover the same period of time.

Upon the expiration of the sixty days' period prescribed the claimant may file in the local land office a sworn statement from the office of publication, to which shall be attached a copy of the notice published, to the effect that the notice was published for the statutory period, giving the first and last day of such publication, and his own

affidavit showing that the plat and notice aforesaid remained conspicuously posted upon the claim sought to be patented during said sixty days' period of publication, giving the dates. The register will also file with the record a certificate showing that the notice was posted in his office for the full period of sixty days, such certificate to state distinctly when such posting was done and how long continued.

Thereupon, not earlier than six months after the expiration of the period of publication, if no objections are interposed or adverse claim filed, entry may be allowed upon payment of the price per acre specified by the act.

The proviso to the second section of the act is as follows:

That nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

The term "shore" is defined to mean the land lying between high and low water marks of any navigable waters within said district.

Section 3 provides for the assertion, by any person or association of persons, of an adverse claim, and requires that such adverse claim shall be filed during the period of posting and publication, or within six months thereafter; that it shall be under oath and set forth the nature and extent thereof.

An adverse claim may be verified by the oath of the adverse claimant or by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated, and, when verified by such agent or attorney in fact, he must distinctly swear that he is such agent or attorney in fact and accompany his affidavit by proof thereof. The adverse claimant should set forth fully the nature and extent of the interference or conflict by filing with his adverse claim a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict; whether the adverse party claims as a purchaser for valuable consideration or as a locator; if the former, a certified copy of the original location, the original conveyance or duly certified copy thereof or an abstract of title from the office of the proper recorder should be furnished, or, if the transaction was a merely verbal one, he will narrate the circumstances attending the purchase, the date thereof and amount paid, which facts will be supported by the affidavits of one or more witnesses, if any were present at the time; and if he claims as a locator he must file a duly certified copy of the location notice from the office of the proper recorder and his affidavit of continued ownership.

Upon the filing of such adverse claim within the sixty days' period of posting and publication, or within six months thereafter, the party who files the adverse claim will be required, under the act, within sixty days after the filing of such adverse claim, to begin an action to quiet title in a court of competent jurisdiction within the district of Alaska.

All papers filed should have indorsed upon them the precise date of filing, and upon the filing of an adverse claim within the time prescribed by the statute all proceedings on the application for patent will be suspended, with the exception of the completion of the publication and posting of notice and plat and filing the necessary proof thereof, until final adjudication of the rights of the parties. In case of final judgment rendered on an adverse suit to determine the right of possession, the party entitled under the decree must, before he is allowed to make entry, file a certified copy of the judgment.

Where such suit has been dismissed a certificate of the clerk of the court to that effect, or a certified copy of the order of dismissal, will be sufficient. Where no suit has been commenced against the application for patent within the statutory period, a certificate to that effect by the clerk of the Territorial court having jurisdiction will be required.

The notice of location and the application for patent should respectively, so far as practicable, in substance follow the forms prescribed in the coal-land circular of July 31, 1882, for declaratory statement and affidavit at time of purchase.

Section 4 provides---

That all the provisions of the coal-land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska.

A copy of the act is attached.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved:

THOS. RYAN,
Acting Secretary.

[PUBLIC—No. 204; 33 Stat., 525.]

AN ACT To amend an act entitled "An act to extend the coal-land laws to the district of Alaska," approved June sixth, nineteen hundred.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty, eighty, or one hundred and sixty acres, with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments, so that the boundaries thereof may be readily and easily traced. And all such locators shall, within one year from the passage of this act, or within one year from making such location, file for record in the recording district, and with the register and receiver of the land district in which the lands are located or situated, a notice containing the name or names of the locator or locators, the date of the location, the

description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same.

SEC. 2. That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated an application therefor, accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor, duly approved by the surveyor-general for the district of Alaska, and a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the district of Alaska published nearest the location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat of survey, to have been kept posted in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located for a like period, and until after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal-land laws: *Provided*, That nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

SEC. 3. That during such period of posting and publication, or within six months thereafter, any person or association of persons having or asserting any adverse interest or claim to the tract of land or any part thereof sought to be purchased shall file in the land office where such application is pending, under oath, an adverse claim, setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of such court therein.

SEC. 4. That all the provisions of the coal-land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska.

Approved, April 28, 1904.

INDIAN LANDS—UMATILLA RESERVATION—ACTS OF MARCH 3, 1885,
AND JULY 1, 1902.

DAVIS *v.* NELSON.

The acts of March 3, 1885, and July 1, 1902, relating to the disposition of lands in the Umatilla Indian reservation, must be construed *in pari materia*, the second act being considered as merely another section added to the first; and so construed the amount of land which may be purchased, by one person, under either or both of said acts is limited to "one hundred and sixty acres of untimbered lands and an additional tract of forty acres of timbered lands," as provided by section two of the act of 1885.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *July 18, 1904.* (V. B.)

The appeal of Christian L. Nelson from your office decision rejecting his application to purchase the NE. $\frac{1}{4}$ of Sec. 2, T. 1 N., R. 32 E.,

La Grande land district, Oregon, is now before the Department for consideration.

By the act of March 3, 1885 (23 Stat., 340), it was directed that allotments be made to Indians residing within the Umatilla reservation, and that after said allotments were made as therein directed, by section 2 of said act it was provided as follows:

The said lands, when surveyed and appraised, shall be sold at the proper land office of the United States, by the register thereof, at public sale, to the highest bidder, at a price not less than the appraised value thereof, such sale to be advertised in such manner as the Secretary of the Interior shall direct.

Each purchaser of any of such lands at such sale shall be entitled to purchase one hundred and sixty acres of untimbered lands and an additional tract of forty acres of timbered lands, and no more.

Under the provisions of said section Nelson became the purchaser at public sale of 160 acres of land. Subsequently, by the act of July 1, 1902 (32 Stat., 730), Congress provided as follows:

That all the lands of the Umatilla Indian reservation not included within the new boundaries of the reservation and not allotted or required for allotment to the Indians, and which were not sold at the public sale of said lands heretofore held at the price for which they had been appraised, and upon the conditions provided in an act entitled "An act providing for allotment of lands in severalty to the Indians residing upon the Umatilla reservation, in the State of Oregon, and granting patents therefor, and for other purposes," shall be sold at private sale by the register of the land office in the district within which they are situated, at not less than the appraised value thereof, and in conformity with the provisions of said act.

Nelson has applied to make purchase of an additional 160 acres, and against his application Dell Davis has filed a protest, which protest was dismissed by the local officers, but has been sustained by the decision of your office, from which action Nelson has appealed to the Department.

The question involved is a very simple one. The two acts of Congress relate to the same subject and are to be construed *in pari materia*. The first act provides for the disposal of the lands in question at public sale, the quantity not to exceed 200 acres to one individual. The second act, which is clearly supplementary and complementary to the first, simply provides that the lands which have not been disposed of at public sale may be disposed of at private sale upon the same terms and conditions as provided for the first sale. Reading the two acts together, and looking to the purpose of Congress, it is obvious that the acts should be read as if the second were merely another section of the first and provided that the remaining lands, which were not disposed of at public sale, should be subject to private cash entry.

The decision of your office is affirmed.

FOREST RESERVE—LIEU SELECTION—NON-MINERAL AND NON-SALINE
AFFIDAVITS.

E. O. MILLER ET AL.

The general statements in the non-mineral affidavit filed in support of an application to select lands under the exchange provisions of the act of June 4, 1897, that there are not within the limits of the land any placer, cement, gravel, "or other valuable mineral deposits," and that the land is "essentially non-mineral land," will not be accepted as a sufficient compliance with the requirements of the circular of November 14, 1901, relative to proof of the non-saline character of the land.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, July 18, 1904.* (J. R. W.)

E. O. Miller and the Mount Whitney Power Company, transferee, appealed from your office decision of June 10, 1904, rejecting Miller's application, number 4964, your office series, under the act of June 4, 1897 (30 Stat., 36), to select the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 4, T. 17 S., R. 29 E., M.D.M., Visalia, California, in lieu of land relinquished to the United States in the Sierra Forest Reserve, California.

February 4, 1902, Miller presented his application at the local office and therewith filed his deed, duly recorded, January 9, 1902, relinquishing to the United States the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 21, T. 19 S., R. 31 E., M.D.M., situate in the Sierra Forest Reserve, and a duly authenticated abstract of title showing that the tract assigned as base for the selection was patented by the United States, August 9, 1897, to George U. Wray, who conveyed it, January 6, 1902, to Miller, who, January 9, 1902, recorded his deed conveying it to the United States, and that the title thereto was then free of any lien for taxes or other incumbrances. With the application was filed proof in due form that the land selected in lieu thereof was then vacant, unoccupied, and non-mineral in character, but without specific proof as to its non-saline character, as required by circular of November 14, 1901 (31 L. D., 130). September 29, 1903, affidavit was made before the register of the local office, and filed in the case, that the land selected contained no salt spring or salt deposit in any form, and was not within six miles of any mining claim, but without any proof as to its being at that time unoccupied, or that it was then of non-mineral character. December 29, 1902, the land was withdrawn from entry or other disposal with view to its proposed inclusion within a forest reserve. Your office held that—

there has been no concurrent showing as to the character and condition of the selected land until the receipt of a non-mineral, non-saline and non-occupancy affidavit executed May 27, 1904, . . . December 29, 1902, the selected land was withdrawn for a proposed forest reserve, and, as the selector had acquired no vested rights in said land at that date, by reason of his failure to show its character and condition, prior to said date, and as the land is not now available for selection by reason of its withdrawal for the purpose mentioned, the selection cannot be approved.

You will require the selector to elect within sixty days from notice hereof whether he will abide by his selection as made, subject to the said withdrawal of the land, to file a new selection in lieu thereof, or to appeal from this requirement; in default of which the selection will be rejected.

The appeal insists that the original non-mineral affidavit was sufficient to prove the non-saline character of the land, inasmuch as it is stated that there were not within the limits of the land any placer, cement, gravel, "or other valuable mineral deposits," and that the land was "essentially non-mineral land."

This contention can not be sustained. While in the generic sense salt is properly classed as a mineral, it is not one of those minerals included or intended by the term mineral in the general laws relating to mineral lands, and salines were not, prior to the act of January 31, 1901 (31 Stat., 745), subject to entry under the statutes authorizing disposal of mineral lands. *Southwestern Mining Company* (14 L. D., 597); *Salt Bluff Placer* (7 L. D., 549).

The general policy of all land legislation, until the act of 1901, *supra*, has been to reserve all salt deposits from disposal. Salt has always been regarded specifically, by itself, and apart from other minerals. In the act of 1901, permitting entry of salt deposits under the mining laws, it is still treated as a specific class by itself, as the act provides, "that the same person shall not locate or enter more than one claim hereunder," a condition not imposed upon entry of other minerals.

The general non-mineral affidavit was framed under the general mineral laws and long prior to the act of 1901, and has reference to those minerals referred to and intended by the general mining laws. There having been no affidavit referring to or negating existence of salt specifically, the circular of November 14, 1901 (31 L. D., 130), was not complied with. The case is therefore within the principle of the decision in *Zachary T. Hedges* (32 L. D., 520), and is thereby controlled.

Your office decision is affirmed.

HOMESTEAD CONTEST—ACT OF JUNE 16, 1898—PRACTICE.

MCDONALD *v.* OVELMAN.

In all contests against homestead entries initiated subsequent to the act of June 16, 1898, on the ground of abandonment, it must be alleged in the affidavit of contest that the settler's absence from the land is not due to his employment in the army, navy, or marine corps of the United States.

A contestee who appears specially at the hearing for the purpose of filing a motion to dismiss the contest on the ground that the affidavit of contest does not state facts sufficient to warrant cancellation of the entry, and excepts to the action of the local officers in allowing the contestant to amend the affidavit, does not, by subsequently participating in the hearing, waive or forfeit the benefit of said motion and exception.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *July 18, 1904.* (A. S. T.)

On November 7, 1899, Charles A. Ovelman made homestead entry for the NE. $\frac{1}{4}$ of Sec. 24, T. 25 N., R. 22 W., Kalispell land district, Montana.

On December 31, 1900, Alexander McDonald filed an affidavit of contest against said entry, charging that "Charles A. Ovelman has wholly abandoned said entry for more than six months last past."

Notice was issued and personally served on the defendant, fixing the hearing on February 9, 1901, at which time the contestant appeared, and the defendant appeared specially, for the purpose of filing a motion to dismiss the contest on the ground that the affidavit of contest did not state facts sufficient to warrant the cancellation of the entry, and especially on the ground that said affidavit did not allege that the defendant's absence from the land was not due to his employment in the army or navy of the United States.

Thereupon the contestant asked leave to amend his affidavit of contest, and he was allowed to amend the same so as to charge that the defendant had not resided on the land for more than six months next prior to the initiation of the contest, but the local officers declined to allow him to amend said affidavit so as to embrace the charge of non-military service. The defendant excepted to this action of the local officers. The contestant filed an amended affidavit of contest, whereupon, without passing upon the defendant's motion to dismiss, the local officers proceeded with the hearing, and both parties offered testimony. The local officers found in favor of the contestant and recommended the cancellation of the entry. The defendant appealed to your office, insisting that the local officers erred in not sustaining his motion to dismiss the contest.

On September 12, 1903, your office rendered a decision affirming the action of the local officers and holding the entry for cancellation, and from that decision the defendant has appealed to this Department, claiming that your office erred in not sustaining his said motion to dismiss the contest.

The act of June 16, 1898 (30 Stat., 473), requires that in all contests of homestead entries thereafter initiated, on the ground of abandonment, it shall be alleged in the affidavit of contest that the settler's absence from the land is not due to his employment in the army or navy of the United States.

In the case of *Burns v. Lander* (29 L. D., 484), it was held that:

The statute is mandatory, and compliance therewith can not 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 statute in question clearly applies to this case, and compliance with its requirements can not be dispensed with, nor can non-compliance therewith be cured by amendment after the service of process, the defendant having only appeared specially to object to the sufficiency of the affidavit, because of the omission therefrom of the required allegation.

The local officers should have sustained the motion of the defendant and dismissed the contest. When they failed to act upon the motion and allowed the contestant to file an amended affidavit, the defendant reserved an exception, and he relied upon the same before your office, and still does so in his appeal to this Department.

Your office held that the affidavit was defective because of the omission therefrom of the required allegation, but that inasmuch as the defendant by his own testimony showed that the entry in question was made after his discharge from the army, and that his absence from the land was not due to service in the army or navy, he thereby waived the objection previously made to the sufficiency of the affidavit.

This Department does not concur in that ruling. The defendant having appeared specially and objected to the sufficiency of the affidavit, and having excepted to the action of the local officers in permitting the contestant to file an amended affidavit, did not waive or forfeit the benefit of said motion and exception by subsequently participating in the hearing.

Your said decision is therefore reversed and said contest is dismissed.

BLACK LEAD LODE EXTENSION.

Motion for review of departmental decision of May 5, 1904, 32 L. D., 595, denied by Acting Secretary Ryan, July 18, 1904.

INDIAN LANDS—ROSEBUD RESERVATION—NON-MINERAL AFFIDAVIT.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 19, 1904.

*Register and Receiver,
Chamberlain, South Dakota.*

SIRS: All persons who apply to enter lands within the former Rosebud reservation, under numbers assigned to them pursuant to the proclamation of May 13, 1904, will be excused from filing the usual non-mineral affidavit with their applications to enter, but will be required to file that affidavit afterwards, before final certificate issues.

those intending to register and participate in the drawing provided for under the proclamation governing the disposal of these lands, and while it specified who were not qualified to register and enter, it is clear that, aside from whatever effect might be given to it in disposing of conflicting rights arising during the sixty day period, it was not intended to, nor can it be held to have in anywise modified the provisions of law governing the disposal of these lands after the expiration of such period. After the expiration of that period the remaining lands were subject to disposition under the general provisions of the homestead law without reference to the circular, and inasmuch as this contest was not initiated until after the expiration of such period, and was initiated at a time when said land might have been entered by Bell, if he was then qualified, under such general provisions, it is believed that it must be determined without reference to the circular. In this view, it will not be necessary to consider whether the circular contravened a provision of the act, *supra* providing for the disposition of these lands:

That any person who having attempted to but for any cause failed to secure title in fee to a homestead under existing laws, 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.

Bell is entitled to the benefits of this provision. In the case of James W. Lowry (26 L. D., 448), the Department in construing a substantially similar provision in section 13 of the act of March 2, 1889 (25 Stat., 980, 1005), said:

In determining the qualifications of an applicant, the status of the applicant at the date of his application must control, and if he has at such time attempted to but for any cause failed to secure title in fee to a homestead under existing law . . . he is qualified to make entry under the provisions of said section.

This case is conclusive of the question here presented. Bell had at the date of his application to make the entry in question attempted to and failed to secure title in fee to a homestead under existing law. He was therefore a qualified homesteader, and a contestant will not be heard to say that he comes within the inhibition of a circular applicable only to a time and condition which did not exist at date of contest.

The decision appealed from is reversed, and Bell's entry will be held intact to await proof of his compliance with law.

SOLDIERS' HOMESTEAD—SECTION 2307, REVISED STATUTES—RESIDENCE.

INSTRUCTIONS.

Where an entry made under section 2307 of the Revised Statutes was perfected prior to the decision of the Department in the Anna Bowes case, under departmental rulings holding that actual residence upon the land included in such entry is unnecessary, such entry, if otherwise regular and valid, will be passed to patent without regard to said decision and the instructions issued thereunder.

Acting Secretary Ryan to the Commissioner of the General Land Office, July 20, 1904.
(F. L. C.) (F. W. C.)

Your letter of May 23d last, submitting instructions under departmental decision of December 7, 1903, in case of Anna Bowes (32 L. D., 331), states that:

With respect to that portion of your decision which states that the requirements relate only to "uncompleted entries of this class," the office fails to find any provision for the disposition of entries upon which final certificate has issued, but which have not yet passed to patent. The office would be pleased to be advised whether it is contemplated that all completed entries shall be disposed of without regard to the provisions of the enclosed circular.

Replying thereto you are advised that where an entry made under section 2307 of the Revised Statutes has heretofore been perfected under departmental rulings holding that actual residence upon the land included in such an entry is unnecessary, such entry, if otherwise regular and valid, will be passed to patent without regard to said decision and the instructions issued thereunder.

MINING CLAIM—PATENT PROCEEDINGS—TRANSFER BY APPLICANT.

LIDDIA LODE MINING CLAIM.

Under paragraph 71 of the mining regulations, a transfer of an interest in a mining claim, made by the applicant for patent therefor subsequent to the filing of the application, will not be recognized by the land department, but entry will be allowed and patent issued in the name of the applicant for patent, only; the title conveyed by the patent in such case inuring by operation of law to the benefit of the purchaser, to the extent of the interest acquired by him, as "the transferee of such applicant."

Acting Secretary Ryan to the Commissioner of the General Land Office, July 20, 1904.
(F. L. C.) (F. H. B.)

By departmental decision of November 17, 1902 (unreported), in the case of Max Beckman *et al. v. Frances Wagner*, the protest of the former against the latter's application for patent to the Liddia lode mining claim, survey No. 9254, Leadville, Colorado, land district, was dismissed; and it was directed that, in the absence of other or further objection, Mrs. Wagner should be permitted to carry her patent proceedings to completion.

January 22, 1903, Joseph Tyssowski, who represented the applicant as her attorney in the above-mentioned case, filed in your office certain papers, together with a communication by him of that date in which he submitted certain questions, respecting the status of the case, for a ruling by your office, and asked that, in view of the evidence submitted by him of his interest in the claim, etc., his name be included in the entry and patent for the Liddia claim, as a joint owner, the basis for

his request being disclosed by the papers therewith filed by him to be, briefly stated, as follows: October 14, 1901 (subsequent to the filing of her application for patent), Mrs. Wagner conveyed to Mr. Tyssowski a one-fourth interest in the claim. This conveyance is recited in the abstract of title among the papers in question; and, in addition, the original deed accompanies those papers. It in terms purports to convey to Mr. Tyssowski a one-fourth interest in the claim—

and also a one quarter ($\frac{1}{4}$) interest in the application for patent for said "Liddia" lode mining claim and in the right to purchase and to make entry of said mining claim under said application for patent therefor which was filed in the United States Land Office at Leadville, Colorado, and is now pending before the Commissioner of the General Land Office.

The deed is endorsed as having been filed for record, October 22, 1901, in the county of Lake, State of Colorado. It appears to have been given in consideration of legal services rendered. At some apparently later time (the date is not mentioned) Mrs. Wagner appears to have been adjudged insane and committed to an asylum for insane in the State of Iowa; and, by certificate of the clerk of the district court of Dubuque county, Iowa, dated May 10, 1902, a guardian of her property is shown to have been appointed.

By letter of March 31, 1903, to the local officers, your office declined to rule upon the questions submitted respecting the status of the patent proceedings, and denied the request of Mr. Tyssowski, that his name be included in the final certificate of entry and the patent, on the ground that such inclusion would be violative of the provisions of paragraph 71 of the mining regulations (31 L. D., 474, 486) and that whatever interest Mr. Tyssowski may have will be fully protected by the issuance of patent to Mrs. Wagner, inasmuch as the title thereby conveyed will inure to his benefit to the extent of the interest acquired under the conveyance to him from her. The local officers were thereupon directed to permit entry to be made in Mrs. Wagner's name, if the proofs should be sufficient, with the view to carrying into effect the direction contained in the departmental decision of November 17, 1902, *supra*.

Subsequently, and on May 21, 1903, entry (No. 4985) was made in the name of "Frances Wagner, by Joseph A. Palen, duly appointed guardian of the property of said Frances Wagner, insane." This being done and the case thus brought regularly before your office for examination and action thereon, Mr. Tyssowski, April 9, 1904, submitted written request for "reconsideration and review of your said opinion of March 31, 1903," to the end that, should your office adhere to the decision therein reached, an appeal might regularly be taken to the Department. To support his request he represented to your office that one-fourth of the purchase price of the claim had been contributed by him; and that the regulation contained in said paragraph 71 was

not in force at the date of Mrs. Wagner's application, at which time, it is argued, no restrictions were imposed upon "assignments by applicants prior to entry," and can only be held to apply to applications filed after the date of its approval (July 26, 1901): Wherefore, he requested that the final certificate of entry be amended by the insertion therein of his name as a co-owner with Mrs. Wagner. A brief of "points presented in oral argument before" your office accompanies the record. In this brief Mr. Tyssowski asserts, in effect, that he accepted the transfer from Mrs. Wagner without knowledge of the change brought about by paragraph 71; cites departmental decision in the case of Thomas *et al. v. Elling* (25 L. D., 495) as holding that one of several co-owners is not entitled to patent in his individual name; and also cites departmental decision of April 4, 1904 (unreported), in the case of Baltimore Lode Mining Claim, as authority for treating this as an "exceptional case," in view of the present mental condition and consequent legal incapacity of the applicant "and the resulting inconvenience and difficulties under which a joint owner would be placed."

May 10, 1904, your office, expressing recognition of the binding force upon it of the provisions of paragraph 71, transmitted here the record, and, "considering the special features in this case," recommended that, "if in the judgment of the Department meritorious," Mr. Tyssowski's request be granted.

For convenient reference, the pertinent portion of paragraph 71 is here given:

Transfers made subsequent to the filing of the application for patent will not be considered, but entry will be allowed and patent issued in all cases in the name of the applicant for patent, the title conveyed by the patent, of course, in each instance inuring to the transferee of such applicant where a transfer has been made pending the application for patent.

Mr. Tyssowski has filed a brief with the Department, which, among other things, substantially covers the points presented before your office. He cites a number of cases to the effect that a mining claimant may transfer his possessory right or interest at will, and certain provisions of the mining laws will recognize the right of the transferee to apply for mineral patent. With respect thereto it is sufficient to say that the regulation is in no wise in conflict with either, but simply provides that the land department will not take into account a transfer made after application for patent is filed, the justification therefor being therein stated.

The Baltimore case, relied upon in part (which is decisive of no particular question), is in no sense parallel to this case. Three special features were presented in that case, not present here. There the transferee took his title, not by conveyance from the applicant for patent, but under judicial sale of the applicant's interest, levied upon, to satisfy a judgment; that interest was purchased by the transferee

prior to the approval of the mining regulations in which the present paragraph 71 first appears; and the right of possession of a portion of the claim concerned, involved in a suit upon an adverse claim, had been awarded to the transferee, personally. In view of the particular and unusual circumstances there presented, the entry (in the name of the transferee) was allowed to stand as made.

Mr. Tyssowski took his apparent interest by direct conveyance from the applicant for patent, expressed in terms of the fee simple; and the deed submitted by him as the original is shown to have been duly recorded. If patent shall be issued, in the name of the applicant, and recorded, the local records upon which both deed and patent are spread will disclose the claimed title of Mr. Tyssowski; and the title conveyed by the patent will inure by operation of law to his benefit, to the extent of such interest as he may have acquired, as "the transferee of such applicant." It is further to be observed that the conveyance to him was made nearly three months after the approval of the regulation in question, and he could not be heard to plead ignorance of the latter, were that material. Whatever objection might be urged against the observance of the regulation in cases of *transfers* made prior to its approval and promulgation, the date of the application for patent would not affect the question as to whether the application of the regulation would be retroactive; and this case falls squarely within its contemplation.

The recitals in the deed, with respect to an "interest in the application for patent," etc., do not enlarge any right acquired by Mr. Tyssowski by the conveyance to him of an interest in the land itself, and are to be treated as surplusage.

The Thomas-Elling case does not have even a remote application to the situation here presented. There Elling, one of several alleged co-owners, filed an application for mineral patent, omitting therefrom the names of those alleged to be then co-claimants with him; and in the course of its opinion the Department remarked:

If Elling be not the sole owner, it follows that he is not entitled to patent in his individual name.

The Department is unable to concur in your recommendation; and the request of Mr. Tyssowski, that his name be included in the entry and patent, is denied.

**FORT SIERMAN MILITARY RESERVATION—ACTS OF JULY 5, 1884, AND
JULY 17, 1902.**

INSTRUCTIONS.

Congress having by the act of July 5, 1884, provided for the disposal of lands in abandoned military reservations, the Secretary of the Interior is without authority to dispose of such lands in any other manner, or to segregate them for use as a reservoir site in connection with an irrigation project under the act of June 17, 1902.

Acting Secretary Ryan to the Director of the Geological Survey, July
(F. L. C.) 20, 1904. (E. F. B.)

The Department is in receipt of your letter of June 27, 1904, communicating a request from the district engineer for Washington, that the Fort Sherman military reserve, in the State of Idaho, be withdrawn as a reservoir site in connection with the Big Bend project in the State of Washington.

You call attention to the fact that preparations are being made for the disposal of the lands of said reservation, which has been abandoned for military purposes, and you submit the question, whether it is competent for the Secretary of the Interior to segregate the lands within said reservation for reservoir purposes under the act of June 17, 1902.

The Fort Sherman abandoned military reservation, containing 591.35 acres of land upon which are fifty-seven buildings, was turned over to this Department October 5, 1900, to be disposed of under the provisions of the act of July 5, 1884 (23 Stat., 103), for the disposal of abandoned and useless military reservations. The direction contained in that act, as to the manner in which such lands shall be disposed of, is a prohibition against the disposal of them in any other manner. Hence, it is not competent for the Secretary of the Interior to segregate these lands for the purposes contemplated by your letter, or to dispose of them in any other manner except as provided by the statute.

Upon the request of the Senators from the State of Washington all action looking to the disposal of these lands was temporarily withheld, in view of contemplated legislation converting said reservation into a National Soldiers' Home. Upon the withdrawal of that request, the Commissioner of the General Land Office was by letter of February 12, 1904, directed to take the necessary steps for the disposal of the reservation under the act of July 5, 1884, both as to the lands and the buildings, but the appraisement has not yet been submitted to the Department for approval.

The act of April 28, 1904 (33 Stat., 452, 485), contains a provision as follows:

That the Secretary of the Interior is hereby authorized, in his discretion, to set apart from the Fort Sherman abandoned military reservation in the State of Idaho, twenty acres of land on the southeast corner thereof, immediately west of the depot grounds, extending forty rods along the lake front and eighty rods back, and the same is hereby granted and donated to the town of Coeur d'Alene, in the State of Idaho, for the use of said municipality as a public park, and which shall be used for such purpose exclusively. The title of said land so detached is hereby vested in the town of Coeur d'Alene for the purposes above specified.

No action has been taken under this provision of law.

There is no reason why these lands may not be temporarily withheld from disposal under said act of 1884 to await Congressional action, if it be apparent that they will be required for public use in connection

with any project, and that if disposed of, the Secretary of the Interior would necessarily be compelled, under the authority conferred by the act of June 17, 1902, to re-acquire the title for the United States by purchase or condemnation. In such case it is evident that the withholding of these lands from disposition to await the action of Congress would be in pursuance of the public good and in the interest of sound and prudent administration.

But it does not appear from anything contained in your letter that the use of the lands within said reservation is essential to the practical operation of the contemplated project, and upon such indefinite showing it is not deemed advisable at present to give to the Commissioner any further direction with reference to said reservation, inasmuch as the lands can not be disposed of until the approval of the appraisement by the Department. When that is submitted for approval, action thereon will be withheld until the reclamation service has been given opportunity to make a full examination and report as to the necessity for the use of said lands in connection with said project, and the extent thereof. You will cause the examination and report to be made, and submit the same to the Department, with your recommendation thereon, as soon as practicable.

MINING CLAIM—PATENT PROCEEDINGS—PENDING ADVERSE SUIT.

RING *v.* MONTANA LOAN AND REALTY CO.

The principle, that where an application for mineral patent can not, by reason of a pending suit in court based upon an adverse claim or of a pending protest before the land department, be prosecuted to completion by making payment and entry for the land involved, and no opportunity has been afforded therefor, the applicant can not be charged with laches and held to have waived and lost the rights acquired under his application, can be invoked only where the barrier interposed to entry is such as the applicant can not himself remove, or of right cause to be removed.

The pending suit in court must be such as the statute contemplates, brought and maintained "to determine the question of the right of possession," and, during its pendency, have for its end the decision of a *controverted* question thereof between the parties thereto.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *July 22, 1904.* (F. H. B.)

October 29, 1898, the Montana Loan and Realty Company filed application for patent to the Golden Rule placer mining claim, survey No. 5418, Helena, Montana. During the period of publication E. W. Kemper *et al.*, claimants of the Belleview placer mining claim, filed an adverse claim, upon which suit in court was seasonably instituted and remained pending until September 27, 1901, when it was dismissed upon stipulation between the parties.

November 9, 1901, Eugene Ring, Jr., filed protest against the application, in which it is alleged, in substance and effect, that for two years then last past the applicant had failed to make the required annual expenditures (Sec. 2324, R. S.), in labor or improvements, upon the Golden Rule claim, and that on or about September 24, 1901, protestant and five others made relocation of the ground therein embraced.

November 27, 1901, the local officers dismissed the protest, under the authority of departmental decision in the case of The Marburg Lode Mining Claim (30 L. D., 202), substantially for the reason that the Montana company, applicant for patent, had been prevented, by the pendency of the suit in court based upon the adverse claim, from making payment and entry prior to September 27, 1901, the date of the dismissal of that suit. By decision of August 30, 1902, your office, upon appeal by protestant, sustained the action of the local officers; and, upon further appeal by protestant, your decision was affirmed by departmental decision of January 22, 1903 (unreported).

Protestant has since filed his corroborated affidavit, in which it is alleged, among other things not material here, in substance, that the stipulation to dismiss, in which the parties to the suit in question joined, was placed in the hands of the defendant in said suit (the Montana company) on or before February 16, 1899, and by it held in abeyance, so that the suit was not dismissed until September 27, 1901; and protestant asks that a hearing be ordered. Upon receipt and consideration of the affidavit and application, the Department, November 20, 1903, returned the record and directed your office to call upon the Montana company to make, within thirty days from receipt of notice, such showing as it might desire in explanation of its failure seasonably to file the stipulation in question, if the facts be as alleged by protestant, or in contradiction of protestant's allegations; and, upon receipt of such showing, or otherwise at the expiration of the time allowed therefor, to retransmit to the Department, for its further action, all the papers in the case.

With its report of compliance with the directions of the Department, your office now resubmits the record, accompanied by two affidavits filed on behalf of the company in response to the departmental requirement aforesaid. In these affidavits, taken together, one by the attorney for the company since February 1, 1900, and the other by the agent in active charge of the property, it is stated, among other things, in substance and effect, as follows:

That it is not true that the stipulation to dismiss the aforesaid suit was placed in the hands of the defendant company on or before February 16, 1899, or was held in abeyance by it for any time whatever; that shortly after the institution of said suit the parties entered into negotiations looking to a settlement of the controversy, as the result whereof the defendant company agreed to convey, and thereupon by

deed dated February 15, 1899, did convey, to the plaintiffs twelve and one-half acres of the Golden Rule claim, and plaintiffs agreed forthwith to dismiss the suit, which they wholly failed and neglected to do; that soon after said settlement the president of the company, under whose direction the patent proceedings had been prosecuted and the settlement effected, resigned his position and removed from the State of Montana; that from the date of settlement of the controversy aforesaid until about September 25, 1901, affiants believed that entry for the Golden Rule claim had been made, and for that reason did not cause annual assessment work to be performed for the years 1899 and 1900; that some time prior to the date when the suit was dismissed, one Dupont B. Vincent, local representative of Mary W. Vincent, purchaser of a one-fourth interest in the twelve and one-half acres of the Golden Rule claim above mentioned, called at the office of the agent in charge of the Golden Rule claim and inquired concerning the status of the claim, and was informed that it was believed that entry had been made therefor but that the facts would at once be ascertained; that one of the affiants thereupon addressed an inquiry concerning the matter to the local officers, and about September 25, 1901, received advice that entry had not been made, whereupon the company's agent aforesaid caused work upon the claim to be at once resumed; that affiants then discovered that the aforesaid adverse suit had not been dismissed by the plaintiffs therein, whereupon the company's attorney aforesaid prepared a stipulation for dismissal, caused the same to be signed without delay by plaintiffs' counsel, filed the same in the court in which the suit was pending, and on the next day and at the earliest possible moment secured an order of the court dismissing the suit in accordance with said stipulation; that upon the resumption at this time of work upon the claim there was found posted thereon notice of relocation, as the "V and R" placer claim, by Dupont B. Vincent, Mary W. Vincent, Eugene Ring, Jr., and others; that the fact is that said "V and R" placer claim was located in bad faith and in derogation of the title under which Mary W. Vincent acquired her interest in the claim; that protestant, Ring, "had no right whatever in said premises prior to the time when he joined said Dupont B. Vincent and Mary W. Vincent in the location of said 'V and R' placer claim, and that the rights of the protestant . . . were in no way whatever prejudiced by the failure of the defendant company to perform annual labor upon said Golden Rule claim during the years 1899 and 1900," but that he seeks to deprive the company of its rights upon a technicality; that the failure of the company to perform annual labor upon the claim for the years mentioned was due wholly to the *bona fide* belief entertained that entry had been made; that since discovery of the fact that entry had not been effected diligent effort has been made to enter the claim, but that this end has

been prevented, first, by the pending protest and, second, by the fact that a former suit is yet pending between the claimants of said Belleview claim and claimant of the Golden Rule, which, however, the affiant attorney believes was virtually settled by the settlement of February 15, 1899, before mentioned.

It is affirmed under oath on the one side, and denied under oath on the other, that a stipulation for the dismissal of the first-mentioned suit in court was entered into between the parties and placed in the hands of the defendant company on or before February 16, 1899, and by the latter held in abeyance until about September 27, 1901, when it was filed in court and the suit on that day dismissed. So far as this controverted question is concerned, it could not, under the uniform rule of the Department, be determined upon the *ex parte* affidavits submitted, but only after hearing regularly had. It would appear, however, that this question need not at this time be considered.

The admitted facts are, that the suit based upon the adverse claim of Kemper *et al.* was compromised, on or about February 15, 1899, and was dismissed September 27, 1901, more than two and one-half years thereafter; that the officers of the defendant company, after the withdrawal therefrom of the president, were ignorant of the status of the claim, as to whether the suit had been dismissed as agreed by the plaintiffs or whether entry for the claim had been made or attempted, and took the first steps to ascertain the facts late in 1901, when prompted by the inquiry made by Dupont B. Vincent; and that notice of relocation was found upon the claim at the time of the resumption of work thereon, after an interval of two years, by the company.

In the Marburg case, *supra*, upon the authority of which the apparent rights of the company under its application for patent were, on the showing by the record as then made up, successively upheld by the local officers, your office, and the Department, it was held that where an application for mineral patent can not, by reason of a pending suit in court based upon an adverse claim or of a pending protest before the land department, be prosecuted to completion by making payment and entry for the land involved, and no opportunity has been afforded therefor, the applicant can not be charged with laches and brought within the principle of the case of Cain *et al. v.* Addenda Mining Company (29 L. D., 62), and other like cases, as having waived and lost the rights acquired under his application. The principle rests upon the ground that by reason of the pendency of adverse or protest proceedings it has been rendered impossible, under the law and official regulations, for the applicant to complete his patent proceedings by making payment and entry for his claim, even if it were attempted. But the barrier interposed to his entry must be such as the applicant can not himself remove, or of right cause to be removed. The pending suit in court must be such as the statute contemplates, brought "to

determine the question of the right of possession" and maintaining that character up to the time of its final determination, and not a dead suit, subsisting solely as a matter of record and within the power of the defendant-applicant to cause to be dismissed. It must be a suit which, during its pendency, has for its end the decision of a *controverted* question of the right of possession as between the parties thereto, and in view of which the statute requires a stay of the proceedings in the land department until the question shall have been settled or decided by the court or the adverse claim waived. The applicant must rely upon his legal rights, and may not rely upon the negligence or default of his adversary when it is in his power to compel action favorable to himself. If he pursues the latter course, he is not within and may not invoke the principle of the Marburg case.

By the admissions of the applicant company in the case at bar, the Kemper-Montana company suit was compromised almost immediately after its institution, and by the terms of the composition the plaintiffs were forthwith to dismiss the cause. Not only was this not done for more than two years and a half, but the company neither made effort during that time to enforce the agreement or even to ascertain whether a dismissal had been entered, nor attempted to make entry on the faith of the agreement. That its own remissness was equally responsible for the delay in dismissing the suit is apparent from the statement now made by the affiant attorney in its behalf, that upon discovery, about September 25, 1901, of the continued pendency of the suit, he prepared a stipulation for dismissal, "caused the same to be signed without delay by plaintiffs' counsel," and thereupon filed it and procured an order of the court dismissing the suit. On its own showing with respect to it, the company was not *prevented* from making entry, during the interval between the settlement of the controversy in court and the filing of Ring's protest, by such an adverse suit as is contemplated in the Marburg case. On its own showing, the company could have procured or compelled the prompt dismissal of the suit. By its admissions, it has neglected its interests and slept upon its rights. So far as the suit in question is concerned, therefore, it can not be relied upon to relieve the applicant company from the consequences of the ensuing delay with respect to its patent proceedings.

However, as substantially stated above, it is alleged by the attorney in the company's behalf that entry for the claim has been impossible by reason, also, of "the fact that there is a former suit pending between the claimants of said Belleview placer and said Golden Rule claim which has not yet been disposed of, but which affiant believes was virtually settled by settlement of February 15, 1899, above referred to." The record contains a further adverse claim, filed May 10, 1892, by William F. Cobban and Robert M. Cobban, as "the

missing his contest against the homestead entry of Fred F. Prince for the SE. $\frac{1}{4}$ of Sec. 19, T. 8 S., R. 8 W., Oregon City, Oregon, land district, and holding said entry intact subject to future compliance with the law.

The grounds upon which the motion for review is based are, substantially (1) that the appeal of the defendant to the Department from your office decision of October 8, 1903, holding his entry for cancellation was and is null and void and should have been dismissed for the reason that the attorney representing the defendant was at the time of the hearing in this case register of the land office at Oregon City, and is disqualified to act as attorney under section 190 of the Revised Statutes, and (2) that the said departmental decision is not sustained by the law and the facts in the case.

(1) Section 190 of the Revised Statutes provides that—

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 employe 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 employe, 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 employe.

In the case of W. D. Harlan (17 L. D., 216), it is held that the phrase "claim against the United States," as employed in said section, means a money demand against the United States, and does not apply to the prosecution before the land department of claims involving the right and title to public lands.

Attention is called in the record to section 8 of the regulations governing the recognition of attorneys desiring to practice before this Department, which is printed on the last page of the Rules of Practice, and prescribes that—

No person who has been an officer, clerk, or employe 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.

This rule (see official order of October 21, 1885, 4 L. D., 220, and also circular of February 1, 1886, 5 L. D., 337) was evidently formulated in accordance with the decision in the case of Luther Harrison (4 L. D., 179), which held that section 190 of the Revised Statutes comprehended in its terms all the Departments and that the prohibition therein extended to the prosecution of pending claims of every class, whether as counsel, clerk, or agent, during the two years designated in the said section; and notwithstanding the decision in the case of W. D. Harlan, *supra*, said rule appears to have been inadvertently carried over and printed (as section 8) in the present Rules and Regulations governing the recognition of attorneys and agents for claimants

before the Department. Said rule or regulation is, however, superseded by the aforesaid decision in the W. D. Harlan case, and no longer governs. It is clear, then, that section 190 of the Revised Statutes does not apply in the case at bar; and even if it were applicable, the objection to the appearance in this case of the said attorney for defendant, on the ground that he was disqualified under section 190 of the Revised Statutes, was not presented to your office nor to the Department when the case was being considered on appeal, and it is too late to raise and urge said objection now on motion for review. *Tyler v. Emde* (13 L. D., 615).

(2) All the material matters and questions touching the merits of the case were well and carefully considered when the case was here on appeal, and it was found that the allegations of the contest were not sustained by the evidence, and now, upon full consideration of the motion for review, specification of errors, and argument of counsel therewith, no reason is seen for disturbing the said departmental decision, and, none appearing otherwise, the motion for review is denied and with the accompanying papers is returned to your office.

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

ALBERT L. BISHOP ET AL.

The right to select public land in lieu of lands within a forest reserve relinquished to the United States under the exchange provisions of the act of June 4, 1897, is not assignable.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *July 25, 1904.* (W. C. P.)

E. J. Carpenter appealed from your office decision of December 30, 1903, denying his application for hearing in proceedings taken by your office, upon the report of a special agent, against Albert L. Bishop's homestead entry final certificate for lots 3 and 7 and the S. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 31, T. 1 S., R. 5 E., B. H. M., Rapid City, South Dakota.

September 10, 1900, Bishop made entry, and October 20, to 25, made final proof at the local office, showing settlement September, 1890, continuous residence with his family on the tract from that time, except during two months in 1891, and cultivation, fencing, erection of a dwelling house, and other improvements showing ample compliance with the homestead law.

October 28, 1902, the entry was suspended upon the report of a special agent that the improvements were on land patented to mineral claimants, that the entry was made in bad faith, that Bishop never resided upon the land, and on the day after final proof conveyed it to the United States and delivered the deed to one O. L. Cooper, October

30, 1900, for the consideration of \$494.97. With the report was transmitted the affidavit of a witness, that the land is unfit for cultivation, of little value for grazing, and none of it had been cultivated by Bishop. Another affiant gave his—

opinion that the buildings claimed by Bishop are upon patented lands owned by the Harney Peak Co., and that claimant has no cultivated lands upon his entry and never has had unless it be a small garden near the west part of his entry.

There was also transmitted at the same time the affidavit of the entryman, made before the special agent, circumstantially asserting the truth of his residence on the land with his wife and three children; that his house and other improvements thereon were of the value of \$800 to \$1000; that he had cultivated a half acre of garden; all improvements were on the land and were in no part on the patented lands of the Harney Peak Tin, Mining, Milling and Manufacturing Company, and that he sold the land after final proof to O. L. Cooper for \$494.97, paid to himself.

Personal service of suspension of the entry was given to O. L. Cooper, October 30, 1902, and to A. W. Bangs, January 5, 1903, which he receipted as "Atty," not designating his client. January, 1903, the local office transmitted an application by E. J. Carpenter, of Minneapolis, Minnesota, for a hearing, filed January 9, 1903, in support of which there was filed affidavit of E. J. Carpenter that:

about April 10th, A. D. 1901, he purchased all the rights of Albert L. Bishop to locate 144.95 acres of the public lands of the United States in lieu of lands located and owned by said Albert L. Bishop within the limits of the Black Hills Forest Reserve, which lands the said Albert L. Bishop, after final proofs had been made and received at the U. S. Land Office, at Rapid City, S. D., where the same were situated, and after issue to him of the receiver's final receipt, had duly relinquished and reconveyed to the United States, pursuant to the laws thereof relating to lieu lands within the forest reserves.

* * * * *

That this affiant received an abstract of title to said land prior to and as a part of said contract of purchase, showing all the proceedings hereinbefore set forth, and a power of attorney from said Albert L. Bishop authorizing affiant to make selection for him and in his name of the lands to which he, the said Albert L. Bishop, was entitled in lieu of the lands so relinquished; also a power of attorney to sell and convey, in the name of said Albert L. Bishop, all the lands so to be selected. That he is informed and believes that such powers are lawful and valid and a proper exercise of the rights of such locator and a proper and lawful manner of exercising the power of selection and location of such lieu lands; and that by the purchase aforesaid he acquired a valid and subsisting interest in the rights of said Albert L. Bishop, which is not subject to revocation.

That affiant is still the owner and holder of said powers and each of them and has no notice or knowledge of any wrongdoing in the premises on the part of said locator. That long after said purchase he was first informed that said entry had been suspended, subsequent to the receipt of said final proofs, for alleged failure of said locator to comply with the laws of the United States.

Therewith was filed affidavit of A. W. Bangs, named in Carpenter's affidavit as his attorney, corroborating the good faith of Carpenter's

purchase, and on information and belief denying the special agent's charges of fraud, and on Carpenter's behalf asking for a hearing to establish the good faith of the entry, and that the motion was made in good faith and not for delay.

January 29, 1903, the local office served the entryman, Bishop, with notice of suspension of the entry, and March 15, 1903, notified him that it was held for cancellation, in default of his application for hearing, subject to his right of appeal within thirty days. No appeal was filed.

July 9, 1903, your office held that:

The applicant has not shown that he is a transferee, either mediately or immediately of the right, title or claim of said Albert L. Bishop in and to the land described in said suspended entry; that the right of exchange or lieu land selection right conferred under the provision of act of June 4, 1897, upon holders of unperfected bona fide claims, within the forest reserve limits is not an assignable or transferable one and the applicant takes nothing by his alleged purchase; that the title to the alleged lieu land selection by E. J. Carpenter as attorney in fact never vested in Bishop for want of simultaneous relinquishment and proffer to and acceptance by the United States, and the said E. J. Carpenter who became an alleged purchaser by operation of the sale and conveyance clause of his power of attorney could take and did take no better title than his vendor possessed.

August 3, 1903, counsel for Carpenter filed a motion for review. December 30, 1903, your office denied the motion, and held that:

Bishop's failure to apply for a hearing relative to the suspension or to appeal from the order holding his entry for cancellation, is equivalent to a confession that the charges against his entry are true and is a waiver of his claim to said land (see first paragraph of syllabus in case of *Stebbins vs. Sweetman et al.*, 12 L. D., 189). And should it be granted that Carpenter is a transferee or an encumbrancer of record, even then he would not be entitled to hearing except on such showing as would entitle the entryman to further hearing (see 5 L. D., 589; 19 L. D., 580, and 11 L. D., 623).

Reconveyance having been made to the United States, in the absence of a formal application to select a specific tract in lieu of the land covered by Bishop's entry, I am of the opinion that Carpenter is not entitled to be heard in defense of said entry.

In *John K. McCornack* (32 L. D., 578), the alleged assignability of the right of selection under said act of 1897 was the basis of McCornack's claim. This Department, however, refused to recognize such right as assignable and affirmed the decision of the General Land Office rejecting an application made by a claimed assignee of the party who executed the deed of relinquishment. Under the authority of this decision, and nothing is now presented that raises any doubt as to its correctness, Carpenter can not be recognized as assignee of Bishop's right of selection.

Carpenter claims that under said powers constituting him attorney in fact of Bishop, he acquired "a valid and subsisting interest in the rights of said Albert L. Bishop, which is not subject to revocation." In so far as this claim involves the right of selection under the act of 1897 it can not be sustained. If it is intended by this declaration to

assert an interest in the land covered by Bishop's homestead entry, the claimant has not presented facts to sustain his claim. The powers are not among the papers and the statement of Carpenter as to their tenor does not intimate that they purported to vest in him an interest in the land, nor even that they purported to authorize him to act for Bishop in perfecting or sustaining the homestead entry. Carpenter has not done that which is required of a party to entitle him to be recognized as a party to the controversy between the United States and Bishop involving the validity of the latter's homestead entry.

The decision of your office being in harmony with the views herein expressed, is affirmed.

MINING CLAIM—DISCOVERY UPON VEIN OR LODE—VALIDITY OF LOCATION.

BUNKER HILL & C. CO. v. SHOSHONE MINING CO.

There can be no valid location of a lode mining claim until the discovery of a vein or lode within the limits of the location.

Rights granted to locators of lode mining claims, with respect to veins, lodes, and ledges found within the limits of their locations, relate to veins, lodes, and ledges the tops or apexes of which lie within the surface lines of the locations extended downward vertically, and to no other; and these rights are exclusive, and follow the veins, lodes, and ledges throughout their entire depth within the vertical end lines of the locations, where no adverse claim existed on May 10, 1872, 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 the locations.

A patent from the United States for land claimed and located for valuable mineral deposits may be obtained only by a person, association, or corporation authorized to locate a mining claim, who has or have claimed and located a piece of land for such purposes, and who has or have complied with the terms of the statute in respect to such location.

Proceedings to obtain patent for mineral land, and to determine whether the applicant for patent is qualified to enter the land and has complied with the requirements necessary to entitle him to patent, are within the jurisdiction of the land department; and only those controversies which relate solely to the right of possession as between adverse claimants under conflicting locations of the same mineral land are committed exclusively to the courts.

A location based upon discovery on the dip or downward course of a vein or lode whose top or apex lies inside the vertical lines of a prior subsisting valid location is wholly illegal and void; and where it is alleged that an applicant's location is so based, it is the duty of the land department to determine that question before the issuance of patent.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) July 27, 1904. (S. V. P.)

August 21, 1895, the Shoshone Mining Company (hereinafter called the Shoshone company) filed application for patent to the Shoshone and Summit lode mining claims, survey No. 1126, Coeur d'Alene land district, Idaho. During the period of publication of notice of the

application an adverse claim was filed by Royal J. Rutter and F. W. Bradley, owners of the Kirby Fraction lode claim, in conflict with the Shoshone claim. Suit on the adverse was brought in the United States Circuit Court for the northern division of the District of Idaho.

July 23, 1896, Rutter and Bradley were erroneously allowed to file application for patent to the Kirby Fraction claim and to have publication of notice thereof, notwithstanding the prior Shoshone and Summit application, the pending adverse against it, and the suit instituted on the adverse which was still undetermined.

Against the Kirby Fraction application the Shoshone company filed a so-called adverse claim and instituted suit thereon in the district court of the State of Idaho. The suit was subsequently removed to the United States Circuit Court and there consolidated for trial with the Kirby Fraction-Shoshone suit, originally brought in that court. The trial resulted in a decree by the Circuit Court in favor of the Kirby Fraction claimants. The consolidated case was then appealed to the United States Circuit Court of Appeals for the Ninth Circuit, where (May 23, 1898) the decree below was affirmed (59 U. S. App., 538). Upon further appeal, to the United States Supreme Court, the judgment of the Circuit Court of Appeals was reversed (April 30, 1900) on the ground that the federal courts were without jurisdiction to hear and determine either of said suits, and the case was remanded to the Circuit Court, with instructions to reverse its decree and enter a decree dismissing the Kirby Fraction-Shoshone suit and an order remanding the Shoshone-Kirby Fraction suit to the State court. (See *Shoshone Mining Co. v. Rutter*, 177 U. S., 505.) The mandate of the Supreme Court was carried into effect, but what, if any, proceedings have since been had in the Shoshone-Kirby Fraction suit in the State court does not appear from this record.

In the meantime, November 28, 1898, the Bunker Hill and Sullivan Mining and Concentrating Company (hereinafter called the Bunker Hill company), owner of the Stenwinder lode mining claim, not in conflict at the surface with the Shoshone and Summit claims or either of them, and also owner of the Kirby Fraction claim as successor in interest of Rutter and Bradley, filed a protest against the Shoshone company's application for patent, alleging, among other things, in substance and effect:

1. That neither the Shoshone company nor its grantors ever made a legal discovery of any vein or lode of mineral, having its top or apex inside the surface lines, extended downward vertically, of either the Shoshone or the Summit claim;

2. That the discoveries upon which the Shoshone and Summit locations are respectively based were made many feet below the surface upon the dip or downward course of a vein or lode of mineral, the top or apex of which lies inside the surface lines, extended downward

vertically, of the Stemwinder claim, the property of the protestant, and which was located long prior to the pretended Shoshone and Summit locations, and has since been held, occupied, and possessed by protestant and its grantors as a valid lode mining claim;

3. That five hundred dollars' worth of labor or improvements has never been expended or made upon the Shoshone and Summit claims, or upon either of them, for the development of any vein or lode of mineral having its top or apex inside the surface lines of said claims or either of them, extended downward vertically;

4. That the survey and plat upon which the Shoshone company's application for patent is based, embrace more ground than was included in the lines of the Shoshone and Summit claims as originally located.

No action was taken upon the protest at the time it was filed.

Other controversies subsequently arose which in part involved the claimed rights of the Bunker Hill company, the Shoshone company, and the Empire State and Idaho Mining and Development Company to portions of the land embraced in the Shoshone company's application for patent. These controversies finally resulted in a decision by this Department of July 28, 1900 (not reported), wherein the facts and rulings with respect thereto are fully stated. It is not material to here repeat them in detail. Among other things it was held in said decision that, inasmuch as the Kirby Fraction-Shoshone adverse suit had been finally disposed of (*Shoshone Mining Co. v. Rutter, supra*), there was no longer any reason why the Bunker Hill company's protest should not be considered and acted upon by your office.

The day before said departmental decision was rendered (July 27, 1900) the Bunker Hill company filed in the local land office a supplemental protest, wherein, among other things, it is alleged that after the dismissal of the Kirby Fraction-Shoshone adverse suit by direction of the Supreme Court, the said company instituted a suit in the United States Circuit Court for the District of Idaho (northern division) against the Shoshone company, the purpose of which is to quiet title in itself, as successor in interest to Rutter and Bradley, to the ground embraced in the Kirby Fraction-Shoshone conflict, the diverse citizenship of the contending parties and the alleged jurisdictional value of the property involved being the grounds of federal jurisdiction.

July 18, 1901, your office considered both protests (the supplemental protest having been, in the meantime, forwarded by the local officers), and by decision of that date directed that a hearing be had to determine, in substance, the following questions:

1. Whether the Shoshone and Summit locations were based on discoveries made on the dip or downward course of a vein or lode of mineral having its top or apex inside the surface lines, extended downward vertically, of another and prior location.

2. Whether the statutory expenditure in labor and improvements required as a condition to obtaining patent was made upon said claims.

3. Whether the survey of the claims embraces more ground than the locations upon which it is based.

From said decision the Shoshone company has appealed here.

It appears that suit was instituted in the United States Circuit Court for the District of Idaho by the Bunker Hill company against the Shoshone company, as alleged in the supplemental protest. The suit was dismissed by decree of the Circuit Court, but on appeal to the United States Circuit Court of Appeals the decree below was reversed and the cause remanded to the Circuit Court for further proceedings (*Bunker Hill, etc., Co. v. Shoshone Mining Co.*, 109 Fed. Rep., 504). Neither that suit, nor the Shoshone-Kirby Fraction suit brought in the State court, as aforesaid, is an adverse suit under the statute. The latter was unnecessary to protect the Shoshone company's rights as against the erroneously received Kirby Fraction application for patent (such rights being fully protected by the prior proceedings had upon the application for patent of the Shoshone company and by the failure of the Kirby Fraction claimants to institute and prosecute, in a court of competent jurisdiction within the time limited therefor, a suit based upon their adverse filed in the local land office, as hereinbefore shown—Secs. 2325-6, R. S.), whilst the former did not purport to be a suit based upon an "adverse claim" and was not brought within the time limited by the statute. The pendency of those suits is therefore without effect to stay proceedings in the land department upon the Shoshone company's application for patent.

The Shoshone and Summit claims were located in March, 1894. The Stenwinder is alleged to have been located long prior to that date.

The principal contention of the appellant is, that the land department is without jurisdiction to inquire whether a mining location is based upon discovery on the dip or apex of a vein or lode. In other words, that jurisdiction to determine matters of that character rests exclusively with the courts, and the land department has no authority to inquire into them.

The provisions of the United States mining laws (Ch. 6, Title 32, Revised Statutes), in so far as they need be here referred to, are as follows:

SECTION 2320. Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at

the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other.

* * * * *

SECTION 2322. The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie 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. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

* * * * *

SECTION 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. 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.

Sec. 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim.

From these provisions the following propositions, bearing upon the question presented by the appellant's contention, are clearly deducible: (1) That there can be no valid location of a lode mining claim until the discovery of a vein or lode within the limits of the location; (2) that rights granted to locators of lode mining claims, with respect to veins, lodes, and ledges found within the limits of their locations, relate to veins, lodes and ledges the tops or apexes of which lie within the surface lines of the locations extended downward vertically, and to no other; (3) that these rights are exclusive, and follow the veins, lodes, and ledges throughout their entire depth within the vertical end lines of the locations, where no adverse claim existed on May 10, 1872, 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 the locations; (4) that a patent from the United States for land claimed and located for valuable mineral deposits may be obtained only by a person, association, or corporation authorized to locate a mining claim, who has or have claimed and located a piece of land for such purposes, and who has or have complied with the terms of the statute in respect to such location; (5) that proceedings to obtain a patent for mineral land, and to determine whether the applicant for patent is qualified to enter the land, and whether he has complied with the requirements necessary to entitle him to a patent, are within the jurisdiction of the land department; and (6) that only controversies between adverse claimants under conflicting mining locations of the same land, and which relate solely to the right of possession, are committed exclusively to the courts. Upon the last proposition see, also, *Turner v. Sawyer* (150 U. S., 578, 587).

In *Lindley on Mines* (2nd Ed., Vol. 1, Sec. 364) it is stated:

There can be no question but that the act of July 26, 1866, contemplated a linear location along the course of the vein as exposed at the surface, where there was an outcropping exposure, or along the top or upper edge of the vein nearest to the surface, where there was no outcrop.

This general rule may be thus concisely stated: A location cannot be made on the middle of a vein or otherwise than at the top, or apex.

As was said by Judge Hallett in one of the early Leadville cases, "It is a part of the statute law of the United States that locations shall be upon the top and apex of the vein; * * * that being done, gives the miner the whole vein, and that the locator must find where the top or apex is and make his location with reference to that."

In the case of *Eilers v. Boatman*, decided in 1882 by the Supreme Court of Utah (2 Pac. Rep., 66, 71), it was held as follows:

The possession of a vein recognized by the mining laws, and to which protection is given, is by one who holds the surface where the vein makes its apex. The location of a vein or lode made upon the surface where the vein or lode finds its apex, will not be defeated by the secret under-ground workings and possession by parties having no possession of or right to the surface embracing it.

In *Mining Company v. Tarbet* (98 U. S., 463, syllabus) it was held:

A locator working subterraneously into the dip of the vein belonging to another, who is in possession of his location, is a trespasser, and liable to an action for taking ore therefrom.

In *Iron Silver Mining Company v. Cheesman* (116 U. S., 529, 533) the Supreme Court, speaking of section 2322, said:

It is obvious that the vein, lode, or ledge of which the locator may have "the exclusive right of possession and enjoyment" is one whose apex is found inside of his surface lines extended vertically; and this right follows such vein, though in extending downward it may depart from a perpendicular and extend laterally outside of the vertical lines of such surface location.

In *Larkin v. Upton* (144 U. S., 19, 21, 23) the court, speaking on the same subject, said:

It is unquestioned law that the top or apex of a vein must be within the boundaries of the claim in order to enable the locator to perfect his location and obtain title.

* * * * *
 Any portion of the apex on the course or strike of the vein found within the limits of a claim is sufficient discovery to entitle the locator to obtain title; for while the owner of a vein may follow it in its descent into another's territory beyond his own side lines, he cannot beyond his end lines, and the vein beyond those end lines is subject to further discovery and appropriation.

If it be true that the Shoshone and Summit locations are based upon discoveries on the dip or downward course of a vein or lode whose top or apex lies inside the vertical lines of the prior Stemwinder claim, owned and possessed by the Bunker Hill company, as alleged in the protest, there can be no serious question, in view of the provisions of the statute referred to and of the principles enounced in the authorities cited, that said locations were made without authority of law, are wholly illegal and void, and confer no rights upon the Shoshone company, claimant thereunder.

It is the duty of the land department, excepting as to controversies committed to the courts by the statute, to determine before issuance of patent whether the applicant is entitled thereto. To entitle a per-

son to a patent for mineral land he must show, among other things, a valid location of the land under the mining laws. There is no authority for the issuance of a patent to a mineral claimant who has not a valid location. An invalid location can not be recognized as a basis for patent. If, prior to patent, the applicant's location is challenged as invalid, as is the case here, the matter must be investigated and the validity of the location determined, or patent can not issue.

The question is not one within the exclusive jurisdiction of the courts, as contended. Controversies committed to the courts for determination are those between adverse claimants to possession under conflicting locations of the same land, and those only. This is not such a case. There is no conflict at the surface between the Stemwinder and the Shoshone and Summit claims. The facts alleged in the protest were in no sense a predicate for adverse proceedings under section 2326. It is therefore not only the right but the duty of the land department to determine the question of the validity of the Shoshone and Summit locations before proceeding further with the application for patent thereto, and there is no error in your office decision ordering a hearing for that purpose.

The case of *Beik et al. v. Nickerson* (29 L. D., 662), cited by appellant, is materially different in principle, as well as on the facts, from the case at bar. In that case *Beik et al.* protested against Nickerson's application for patent to a mining claim known as the Rattlesnake, and alleged that the issuance of patent as applied for would injuriously affect their extralateral rights as owners of a mining claim known as the Levant, located in close proximity to the Rattlesnake but not in conflict therewith. The Department held that the question of extralateral rights as between contending parties under different mining locations was one for the courts to determine, and that the issuance of patent for the Rattlesnake claim would not be an adjudication as to any such rights the Levant claimants might possess. This was not because of the special jurisdiction of the courts under section 2326, but by reason of their general jurisdiction of controversies between individuals involving property rights. There was no allegation or contention that the Rattlesnake location was based upon a discovery on the dip instead of the apex of the vein or lode claimed under it, or that the location was void for want of legal discovery in any sense, and no question such as that here presented was there decided or considered.

The charge that the expenditure in labor or improvements required as a condition to obtaining a patent was never made for the benefit of the Shoshone and Summit locations, or either of them, is but another form, as the Department understands the protest, of presenting the question of the validity of the locations. It is not denied that there has been an expenditure by the Shoshone company and its grantors of

an amount equal to that required by the statutes. The contention is that the expenditure shown was not made for the development of a vein or lode or veins or lodes legally located. The determination of the question of the validity of the locations will therefore determine the question of the sufficiency of the expenditure by the Shoshone company, and nothing further need be said in regard to it.

As to the third and last inquiry embraced in the order for a hearing, it is sufficient to say that the discretionary powers vested in your office in such matters are not shown to have been abused in this respect. Any information needed to determine whether the mineral survey has been legally made, should be had, if obtainable; and in a case like the present one, where the determination of the question will probably depend upon proof of facts not of record, a hearing is the proper means to accomplish the purpose desired.

The Department finds no error in the decision appealed from, and the same is accordingly affirmed.

RAILROAD GRANT—CONFLICTING CLAIMS—ADJUSTMENT—ACT OF
JULY 1, 1898.

NORTHERN PACIFIC RAILWAY CO.

Where the Northern Pacific Railway Company declines to relinquish a tract of land under the provisions of the act of July 1, 1898, on the ground that it has theretofore sold the tract, and the land department thereupon considers the conflicting claims to said tract and holds the land excepted from the company's grant, such adjudication will not prevent the adjustment of such conflicting claims under said act where the company subsequently makes settlement of its outstanding contract of sale and secures a reconveyance of the land from its purchaser.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *July 29, 1904.* (F. W. C.)

The Department has considered the appeal by the Northern Pacific Railway Company from your office decision of September 29, last, wherein it was held, in effect, that the conflicting claims of the Northern Pacific Railway Company and Robert K. Lansdale to the N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 35, T. 16 N., R. 43 E., Walla Walla land district, Washington, could not now be adjusted under the provisions of the act of July 1, 1898 (30 Stat., 597, 620).

The location of the tract in question with regard to the company's grant is not set forth in the decision appealed from. It does appear, however, that this tract was listed by your office in what is known as Washington list No. 25, of lands subject to adjustment under the act of 1898, which list received departmental approval December 17, 1901.

Upon being advised of the approval of said list and upon being

requested by your office to make relinquishment of the tracts included therein, under said act, the company relinquished a portion of the lands included in said list but reported its inability to make relinquishment of the tract in question because of sale of the land; whereupon your office advised Lansdale of the sale and afforded him a further opportunity to relinquish his claim to this land, but he again elected to retain the tract; whereupon your office considered the case independently of the act of 1898, holding that the land was excepted from the railroad grant, and permitted Lansdale's timber culture entry made for this land February 25, 1889, to remain intact subject to compliance with law.

The company did not appeal from the decision of your office and the same was declared final and the case closed.

The decision appealed from was predicated upon request filed by the railroad company under date of July 20, 1903, to be permitted, under the act of 1898, to now relinquish the land as originally requested, the company having in the meantime obtained a relinquishment of the land from the party holding its contract of sale.

In your office decision appealed from it is said:

To permit the company under these circumstances, to relinquish its pretended claim to the land and thereby wrongfully acquire the resulting right of selecting land in lieu of the land relinquished and to which the land department has finally adjudicated the company had no right whatever, is not, in my opinion, the proper construction to be placed on the act of July 1, 1898. If such an interpretation as this were to obtain, the railway company would get the right of making a lieu selection in every case it lost after fighting out the contest on its merits, wholly irrespective of, and without reference to, the act of 1898. Such result is certainly not contemplated by the provisions of the act.

In its appeal the railway company states that prior to the original inclusion of this land in Washington list No. 25, for relinquishment under the act of 1898, and prior to the subsequent adjudication of the case upon its merits, the company had initiated proceedings in court to eject Mr. Lansdale and final decision was rendered in the company's favor August 8, 1898, declaring it to be the owner of the land, and as Lansdale never appealed from that decision it became final and can not be reopened; that upon being requested to relinquish this land under the act of 1898 the company was obliged to report its inability to make relinquishment as requested because of the sale of the land, but, in good faith, and with a view of having all possible cases adjusted under the act, the company took steps to secure the settlement of its outstanding contract and a reconveyance from its purchaser, and urges that the decision of your office, in so far as it hinted at the possibility that the company might fight its cases as long as possible before the Department and then, if beaten upon the merits, apply for an adjustment under the act of 1898, is unfair to the company and is not warranted from a careful consideration of its

efforts, as shown by the proceedings in the land department, to adjust all possible cases under the act regardless of their merits.

It is clear that because of the sale of the land the company was not in a position to make relinquishment as originally requested. In fact, a relinquishment made at that time could not have been accepted because of the outstanding contract of purchase. The fact that under the regulations it became necessary to adjudicate the pending controversy upon its merits does not, in the opinion of this Department, prevent adjustment at this time of the conflicting claims to this land under the act. Paragraph 7 of the regulations issued under the act of 1898 (28 L. D., 103, 107), states that—

the point to which the opposing claims have been prosecuted or the extent to which they have been considered by the land department is not material, if they be otherwise within the terms of the act and the lands remain unpatented.

It does not appear that Lansdale's claim has proceeded to patent; in fact, he does not appear to have offered final proof upon his entry. Further, upon the showing made by the company in support of its appeal it seems that the relinquishment by the railway company is very necessary to Lansdale's right to hold this land.

Under all the circumstances, therefore, the Department holds that your office erred in advising the company that its relinquishment could not be accepted under the act of 1898, and you are now directed to advise the company that upon its filing a proper relinquishment under the act, if otherwise regular and satisfactory, the same will be accepted and the company will thereupon be entitled to select other lands subject to the conditions and limitations found in the act of 1898.

DESERT LAND ENTRY—ASSIGNMENT—RIGHTS OF ASSIGNEE.

T. C. POWER & BRO.

No assignable interest is acquired by the filing of a desert land declaratory statement, prior to the payment of twenty-five cents per acre for the land as required by the desert land laws.

One claiming as assignee of a desert land entry acquires no such right to the land, by showing the necessary annual expenditure and making the final proof and payment required by law, as will entitle him to patent therefor, where the assignment under which he claims was made prior to the acquisition of an assignable interest in the land by the assignor.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) July 30, 1904. (A. S. T.)

On December 5, 1898, John Shearer was by a United States commissioner sworn to a declaration of intention to reclaim, as desert land, the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 29, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 32, T. 24 N., R. 1 E., Great Falls land

district, Montana, and on the same day he executed a quitclaim deed, whereby he conveyed to T. C. Power & Bro., Incorporated, all his right, title, and interest in and to said tract of land. On December 8, 1898, said declaratory statement was filed in the local office and the necessary payment was made, and he was thereupon allowed to make desert land entry for said tract. Subsequently the local officers were notified of said conveyance by Shearer to T. C. Power & Bro.

On January 3, 1900, T. C. Power & Bro. submitted proof of first year's annual expenditure on said entry, showing an expenditure of \$171.00, and on September 4, 1900, said T. C. Power & Bro. offered proof of second year's annual expenditure, amounting to \$160.00.

On November 16, 1901, said entry was canceled on the relinquishment of T. C. Power & Bro., as to the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said Sec. 29.

On November 16, 1901, said T. C. Power & Bro. filed proof of third year's annual expenditure on said entry, amounting to \$60.00.

On June 7, 1902, T. C. Power & Bro. executed a deed of conveyance whereby said T. C. Power & Bro. attempted to convey said entry to T. C. Power & Bro., Limited, but the land was erroneously described therein as the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 32, and on August 4, 1903, said T. C. Power & Bro. executed another deed to T. C. Power & Bro., Limited, conveying and correctly describing the land embraced in said entry. This latter deed was executed for the purpose of correcting the erroneous description of the land in the deed of June 7, 1902.

On July 23, 1902, T. C. Power & Bro., Limited, made final proof in support of said entry, and made final payment thereon, and on August 7, 1902, final certificate was issued to said T. C. Power & Bro., Limited. Said final certificate was duly transmitted to your office, where on May 26, 1903, a decision was rendered holding the entry for cancellation on the ground that Shearer, the original entryman, had acquired no interest in the land at the time of his pretended conveyance to T. C. Power & Bro., and on the ground that the entry was made not for the benefit of the entryman, but in the interest of another. T. C. Power & Bro., Limited, has appealed from said decision to this Department.

Your office cited, in support of your said decision, the case of *Thomas v. Blair* (13 L. D., 207), wherein it was held that prior to the payment of twenty-five cents per acre for the land no rights are acquired by an entryman under the act of 1877. Counsel for appellant argues at considerable length that said ruling is not applicable to the case at bar, for the reason that the entry in that case was made under the act of 1877, which did not permit assignments of such entries, while the entry here in question was made under the act of 1891, which does permit such assignments.

The question of the assignability of such entries did not enter into the case of *Thomas v. Blair, supra*, but the point there decided was that the entryman had no interest in the land or valid claim thereto prior to the payment by him of the twenty-five cents per acre required by law as preliminary to his entry, and it can not be said that that ruling does not apply to every desert land entry. Therefore, Shearer, when he executed said deed, had no interest in or valid claim to the land, and, of course, could convey none to his assignee. He had not made entry for it, and had no assignable interest in the land. It is practically admitted that he had no assignable interest in the land at the time of the execution of said deed, but it is argued that when he subsequently made his entry he acquired an interest, which by virtue of said deed inured to the benefit of his assignee. If this be conceded, then it must be admitted that he intended when he made the entry, on December 8, 1898, that it should have that effect, and hence that he made the entry for the benefit of T. C. Power & Bro., and not for his own benefit. The fact that he attempted to convey the land on the same day on which he was sworn to his declaratory statement is a circumstance calculated to raise a suspicion as to his good faith, but if he had not contracted to convey the land prior to swearing to his declaratory statement, he certainly had done so before he made the entry.

It is argued, in substance, that the purpose of the desert land law is to secure the reclamation of arid lands, and that where one reclaims a tract of such land by the expenditure thereon of the amount of money prescribed by law, and makes the required proof and payments, he should be given a patent for the land regardless of whether or not he has complied with the requirements of the law in other respects. This position is not tenable. The law requires certain things to be done by the person desiring to make an entry under said statute prior to the allowance of the entry, and until these preliminary acts are performed, he has no right to the land, nor any authority to take possession of it. The law also requires him to do certain things after his entry is allowed, but the doing of these things will not entitle him to a patent or give him any valid claim to the land, if he has failed to perform the preliminary acts prescribed by law. It is not sufficient for him to show that he has reclaimed the land by the expenditure of the amount prescribed by law, and that he has made the final proof and payment required by law. This will not entitle him to a patent, if he has not filed the declaratory statement, made the preliminary payment, and had his entry recorded as the law requires. An entry made under said statute is subject to contest and cancellation for failure to perform in good faith any of said preliminary acts, as much as it is for failure to perform the acts required subsequent to the entry.

While a desert land entry made in accordance with the law may be lawfully assigned the right to make such an entry is not assignable.

Shearer, when he made said assignment, had no entry; he only had the right to make an entry upon filing his declaratory statement, showing his qualifications and making payment. These things had not been done, and therefore he had no right or authority to take possession of and reclaim the land, and, of course, could convey no such right or authority to his assignee. Therefore, whatever was done by the assignee by virtue of the assignment was done without right or authority.

It is argued that, although the doctrine of estoppel can not operate against the government, still the fact that the local officers and your office recognized the rights of the assignee, by permitting it to make proof of annual expenditures on the land, by accepting its relinquishment and thereupon canceling the entry as to the portion so relinquished, and by accepting its final proof and payment, and issuing final certificate thereon, clothes the assignee with such equities as entitle it to a patent for the land.

The questions involved in this case are similar in all material respects to those involved in the case of *Smith v. Custer et al.* (8 L. D., 269), wherein it was held (syllabus):

A pre-emption claimant acquires no title to public land, until he has fully complied with all the prerequisite requirements, and paid for the land.

The pre-emptor takes by final proof, payment and receipt of final certificate, only a right to a patent, in the event that the General Land Office, or the Department on appeal, find that the facts warrant the issuance thereof.

One who purchases land from a pre-emptor prior to a patent, acquires no greater right than existed in the pre-emptor, and is charged with knowledge that the legal title remains in the United States, subject to the necessary inquiry and determination by the Land Office and Department on which patent may issue.

* * * * *

It is the duty of the Department to cancel any entry which has been made contrary to law. or of lands not subject to such entry, or by a person not qualified, or where compliance with legal prerequisites did not take place, or where by false proofs a seeming compliance was fraudulently established.

When the assignee in this case filed said relinquishment, made proof of annual expenditures, and final proof and payment, and received final certificate, it was with full knowledge of the fact that the action of the local officers and your office in accepting said relinquishment, proofs, and payment, and issuing said final certificate, was subject to review and revision by this Department; that the legal title to the land remained in the government, and that the issuance of patent was dependent upon the inquiry and determination of your office and of this Department as to whether or not all the necessary prerequisites had been performed, and whether or not any fraud had been perpetrated in the making of the entry. It not only had this knowledge, but knew that Shearer had sold the land before he made his entry, and that when the entry was made it was intended by him that it should inure to the benefit of the assignee, and was therefore fraudu-

lent in its inception; and having made said expenditures with that knowledge, it can not be said that it thereby acquired such equities in the land as entitle it to a patent.

Your said decision is therefore affirmed and said entry will be canceled.

RAILROAD LANDS—SMALL-HOLDING CLAIMS—ACT OF APRIL 28, 1904.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *August 2, 1904.*

*Register and Receiver,
Santa Fe, New Mexico.*

SIRS: Your attention is called to the act of April 28, 1904 (33 Stat., 556), entitled, "An act for the relief of small-holding settlers within the limits of the grant to the Atlantic and Pacific Railroad Company in the Territory of New Mexico," which is as follows:

That the Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States any section or sections of its or their lands in the Territory of New Mexico the title to which was derived by said railroad company through the act of Congress of July twenty-seventh, eighteen hundred and sixty-six, in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this act, and shall then be entitled to select in lieu thereof and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior.

SEC. 2. That the Secretary of the Interior shall, as soon as may be after the passage of this act, cause inquiry to be made of all lands so held by settlers, and shall cause the holdings of such settlers to be surveyed, and on receiving such relinquishments or deeds shall at once, without cost to the settlers, cause patents to issue to each such settler for his or her holdings: *Provided*, That not to exceed one hundred and sixty acres shall be patented to any one person, and such recipient must possess the qualifications necessary to entitle him or her to enter such land under the homestead laws.

SEC. 3. That any fractions of any such sections of land remaining after the issuance of patents to the settlers as aforesaid shall be subject to entry by citizens the same as other public lands of the United States.

The purpose of this act is to enable certain claimants to lands, known as "small-holding claimants," who were authorized to receive patents for such lands, not to exceed 160 acres, upon specified conditions, by sections 16 and 17 of the act of March 3, 1891 (26 Stat., 854), as amended by the act of February 21, 1893 (27 Stat., 470), to complete title to their entire claims, the odd-numbered sections in a number of cases having passed under the grant by Congress to the Atlantic and Pacific Railroad Company; but it will be observed that the benefits

intended to be conferred are restricted to the odd-numbered sections within the limits of said railroad grant in the Territory of New Mexico, and that the act is not mandatory, but simply provides a means for the relief of said claimants depending upon the voluntary relinquishment by the railroad company, or its successors in interest and its or their assigns, upon request by the Secretary of the Interior, of the lands claimed.

Under the provisions of the act of March 3, 1891, as amended by the act of February 21, 1893, *supra*, and the act of June 27, 1898 (30 Stat., 495), a claim not filed with the surveyor-general of New Mexico before March 4, 1901, is invalid, and it does not appear to be the intention of the present law to revive any such claim, excepting so much thereof as may be found to be within an odd-numbered section or sections granted to the Atlantic and Pacific Railroad Company.

The proof required of claimants under this act is that the land claimed has been occupied as a home or homestead by themselves, or by their predecessors in interest, as settlers, for a period of at least twenty-five years immediately preceding the passage of this act, and that the claimants possess the qualifications necessary to entitle them to enter lands under the homestead law. This proof may be made before your office or before any officer authorized to take homestead proofs, and may consist of the affidavit of the claimant, corroborated by at least two witnesses having knowledge of the facts; and in cases where the claimant was not himself a settler during the whole period of twenty-five years next before the passage of the act, but bases his claim partly upon the occupancy of prior settlers, the affidavits must give the names of such settlers, the periods covered by their respective settlements, and the material facts evidencing such settlements.

When the proof required has been filed in your office and upon examination found sufficient, in your opinion, to entitle the claimant to the tract applied for, you will approve the same and issue your joint certificate as in other small-holding claims.

As the law provides that the lands to which the claimants may be found entitled shall be patented without cost to them, no publication of notice of intention to make proof will be required, nor will you require the payment of any fees or commissions by them.

The authority given the railroad company to relinquish lands covered by the claims of the small-holding claimants and select other lands in lieu thereof, does not restrict it to the acreage embraced in said claims, but the company may relinquish any part, or the whole, of any section containing such claim or claims, and any fractions of any such section remaining after the issuance of patents to the settlers will be subject to entry the same as other public lands.

There is inclosed herewith a list of the parties, so far as can be ascertained from the records of this office, who have claims that may come

within the provisions of this law, only a few of whom—those indicated by the final certificate number—appear to have perfected their claims, as required by the circular of instructions of September 18, 1895 (21 L. D., 157), and March 25 and May 1, 1896 (22 L. D., 523, 524), issued under the acts of March 3, 1891, and February 21, 1893, aforesaid.

You will notify each of these parties that he will be allowed ninety days within which to submit proof on his claim under the provisions of this act, and you will call upon the surveyor-general for the names of any other small-holding claimants to lands in the odd-numbered sections within the grant to said railroad company, and serve a similar notice on them if any are given.

In cases where the claims have not yet been surveyed you should secure from the surveyor-general a list of such claims as soon as the surveys are made and approved.

Very respectfully,

J. H. FIMPLE,

Acting Commissioner.

Approved:

THOS. RYAN, *Acting Secretary.*

ARID LAND—ACT OF JUNE 17, 1902—TRUCKEE-CARSON PROJECT.

INSTRUCTIONS.

Directions given relative to the publication and posting of notice, under section four of the act of June 17, 1902, regarding the lands irrigable under the Truckee-Carson irrigation project in Nevada.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *August 5, 1904.* (E. F. B.)

A contract having been entered into for the construction of the irrigation works known as the Truckee-Carson project in Nevada, it becomes the duty of the Secretary of the Interior under section 4 of the act of June 17, 1902 (32 Stat., 388), to give public notice of the lands irrigable under such project and to limit the area per entry of lands susceptible of irrigation therefrom, to such acreage as in the opinion of the Secretary may be reasonably required for the support of a family. The act also requires that public notice shall be given of the charges which shall be made per acre upon said entries and upon the lands in private ownership which may be irrigated by the waters of said project, the number of instalments in which such charges shall be paid and the time when such payments shall commence, said charges being made with a view to returning to the reclamation fund the cost of the construction of the project.

To this end I have caused an examination of the lands in townships 18 and 19 N., ranges 28 and 29 E., M. D. M., to be made by the Reclamation Service, with a view to determining the acreage that may reasonably be required for the support of a family and to limit the area per entry accordingly.

In order to prevent the waste of any irrigable land lying under said project and to distribute the cost of construction as far as possible by bringing under contribution the entire territory susceptible of irrigation from said works, I have caused the legal subdivisions of public lands in said townships to be combined and classified as farm units which shall constitute specific entries and no entry will be allowed except in conformity thereto. This designation of the legal subdivision or subdivisions that shall constitute a specific entry has been made with a view to equalizing value and benefits in entries throughout the entire township.

These townships have heretofore been withdrawn from entry "except under the homestead law" under authority of the third section of the reclamation act which provides however "that all lands entered and entries made under the homestead laws within areas so withdrawn shall be subject to all the provisions, limitations, charges, terms and conditions of this act."

Any entry that may have been allowed of said lands during such withdrawal must be adjusted so as to conform to the farm units and to the limits of area per entry as designated upon said maps herewith enclosed and the local officers will be instructed to adjust and allow entries of lands in said townships only in conformity with the farm units designated upon said maps.

You will therefore cause public notice to be given, by posting in the local office and by publication, that the public lands in said townships will be susceptible of irrigation by the waters from the Truckee-Carson irrigation project now in course of construction under the provisions of the act of June 17, 1902, and that said lands are subject to homestead entry under the terms of the reclamation act which will be allowed only in conformity with the units as designated by said maps. You will also cause notice to be given that the charges which shall be made per acre upon entries of said lands are estimated to be \$26.00 per acre, payable in ten annual instalments, and that payment of said instalments shall commence on the first day of December of the year in which the water has been delivered to the land during the month of April of that year.

At the same time special notice by registered mail to the address of record shall be given to every person who may have made entry of any of said lands during the period of withdrawal, requiring him to appear at the local office and adjust his entry to conform to the units designated upon said maps, within sixty days from receipt of such notice

and upon failure to make such adjustment, the local officers will adjust the entry and allow the subdivisions eliminated to be entered by others, but only in conformity to the areas and units designated upon the maps.

HEIRS OF STEVENSON *v.* CUNNINGHAM.

Motion for review of departmental decision of May 23, 1904, 32 L. D., 650, denied by Acting Secretary Ryan, August 8, 1904.

PETITION FOR WRIT OF CERTIORARI—COPY OF DECISION
COMPLAINED OF.

ELFRINK *v.* LUNDELL.

A petition for the writ of certiorari should be accompanied by a copy of the decision or decisions of the Commissioner of the General Land Office complained of.

Failure to file an appeal within the time required by the rules of practice will not of itself deprive a litigant of the right to the relief he may be justly entitled to; but such relief will be granted, in a proper case, through the exercise of the supervisory authority of the Secretary, although the right of appeal may have been properly denied.

A petition for the writ of certiorari will not be granted unless it be shown that the decision of the Commissioner of the General Land Office complained of is erroneous, even though it may clearly appear that he erred in refusing to transmit an appeal from said decision.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 14, 1904.* (E. F. B.)

This petition is filed by Caroline Lundell, complaining of the action of your office refusing to transmit her appeal from your decision of September 5, 1903, holding for cancellation her homestead entry for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 12, T. 160, R. 45, Crookston, Minnesota, and praying that your office be directed to certify the record in said case to the Department under Rule 83 of Rules of Practice.

The petitioner has failed to exhibit copies of the decisions of your office in said case with her petition. She simply embodies in the petition extracts from your decision containing the ruling of your office, but omits the facts upon which such ruling was made.

While the rule requiring a copy of the Commissioner's decision to be exhibited with a petition for certiorari is not included in the Rules of Practice, the rule has been uniformly followed in the decisions of the Department. In accordance with such rule a copy of every decision of your office complained of in a petition for certiorari should be exhibited with the petition or embodied in the petition, and a failure to comply with this rule is a sufficient ground for dismissing the peti-

tion. (*Hoover v. Lawton*, 13 L. D., 635, and authorities cited; *Ream v. Larson*, 14 L. D., 176; *French v. Noonan*, 16 L. D., 481.)

The petition may contain all the material facts which, in the opinion of the petitioner, or his counsel, are necessary to a clear understanding of the errors complained of, but it may omit facts that controlled the decision of the Commissioner and which may present his ruling to the Department in a different light from that viewed by the petitioner.

The failure to file an appeal within the time required by the rule will not of itself deprive a litigant of the right of relief which the petitioner shows he is justly entitled to. If the facts as set forth in the Commissioner's decision and which are not controverted by the petition show that he is entitled to relief by the exercise of the supervisory authority of the Secretary it will be granted, although the right of appeal was not wrongfully denied. (*Oscar T. Roberts*, 8 L. D., 423; *Robert O. Collier*, 19 L. D., 32.) So, on the other hand, a petition for certiorari will not be granted if it is not shown that the decision of the Commissioner is erroneous, although he may have erred in refusing to transmit an appeal from said decision. (*Whiteford v. Johnson*, 14 L. D., 67; *Blackwell Townsite v. Miner*, 20 L. D., 544.)

In order to determine intelligently whether the action of the Commissioner deprived a litigant of any substantial right it is necessary that his statement of facts as they appear in the record and his rulings thereon should be fully exhibited to the Department. As this petition fails to comply with the practice of the Department in that respect it is dismissed and returned to your office for proper filing.

FOREST RESERVE—SELECTIONS—ACT OF JUNE 4, 1897.

SANTA FE PACIFIC RAILROAD CO.

A list of railroad indemnity selections presented in accordance with departmental regulations and accepted and recognized by the local officers has the same segregative effect, while pending, as a homestead or other entry made under the general land laws.

The local officers have the power to reject an application to select lands under the exchange provisions of the act of June 4, 1897, where the lands covered thereby are not subject to such selection because embraced within a pending railroad indemnity selection list.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 30, 1904.* (J. R. W.)

The Santa Fe Pacific Railroad Company appealed from your office decision of February 4, 1904, affirming the rejection by the local office of its application under the act of June 4, 1897 (30 Stat., 36), to select lots 2 and 7, Sec. 3, and lot 5, Sec. 5, T. 54 N., R. 12 W., 4th P. M.,

Duluth, Minnesota, in lieu of lands relinquished to the United States in a forest reserve.

December 9, 1903, Charles H. Maginnis, as attorney in fact for the Santa Fe Pacific Railroad Company, presented the application at the local office. The tracts were included in the Northern Pacific Railway Company's indemnity selection list No. 15, then pending. The selector requested that "the application be received and held subject to the claim" of the Northern Pacific Railway Company. This the local office refused and rejected it "because of conflict with Northern Pacific Railway Company's list No. 15 involving the same land and intact on the records of this office." Your office held that the pending selection list was such a claim of record as under the circular of July 14, 1899 (29 L. D., 29), and departmental decision in *Porter v. Landrum* (31 L. D., 352, 353), precluded receipt of the application, and affirmed the action of the local office. The appeal presents two questions—viz: that the application was authorized by circular of September 6, 1887 (6 L. D., 131), and should not have been rejected; that the local officers have no power to determine whether a tract is or is not subject to selection under the act of June 4, 1897, but can only forward such application with a report as to the status of the land.

In *Southern Pacific Railroad Company* (32 L. D., 51, 53), discussing the effect of a pending railroad indemnity selection, it was held that:

In fact, a railroad indemnity selection, presented in accordance with departmental regulations and accepted or recognized by the local officers, has been uniformly recognized by the land department as having the same segregative effect as a homestead or other entry made under the general land laws.

So, in *Porter v. Landrum* (31 L. D., 352, 353), cited by your office, the Department held that—

ordinarily, where an entry or selection of public lands is received and recognized by the local officers, it will, while pending, prevent the receipt or recognition of other applications for the same land, until such entry or selection is disposed of.

A pending selection list is therefore given the same force in segregation of the land as an actual entry, and lands so conditioned are within the rule fixed by circular of July 14, 1899 (29 L. D., 29), which supersedes the circular of September 6, 1887, so far as in conflict therewith.

As to the power of the local officers to reject an application for lands not subject thereto, the contention can not be sustained. Such power has repeatedly been recognized. Where one selection was received by the local officers while another was pending, it was held, in *Arden L. Smith* (31 L. D., 184, 185), that:

The selection by Smith of land included within a prior and pending selection by Clarke should have been promptly rejected by the local officers for that reason alone. Good administration requires that not more than one selection of this character be entertained at the same time for the same land.

And in Charles H. Cobb (31 L. D., 220, 221), where the local officers received and forwarded an application not accompanied with the required proofs of the condition and character of the land, it was held that:

An imperfect selection, such as this, should have been rejected by the local officers at once, upon its presentation. . . . Unless his selection conformed to the law and regulations, he was not entitled to have it received by the local officers and noted upon the records of their office.

Section 2234 of the Revised Statutes, as amended by the act of January 27, 1898, provides, among other things, that they—

shall have charge of and attend to the sale of public and Indian lands within their respective districts, as provided by law and official regulations.

The local officers are not mere perfunctory clerks, whose sole duty is to receive, register, and forward applications for public lands. They are local agents of your office to see that the rules and regulations for administration of the public lands are complied with, and their intelligent and impartial attention to duty greatly facilitates the business of your office, enabling applicants more speedily to transact their business by avoiding defects and irregularities which tend to confusion and delay. Power to reject an improper application is incident to their office under the laws for organization of the land department, and needs not to be conferred specially in each set of instructions under every new act relating to disposals of public lands, but is expressly provided for in the circular of July 7, 1902 (31 L. D., 372), governing selections under the act of June 4, 1897, in force at the time this application was presented at the local office.

Your office decision is affirmed.

SANTA FE PACIFIC RAILROAD COMPANY.

Motion for review of departmental decision of June 30, 1904, 33 L. D., 161, denied by acting Secretary Ryan, August 31, 1904.

REGULATIONS CONCERNING THE MANNER OF ACQUIRING TITLE TO TOWN SITES ON PUBLIC LANDS IN THE DISTRICT OF ALASKA.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., August 1, 1904.

The following rules and regulations for the entry of public lands for town-site purposes in the district of Alaska, under section 11 of the act of Congress approved March 3, 1891 (26 Stat., 1095), are hereby

prescribed for the government and guidance of the surveyor-general, the private land and reservation boards, the registers and receivers of the United States land offices, and the town-site trustees in Alaska; and all former rules and regulations pertaining thereto in conflict herewith are hereby revoked.

1. All town-site entries in said district are to be made by trustees to be appointed by the Secretary of the Interior, according to the spirit and intent of section 2387, United States Revised Statutes, which section provides that the entries of land for such purposes are to be made in trust for the several use and benefit of the occupants thereof, according to their respective interests, and at the minimum price, which in these cases shall be construed to mean \$1.25 per acre. When the inhabitants of a place and their occupations and requirements constitute more than a mere trading post, but are less than 100 in number, the town-site entry shall be restricted to 160 acres; but where the inhabitants are in number 100 and less than 200, the town-site entry may embrace any area not exceeding 320 acres; and in cases where the inhabitants number more than 200 the town-site entry may embrace any area not exceeding 640 acres. It will be observed that no more than 640 acres shall be embraced in one town-site entry in said district.

2. The "system of public-land surveys" was extended to Alaska by act of March 3, 1899 (30 Stat., 1074, 1097-1098), making a general appropriation for the survey of "lands adapted to agriculture and lines of reservations." The cost of surveys of the exterior lines of town sites on public lands, over which the township surveys have not been extended, are "payable out of the general appropriations for the survey of 'lands adapted to agriculture and lines of reservations.'" (18 Copp's Landowner, 117, 119.) Where, therefore, the land on which a town site is situated in said district is not within a surveyed township, it becomes necessary for the occupants thereof, as a prerequisite to the entry of the land as a town site, to secure a special survey of the land by application to the surveyor-general.

3. The title to certain real estate in Alaska was held under Russian rule by certain individuals and the Greek Oriental Church, and confirmed by treaty concluded March 30, 1867, between the United States and the Emperor of Russia (15 Stat., 539). The act of March 3, 1891 (26 Stat., 1095), in section 14, has expressly excepted from entry for town sites and trading and manufacturing sites all tracts of land in Alaska, not exceeding 640 acres in any one tract, occupied as missionary stations at the date of the passage of same, while other real property is now held and occupied by the United States in several of the Alaska towns for school and other public purposes, and it is perhaps desirable that still other lots or blocks in those towns that take advantage of the provisions of the town-site law should be reserved to meet the future requirements for school purposes or as sites for Government

buildings. Therefore such employee or employees of the Government as shall be designated or detailed for that purpose shall constitute a board whose duty it shall be, as soon as notified by the United States surveyor-general of Alaska that an application for a special survey of the exterior lines of any such town site has been received by him, to go upon the land applied for and to determine and designate what lands should be eliminated from the town-site survey, as above indicated.

Such board shall inquire into the title to the several private claims and church claims held in such town site under Russian rule, as originally claimed at the date of the acquisition of Alaska by this Government, and into the claims for land therein, not exceeding 640 acres in one tract, occupied as missionary stations on March 3, 1891, and shall fix and determine the proper metes and bounds of said church, missionary, and private claims, after due notice having been given to the present owners of same, both of their right to submit testimony and documents, either in person or by attorney, in support of same, and of their right, within thirty days from receipt of notice of the conclusions of said board, to file an appeal therefrom with said board, for transmission to this office. Should any one of such parties be dissatisfied with the decision of this office in such a case he may still further prosecute an appeal to the Secretary of the Interior upon such terms as shall be prescribed in each individual case. Proper evidence of notice should be taken by said board in all cases, and a record of all testimony submitted to them should be kept. If an appeal is taken, the same, together with the decision of the board and all papers and evidence affecting the claims of the appellant, should be forwarded direct to this office. Should no appeal be taken, the report of the board should be filed with the United States Surveyor-General for his use and guidance as hereinafter directed.

It shall also be the official duty of said board to approximately fix and determine the metes and bounds of all lots and blocks in any such town site now occupied by the Government for school or other public purposes, and of all unclaimed lots or blocks which, in their judgment, should be reserved for school or any other purpose, and to make report of such investigations to the surveyor-general for his use and guidance, as also hereinafter directed, should no appeal be filed therefrom.

Should an application to the surveyor-general for a town-site survey be accompanied with ample proof that no such claims under Russian rule exist; that no occupation as missionary stations of the land applied for existed on March 3, 1891; that no part of said land is occupied or required for district court purposes; and that therewith is a description of all available reservations needed or occupied for school, Government, or other public purposes upon said land, the surveyor-general shall immediately submit the same to this office with his recommendation thereon, and if said proof be found sufficient, action by such

board may be waived by this office in its discretion, in which case the surveyor-general will be instructed to proceed with the survey of such town site.

4. Should an appeal from the action or decision of such board be filed in any case, no further action will be taken by the surveyor-general until the matter has been finally decided by this office or the Department. But should no appeal be filed, the surveyor-general will proceed to direct the survey of the exterior lines of the town site to be made, the same in all respects as above directed in the survey of land for trade and manufacturing purposes, except that no deposit for survey will be required, and that he will accept the report and recommendations made by said board and exclude and except, by metes and bounds, from the land so surveyed all the lots and blocks for any purpose recommended to be excepted by said board. The execution of the survey of the lots and blocks thus excepted shall be made a part of the duties of the surveyor who is deputized to survey the exterior lines of the town site; the survey of such lots or blocks shall be connected by course and distance with a corner of the town-site survey, and also fully described in the field notes of said survey and protracted upon the plat of said town site; and the limits of such lots or blocks will be permanently marked upon the ground in such manner as the surveyor-general shall direct. In forwarding the plat and field notes of the survey of any town site for the approval of this office, the surveyor-general will also forward any report that said board may have filed with him for approval in like manner.

5. Under section 31 of the act of June 6, 1900 (31 Stat., 321, 332), the district court of Alaska is authorized, by its order, to set aside unappropriated public land in said Territory for jail and court-house sites, a certified copy of which order, when duly made and filed in this office, operates as a reservation of the lands therein properly set aside under said section. Where any certified copies of such orders have been filed in this office prior to the survey of the exterior lines of any such town site, affecting the lands therein, this office will, on being informed of an application for such survey, furnish the surveyor-general with a copy thereof, and he will proceed to exclude from such survey the land in such orders reserved in the manner above provided for the reservations made by such board.

6. When the plat and field notes of the survey of the exterior lines of any town site shall have been approved the Secretary of the Interior will appoint one trustee to make entry of the tract so surveyed in trust for the occupants thereof, as provided by said act. The trustee, having received his appointment and qualified himself for duty by taking and subscribing the usual oath of office and executing the bond hereinafter required, will then file with the proper local land office a written notice in due form, reciting the name of the party who will make the

entry, the name and geographical location of the town site, the place and date of making proof, and the names of four witnesses by whom it is proposed to establish the right of entry. The register will issue his notice accordingly, to be published once a week for six consecutive weeks, at the applicant's expense, in a newspaper published in the town for which the entry is to be made, or nearest to the land applied for. Copies of said notice must also be posted in the office of the register and in a conspicuous place upon the land for thirty days next preceding the date of making proof. The required proof shall consist of the testimony of the applicant and two of the published witnesses, and shall show (1) the actual occupancy of the land for municipal purposes; (2) the number of inhabitants; (3) the character, extent, and value of town improvements; (4) the mineral or nonmineral character of the town site; (5) that said town site does not contain any land occupied by the United States for school or other public purposes, nor any land to which the title was claimed under Russian rule and confirmed by the treaty of transfer to the United States, nor any land for which patents have been issued by the United States; and (6) proof of the publication and posting of notices for the required time, consisting of the affidavit of the publisher to that effect, accompanied by a copy of the published notice, together with the certificate of the register as to the posting of the notice in his office and the affidavit of the party who posted the notice upon the land, reciting the fact and date of posting said notices and that the same so remained for the specified time hereinbefore required. The proof being accepted by this office, the trustee will call upon the occupants of said town site for the requisite amount of money necessary to pay the Government for the land as surveyed, and other expenses incident to the entry, keeping an accurate account thereof and giving his receipt therefor. And when realized from assessment and allotment he will refund the same, taking evidence thereof, to be filed with his report in the manner hereinafter directed. The purchase price of the land should be paid to and receipted for by the receiver of the land office, and thereupon the certificate of entry will be issued by the register and the papers will be forwarded to this office, and, if found to be complete and made in accordance with these instructions, patent will issue without delay. Cash certificate of entry (No. 4—189) will be used by the register in allowing all entries authorized by the law and these regulations, and said entries will be given the consecutive number of the series of cash entries issued by the land office.

7. A protest against the allowance of a townsite entry will be heard, and the same permitted to be carried into a contest in the same manner and under the same conditions as provided in the matter of contests before local land officers.

8. Trustees of the several town sites entered in said district shall

levy assessments upon the property either occupied or possessed by any native Alaskan the same as if he were a white man, and shall apportion and convey the same to him according to his respective interest.

9. The entry having been made and forwarded to this office, the trustee will cause an actual survey of the lots, blocks, streets, and alleys of the town site to be made, conforming as near as in his judgment it is deemed advisable to the original plan of survey of such town and the individual holdings as shown by the recorded titles and the improvements thereon, making triplicate plats of said survey, attaching a certified copy of the field notes thereof to each plat, and designating upon each plat the lots occupied and improved, together with the value of the same, and the name of the owner or owners thereof; and in like manner he will designate thereon the lots occupied by any corporation, religious organization, or private or sectarian school. The designation of an owner on such plats will be temporary until final decision of record in relation thereto, and shall in no case be taken or held as in any sense or to any degree a conclusion or judgment by the trustee as to the true ownership in any contested case coming before him.

10. As soon as said plats are completed, the trustee will then prepare a notice to the effect that such survey and platting have been completed, and unless objection thereto be filed with the trustee within thirty days from the publication of such notice, said plats will be approved by him, and notifying all persons concerned or interested in such town site that on a designated day he will proceed to set off to the person entitled to the same, according to their respective interests, the lots, blocks, or grounds to which each occupant thereof shall be entitled under the provisions of said act. Such notice shall be published by posting copies thereof in three conspicuous places in the town, at least thirty days prior to the day set apart for making such division and allotment, and by advertising the same in a newspaper published in the town, if there be one, once a week for five successive weeks. Proof of posting such notice shall be the certificate of the trustee, and of advertising the same shall be the affidavit of the publisher of the newspaper, accompanied with a copy of such notice. Should objection be filed against said survey and the approval of said plat, or any part thereof, the trustee will receive all evidence offered for or against the same and render his decision thereon subject to appeal to this office as in other cases provided. When the plats are finally completed they will be certified to by him as follows:

I, the undersigned, trustee of the town site of ———, district of Alaska, hereby certify that I have examined the survey of said town site and approved the foregoing plat thereof as strictly conformable to said survey made in accordance with the act of Congress approved March 3, 1891, and my official instructions.

Said plats with the field notes attached shall be filed, one in the office of the Commissioner of the General Land Office, one with the recorder of deeds for the recording district in which the land is situated, and one shall be retained by the trustee in his office.

11. After such notice shall have been duly given and the plats approved, the trustee will proceed on the designated day, or as soon thereafter as possible, except in contest cases, which shall be disposed of in the manner hereinafter provided, to set apart to the persons entitled to receive the same the lots, blocks, and grounds to which each person, company, or association of persons shall be entitled according to their respective interests, and in so doing he will observe and follow as strictly as the platting of the town site will permit the rights of all parties to the property claimed by them; as shown and defined by the records of the recorder of deeds and mortgages and other contracts relating to real estate in said recording district. Only those who were occupants of lots or entitled to such occupancy at the date of entry, or their assigns thereafter, are entitled to the allotments herein provided.

Claimants should file their applications for deeds, setting forth therein the grounds of their claims for the premises applied for, which should be verified by their affidavits, and if the trustee in the exercise of his discretion should require corroboration of the allegations in any such application, the same must be corroborated by one or two witnesses. All affidavits to such allegations may be subscribed and sworn to before the trustee, without other fee therefor than the compensation herein allowed him, or before any other officer authorized to administer oaths.

12. After setting apart such lots, blocks, or parcels, and upon a valuation of the same as hereinbefore provided for, the trustee will proceed to determine and assess upon such lots and blocks according to their value such rate and sum as will be necessary to pay all expenses incident to the town-site entry. In those cases in which there appears more than one claimant for any lot or block the trustee will require the second claimant at the time he presents his application, as a condition precedent to its reception and filing, to deposit with the trustee a sum sufficient to cover all costs and expenses that may be incurred for one day in determining the priority of right, and upon such deposit being made the trustee will personally or by registered letter notify the first claimant to deposit a like sum within fifteen days from service of such notice upon him, failing in which his application will be rejected. All other claimants for such lot or block will be required to deposit a like sum as a condition precedent to the reception and filing of their applications. Upon the final determination of such proceedings the amount deposited by the successful claimant shall be returned to him and the other deposits shall be disposed

of as provided in section 14 hereof. In making the assessments the trustee will take into consideration—

First. The reimbursement of the parties who advanced such money as was necessary to pay the purchase price of the land.

Second. The money expended in advertising and making proof and entry of the town site.

Third. The compensation of himself as trustee.

Fourth. The necessary expenses for clerk hire as hereinafter provided.

Fifth. All necessary expenses for rent, fuel, light, publication, and registered letters, and all other legitimate expenses incident to the expeditious execution of his trust.

More than one assessment may be made, if necessary, to effect the purpose of said act of Congress and these instructions. Upon receipt of the patent and payment of the assessments the trustee will issue deeds for the uncontested lots, blank forms of conveyance being furnished by this office for that purpose. No deed shall be issued until the assessments upon the lots to be thereby conveyed have been paid in full, and when so paid the deed should be issued, acknowledged before an officer duly authorized to take acknowledgments of deeds, at the cost of the grantee, and delivered to the party entitled thereto without any unnecessary delay.

No limitation is placed by statute on the number of lots that may be awarded to any one person, except that he must be an occupant or entitled to such occupancy in the sense of the law on the date of the entry of each lot awarded to him. Minority and coverture are not disabilities.

13. His work having been completed to this point, the trustee will then, and not before, in cases where he finds two or more applicants claiming the same lot, block, or parcel of land, proceed to hear and determine the controversy, fixing a time and place for the hearing of the respective claims of the interested parties, giving each fifteen days' notice thereof and a fair opportunity to present their interests in accordance with the principles of law and equity applicable to the case, observing, as far as practicable, the rules prescribed for contests before registers and receivers of the local offices; he will administer oaths to the witnesses, observe the rules of evidence in making his investigations, and at the close of the case, or as soon thereafter as his duties will permit, render a decision in writing. If the notice herein provided for can not be personally served upon the party therein named within five days from its date, such service may be made by a printed notice published for thirty days in a newspaper in the town in which the lot to be affected thereby is situated; or, if there be none, then said notice may be printed in the newspaper published nearest the land in Alaska. Copies of such notice must also be posted upon

the lot in controversy and in at least three other conspicuous places in the town wherein the lot is situated, and be served by registered letter upon each party therein named, addressed to each at his last known post-office address, such posting and mailing to be not less than thirty days before the day fixed for hearing. The proof of such publication shall be the affidavit of the publisher of the newspaper with a copy of the printed notice attached; the proof of posting shall be the certificate of the trustee, and the proof of service by registered letter shall be the registry return receipt or returned letter, as the case may be.

The proceedings in these contests should be without any unnecessary delay. The town, through its authorized representative, may be a party to any such contest for the purpose of showing that the other parties thereto have no legal claim to the land involved, and that the same should be subject to sale as unclaimed or be reserved for the benefit of the municipality. In such cases the town shall be possessed of the same rights and privileges and be subject to the same requirements as individual claimants.

14. Before proceeding to dispose of the contested cases the trustee will require each claimant to deposit with him each morning after the first day a sum sufficient to cover and pay all costs and expenses on such proceedings for that day, except when there are three or more claimants for a lot, when the deposit which each claimant shall be required to make daily shall be ascertained by dividing the sum sufficient to cover and pay all costs and expenses of such proceedings for the day by the number of claimants less one. Persons jointly claiming a lot are to be considered as but one claimant. While the amount of deposit for such costs and expenses should be adequate, it should not be in excess of a just and reasonable sum therefor. It should include the compensation of the trustee and clerk or stenographer for the time actually employed in the hearing and consideration of the case, the expense for fuel, light, and rent during such time, the postage paid or to be paid for all necessary registered letters, and the fees for publication of notice when published. At the close of the contest, on appeal or otherwise, the sum deposited by the successful party shall be returned to him, but that deposited by the losing party shall be retained and accounted for by said trustee, except as to any excess over the actual costs, which excess shall be returned to such party.

Where lots are awarded by final judgment on default of an adverse party, the costs and expenses thereof shall be paid out of the deposit by the unsuccessful party. In case of a compromise by the parties, or of a judgment dividing the lots, the costs and expenses shall be taken from the deposits pro rata in proportion to the unsuccessful claims.

15. The testimony of each witness in contest cases must be reduced to writing, be subscribed by the witness, and the jurat of the trustee be thereto attached, and all objections, exceptions, motions, rulings,

stipulations, and other proceedings must be noted, and reference must be made for identification to the record evidence introduced, each in its regular order; or the same may be taken in shorthand and transcribed by the stenographer, and each witness may be then required to subscribe to his testimony, and the jurat of the trustee be then thereto attached. But in the discretion of the trustee he may waive the signatures of the witnesses and the transcribing of the testimony and other proceedings entirely until an appeal be taken, in which case the same must be transcribed, and should the signatures of the witnesses to their testimony and the jurats thereto be omitted, the stenographer must attach his affidavit to such transcript to the effect that the same is true and correct and contains all the testimony and references to other evidence introduced, and notes of all objections, exceptions, motions, rulings, and stipulations made, and other proceedings had at said trial. The trustee must also attach his certificate thereto to the effect that all of the witnesses therein named testified under oath administered by him; that such witnesses were all the witnesses who testified at such trial; that said transcript is a true record of all the proceedings had before him; and that thereto attached is all the record evidence introduced on said trial.

16. All decisions by the trustee involving the right of appeal, or the exercise of other rights within a certain time, or compliance with some official requirement, shall be in writing and be served by him personally or by registered letter. The evidence of such service must be transmitted to this office with the papers in the case, the evidence of service by registered mail being the registry return receipt or the returned letter, as the case may be.

17. Any person feeling aggrieved by the decision of the trustee may, within thirty days after notice thereof, appeal to the Commissioner of the General Land Office, under the rules as provided for appeals from the opinions of the registers and receivers, and if either party is dissatisfied with the conclusions of said Commissioner in the case, he may still further prosecute an appeal, within sixty days from notice thereof, to the Secretary of the Interior, upon like terms and conditions and under the same rules that appeals are now regulated by and taken in adversary proceedings from the Commissioner to the Secretary, and motions for review and for rehearing shall also be governed by the rules in such adversary proceedings.

No deed will be issued for any land involved in a contest until the case has been finally determined and closed.

18. The trustees will, as soon as practicable after all allotments and awards have been made by him and deeds have been issued on the lots upon which the assessments have been paid, prepare and submit to this office a statement showing all tracts not disposed of by deed and

each tract awarded to a claimant or claimants who have failed to make payment of the assessments thereon, giving the last known address of each delinquent allottee, and reporting all proceedings had and notices given by him to any such allottee, and thereupon should such proceedings be found regular, and no errors appear in such statement, the trustee will be directed by this office to give notice that he will sell, at a certain designated place in said town and on a certain day therein designated, to be not less than sixty days from the date of such notice, at public outcry, for cash, to the highest bidder, all lots and tracts remaining unoccupied and unclaimed at the date of said entry, and all lots and tracts claimed and awarded on which the assessments have not been paid at the date of such sale. Said notice shall further contain a description of the lots and tracts to be sold, made in two separate lists, one containing the lots and tracts unclaimed at the date of entry, and the other the lots and tracts claimed and awarded on which the assessments have not been paid, each lot and tract in the latter list to contain opposite such lot or tract the name of the delinquent allottee to whom awarded and the amount of the assessments thereon. The notice shall also contain a further statement that unless such delinquent allottee or allottees shall, before the lot or lots, tract or tracts, awarded to him or them have been sold as herein provided, pay the assessments thereon, together with the pro rata costs of this publication and the cost of acknowledging deed, his right to a deed for said lot or lots, tract or tracts, will be forfeited. Such notice will be signed by the trustee, and he will cause it to be published for five successive weeks in a newspaper published in the town, or if there be none, then in the newspaper published in Alaska nearest the land, the first publication to be at least forty days prior to the date fixed therein for such sale; and he shall post copies thereof in three conspicuous places on the land and serve upon the delinquent allottee personally, or by registered letter addressed to him at his last known post-office address, a copy of such notice, at least fifty days prior to the date of said sale.

Upon conclusion of such sale the trustee will report to this office the result thereof, showing the names of the purchasers, lots and tracts sold, amount received for each, the expenses attending the sale, the costs of publication, including registered letters, the amount of the assessments on each lot and tract, and all claims by the trustee for compensation for services rendered in connection therewith. Proper proofs of the publication, posting, and service on the delinquent allottees of the notices of sale must accompany the report. As soon as practicable after the receipt of the report by this office such directions will be given as to the disposition of the net proceeds of the sale and any balance remaining in the hands of the trustee as the Secretary

of the Interior may order for the use and benefit of the municipality or the inhabitants of the town site for public purposes.

19. The trustee shall receive and pay out any money provided for in these instructions, subject to the supervision of this office, keeping an accurate account thereof; and before entering upon duty he shall, in addition to taking the official oath, also enter into a bond to the United States in the penal sum of \$5,000 for the faithful discharge of his duties, both as now prescribed and furnished by the Department of the Interior.

All payments by the occupants of any townsite for any of the purposes in these instructions mentioned shall be in cash and made only to the trustee thereof, who shall make duplicate receipts for all money paid him, one to be given to the party making the payment and the other to be forwarded to this office with the trustee's papers and accounts. Said trustee shall also take receipts for all money disbursed by him, and be held strictly accountable by this office, under his bond, for the proper handling of the trust funds in his possession.

20. The trustee shall keep a book in which he shall record the minutes of each day's proceedings, to be completed and signed by him before the next day's business shall be begun, and the same shall not thereafter be changed except by a further record. He shall keep a tract book in which the blocks in the town site shall be consecutively entered, and underneath each block the lots shall be designated in regular order. Opposite each lot shall be entered the names of the claimants therefor, the valuation thereof, the rate per cent of the assessments, the amount of the assessments, the number of the receipt for the assessments, the amount paid for deed, to whom deeded, date of deed, to whom deed delivered, date of delivery, and page where recorded in the record of deeds kept by him. He shall record in a book, kept for the purpose by him, a correct copy of each deed issued. He shall keep a contest docket in which he shall enter the number of the contest, the title of the case, the names of the attorneys for each party, the premises involved, the deposits made by each party, and all proceedings had in such contest and the date thereof. He shall also keep the books of accounts and vouchers hereinafter mentioned. The necessary stationery, blanks, and blank books for his use as trustee will be furnished him by this office upon requisition therefor.

21. The trustee will correspond with the Commissioner of the General Land Office and only through him with the Secretary of the Interior.

22. In order to secure uniformity in the preparation of accounts of the trustee relative to moneys received and disbursed by him on account of assessment funds, contest funds, and proceeds from lot sales, the following method will be observed:

BOOKS OF ACCOUNT AND VOUCHERS.

CASH BOOK—ASSESSMENT FUNDS.

RECEIPTS.

The trustee will enter on the left-hand page of said book all moneys received by him from allottees in payment of assessments levied on their lots, showing the date when received, number of receipt issued, name of allottee, lots and blocks involved, and the amount received; said receipts to be numbered consecutively, commencing with number one, assessment funds.

The money received from the occupants of the town site to pay the Government for the land as surveyed, and other expenses incident to the entry thereof, will be accounted for in connection with assessment-fund receipts.

DISBURSEMENTS.

He will enter on the right-hand page of said book the amount paid for the land and the usual fees in connection with the entry thereof, the amount refunded the occupants of the town site who advanced said money, amount paid for publication of notices in connection therewith, the trustee's compensation when employed on assessment work, the fees for acknowledging deeds, the expense of recording plat and patent of town site, rent, fuel, and registered letters. Said entries will show the date of payment, number of voucher, to whom paid, for what purpose, and amount paid. Vouchers must be furnished for each disbursement, which will be numbered consecutively commencing with number one, assessment series.

CASH BOOK—CONTEST FUNDS.

RECEIPTS.

The same rule will be observed in keeping this account as provided for assessment funds, except that the number of the contest will be reported, and the receipts numbered to commence with No. 1, contest-fund series.

DISBURSEMENTS.

The trustee will enter on the right-hand page the amount paid to himself for compensation for time employed in contest cases, reciting the amount chargeable to each contest, giving the number of the case, the amount paid for publication of notice of hearing and to the stenographer for taking and transcribing testimony, if one shall be employed in the case.

Each contest case must bear all the expenses in connection therewith, and if there shall be any excess of the deposit by the losing contestant such excess must be refunded under the rules at the close of the case.

Every credit claimed must be supported by proper vouchers, numbered consecutively, commencing with No. 1, contest-fund series.

Care must be taken that no receipts or payments on account of assessment funds are confused with contest funds or proceeds from lot sales, as said accounts are separate and distinct and must be kept and rendered.

WEEKLY TIME REPORTS.

The trustee will forward at the end of each week a report (Form 4-489) showing his official acts for each day thereof, which reports are not to be submitted as a mere matter of form, but must show the nature of the official business or office work. Such terms as "Attending to official business," "Engaged in office work," "Writing official communications," are not sufficiently specific and will not be accepted by this office. Time employed on assessment work will be so reported. Time on contest work will be reported, giving the number of the case and the first-named party therein. Such service will be reported by days, three-quarter days, half days, or quarter days, as the case may be. Payment of compensation to the trustee and for clerical services will be based upon such time reports, and vouchers will not be accepted by this office unless the dates and amount of time paid for agree with the time reported as appears in said report, separate vouchers being required for payments on account of assessment work and contest work.

MONTHLY ACCOUNTS.

ASSESSMENT FUNDS.

At the end of each month the trustee will render an account current (Form 4-123d) assessment funds, in which he will enter on the right-hand page the balance on hand brought forward from the previous month, and the total amount of such funds received during the month, as appears by an abstract, which will show in detail the names of parties, date and number of receipts, amount received from each allottee as appears from the assessment fund cash book, together with the duplicate receipts issued in each instance. He will enter on the left-hand page the amount disbursed, as appears by an abstract to be furnished, showing date of payment, number of voucher, name of payee in each instance, as appears by the cash-book assessment funds, vouchers for such disbursements to be submitted with each account current. The trustee will declare the balance on hand at the close of each month, according to said account current, which balance must agree with the balance shown by said cash book.

CONTEST FUNDS.

The trustee will render another account current contest funds, in which he will account for all receipts and disbursements on account of contest funds prepared as provided for assessment funds.

No abstracts need be rendered where there is sufficient space on the account current to enter the receipts and disbursements in detail, but in any event the duplicate receipts and vouchers to correspond with the amounts received and disbursed must be furnished with the monthly account current.

ACCOUNT CURRENT LOT SALE.

The trustee will render an account current (Form 4-123d), proceeds of lot sales, in which he will enter on the right-hand page the amount received as appears by an abstract, showing the date of sale, name of purchaser, number of receipt, lot and block sold, and amount received therefor, together with the duplicate receipt issued in each instance. He will enter on the left-hand page, in detail, all the disbursements made under authority of the office and furnish proper vouchers therefor.

23. The trustee of any town site in the district of Alaska will be allowed compensation at such rate per day as may be fixed by the Secretary of the Interior, for each day actually engaged and employed in the performance of his duties as such trustee.

24. Whenever the volume of business is such that the trustee is unable to perform it all without assistance he may, upon a petition by the corporate authorities or a majority of the lot occupants employ a clerk from time to time, as the exigencies of the business demands, to perform such ministerial or clerical duties as he is for the time unable to perform, and for whose acts the trustee will be held responsible upon his bond, at a compensation for the time actually employed not exceeding the amount paid for similar services by the clerk of the district court of the division in which the land is situated, and in his reports thereon to this office the trustee shall certify that he was unable by reason of the volume of business to perform the clerical services for which such clerk or clerks were employed, and that such employment for the time such clerk or clerks were employed was essential to the expeditious transaction of the business of his trust.

Where the clerk is not a stenographer and a stenographer or clerk becomes necessary in a contest case, the trustee may employ one, who shall receive compensation not exceeding the rate per day allowed for similar services by the district court for the division in which the land is situated, for the time actually engaged and employed, to be paid out of the deposits made by the parties to the contest. Nothing herein contained shall prevent the parties to any such contest, with the consent of the trustee, from mutually agreeing to and employing and paying their own stenographer or clerk, who shall perform his services under the direction and supervision of the trustee.

25. The trustee's duties herein prescribed having been completed, the books of accounts of all his receipts and expenditures, together with a record of his proceedings as hereinbefore provided, with all papers, other books, and everything pertaining to such town site in his posses-

sion, and all evidence of his official acts, shall be transmitted to this office to become a part of the records thereof, excepting from such papers, however, in case the town be incorporated, the subdivisional plat of the town site and field notes thereto attached, which in such cases he shall deliver to the municipal authorities of the town, to be kept with its records, taking a receipt therefor, to be transmitted to this office.

W. A. RICHARDS,
Commissioner.

Approved August 1, 1904:

THOS. RYAN,
Acting Secretary.

LAWS RELATING TO TOWN SITES IN ALASKA.

SEC. 2387. Whenever any portion of the public lands have been or may be settled upon and occupied as a town site, Entry of town authorities in trust for occupants. 2 March, 1867, c. 177, v. 14, p. 541. 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 lots in such town 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.

SEC. 2388. The entry of the land provided for in the preceding section shall be made, or a declaratory statement of the purpose of the inhabitants to enter it as a town site shall be filed with the register of the proper land office, prior to the commencement of the public sale of the body of land in which it is included, and the entry or declaratory statement shall include only such land as is actually occupied by the town and the title to which is in the United States; but in any territory in which a land office may not have been established such declaratory statements may be filed with the surveyor-general of the surveying district in which the lands are situated, who shall transmit the same to the General Land Office.

SEC. 2389. If upon surveyed lands, the entry shall in its exterior limit be made in conformity to the legal subdivisions of the public lands authorized by law; and where the inhabitants are in number one hundred, and less than two hundred, shall embrace not exceeding three hundred and twenty acres; and in cases where the Entry in proportion to number of inhabitants. 2 March, 1867, c. 177, v. 14, p. 541.

inhabitants of such towns are more than two hundred and less than one thousand shall embrace not exceeding six hundred and forty acres; and where the number of inhabitants is one thousand and over one thousand shall embrace not exceeding twelve hundred and eighty acres; but for each additional one thousand inhabitants, not exceeding five thousand in all, a further grant of three hundred and twenty acres shall be allowed.

* * * * *

SEC. 2391. Any act of the trustees not made in conformity to the regulations alluded to in section twenty-three hundred and eighty-seven shall be void.

Certain acts of trustees to be void,
2 March, 1867, c. 177, v. 14,
p. 541.

SEC. 2392. No title shall be acquired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws.

No title acquired to gold mines, &c., or to mining claims, &c.
2 March, 1867, c. 177, c. 53,
v. 15, p. 67.

SEC. 2393. The provisions of this chapter shall not apply to military or other reservations heretofore made by the United States, nor to reservations for light-houses, custom-houses, mints, or such other public purposes as the interests of the United States may require, whether held under reservations through the land office by title derived from the Crown of Spain, or otherwise.

Military or other reservations, &c.
2 March, 1867, c. 177, v. 14,
p. 541.

AN ACT To repeal the timber-culture laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * *

SEC. 11. 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 town-site entry.

How and by whom entered.
Act March 3, 1891, 26
Stat., 1095.

AN ACT Making further provision for a civil government for Alaska, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

TITLE I.—Chapter One. * * *

SEC. 31. * * * Any division of the court may, where necessary, order the construction or repair of a jail building at the place or places where terms of the court are held, at a cost not to exceed three thousand dollars for each building, the same to be paid by the clerk as provided for the payment of other allowances for the necessary expenses of the court; and any part or portion of the unappropriated public domain of the United States, embracing not more than four thousand square feet, to be taken in compact form, as near as may be practicable, may be set aside by order of the court as a jail site, which order shall describe the location of the ground selected, where unsurveyed by metes and bounds and by reference to natural objects and permanent monuments, in such manner that its boundaries and its location may be readily determined, a certified copy of which order of the court shall be by the clerk thereof transmitted to the Commissioner of the General Land Office, who shall cause the same to be noted on the records of his office, and thereafter the ground described shall be reserved from sale or other disposition, unless for good cause the court shall vacate the order of reservation or Congress shall otherwise direct. * * *

Where a suitable court room is not available or can not be obtained at a reasonable rental at the place or any of the places where terms of the court are held, the court may enter a like order of reservation and direct the construction of a suitable building where the sessions of the court may be held, the cost of such building not to exceed in any case the sum of five thousand dollars, the same to be paid and proceedings to reserve the land to be as in the case of the reservation of ground and construction of jail, as hereinbefore provided.

Reservation for court-house site.
Act June 6, 1900; 31 Stat., 321.

CHIPPEWA CEDED LANDS—LOT 1, SEC. 10, T. 168 N., R. 35 W., CROOKSTON, MINNESOTA, WITHDRAWN FROM ENTRY.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 5, 1904.

Register and Receiver, Crookston, Minnesota.

GENTLEMEN: I inclose herewith a copy of departmental letter of July 6, 1904 [see below], in regard to Lot 1, Sec. 10, T. 168 N., R. 35

W., 5th P. M., surveyed as a part of the Chippewa ceded Indian lands, and in accordance with said departmental letter said lot is not subject to settlement, entry, or other disposal under any of the land laws of the United States. You will so note on your records.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved, August 5, 1904.

THOS. RYAN, *Acting Secretary.*

[Departmental letter of July 6, 1904.]

The Commissioner of the General Land Office.

SIR: Referring to your office letter of April 26, 1904, requesting instructions as to sale of lot 1, Sec. 10, T. 168 N., R. 35 W., 5th P. M., surveyed as a part of the Chippewa ceded Indian lands, subject to disposal under the act of January 14, 1889 (27 Stat., 642), and act amendatory thereof, you were directed, May 21, 1904, not to proceed to a sale or disposal of this tract or of other land similarly situated in loops of the intersecting national boundary in that vicinity, until further advised.

This Department deemed the matter involved to be one touching questions of national boundary and relations of amity between the United States and the British empire, and submitted the matter to the Department of State, requesting advice thereon.

This Department is in receipt of the letter of June 25, 1904, of the Department of State, a copy whereof is enclosed for information of your office, advising that, in view of the premises therein expressed, it does not seem advisable to make the disposition of the lands now under consideration. You are therefore directed not to advertise or make disposal of these lands.

Very respectfully,

THOS. RYAN, *Acting Secretary.*

SCHOOL LANDS—INDIAN RESERVATION—ACT OF FEBRUARY 22, 1889.

INSTRUCTIONS.

Under its grant of school lands made by the act of February 22, 1889, the State of Montana is entitled to sections sixteen and thirty-six within the boundaries of the former reservation of the Gros Ventres and other tribes of Indians, where such lands have not been appropriated by a *bona fide* settler prior to their identification by survey.

Acting Secretary Ryan to the Director of the Geological Survey,
(S. V. P.) *August 9, 1904.* (J. R. W.)

The Department is in receipt of your office letter of June 27, 1904, asking to be advised whether the State of Montana is entitled under its school land grant of February 22, 1889 (25 Stat., 676, Sec. 10, 679), to claim sections 16 and 36 in those townships in the Milk River Valley, Montana, embraced in the former Indian reservation for the Gros Ventres and other tribes, created by the act of April 15, 1874 (18 Stat., 28), and restored to the public domain by the act of May 1, 1888 (25 Stat., 113-133); also whether this area is subject to indemnity school selections.

By section 3 of the act of 1889, *supra*, it was provided that these lands—

are a part of the public domain and are open to the operation of the laws regulating homestead entry, except section twenty-three hundred and one of the Revised Statutes, and to entry under the townsite laws and laws governing the disposal of coal lands, desert lands, and mineral lands; but are not open to entry under any other laws regulating the disposal of the public domain.

By the act of February 22, 1889 (25 Stats., 676), for the admission of Montana and other territories into the Union, section 10 (Ib. 679) provided:

SEC. 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, 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 States* for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the sixteenth 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 a part of, the public domain.

By section 11 of the act this grant of the specific sections was made absolute by a provision that—

such land 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 reserved for school purposes only.

The people of Montana by adoption of a constitution accepted the grant, which became operative by Executive proclamation of November 8, 1889 (26 Stat., 1551), and title as of present grant for the specific sections vested in the State subject to their future identification by the public land surveys. The later act of February 28, 1891 (26 Stat., 796), amending sections 2275 and 2276, Revised Statutes, saves the rights of settlers before survey, but, otherwise than for protection of settlers, the grant of the specific sections is not affected. *Noyes v. State of Montana* (29 L. D., 695). It follows therefore that the State of Montana is entitled to claim the specific sections in place within the boundaries of the former reservation where they have not been appropriated by a *bona fide* settler prior to their identification by survey, and the first question is answered in the affirmative.

So far as the right of indemnity selection is concerned throughout the whole extent of the former reservation, the Department deems it unnecessary at this time to decide and inadvisable to do so without opportunity to the State to be heard. The real question, as under-

stood by the Department, of interest to your bureau, concerns only that part of the former reservation included within what is known as the Milk River project under the act of June 17, 1902 (32 Stat., 388). The lands within that project were withdrawn from entry to be disposed of only under the provisions of the reclamation act. This withdrawal excludes them from school land indemnity selection or other disposal from the date of such withdrawal. If any indemnity selections were made by the State prior to such withdrawal, respecting the validity of which your bureau desires to be advised, you will so report, with specific description, and the State of Minnesota will be allowed to be heard thereon.

MINING CLAIM—SURVEY—CONFLICTS.

DROGHEDA AND WEST MONROE EXTENSION LODE CLAIMS.

The survey of a mining claim, whereby record conflicts with prior surveys are made to appear which are alleged to have no existence in fact, can be approved by the surveyor-general only when it is determined, agreeably to the principle of the case of *Sinnott v. Jewett*, what conflicts therewith, if any, must be recognized, and the conditions are shown accordingly.

Paragraph 147 of the mining regulations (31 L. D., 474, 498), as amended August 8, 1904, cited and quoted.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, August 11, 1904.* (F. H. B.)

Charles Horning and The Kansas-Burroughs Consolidated Mining Company have filed motion for review of departmental decision of August 30, 1902 (unreported), in the above-entitled case. Substantially stated, the facts and history of the case are as follows:

November 23, 1899, the surveyor-general for Colorado, upon the application of Horning, issued an order to a United States deputy mineral surveyor for the survey of the Drogheda and West Monroe Extension lode mining claims, embracing lands in unsubdivided township 3 south, range 73 west, 6th P. M., Nevada mining district, Gilpin county, Colorado. The survey (No. 13654) was executed November 25-27, 1899, and forwarded to the surveyor-general for his examination and approval.

January 26, 1901, the surveyor-general returned the survey without his approval, because of apparent conflicts with prior surveys, accompanied by a letter wherein he stated the grounds for his action and gave directions to the deputy mineral surveyor as follows:

From an examination of the case it appears that the relative position of the survey with the conflicting claims is not properly shown; that is, the position of the claims as indicated in the field notes and upon the preliminary plat filed with the case may be as staked upon the ground, but office records show the conflicting claims to have

been surveyed, which was made the basis for the description contained in the several patents issued thereon, and this office cannot at this time accept the report showing the positions of the claims other than described in the several patents.

* * * * *

You are therefore directed to re-examine your work, and advised that it is your duty to comply with the practice and regulations of the Department by showing the relative position of your survey with the conflicting surveys, as approved and patented.

For your information and guidance in the case I enclose herewith a diagram tracing, showing the relative position of these surveys in accordance with the records of this office.

Thereupon Horning and the Kansas-Burroughs company, the latter asserting an interest in the Drogheda and West Monroe Extension claims, appealed to your office.

By decision of March 26, 1901, your office sustained the action of the surveyor-general to the extent of his refusal to approve the survey under existing conditions, but stated, in effect, that if the appellants would secure the surrender and relinquishment to the United States of the outstanding patents which embrace conflicts with or overlaps upon the Drogheda and West Monroe Extension claims, as represented upon said survey, in so far as such patents are based upon surveys alleged to be erroneous because not in accord with the claims as staked and marked on the ground, new patents would be issued in lieu of those surrendered, upon new and correct surveys of the claims being furnished, and that republication and reposting of notice would not be required.

An effort appears to have been made to carry into execution the plan suggested with respect to the surrender of the patents, but without avail. Among other things, the Kansas-Burroughs company filed a list of patented and surveyed claims, stated to be owned or controlled by it, among which are most of the claims with which the survey here in question was found by the surveyor-general apparently to conflict. Finally, in a letter addressed to your office by the attorney for Horning and the Kansas-Burroughs company, it was stated that it was found, after considerable expenditures, to be impracticable to surrender the outstanding patents, and that it was therefore desired to appeal.

An appeal to the Department from the decision of your office was accordingly taken. In the departmental decision aforesaid, after stating the case substantially as above, it was said and held, so far as necessary now to be considered, as follows:

The appellants assert that said survey was made to accord with the Drogheda and West Monroe Extension locations as staked and marked on the ground; that the surveys upon which the conflicting outstanding patents are based, respectively, were not made in conformity to the several patented locations as staked and marked on the ground; that hence the conflicts between the Drogheda and West Monroe Extension, and said patented claims, as located on the ground, are not correctly represented

in the patents; and that such result was brought about by errors and mistakes in the surveys of the patented claims, and not by any error or mistake in the survey here in question. Upon the theory that the existing conditions are in fact as thus represented, it is contended that the survey should be approved and accepted as a basis for patent proceedings, even though admitted to embrace lands already included in the outstanding patents.

Even if all that is claimed by the appellants with respect to the facts in the case be true, it is clear that the survey cannot be approved, so long as the patents to the conflicting claims remain outstanding, unless it shall be amended to show the conflicts with the patented claims as described in the patents. The patents were issued upon approved surveys and in conformity with such surveys. The land department has no jurisdiction or authority, after patent to a mining claim has been issued, to correct errors or mistakes in the survey upon which the patent is based. Certainly not in such a case as this, where to correct the alleged errors or mistakes in the former surveys would involve such changes in the surveys as to render them out of harmony with and materially different from the descriptions contained in the patents issued upon said surveys. Nor has the land department jurisdiction or authority to issue a patent for lands included in a patent already issued and which is still outstanding (see *Mono Fraction Lode Mining Claim*, 31 L. D., 121). The decision of your office, in so far as it sustains the refusal of the surveyor-general to approve the survey in question, is therefore affirmed.

It is asserted by appellants, in substance and effect, in support of their motion for review, that in the prior surveys, made as the claims involved were found to be located and marked upon the ground, the errors complained of occur merely in the returned courses and distances of the tie lines thereof to section corners described in the patents, whereby conflicts with the Drogheda and West Monroe Extension claims are made to appear which do not exist on the ground. The case involves the question presented and decided in, and is in that respect controlled by, the recent case of *Sinnott v. Jewett*, decided by the Department July 12, 1904 (33 L. D., 91), in which the requirements under the law and official regulations with respect to the designation of a particular tract for patent purposes are set forth, and in which it is held (syllabus):

In case of variance between the *locus* of a patented mining claim as indicated by the tie line described in the patent, from a corner of the claim to a corner of the public survey or a United States mineral monument, and as defined upon the ground, the land department will regard as constituting the patented claim, and will not receive further application for patent to, the tract of land embraced in the survey and bounded by the lines actually marked, defined, and established on the ground by monuments substantially within the requirements under the law and official regulations and corresponding to the description thereof in the patent.

The case at bar presents the opposite of the situation presented in the *Sinnott-Jewett* case, in this: In the latter no conflict between the two surveys there in question appeared by the records of the surveyor-general, but a conflict in fact was alleged by the patentee to exist; whilst in the former the conflicts apparent upon the official records are asserted to have no existence in fact as the claims concerned are laid and were surveyed upon the ground.

The field notes of the Drogheda and West Monroe Extension survey, and the report of the deputy mineral surveyor in that connection, with the record now before the Department, do not of themselves contain data sufficient to justify approval of that survey, with the omission therefrom of the conflicts apparent upon the present plats or connected sheets of the surveyor-general. To the end that it may be determined in what shape the survey may finally be approved, it will be necessary that a further examination upon the ground be made by a deputy mineral surveyor, in order that the conditions existing thereon may be fully disclosed. When such examination shall have been made, the mineral surveyor will indicate (by diagram, if necessary) the exact relative situations of the various claims as marked and established on the ground, and fully and specifically describe in his report the positions and character of the monuments, if any, by which each claim which actually adjoins or conflicts, or which appears by the present plats of the surveyor-general to conflict, with the Drogheda and West Monroe Extension claims, or either of them, is marked, as well as any other visible evidence whereby any of such claims was by him identified on the ground.

If, upon receipt of the required report of the mineral surveyor, it shall be found by the surveyor-general to so far comport with the descriptive reports and other essential portions of the approved prior surveys, on file in his office, as to enable him to determine with certainty, all the data considered, that the prior surveys are clearly defined and can be and have been identified upon the ground in such positions as to embrace no portions of the apparent conflicts before mentioned, as asserted by appellants, the survey here in question, if in all other respects satisfactory, may be approved. If, on the other hand, the absence of essential monuments of any of the apparently conflicting surveys be reported or the claims therein embraced be not otherwise clearly and satisfactorily identified on the ground, or the later and earlier reports irreconcilably disagree in any material respects as to the *loci* or identity of the prior surveys (irrespective of course or distance of the tie or boundary lines thereof), or the showing as a whole be otherwise called in question, so that the surveyor-general is unable to determine that the conflicts, or any of them, now apparent do not exist in fact, as alleged, approval of the survey will be withheld pending a regular determination of the facts.

In the latter event, upon application therefor by appellants, a hearing will be ordered before the local officers of the land district in which the claims are situate, with due notice to claimants under such surveys as are or appear to be affected by the survey in question, at which full opportunity will be afforded for the submission of all available evidence touching the identity of the various surveys and respecting the conditions existing on the ground. The survey here in

question, if found or made to conform to the showing there made and as the facts are finally determined, may be approved, if otherwise satisfactory; and the surveyor-general will thereupon adjust his records accordingly.

In this connection it may be stated that, for the guidance of all concerned, paragraph 147 of the mining regulations (31 L. D., 474, 498) was on August 8, 1904, amended to read as follows:

147. If an official mineral survey has been made in the vicinity, within a reasonable distance, a further connecting line should be run to some corner thereof; and in like manner all conflicting surveys and locations should be so connected, and the corner with which connection is made in each case described. Such connections will be made and conflicts shown according to the boundaries of the neighboring or conflicting claims as each is marked, defined, and actually established upon the ground. The mineral surveyor will fully and specifically state in his return *how* and by what *visible evidences* he was able to identify on the ground the several conflicting surveys and those which appear according to their returned tie or boundary lines to conflict, if they were so identified, and report errors or discrepancies found by him in any such surveys. In the survey of contiguous claims which constitute a consolidated group, where corners are common, bearings should be mentioned but once.

It is not intended hereby to suggest that conflicts with prior approved surveys, if any, upon which applications for patent have not been filed or patents issued, may not be included in an application for patent filed by appellants as claimants under the later survey; but that the survey here in question can be approved only when it is determined, agreeably to the principle of the Sinnott-Jewett case, what conflicts therewith, if any, must be recognized, and the conditions are shown accordingly.

The decision under review is modified to conform hereto, and the record is returned for further proceedings in accordance herewith.

MINING CLAIM—ADVERSE—SECTIONS 2325 AND 2326, R. S.

SELMA OIL CLAIM.

A suit involving the possession of, and instituted prior to the filing of an application for patent for, a mining claim, notice of the commencement and pendency of which, by certificates of the clerk of the court to that effect, is brought to the land department after the expiration of the period of publication of notice of the patent application, is not such a proceeding in court as is contemplated by section 2326, Revised Statutes, and pending the determination whereof the patent proceedings are required by the section to be stayed.

Whilst the land department may, under the discretionary power lodged in it by Congress, suspend proceedings upon an application for mineral patent pending the determination of a suit in court which involves the land applied for, though such suit is not based upon an "adverse claim" within the contemplation of sections 2325 and 2326, Revised Statutes, yet, ordinarily, it should not exercise this power unless an adjudication by the court of the questions involved in the suit would aid in the disposal of a protest filed in the land department against the patent application.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *August 16, 1904.* (A. C. C.—F. H. B.)

The Department, by decision of December 7, 1903 (unreported), held, in effect, that mineral entry No. 36, made January 10, 1902, by the Bay City Oil Company for the Selma placer mining claim, embracing the NE. $\frac{1}{4}$ of Sec. 22, T. 32 N., R. 23 E., M. D. M., Visalia, California, land district, should be passed to patent for the reason, as stated therein, that no adverse claim had been filed and the entry appeared to have been duly and regularly allowed by the local officers, thereby reversing your office decision of August 27, 1902, whereby further action in respect to said entry was suspended pending the disposition of a suit brought by the Midway Oil Company in the Circuit Court of the United States for the ninth judicial circuit, in and for the southern district of California, northern division, against Robert Matson and forty-six other defendants (among them, the Bay City Oil Company), for the possession of certain public lands, including the tract covered by the entry.

February 1 and 24, 1904, the Midway Oil Company filed motions for review, which were entertained March 23, 1904, because it appeared, in effect, that the company had had no notice of your office decision of August 27, 1902, nor of the appeal therefrom by the Bay City Oil Company. The motions for review have now regularly matured. Both companies have appeared by counsel, and the Midway company has filed a brief and argument, whilst the Bay City company has filed a brief and argument in opposition thereto.

The facts in the case, so far as it is necessary to consider them in order to dispose of the pending review, as the same appear from the record and seem to be conceded by the parties, would indicate that the land in question is subject to disposal under the placer mining laws; that the Midway Oil Company claims the possessory title thereto under said laws, and to enforce its claimed right brought suit in the above mentioned court against the Bay City Oil Company, August 11, 1900, in which suit the latter company appeared and answered; that said suit is still pending; that, September 27, 1901, the Bay City Oil Company filed application for patent to the tract in question under the placer mining laws, which application was based upon location made September 8, 1899, by Robert Matson *et al.*; that notice of the application was duly posted and published, and no adverse claim was filed; that, January 10, 1902, entry was allowed upon proofs duly and regularly made by the Bay City company; that the Midway company, shortly before entry was allowed, brought to the attention of the land department notice of the commencement and pendency of said suit, and shortly after the allowance of entry notice of the continued pendency thereof, by filing with the local officers and in your office certificates of the clerk of the court to that effect.

Section 2325 of the Revised Statutes provides, among other things, that upon the filing of an application for patent to a mining claim, notice thereof shall be published in a newspaper for sixty days; and that if, at the expiration of that time, no adverse claim shall have been filed in the local office, "it shall be assumed that the applicant is entitled to a patent . . . 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" the statute.

Section 2326 of the Revised Statutes provides, in part, as follows:

Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim.

The certificates of the clerk of the court showing the beginning and the pendency of the suit in question were filed with the land department after the expiration of the period of publication of notice of the application for patent; they were not sworn to, and they do not "show the nature, boundaries, and extent" of the claim to the land therein prosecuted by the Midway company. In no sense can they be regarded as constituting an "adverse claim" within the contemplation of sections 2325 and 2326.

The suit in question was commenced prior to the filing of the application for patent; and notice of its pendency was given the land department, by certificates of the clerk of the court, after the period of publication had expired. At the expiration of that period, during which no adverse claim was filed, the assumption arose that no adverse claim existed. In no sense can the suit be considered such a proceeding in court as is contemplated by section 2326 and pending the determination whereof patent proceedings are required by the section to be stayed.

Whilst the land department may, under the discretionary power lodged in it by Congress, suspend proceedings upon an application for patent to a mining claim pending the determination of a suit in court which involves the land applied for, though such suit is not based upon an "adverse claim" within the contemplation of sections 2325-6 of the Revised Statutes, yet, ordinarily, it should not exercise this power unless an adjudication by the court of the questions involved in the suit would aid in the disposal of a protest filed in the land department against the patent application; and that was the situation in the case of

Thomas *et al. v. Elling* (26 L. D., 220), cited and relied upon by your office. Even though it should be conceded that the notice given the land department of the suit in question should be treated as a protest against the issuance of patent to the land involved, an adjudication by the court of the questions which would appear to be involved in the suit would not aid the land department in the proper disposal of the protest.

The Midway Oil Company, by reason of its failure to file an "adverse claim" with the local officers within the period of publication of notice of application for patent, and by its failure to show or allege that the applicant, the Bay City Oil Company, had not complied with the provisions of the mining laws prior to entry, has waived its rights, if any it had, to be heard before the land department in opposition to the issuance of patent.

If the Midway Oil Company has equities in the entered land under the mining laws as against the Bay City Oil Company, it would seem that such equities could be fully protected and enforced by the courts notwithstanding, and would be in no wise defeated or prejudiced by, the passing of the entry to patent.

The decision under review is adhered to.

ALASKA COPPER COMPANY.

Motion for review of departmental decision of May 12, 1903, 32 L. D., 128, denied by Acting Secretary Ryan, August 17, 1904.

ARID LAND—TRUCKEE-CARSON RECLAMATION PROJECT.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 18, 1904.

Register and Receiver, Carson City, Nevada.

GENTLEMEN: The inclosed notice, issued pursuant to directions of the Secretary of the Interior contained in his letter of August 5, 1904, is transmitted to you with direction to have publication thereof made in the Carson City News, Carson City, Nevada, and in the Wadsworth Dispatch, Wadsworth, Nevada, and also to post a copy thereof in the local land office at Carson City, Nevada. I also forward herewith four maps or plats of T. 18 and 19 N., R. 28 and 29 E., M. D. M., showing the "farm units" and limits of area per entry which the Secretary of the Interior has prescribed for lands which are believed to be susceptible to irrigation from the works now in course of construction under

the provisions of the reclamation act of June 17, 1902 (32 Stat., 388), known as the Truckee-Carson project.

All entries of lands in said townships must be made in conformity with the "farm units" designated upon said maps by letters and will be limited as to area by the quantity contained in said unit. For instance, in township 18 N., R. 29 E., the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, containing 40 acres, is designated as unit "D" of that section. The NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 6, containing in the aggregate 80 acres, have been combined as farm unit "A" of that section. The NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ of Sec. 22, containing 120 acres, have been combined as farm unit "A" of that section. These units are not divisible, but must be entered in their entirety and no more than one of such units can be embraced in an entry.

Inasmuch as several existing entries of lands in said townships made during the period of the withdrawal thereof are affected by the action of the Secretary of the Interior under authority of said act, in limiting the area per entry, and combining and classifying the legal subdivisions as farm units, you will examine your tract books immediately upon receipt of these instructions, and when you have ascertained what entries are affected by the order of the Secretary, you will promptly send notice by registered mail to each of such entrymen at his address of record, that he will be required, within thirty days from receipt of such notice, to adjust and conform his entry to said farm units, and to elect in case of reduction the unit he desires to retain, or to show cause, within the same period, why his entry should not be conformed to the "farm units" and canceled as to the area of land held in excess thereof, and that upon his failure to take action under said notice within the time specified, such entry will be conformed to the existing farm units, and when so conformed will be canceled as to any excess in area over that of the farm unit.

Upon receipt of the election of any entryman, or of the showing made in pursuance of said notice, the same will be immediately forwarded to this office, and where the rights of entrymen conflict with each other, or with the same farm unit, whether or not showing is made by either of the parties, you will report the matter to this office, forwarding all papers and your recommendation as to the action to be taken in connection therewith.

Upon failure of any party so notified to take action within the time specified, you will at once report the case to this office, accompanied by evidence of service of notice together with your recommendation, your reasons therefor being specifically stated therein.

All cases arising out of the adjustment of entries conformed to the system of farm units hereunder, will receive early and special consideration upon their receipt in this office.

You will also notify all settlers and entrymen and all persons who

contemplate the use of the waters from such works upon lands in private ownership that the charges to be made per acre upon such lands are estimated to be \$26 per acre, payable in ten annual installments, commencing on the first day of December of the year in which the water may be delivered to the lands during the month of April of that year.

Very respectfully,

J. H. FIMPLE,

Acting Commissioner.

Approved, August 16, 1904.

THOS. RYAN,

Acting Secretary.

OKLAHOMA LANDS—SETTLEMENT—ACT OF MARCH 3, 1901.

OWEN *v.* STEARNS.

Where a person, in violation of the provisions of the act of March 3, 1901, goes upon the land opened to settlement and entry by said act, prior to the expiration of the sixty-day period, he does not, by his wrongful presence on the land at the expiration of such period, acquire any right thereto which will be recognized by the land department as superior to the rights of one who goes upon the land immediately upon the expiration of the sixty-day period and makes settlement thereon as soon as it becomes legally subject to settlement and entry under said act.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, August 19, 1904.* (V. B.)

Edgar Owen has filed, and the Department has considered, a motion for review of its unreported decision of May 25, 1904, dismissing his contest against the entry of Agnes I. Stearns for the SE. $\frac{1}{4}$ of Sec. 2, T. 2 N., R. 16 W., Lawton, Oklahoma.

To a clear understanding of the case it is proper to state chronologically certain facts disclosed by the record.

On October 5, 1901, Stearns made homestead entry of the tract involved and on October 30, 1901, Edgar Owen initiated a contest against said entry on the ground of prior settlement and charging that defendant did not make entry in good faith and had not resided on the tract.

Upon the hearing the local officers recommended the dismissal of the contest and on November 2, 1902, Owen filed by his attorney of record, L. P. Ross, an appeal from said decision.

On January 7, 1903, the record of the case was forwarded from the local office to your office. On April 30, thereafter, Owen filed in the local office a revocation of the authority of Ross to act as his attorney. It appears that of this revocation neither Ross nor the defendant

herein had any notice or knowledge whatever until after it was forwarded by the local officers to your office long afterward.

On December 12, 1903, you rendered a decision in the case reversing that of the local officers, which was duly served upon Stearns. On December 18, 1903, an appeal was filed by Stearns in the local office and forwarded to your office, after due service thereof on said Ross as attorney for Owen.

On March 5, 1904, Owen wrote, inquiring of this Department what service appeared to have been made of the appeal here. On March 24, he was informed through your office that the appeal was filed and accepted by his attorney, Ross, and the next day thereafter you forwarded the record in the case to this Department.

On April 5, the local officers forwarded to your office the revocation of the authority of Ross to act as the attorney of Owen, which had been suffered negligently to lie in their office for nearly a year. On April 16, 1904, Owen filed here a motion to dismiss the appeal of Stearns because it had never been served on him or any person authorized to accept service.

On April 23, 1904, a copy of the appeal of Stearns was served by her resident counsel on Owen by registered letter and, as before stated, on May 25, 1904, the case was decided by this Department, the motion to dismiss the appeal was overruled and the contest of Owen was dismissed.

The specifications of error are several but may be grouped under three heads.

The first is error in not dismissing the appeal upon the motion of Owen. That question was fully considered in the departmental decision and the motion was denied for the reasons therein stated. It was no fault of the defendant that the appeal was not properly served. The fault is with Owen and the register and receiver. Owen should have notified his attorney that his authority to act had been revoked, so that he would not, innocently and without knowledge of such revocation, have accepted notice of the appeal when it was served by the opposite counsel. It was the fault of the local officers not to have immediately forwarded said revocation to your office and also in failing to call attention to the revocation when the appeal was presented by Stearns's counsel with the acknowledgment of service thereon by Ross. At all events Stearns and her counsel and Ross, all appear to have acted in entire good faith in the premises.

Whilst the rules of practice require that service must be made upon the opposite party, or his duly authorized attorney of record, those rules are established to promote orderly procedure in cases coming before the different branches of the Department, but such rules are always under the control of the Secretary and can not interfere with his supervisory authority in the proper control of all matters relating

to the just disposal of the public lands. In this case the Department will not allow the error, if it be such, of the defendant, to prevent her from having a hearing on the merits of the case. No reason is therefore seen for disturbing the ruling of the Department on this point.

The second error suggested in the motion for review is that the departmental consideration and decision of the case on appeal here was premature, inasmuch as the motion for dismissing the appeal showed that the same had not been duly served upon the contestant, and that the record showed he had not seen a copy thereof until after the resident counsel of defendant had caused a copy to be served upon him by registered mail, on the 23d of April, 1904; after which he was entitled, under the rules, to have thirty days in which to reply thereto and ten days additional for transmission by mail. It must be conceded that the decision made on May 25, 1904, was premature and before due opportunity was given appellee to file an answer to the appeal and the argument made thereon. The Department therefore holds that this specification of error is well taken; and inasmuch as counsel has now filed with the motion a full and elaborate argument upon the merits of the case, thus obtaining that full hearing before the Department and having his day in court, which he did not have before and is entitled to, the entire record of the case has been recalled from your office and has again been carefully examined and considered, in the light of the argument now submitted, and of the third specification of error which traverses the finding of the Department on the merits.

The grounds of the contest have been heretofore stated, and unless the contestant shows prior settlement, as alleged, he can have no standing, as whatever settlement was made the Department is satisfied was sufficiently followed up. As to this question of priority, it very clearly appears that at the hour of 12 o'clock at night on the 4th of October, the defendant, Stearns, went upon the land and performed sufficient acts of settlement to disclose her purpose to take it as a homestead. It also clearly appears that the contestant, Owen, went upon the land prior to 12 o'clock, at night, and was upon the land at that time. It is insisted in his behalf that having gone upon the land before 12 o'clock at night and erected his tent, and being thereon at that instant of time, he was there necessarily prior to the entrance of Mrs. Stearns upon the land, who had remained outside of the tract until that hour. The Department has well said in its decision that this contention is not well taken and can not be sustained.

The act of March 3, 1901 (31 Stat., 1093), under which the land was opened for entry, provides that—

No person shall be permitted to settle upon, occupy or enter any of said lands except as prescribed in such proclamation *until after* the expiration of sixty days from the time when the same are opened to settlement and entry.

The proclamation thereunder provided for entry and settlement after the expiration of said period of sixty days but *not before*. In the departmental circular of September 16, 1901 (31 L. D., 107), it was also said that this period of sixty days will expire at midnight of October 4, 1901.

The Department adheres to its former ruling that no rights can be recognized as having accrued to a party who thus violates the language and the spirit of the statute, of the proclamation, and the circular of the Department, and goes upon the land prior to the time when the Department permits such settlement and entry and against its clear prohibition; and especially will no such rights be recognized as against one who has acted in an orderly manner and obeyed the direction of the law. Adhering to this ruling, therefore, the conclusion is inevitable that the contestant, Owen, has not shown prior settlement as against the entryman. The most that can be said in his favor is that the settlement would date from the hour of 12 o'clock, the time at which that of the defendant also attached. But the settlement made at the same time as that of the defendant can not be treated as prior thereto.

Therefore, considering the motion for review, the specification of errors and the argument of counsel therewith, no reason is seen for disturbing the departmental decision, and, none appearing otherwise, the motion for review is denied.

WILLIAM E. MOSES.

Motion for review of departmental decision of April 23, 1904, 32 L. D., 566, denied by Acting Secretary Ryan, August 23, 1904.

RAILROAD GRANT—ARID LAND—WITHDRAWAL UNDER ACT OF JUNE 17, 1902.

SANTA FE PACIFIC RAILROAD CO.

The withdrawal, September 8, 1903, under the act of June 17, 1902, of lands subject to irrigation under the Mojave valley project, affected only public lands within the limits of the withdrawal, and furnishes no ground for the rejection of an application for the survey of lands within the limits of such withdrawal and also within the limits of a railroad grant, under the provisions of the act of February 27, 1899, where the railroad company has fully complied with the provisions of said act and the application is otherwise subject to approval.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, August 23, 1904.* (E. F. B.)

With your letter of June 28, 1904, you transmit the appeal of the Santa Fe Pacific Railroad Company, successor to the Atlantic and

Pacific Railroad Company, from the decision of your office of May 26, 1904, rejecting its application for the survey of certain lands, estimated to be about 80,000 acres, lying along the Colorado river, within the Mojave valley, and within the limits of the grant to the Atlantic and Pacific Railroad Company.

The application was presented under authority of the act of Congress of February 27, 1899 (30 Stat., 892), which provides as follows:

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.

You rejected said application upon the authority of the letter of the Department of February 24, 1904, directing you to reject the application of the Santa Fe Pacific Development Company for the survey of the same lands for the reasons stated in the report of the Director of the Geological Survey of February 18, 1904, to whom the application was referred.

The lands in question are within the limits of a withdrawal made September 8, 1903, under the act of June 17, 1902 (32 Stat., 388), in view of a contemplated project for the irrigation of lands in the Mojave valley. That withdrawal affected only the public lands within those limits, and affected in no respect whatever the right of the railroad company to dispose of its lands in any manner it may deem proper. In the report of the Director of the Geological Survey, upon which the application presented by the Santa Fe Pacific Development Company was rejected, it was stated that an irrigation company had for some time been endeavoring to obtain a right to construct irrigation works across the Mojave Indian reservation, with the intention of irrigating the railroad lands, and that said company had been carrying on the work of construction without complying with certain preliminary conditions deemed necessary for the protection of the interests of the Government. The Director advised that these lands ought not to be surveyed until the question as to the rights of the irrigation company are fully settled. He further suggested that the attachment of any right in favor of the irrigation company, or the railroad company, to these lands, would seriously interfere with the development of any project which may be deemed feasible for the irrigation of the public lands in the townships to be surveyed. That suggestion seemed to be predicated upon the theory that if the railroad lands should be surveyed it would enable the railroad company to dispose of them

indiscriminately to anyone applying and thus interfere with the plans to be worked out by the reclamation service, which contemplates the irrigation of all the arid lands in that valley, by works to be constructed under the reclamation act, and the utilization of the waters from such works to their fullest extent.

On April 24, 1904, a permit was granted to the Rio Colorado Land and Improvement Company, the company referred to by the Director, to construct and operate a ditch across Camp Mojave Indian reservation, thus removing one of the objections urged by the Director to the survey of these lands; the only remaining objection being that if the lands are surveyed the railroad company will be enabled to sell them indiscriminately to any person, thus creating a large number of land owners to deal with in working out the project for the irrigation of these lands in connection with the public lands.

As before stated, the withdrawal of the public lands in the township to be surveyed does not in any manner affect the right of the railroad company to dispose of its lands in those townships in any quantity and to any person that it may deem proper, as the right of the company to such lands is in no manner dependent upon the designation thereof by the government surveys. It is probable that the refusal of the government to survey the lands and thus prevent the company from obtaining a patent to them would seriously embarrass it in its effort to obtain purchasers, but this does not appeal to the Department as a convincing reason for refusing it the benefits secured by the act of February 27, 1899, *supra*, which declares that it shall be the duty of the government to survey such lands upon compliance by the company with its provisions.

The application should be granted.

RAILROAD GRANT—CONFIRMATION—SECTION 4, ACT OF MARCH 3, 1887.

MOODY ET AL. *v.* EWING.

No time having been fixed by the Secretary of the Interior within which purchasers from the Mobile and Girard Railroad Company, of lands erroneously certified or patented to the company on account of the grant made to aid in the construction of its line of road, or the heirs or assigns of such purchasers, should make proof of their purchase, in order to bring their claims within the confirmatory provisions of section 4 of the act of March 3, 1887, laches can not be imputed generally to such purchasers, their heirs or assigns, for failure to assert their rights promptly after the adjustment of said grant; but as to such of said lands as have been restored to the public domain and entered under the public land laws, and final proof submitted on such entries after the publication of notice as required by law, without timely objection by such purchasers, their heirs or assigns, they are estopped from claiming the benefits of said section.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, August 29, 1904.* (G. B. G.)

This case is again before the Department upon motion of Hampton D. Ewing, for review of departmental decision of January 31, 1902 (unreported), denying his application, under section 4 of the act of March 3, 1887 (24 Stat., 556), for confirmation of title to certain lands particularly described in the application and familiarly known as Mobile and Girard railroad lands, lying in the Montgomery land district, Alabama.

The motion was duly entertained, April 2, 1902, and has been returned, with evidence of service upon counsel representing the several parties who are protesting against Ewing's application.

Notice of the application was duly published by Ewing and duly posted at the local office, whereat Richard E. Moody and many other persons protested against its allowance, on the ground that they each had homestead entries for certain portions of the land, respectively, and as to some of them that final proof had been submitted on these entries and final certificates issued. Proof was offered by Ewing in support of his application, but the local officers denied the application upon the ground that the purchasers of these lands had lost whatever rights they may have otherwise had thereto by virtue of said act because of their laches and supineness in invoking its provisions. Upon Ewing's appeal your office sustained the action of the local officers, upon the ground that it was not shown that there had been a real conveyance of the lands in controversy, or a genuine consideration, or good faith purchase thereof, but, "on the contrary, that this is a revival of a claim of speculative character, lacking in the essential quality of good faith." Upon the further appeal of Ewing, the Department rendered its said decision herein, now under review, which affirmed the decision of your office upon the ground that the applicant, Hampton D. Ewing, having "purchased" this land, August 5, 1896, with full knowledge that the grant to the Mobile and Girard Railroad Company had been adjusted, after said land had been restored to the public domain, and with full knowledge that the company acquired no title thereto, his claim is not protected by section 4 of said act. Hampton D. Ewing does not claim to be a "purchaser" of said lands in good faith or at all. The conveyance of the land in controversy to Ewing, August 5, 1896, for a nominal consideration of one dollar, was made in trust by the real parties in interest, and Ewing is acting for them in a fiduciary capacity. This was not in terms stated in the application itself, but it was so stated by Ewing in opening his case before the local office, and the whole record leaves no doubt in respect of this as to the intention of the parties.

The applicant is therefore entitled to a further consideration of the record.

The history of the grant made to the State of Alabama by the act of June 3, 1856 (11 Stat., 17), to aid in the construction of a railroad from Girard to Mobile in that State, and the proceedings in the land department looking to the adjustment of that grant, are of familiar statement in the published decisions of the Department, and need no repetition here, further than to say that, the company having filed its map of definite location, something over one-half million acres of land were certified to the State on that account, which were by appropriate State legislation conveyed to the company. Only eighty-four miles of the road were built, and by the forfeiture act of September 29, 1890 (26 Stat., 496), the grant opposite the unconstructed portion of the road was forfeited, but it was provided by section 8 of that act said company should be entitled to the amount of land earned by the construction of the eighty-four miles of road, and the Secretary of the Interior was directed, in making settlement and certifying lands to or for the benefit of said company, to include "all the lands sold, conveyed, or otherwise disposed of by said company."

When your office came to the adjustment of the grant, it became apparent that the company had not earned sufficient lands to satisfy in full the claims for lands sold, conveyed, or otherwise disposed of by the company, and, December 22, 1892, the "large purchasers" entered into an agreement to pro-rate their claims. By virtue of this agreement the heirs of one Abraham [Abram] Edwards were allowed to participate in the pro-ration and allowed their share of the earned lands, amounting to about fifty-eight per cent of Edwards's claim. May 4, 1893, the residue of the lands, among which were the lands here in controversy, were restored to the public domain, on July 19, 1893, after notice by publication.

The applicant's title rests upon the granting act; the certification of the lands to the State by the land department of the government; the act of the State legislature conferring the lands upon the Mobile and Girard Railroad Company; a deed from the company, by its president, to Abram Edwards, executed January 21, 1871; a deed from Edwards and wife to Samuel T. W. Sandford, dated January 27, 1871; a will by Samuel T. W. Sandford, proved in the surrogate's court of Queens county, New York, January 11, 1883, and on November 11, 1899, in the probate court of Baldwin county, Alabama, devising and bequeathing to his widow, Jane E., and his three sons, Drurie S., Clarence T., and Horatio S. Sandford, all of the testator's property, real and personal, share and share alike; a deed from Drurie S. Sandford, Clarence T. Sandford, and Horatio S. Sandford, as devisees under the last will and testament of Samuel T. W. Sandford, deceased, and as the only heirs at law of the said Samuel T. W. Sandford, deceased, and Jane E. Sandford, deceased, his wife, to Hampton D. Ewing, the applicant, executed August 5, 1896.

This chain of title is supported in part by the records of the land department, of which judicial notice must be taken, and in part by certified copies of the deeds and will referred to. The application is made as trustee for and on behalf of Drurie S., Clarence T., and Horatio S. Sandford, and upon the ground that their ancestor, Samuel T. W. Sandford, was a good-faith purchaser of these lands within the meaning of section 4 of the act of March 3, 1887, *supra*. That section is as follows:

That as to all lands . . . which have been erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, . . . 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.

It has been repeatedly held by this Department that Edwards was not a good-faith purchaser of these lands from the railroad company. They were deeded to him by the company in the execution of a lobbying contract, and Edwards knew that the company had not earned the lands, and that steps were being taken looking to a forfeiture of the grant. But the character of the Edwards purchase does not control this case. If Samuel T. W. Sandford in good faith bought these lands from Edwards, without knowledge of the defect of title on account of the erroneous certification thereof to the State of Alabama, his heirs, or their assignees, are entitled to a patent therefor. *Ray et al v. Gross* (27 L. D., 707).

The deed from Edwards to Sandford was made pursuant to a written contract entered into between the parties, which was the result of negotiations growing out of an advertisement inserted in a New York newspaper, by Sandford, offering to exchange an interest in certain mineral properties in the State of New York for lands. The advertisement was answered by a broker representing Edwards, and the exchange of properties was eventually made. The consideration named in the deed was \$5,000, but it is evident that this was not the true consideration, but was expressed at Edwards's request, probably for the purpose of avoiding the payment of a large stamp tax. Taking into consideration the market value of the stock in the mineral property then and afterwards, which was transferred to Edwards, it is probable that more than \$30,000 was paid by Sandford for these lands.

Upon a most careful consideration of the record, it is thought to be clear that the finding of your office, that Sandford's purchase from Edwards was made in bad faith, should not be sustained. The purchase may have been and probably was made as a speculation, but this is no evidence whatever of bad faith. It was a *bona fide* transaction. The legal title was in Edwards, a consideration not only valu

able, but adequate, was actually paid, and there is no evidence tending to show that Sandford knew anything of the circumstances under which Edwards acquired these lands from the company.

The Supreme Court, in the case of *United States v. Winona, etc., Railroad* (165 U. S., 463), interpreting the act of 1887, said:

Section 4 of the same act, expressly referring to all other lands erroneously certified or patented to any railroad company, provides that citizens who had purchased such lands in good faith should be entitled to the lands so purchased and to patents therefor issuing directly from the United States, and that the only remedy of the Government should be an action against the railroad company for the Government price of similar lands. It will be observed that this protection is not granted to simply *bona fide* purchasers (using that term in the technical sense), but to those who have one of the elements declared to be essential to a *bona fide* purchaser, to wit, good faith. 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 has made an honest purchase of the lands. The plain intent of this section is to secure him the lands, and to reinforce his defective title by a direct patent from the United States, and to leave to the Government a simple claim for money against the railroad company. It will be observed that the technical term "*bona fide* purchaser" is not found in this section, and while it is provided that a mortgage or pledge shall not be considered a sale so as to entitle the mortgagee or pledgee to the benefit of the act, it does secure to every one who in good faith has made an absolute purchase from a railroad company protection to his title irrespective of any errors or mistakes in the certification or patent.

Under this interpretation of section 4 of said act, and the facts disclosed by the record, there can be no doubt that it was just such a case as this that said section was designed to protect, and unless laches may be imputed to the Sandfords, or their assigns, in asserting claim, they are entitled to a confirmatory patent.

Said section 4 merely provides that, "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," citizens of the United States who had purchased such lands in good faith, their heirs, or assigns, should be entitled to patents.

After the adjustment of the grant to the Mobile and Girard Railroad Company, as hereinbefore stated, these lands were restored to the public domain; but the Secretary of the Interior has never prescribed rules fixing a time within which purchasers of these lands, their heirs, or assigns, should make the proof required by said section.

From inquiry in your office, it is ascertained to have been the general rule, when restoring forfeited railroad lands, to fix a time within which purchasers claiming under the 4th and 5th sections of the act of March 3, 1887, should come forward and present their claims, of which time due notice was given. This was not done, as to the restored Mobile and Girard lands, presumably because your office entertained the view that the adjustment with the company under the forfeiture act settled the claims of all purchasers from the company.

This was an erroneous view. Section 3 of said forfeiture act of September 29, 1890, provided that nothing in that act should be construed as limiting the rights granted to purchasers by the act of March 3, 1887, *supra*, and in the case of Perdido Land Company (23 L. D., 288), it was held that the agreement of a transferee of the Mobile and Girard Railroad Company to accept, under section 8 of the act of September 29, 1890, a pro rata share of the lands earned by said company, and the consummation of such agreement, do not operate as a waiver or abandonment of the right on the part of said transferee to subsequently apply for relief under section 4 of the act of March 3, 1887, as to lands purchased from said company, but not secured through said pro rata adjustment. Inasmuch, therefore, as no notice was given to the purchasers of said lands, and as the act itself does not place any limitation on the time within which such claims may be asserted, laches may not be imputed generally in this case.

But this is true only generally and cannot be admitted in instances where the land has been entered under the public land laws and final proof submitted on such entries after due publication of notice as required by law, without timely objection by the purchaser, his heirs or assigns. While these applicants for confirmation of title under said section 4 of the act of March 3, 1887, are not chargeable with notice, either actual or constructive, of the opening of said lands to settlement and entry, this being a question between the purchaser and the government, and the delay by the purchaser in asserting claim being due largely to the government's failure, under a misconstruction of law, to give the usual notice in such cases, yet the purchaser is chargeable with constructive knowledge of notice to submit final proof upon entries of these lands, and as to them is estopped from claiming the benefits of said section.

The decision under review is recalled and vacated; the decision appealed from is reversed, and your office is directed to issue patents as applied for, except as to tracts upon which final proof had been submitted under the public land laws without objection, prior to the filing of the application for a confirmatory patent.

ARID LAND—CONTRACTS BETWEEN "WATER USERS' ASSOCIATIONS"
AND OWNERS OF LANDS—ACT OF JUNE 17, 1902.

INSTRUCTIONS.

Suggestions relative to the form of contracts to be entered into between "Water Users' Associations" and the owners of lands lying within the irrigable area of irrigation projects constructed under the provisions of the act of June 17, 1902.

Acting Secretary Ryan to the Director of the Geological Survey,
(F. L. C.) August 30, 1904. (E. F. B.)

With your letter of July 28, 1904, you submit two forms of a proposed contract and agreement to be entered into between "Water

Users' Associations" and the owners of large bodies of lands lying under irrigation projects to be constructed under the provisions of the reclamation act. The object of the contract is to create a trust in the Water Users' Associations for the sale of the lands to individuals who will reside upon them, in tracts of not more than one hundred and sixty acres. You submit them with the request "that they be examined as to form and as to the question whether they will insure the carrying out of the procedure intended."

The United States, either by the Secretary of the Interior or otherwise, is not to be a party to the contract, and the only suggestion of any interest it may have in the proposed agreement, or benefit that it may receive therefrom, is that it will secure the transfer of large bodies of lands within the irrigable area now held by individuals and corporations, to the ownership of individuals who will reside thereon, in holdings of such size as to bring them within that provision of the reclamation act authorizing the irrigation of lands in private ownership by the waters from such works, of not exceeding 160 acres to any one land owner, who must be a *bona fide* resident on the land or occupant thereof, residing in the neighborhood.

You state that the owners of lands under the projects in question will agree to dispose of their holdings in small tracts to qualified parties when the government is ready to accept applications for water rights, but the object to be attained in having contractual relations entered into between such parties at this time, is to assure the government that such obligations will be carried out by giving the "Water Users' Associations" the power to sell the land to qualified persons who apply for water under the reclamation act, in case the owners failed to do so. It contemplates that as to the two projects referred to, the law will practically be administered through the agency of associations organized within the irrigable area of the project, upon conditions similar to those set forth in the articles of the Salt River Valley Water Users' Association, which has been approved by the Department as to general principles.

It can not be doubted that in many, if not in all the projects that will, as now contemplated, be constructed under the act of June 17, 1902, the quantity of lands in private ownership that may be irrigated from the waters of such projects will necessarily be an important factor in determining whether the project is practicable. If there is not a sufficient quantity of public lands to utilize the waters that may be available from such works, the irrigation of lands in private ownership would become absolutely necessary in order that the cost of construction may be distributed as far as possible over the entire irrigable area. As the rights of such owners, which they may have obtained under State or Territorial laws, must be respected, it will readily be seen that the feasibility of the scheme can be materially promoted if

all the irrigable lands lying under such project are irrigated by the waters thereof, upon the terms, conditions, restrictions and provisions of the reclamation act. This can only be accomplished by the mutual agreement between the water users throughout the entire irrigable area who will agree upon general principles to govern in the use and distribution of the water and who will subordinate whatever rights they may have theretofore acquired to the provisions and conditions of the reclamation act. Such is the purpose contemplated by the Water Users' Associations.

But the primary object of the act of June 17, 1902, is the reclamation of the arid public lands. This important fact should be kept prominently in view in selecting sites for reservoirs to be constructed under said act, so as to avoid as far as possible any complications growing out of the private ownership of lands within the irrigable area and of rights to the use of the waters. It is probable, however, that no project undertaken under the reclamation act will find the field entirely free of individual interests, and hence it is important to devise some plan by which these interests may be brought in accord with the government's plans in each instance. They should be so handled as to become elements of harmony and strength rather than of discord and weakness in the working out of the project.

While this Department has no authority or jurisdiction to supervise transactions like those contemplated by the proposed agreements submitted, or to in any manner control the parties thereto or dictate what course shall be pursued, yet the government has such interest in the subject matter as affords justification for a response to a request by the parties for its views in the premises.

Upon this theory the forms of agreement submitted have been examined. They are in the essentials substantially the same and either would probably effectuate the result sought to be accomplished thereby. Any such agreement should, as to the manner of sale and the procedure therefor, adopt as far as practicable the procedure prescribed by the law of the State or Territory for judicial sales. The provisions as to this subject would very likely differ in the various States and Territories and therefore it would perhaps be impracticable to attempt the preparation of a form adapted to all sections. Any agreement drawn upon the lines suggested in either of the forms submitted, and providing a method of sale conforming as near as may be with the provisions of the local law governing judicial sales, would meet the views of this Department as to the necessities of the case. It is important to provide for some person to act in case of refusal or inability of the Water Users' Association to perform the duties assumed by it in any such agreement. This is attempted in paragraph 12 of the Yuma form. Instead, however, of providing that the Secretary of the Interior should exercise these powers, it would seem

the better plan to authorize and empower him, in such contingency, to designate some person or persons to act, conferring upon the party thus designated all the powers of the grantee association in the premises.

KLAMATH RIVER INDIAN RESERVATION—ALLOTMENT—ACT OF JUNE 17, 1892.

CRICHTON *v.* SHELTON.

The Klamath River Indian reservation was not abolished by or under the provisions of the act of April 8, 1864, but was recognized by the act of June 17, 1892, as an existing reservation, and the Indians thereon were by said act recognized as constituting a tribe.

Timbered lands are not necessarily excepted from allotment to Indians, but may be so allotted provided they contain sufficient arable area to support an Indian family and are on the whole, considering their location and the habits and subsistence of the Indians, suitable for a home for the allottee.

Allotments to Indians on the Klamath River reservation, under the provisions of the act of June 17, 1892, were made to the Indians as a tribe, under section 1 of the general allotment act of February 8, 1887, and not under the provisions of section 4 of said act.

Under the act of February 8, 1887, reservation Indians are not required to settle, improve, or maintain residence upon their allotments made from lands held for the tribe.

An Indian woman, recognized as a member of the Klamath tribe, is not by reason of her marriage to a white man, deprived of her right to an allotment in the tribal lands; and the children of such woman are likewise entitled to such an allotment.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) August 30, 1904. (C. J. G.)

An appeal has been filed by John L. Crichton from the decision of your office of December 19, 1903, holding intact Klamath River Indian allotments Nos. 108 and 109, made to Mary Shelton and her minor daughter, Mary Shelton, jr., respectively, for lot 7 and the SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 33, the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 33, and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 32, T. 13 N., R. 2 E., H. M., Eureka, California.

The allotments were made in August, 1893, under the act of June 17, 1892 (27 Stat., 52), and first or trust patents issued thereon September 26, 1893. Crichton filed charges against said allotments May 9, 1902, and amended affidavit January 19, 1903, for the purpose of suggesting the death in the meantime of Mary Shelton, sr. He alleged substantially that the allotments were illegally made for the reason that the lands were timber lands subject to sale under the act of June 3, 1878; that said lands were not disposed of in accordance with the provisions of the act of June 17, 1892; that the lands are not suitable for or adapted to agriculture or grazing, being rough and covered with a dense and heavy growth of redwood and pine timber; that the allottees never made settlement upon said lands or resided

thereon, and have never improved or cultivated the same; that said allottees do not belong to any Indian tribe; and that they were the wife and daughter, respectively, of a white man.

Your office, after receiving the report of a special agent who had investigated the matter, ordered a hearing in the case, at which both parties appeared and submitted testimony. The local officers rendered divided opinions, the register finding that the allotments should remain intact and the receiver that they should be canceled. Your office, in the meantime having procured the opinion of the Commissioner of Indian Affairs in the premises, concurred in the finding of the register and denied Crichton's application for the cancellation of the allotments.

The chief contentions made by appellant are that under the provisions of the act of April 8, 1864 (13 Stat., 39, 40), the Klamath River Reservation was abolished and became subject to subdivision and sale; that the lands covered by these allotments are timber lands and therefore not subject to allotment; and that the allottees not being members of a tribe and the lands no longer being in reservation, the allotments, under the provisions of the act of June 17, 1892, *supra*, could only be made under section 4 of the act of February 8, 1887 (24 Stat., 388), and not under section 1 of said act.

The act of June 17, 1892, is as follows:

That all of the lands embraced in what was Klamath River Reservation, in the State of California, as set apart and reserved under authority of law by an Executive order dated November sixteenth, eighteen hundred and fifty-five, are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands: *Provided*, That any Indian now located upon said reservation may, at any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment of land for himself and, if the head of a family, for the members of his family, under the provisions of the act of February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and if found entitled thereto, shall have the same allotted as provided in said act or any act amendatory thereof: *Provided*, That lands settled upon, improved, and now occupied by settlers in good faith by qualified persons under the land laws shall be exempt from such allotment unless one or more of said Indians have resided upon said tract in good faith for four months prior to the passage of this act. And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians. And any person entitled to the benefits of the homestead laws of the United States who has in good faith prior to the passage of this act, made actual settlement upon any lands within said reservation not allotted under the foregoing proviso and not reserved for the permanent use and occupation of any village or settlement of Indians, with the intent to enter the same under the homestead law shall have the preferred right, at the expiration of said period of one year to enter and acquire title to the land so settled upon, not exceeding one hundred and sixty

acres, upon the payment therefor of one dollar and twenty-five cents an acre, and such settler shall have three months after public notice given that such lands are subject to entry within which to file in the proper land office his application therefor; and in case of conflicting claims between settlers the land shall be awarded to the settler first in order of time: *Provided*, That any portion of said land more valuable for its mineral deposits than for agricultural purposes, or for its timber, shall be entered only under the law authorizing the entry and sale of timber or mineral lands: *And provided further*, That the heirs of any deceased settler shall succeed to the rights of such settler under this act: *Provided further*, That the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children.

Section 1 of the act of February 8, 1887, as amended by the act of February 28, 1891 (26 Stat., 794), is in part as follows:

That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or Executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation, or any part thereof, of such Indians is advantageous for agricultural or grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed, if necessary, and to allot each Indian located thereon one-eighth of a section of land.

Section 4 of said act provides:

That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land-office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations, etc.

By act of March 3, 1853 (10 Stat., 226, 238), entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes," etc., it was provided:

That the President of the United States, if upon examination he shall approve of the plan hereinafter provided for the protection of the Indians, be and he is hereby authorized to make five military reservations from the public domain in the State of California or the Territories of Utah and New Mexico bordering on said State, for Indian purposes: *Provided*, That such reservations shall not contain more than twenty-five thousand acres in each: *And provided further*, That said reservation shall not be made upon any lands inhabited by citizens of California, and the sum of two hundred and fifty thousand dollars is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to defray the expense of subsisting the Indians in California and removing them to said reservations for protection: *Provided, further*, if the foregoing plan shall be adopted by the President, the three Indian agencies in California shall be thereupon abolished.

By act of March 3, 1855 (10 Stat., 686, 699), also an appropriation act of similar title to the above, it was provided:

For collecting, removing, and subsisting the Indians of California, (as provided by law,) on two additional military reservations, to be selected as heretofore, and not to contain exceeding twenty-five thousand acres each, in or near the State of California

the sum of one hundred and fifty thousand dollars: *Provided*, That the President may enlarge the quantity of reservations heretofore selected, equal to those hereby provided for, and shall not expend the amount herein appropriated unless, in his opinion, the same shall be expedient; and the last proviso to the authority for five military reservations in California, per act of third of March, eighteen hundred and fifty-three, be, and the same is hereby, repealed.

By executive order of November 16, 1855 (Executive Orders relating to Indian Reserves, 1902, pp. 21, 22), in pursuance of the above legislation, a strip of territory commencing at the Pacific Ocean and extending one mile in width on each side of the Klamath River for a distance of twenty miles was set apart for Indian purposes. It was provided that upon a survey of the tract a sufficient quantity be cut off from the upper end thereof to bring it within the limit of 25,000 acres authorized by law. This reservation has since been known and referred to as the Klamath River Indian Reservation in California. In the year 1861 nearly all the arable lands of said reservation and the improvements thereon were destroyed by a freshet, in view of which, upon recommendation of the Indian agent, a new and temporary reservation, known as Smith River Reserve, was established May 3, 1862, to which it was proposed to remove the Klamath Indians. The indorsement of the Secretary of the Interior on the recommendation of the Commissioner of Indian Affairs relating to Smith River Reserve was: "The lands embraced in the proposed reservation may be withdrawn from sale for the present." (Ex. Orders, p. 33.) It appears that only a small portion of said Indians removed to the new reservation, by far the greater number preferring to remain on the old; and nearly all of those who did remove returned within a few years to Klamath River.

By act of April 8, 1864 (13 Stat., 39, 40), the State of California was constituted one Indian superintendency, and the President was authorized in section 2 of the act, to set apart—

not exceeding four tracts of land, within the limits of said State, to be retained by the United States for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said State, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended: *And provided, further*, That said tracts to be set apart as aforesaid may, or may not, as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian reservations heretofore set apart in said State, and that in case any such reservation is so included, the same may be enlarged to such an extent as in the opinion of the President may be necessary, in order to its complete adaptation to the purposes for which it is intended.

SEC. 3. *And be it further enacted*, That the several Indian reservations in California which shall not be retained for the purposes of Indian reservations under the provisions of the preceding section of this act, shall, by the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, be surveyed into lots or parcels of suitable size, and as far as practicable in conformity to the surveys of the public lands, which said lots shall, under his direction, be appraised by disinterested persons at their cash value, and shall thereupon, after due advertisement,

as now provided by law in case of other public lands, be offered for sale at public outcry, and thence afterward shall be held subject to sale at private entry, according to such regulations as the Secretary of the Interior may prescribe, etc.

AS TO THE STATUS OF THE KLAMATH RIVER RESERVATION.

At the date of the act of April 8, 1864, there were in existence in California the following reservations: Klamath River, Mendocino and Smith River (Ex. Orders, pp. 21, 22 and 33). In addition, the Secretary of the Interior had directed that Nome Cult Valley, or Round Valley, be set apart and reserved for Indian purposes (Ex. Orders, p. 29, and House Doc. 33, 50th Cong., 1 Sess.). The Mendocino and Smith River reservations were discontinued by act of Congress of July 27, 1868 (15 Stat., 221, 223). There was never such an act with reference to Klamath reservation. Under date of August 21, 1864, State superintendent Wiley, acting under instructions from the Department, notified settlers in Hoopa Valley not to make any further improvements upon their places, as he had located said valley as one of the four tracts authorized by the act of 1864, to be named the Hoopa Valley Reservation, the metes and bounds to be thereafter established subject to the approval of the President (Ex. Orders, p. 20). Notwithstanding there had been no executive orders setting apart the same, Congress recognized both the Round Valley and Hoopa Valley reservations by making appropriations for them as such (15 Stat., 221, and 16 Stat., 37). The President declared the exterior boundaries of the Hoopa Valley Indian Reservation June 23, 1876, and formally set apart the same for Indian purposes "as one of the Indian reservations authorized to be set apart in California by act of Congress approved April 8, 1864." (Ex. Orders, p. 20.) No order, executive or otherwise, appears to have issued setting apart or retaining the Round Valley reservation, under the act of 1864, as it was selected by the State superintendent in 1856 and established by order of the Secretary of the Interior in 1858 (Ex. Orders, p. 29, and House Ex. Doc., 33, 50th Cong., 1 Sess.). But by order of the President of March 30, 1870, said reservation was enlarged (Ex. Orders, p. 31). By act of March 3, 1873 (17 Stat., 633), the boundaries of said reservation were changed so as to add thereto thousands of acres, and by executive order of July 26, 1876, a tract of land was "withheld from public sale, and reserved for the use and occupancy of the Indians located on the Round Valley Reservation, as an extension thereof" (Ex. Orders, p. 33). By executive order of January 31, 1870, two tracts were set apart for the Mission Indians in California. This order was subsequently revoked and the lands restored to the public domain. But by order of December 27, 1875, the President set apart nine different non-contiguous tracts "as reservations for the permanent use and occupancy of the Missions Indians

in Lower California." May 15, 1876, eight other tracts were in the same way ordered set apart as reservations for said Indians, in addition to those reserved under Executive order of December 27, 1875. Other orders were from time to time made adding to, taking away from and changing the lines of the tract already reserved, until no less than nineteen different and non-contiguous tracts were reserved for the Mission Indians, and all these constituted one of the four reservations authorized by the act of April 8, 1864 (Executive orders, pp. 23, 24, 25, 26, 27 and 28). The Tule River Reserve was set apart for Indian purposes by Executive order of January 9, 1873, and by order of October 3, 1873, another tract, known as the "Tule River Indian Reservation," was set apart in lieu of that under the order of January 9, 1873; and by Executive order of August 3, 1878, a portion of the land described was taken out of reservation and restored to the public domain (Executive Orders, p. 34).

Under date of January 20, 1891, the Assistant Attorney General for this Department rendered an opinion upon certain questions propounded by the Commissioner of Indian Affairs, one of which was as to whether the Department was authorized to cause the removal of intruders from the Klamath River Indian Reservation in California. In the course of said opinion, after referring to the above orders withdrawing lands for Indian purposes, it was said:

The foregoing matters are all contained in the reports of the officers of the Indian Office, annually communicated to and therefore within the knowledge of and it is to be presumed approved by Congress when the annual appropriations were subsequently and continuously made for these four reservations of Hoopa Valley, Round Valley, The Mission and Tule River.

It is therefore fair to adopt this approval, by Congress, of the action of the officers, in the premises, as a legislative construction of the act of 1864. Three conclusions inevitably flow from such construction: 1, that no formal order of the President retaining an existing reservation was deemed necessary, but its actual retention by the officers of the Indian Bureau was sufficient to constitute it one of the four authorized reservations; 2, that contiguity was not an essential, but a reservation might be composed of several non-contiguous parcels of land; and 3, that the Executive authority, in that respect, was not exhausted when once exercised in the setting apart of "four tracts" or parcels of land, as reservations; but that discretion continued, and yet exists, to change, add to, diminish or abolish reservations and establish others, as may seem most promotive of the public interests.

In relation to the Klamath River reservation, as in that of the Round Valley, no formal or written order appears to have been issued for its retention. In both of these instances the Indian Office retained possession and control of the former reservation, making no change in their condition, status or management, further than that they passed under the control of the one State superintendent as required by the act of 1864. The Indians remained in the occupation of both of these reservations, and yet so occupy them alone, except so far as that occupation may have been intruded upon by individual white men, under color of claims. Congress has made annual appropriations for support of the Indians on the Round Valley reservation, but none for those on Klamath, and for the all-sufficient reason that the latter are self-supporting and have never cost the government a dollar in this respect.

As showing further the status of the Klamath River reservation and the Indians thereon the following references are made:

The permanent settlement of the Indians residing upon said reservation, and the disposal of so much of the reservation as may not be needed for that purpose, are matters engaging the attention of the Department at this time. What the final result may be I am unable to say. The reservation is still in a state of Indian reservation, and must so remain, uninterfered with, until otherwise ordered by competent authority (Comr. Ind. Affs. to D. B. Hume, July 23, 1883—Ex. Doc., 140, p. 11).

The appeal raises the question of fact, namely, whether the said reservation, which was created by Executive order of November 16, 1855, has been regarded as a reservation since passage of the act of April 8, 1864 (13 Stat., 39), which limited the Indian reservations in California to four. It is sufficient for me to say that it has been so regarded, and that various allotments within its limits have recently been made. In my letter of March 26, 1883, to the Commissioner of Indian Affairs, I stated that when the selections within said reservation were all made, I would consider the question of restoring the remainder of the lands to the public domain (John McCarthy, 2 L.D., 460).

Now it appears that in carrying out the provisions of the act of April 8, 1864, the Hoopa Valley Reservation was established (Pamphlet, Ex. Orders, p. 301), the Round Valley already in existence was retained, and it was the declared purpose and intention of the superintendent of Indian affairs for California, who was charged with the selection of the four reservations to be retained, to extend the Hoopa Valley Reservation so as to include the Klamath River Reservation, or else keep it up as a separate reservation, and have a "station" or sub-agency there, to be under the control of the agent at the Hoopa Valley Reservation.

* * * * *
 The Klamath River Reservation has certainly been regarded by this Department as in a state of Indian reservation.

* * * * *
 I do not find that any steps were ever taken to sell the Klamath Reservation as an abandoned reservation, under section 3 of the act of April 8, 1864, nor that the General Land Office was ever formally advised of the relinquishment of the same. The reservation appears to have been kept intact with a view to holding it for the continued use of the Indians, who it appears never did wholly abandon it.

In 1879, in compliance with the wishes of this office, all trespassers known to be on the reservation were removed by the military under the direction of the War Department.

In 1883 the Secretary of the Interior directed that allotments of land be made to the Indians on the reservation, and the Indians were accordingly requested to make individual selections, but the work had to be suspended on account of the discovery of gross errors in the public surveys.

All this tends to show that the Department has regarded the lands as being in a state of reservation, and I may add that for a number of years the agent at the Hoopa Valley Agency has been required to exercise supervision over the affairs of the reservation (Comr. Ind. Affs. to Sec'y Int., April 4, 1888).

By the second section of the act of April 8, 1864 (13 Stat., 39), it is provided that the President, at his discretion, shall set apart not exceeding four tracts of land within the State of California to be retained by the United States for the purposes of Indian reservations, and that said tracts may, or may not, as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian reservations heretofore set apart in said State.

The third section of that act provides "that the several Indian reservations in

California which shall not be retained for the purposes of Indian reservations" shall be surveyed and offered for sale as therein directed. Indians have continued to reside on the Klamath River lands, and those lands have been and are treated as in state of reservation for Indian purposes, the jurisdiction is under the United States Indian agent for the Hoopa Valley Agency (An. Rept. Sec'y Int., 1888).

The following is a resolution of the Senate dated February 13, 1889:

Resolved, That the Secretary of the Interior be, and he hereby is, directed to inform the Senate what proceedings, if any, have been had in his Department relative to the survey and sale of the Klamath Indian Reservation in the State of California, in pursuance of the provisions of the act approved April 8, 1864, entitled "An act to provide for the better organization of Indian affairs in California."

In response to this resolution the Commissioner of Indian Affairs addressed a letter to the Secretary of the Interior, dated February 18, 1889, in part as follows:

In response to said resolution, I have to state that I am unable to discover from the records or correspondence of this office that any proceedings were ever had or contemplated by this Department for the survey and sale of said reservation under the provisions of the act aforesaid; on the contrary, it appears to have been the declared purpose and intention of the superintendent of Indian affairs for California, who was charged with the selection of the four reservations to be retained under said act, either to extend the Hoopa Valley Reservation (one of the reservations selected under the act), so as to include the Klamath River Reservation, or else keep it as a separate independent reservation, with a station or subagency there, to be under control of the agent at the Hoopa Valley Reservation, and the lands have been held in a state of reservation from that day to this (Ex. Doc. 140, pp. 1, 2).

In the opinion of the Assistant Attorney General for this Department hereinbefore referred to, it was said:

These facts show that the reservation in question has never been relinquished by formal act of the Indian Office, and no steps whatever have been taken looking to its release from Indian reservation and occupancy, and its survey, appraisement and sale under the act of 1864. On the contrary, it appears that it was always the purpose of the Indian Office to retain it as a reservation. . . .

Pushing aside all technicalities of construction, can any one doubt that for all practical purposes the tract in question constitutes an Indian reservation? Surely, it has all the essential characteristics of such a reservation; was regularly established by the proper authority; has been for years and is so occupied by Indians now, and is regarded and treated as such reservation by the executive branch of the government, to which has been committed the management of Indian affairs and the administration of the public land system It is said, however, that the Klamath River reservation was abolished by section three of the act of 1864. Is this so?

* * * * *

In the present instance, the Indians have lived upon the described tract and made it their home from time immemorial; and it was regularly set apart as such by the constituted authorities, and dedicated to that purpose with all the solemnities known to the law, thus adding official sanction to a right of occupation already in existence. It seems to me something more than a mere implication, arising from a rigid and technical construction of an act of Congress, is required to show that it was the intention of that body to deprive these Indians of their right of occupancy of said lands,

without consultation with them or their assent. And an implication to that effect is all, I think that can be made out of that portion of the third section of the act of 1864 which is supposed to be applicable.

It was therefore concluded that the Klamath River reservation might be legally considered a part of the Hoopa Valley reservation, one of the four Indian reservations authorized by the act of 1864, and consequently that the Department was clothed with authority to remove intruders therefrom, and that the Hoopa Valley reservation may be legally extended so as to cover the ground of the Klamath reservation.

From the foregoing it will be seen that the question raised by the appeal as to the status of the Klamath River Reservation in California is not a new one. Such reservation has all along been regarded and treated as retained for Indian purposes, and the Department has so held. The only Indians even remotely recognized as non-reservation Indians were those residing along the Klamath River between the boundaries of the Hoopa Valley and Klamath River reservations. In the case of *Spalding v. Chandler* (160 U. S., 394, 403-404) it is said:

It is not necessary to determine how the reservation of the particular tract, subsequently known as the "Indian reserve," came to be made. It is clearly inferable from the evidence contained in the record that at the time of the making of the treaty of June 16, 1820, the Chippewa tribe of Indians were in the actual occupation and use of this Indian reserve as an encampment for the pursuit of fishing. . . . But whether the Indians simply continued to encamp where they had been accustomed to prior to making the treaty of 1820, whether a selection of the tract, afterwards known as the Indian reserve, was made by the Indians subsequent to the making of the treaty and acquiesced in by the United States Government, or whether the selection was made by the Government and acquiesced in by the Indians, is immaterial. . . . If the reservation was free from objection by the Government, it was as effectual as though the particular tract to be used was specifically designated by boundaries in the treaty itself. The reservation thus created stood precisely in the same category as other Indian reservations, whether established for general or limited uses, and whether made by the direct authority of Congress in the ratification of a treaty or indirectly through the medium of a duly authorized executive officer.

In the case of *Minnesota v. Hitchcock* (185 U. S., 373, 389-90), it was held:

Now, in order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes.

And in the case of *State of Minnesota* (22 L. D., 388), it was said:

It is not necessary in order to constitute a reservation that a treaty, or act of Congress, shall specifically mention the lands that are reserved, but it is sufficient if the lands occupied by the Indians are recognized by the officials of the government as reserved Indian lands.

The fact is that by Executive order of October 16, 1891 (Executive Orders 1902, p. 20), the Hoopa Valley Reservation was made to include the Klamath River Reservation, as follows:

It is hereby ordered that the limits of the Hoopa Valley Reservation, in the State of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart in said State by act of Congress approved April 8, 1864 (13 Stat., 39), be, and the same are hereby, extended so as to include a tract of country 1 mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley Reservation to the Pacific Ocean: *Provided, however,* That any tract or tracts included within the above-described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended.

This then was the status of the Klamath reservation upon the passage of the act of June 17, 1892, *supra*. Previously thereto numerous bills had been introduced in Congress providing for the disposition and sale of lands within said reservation. In his annual report for 1885 the Commissioner of Indian Affairs said:

No less than three bills were introduced in the last Congress "to restore the reservation to the public domain," in each of which provision was made for allotting lands in severalty to the Indians (S. 813 and H. R. 112 and 7505). Neither of said bills was enacted, for the reason, it is presumed, that they were not reached in the regular course of business before adjournment. It is my intention to ask at an early day for legislation suitable to the wants of these Indians.

In the committee reports upon House bills Nos. 113, Report 1176, 51 Cong., 1 Sess., and 38, Report 161, 52 Cong., 1 Sess., it was stated that as the Klamath River Reservation was not included within the limits of either of the four reservations authorized by the act of 1864, it became abandoned under the provisions of said act. It was further stated:

As this land does not constitute an Indian reservation, and has not been used as such for twenty-eight years, there does not appear to be any reasonable objection to the passage of the present bill, the only object and effect of which will be to prescribe a mode for its disposition and sale different from that fixed by act of April 8, 1864 (House Rept. 161, 52 Cong., 1 Sess.).

In view of what is set forth herein the committee was apparently mistaken in concluding that the Klamath had not been used as an Indian reservation. However, none of the bills became law except that of June 17, 1892, which can be construed in no other light than a distinct recognition of the Indians' rights on said reservation. Both the reports of the committee and the act of 1892 preclude the idea that the lands within said reservation should have been disposed of under the provisions of the act of 1864, a different mode for their disposition being prescribed in the bill that became law as well as in the bills that did not.

In support of the appeal here reference is made to the case of *United States v. Forty-eight Pounds of Rising Star Tea* (35 Fed. Rep., 403),

decided in the United States district court of California, and also to the same case decided in the United States circuit court for the same State (38 Fed. Rep., 400). The first case was elaborately discussed by the Assistant Attorney General for this Department in his opinion of January 20, 1891, hereinbefore referred to, with the result that while conceding the probable correctness of the judgment rendered in said case, the Assistant Attorney General was not convinced that his own views were erroneous, and he could not assent to the reasoning of the court. That case arose upon a libel filed by the United States against certain packages of goods belonging to one R. D. Hume, seized because of an alleged violation of Sec. 2133 of the Revised Statutes, which provides:

Any person other than an Indian who shall attempt to reside in the Indian country as a trader, or to introduce goods, or to trade therein without such license, shall forfeit all his merchandise offered for sale to the Indians, or found in his possession, and shall moreover be liable to a penalty of five hundred dollars.

The violation of law in this instance consisted in paying the Indians "in trade" for their services in fishing, by furnishing them with articles composing the cargo of a vessel owned by Hume, in the Klamath River, a navigable stream under the laws of the State of California. The court incidentally held that the Klamath River reservation was an abandoned reservation, to be disposed of as specifically provided in the act of 1864; that the Klamath lands are not such a reservation as brings them within the meaning of the terms "Indian country." The Assistant Attorney General held "there was and could be no question properly before the court as to the legal or actual status of that reservation; and the utterances of the Judge in relation thereto were *dicta* and not essential to the decision of the case before the court." The date of decision by the district court was June 7, 1888, which was the one discussed by the Assistant Attorney General, and that of the circuit court April 1, 1889. The case again has been considered in connection with the concurring decision therein on appeal to the circuit court. The Department is unable to find that it has any controlling bearing upon the case now under consideration. Besides, whatever persuasive force said cases may have had prior thereto, is minimized or destroyed by reason of the Executive order of October 16, 1891, extending the Hoopa Valley Reservation so as to include the Klamath, and the act of June 17, 1892, which specifically provides for a different mode of disposition for the lands in the latter reservation from that prescribed in the act of 1864.

AS TO THE CHARACTER OF THE LANDS IN THE KLAMATH RIVER RESERVATION.

The directions given to the State superintendent August 15, 1855, were to select the reservation from such "tracts of land adapted as to soil, climate, water privileges, and timber, to the comfortable and permanent accommodation of the Indians."

The land on this river is peculiarly adapted to the growth of vegetables, and it is expected that potatoes and other vegetable food, which can be produced in any abundance, together with the salmon and other fish which abound plentifully in the Klamath river, shall constitute the principal food for these Indians (An. Rept. Comr. Ind. Affs. 1856, p. 238).

One great difficulty this reservation labors under is the small amount of land that can be brought under cultivation. The Klamath river runs through a canon the entire length, and the reservation being located upon each side of it, the only land suitable for cultivation is in the bottoms, ranging in size from one acre to seventy. . . . With these exceptions, the balance consists of mountains heavily timbered, through which the river appears to have cleft its way, interspersed with bottoms of from one to three acres (Id. 1858, p. 286).

This reservation is well located, and the improvements are suitable and of considerable value. There is an abundance of excellent timber for fencing and all other purposes, and at the mouth of the Klamath river there is a salmon fishery of great value to the Indians (Id. 1861, p. 147).

The Klamath river, from the mouth of the Salmon river down, runs mostly through a close canon, and is a very broken country, and had my predecessor allowed the Indians to care for themselves at the time of the great overflow, they would have taken to the mountains, and in a few days after the flood had subsided they would have returned to the river banks, and with fish have provided for their immediate wants, (as in fact two-thirds of them did and yet remain there), and would have saved the government the heavy expense of their removal and subsistence at Smith's river. The great number of Indians inhabiting the Klamath and Humboldt countries, the dense redwood forests on the river bottoms, and the high, craggy, precipitous mountains back, would, to my mind, be a serious warning against any effort to remove them by military force, etc. (Id. 1864, p. 122).

The country along the Klamath river, especially where the non-reservation Indians were located, and the habits and homes of the people, are thus described in the report of a special agent under date of June 25, 1885 (An. Rept. Comr. Ind. Affs. 1885, p. 264):

Nature seems to have done her best here to fashion a perfect paradise for these Indians, and to repel the approach of the white man. She filled the mouth of the Klamath River with a sand-bar and huge rocks, rendering ordinary navigation impossible, and pitched the mountains on either side into such steeps and amazing confusion that the river has a hard struggle to drive its way through the wonderful gorges; it turns and twists and tumbles along the rocks and gulches in an incessant mad rush to the ocean, without one moment's rest and without touching the borders of one acre of meadow land. The banks and hills shoot up abruptly from the river in jaunty irregularity, as if formed solely for the capricious life and limited aspirations of the Indian. Tremendous bowlders and cragged points jut into the river and change its course, forming innumerable eddies and back currents, where salmon seek rest, to be taken in large numbers by means of Indian nets. . . .

This, then, is where these Indians dwell in their grotesque villages. They form a very respectable peasantry, supporting themselves without aid from the Government by fishing, hunting, raising a little stock, cultivating patches of soil, and by day's labor at the Arcata lumber-mills. There is a crude thrift among them that one can not help admiring. Their little villages are perched on the mountain side, with most picturesque attractiveness, their houses are all made of lumber, and look as if they had been tossed upon the hillsides and allowed to stand wherever they gained a foothold. The beauty of irregularity could have no finer effect with studied art or the taste of cultivated refinement. Often a latticed porch, a curtained window, or a high roof with overhanging eaves displays an attempt at civilization, crude as it may be

The old men keep the nets in order and fish steadily; the women dress and dry fish, gather acorns for meal, and fetch wood and water; middle-aged men go off to work awhile, look after the hogs and horses, and make gardens, with their wives to help them. It is common to find little gardens of potatoes, beans, and corn among them, fenced in, just out of town as it were. . . . Indians have had general and actual, though unrecorded, possession and occupation of the whole river line here for years and years. Their dwellings are scattered and permanent. They wish to remain here; here they are self-supporting—actually self-sustaining. This is their old home, and home is very dear to them—treasured above everything else. No place can be found so well adapted to these Indians, and to which they themselves are so well adapted, as this very spot. No possessions of the Government can be better spared to them. No territory offers more to these Indians and very little territory offers less to the white man.

* * * * *

The few among these Indians who have turned their attention to farming show much thrift and enterprise. Though, owing to the fact that but a small portion of their territory is suitable for farming, a large majority of them depend upon wages for a living (Id. 1892, p. 230).

The only arable land occupied by Indians is found on the benches along the river in lots of a few acres in extent. These are generally cultivated as gardens. . . . The land allotted can never be used for agriculture, but the allotment secures the Indians in the tenure of their homes. (Id. 1894, p. 117.)

If it should be thought wise to allot land in severalty to Indians in such a stage of civilization, still this tract is of a character which ought not to be devoted to such a purpose. It would be entirely useless to them, being alone valuable for lumbering, for mining, and stock raising—by far the greater part being heavily timbered, mountainous, and broken, as shown by the field notes of survey of said land (House Rept. 1176, 51 Cong., 1 Sess., April 1, 1890, and Id. 161, 52 Cong., 1 Sess., February 5, 1892).

The above extracts require very little comment. They perhaps show that a comparatively small portion of the lands within the Klamath Indian reservation is suitable for agricultural purposes, strictly speaking, and that said lands might fairly be classed as timber lands. But it is equally clear that the lands within this reservation are peculiarly adapted to the purposes for which it was set apart, reference being had to the location of said lands and the habits and necessities of the Indians. There is little question that the prevailing motive for setting apart the reservation was to secure to the Indians the fishing privileges of the Klamath river. At the same time there is undoubtedly sufficient arable lands for garden and grazing pur-

poses, and at some points on the river there are large quantities of farming lands. In the Instructions of February 21, 1903 (32 L. D., 17), it is said:

The practice of forbidding allotments under section 4 of the general allotment act, of lands valuable for the timber thereon, is not based upon any decision of the Department laying down a well defined rule, and there is no good reason for such prohibition provided the allotment contains sufficient arable land to support an Indian family and is on the whole suitable for a home for the allottee and is applied for in good faith for that purpose.

⁵ This is certainly true of allotments of reservation lands under the act of 1887, and particularly so where allotments are authorized of specified tracts under special acts. But what is of more importance, the above extracts clearly show that Congress was fully aware of the status and character of these lands, the history of the Indians and their occupancy of said lands, at the date of the passage of the act of June 17, 1892. The act of June 17, 1892, provides, among other things:

That any portion of said land more valuable for its mineral deposits than for agricultural purposes, or for its timber, shall be entered only under the law authorizing the entry and sale of timber or mineral lands.

The whole history of these Indians, the recommendations of the Indian Office, and the context of the act itself, show that the primary purpose of the legislation of 1892 was to preserve the rights of the Indians located on the Klamath reservation. Allotments were to be made to all applicants who should make their selections within one year. Even lands settled upon, improved, and occupied by settlers were not exempt from allotment if the same had been resided upon by one or more Indians for four months prior to the passage of the act. After the expiration of one year, if any person had settled upon a tract not allotted to or reserved for the Indians, he could enter it under the homestead law upon payment of a certain price therefor. But, under the proviso above quoted, the lands not allotted or reserved were to be entered under the laws usually applicable to their particular character.

AS TO THE TRIBAL STATUS OF THE KLAMATH RIVER INDIANS.

It may be stated generally that these Indians have always been recognized as a tribe by the government. Any effort to show that they are not a tribe must combat the reports of the government's agents, the correspondence between the Department and the Indian Office, the orders of the Executive and the appropriation acts of Congress wherein such recognition unmistakably appears. The preponderance of the evidence introduced at the hearing in this case is to the effect that the Klamaths constitute a tribe. Members of the tribe by blood, as well as white men who have intermarried with these Indians and who are familiar with their habits, customs and government, from long residence among them testify that they are a distinct tribe, that they

speak a different language from the neighboring Indians, have laws of their own; that there are men among them who are recognized as leaders or chiefs—the present chief being Peckwanish Colonel or Suregoim Jim—and that the members of this tribe are called “Polyacks.” The records of the Indian Office show that on October 6, 1851, a treaty was made as follows:

A treaty of peace and friendship made and concluded at Camp Klamath, at the junction of the Klamath and Trinity rivers, between Redick McKee, one of the Indian Agents, specially appointed to make Treaties, with the various Indian Tribes in California, on the part of the United States, and the Chiefs, Captains, and Headmen of the Tribes or bands of Indians, now in council at this camp, representing the “Poh-lik,” or lower “Klamath,” The “Peh-tuck,” or upper Klamath, and the “Hoo-pah” or Trinity river Indians—containing also stipulations, preliminary to future measures, to be recommended for adoption on the part of the United States.

The treaty provided for a cession, and the setting apart of a described tract 20 miles in length by 12 in width—“containing in all six or seven square miles of farming land”—as an Indian reservation for the tribes named and such other tribes as the United States might thereafter remove from other parts of the valleys of the Trinity and Klamath rivers, or the country adjacent. The treaty appears never to have been ratified or confirmed, but it effectively shows that the Indians had the capacity of making treaties; that they had a tribal organization capable of entering into a treaty with the United States. Being self-supporting and independent as they were, it may be their tribal relations were not so intimate and pronounced as other tribes who were dependent upon the government. But they were nevertheless looked after by agents of the government and were always regarded and treated as a tribe. Congress in the act of June 17, 1892, in effect recognized these Indians as a tribe, as well as their claims to the lands in the Klamath reservation, by providing that the proceeds arising from the sale of the remaining lands after allotments were made, should constitute a fund to be used for the maintenance and education of the Indians and their children.

In view of the provisions of the act of June 17, 1892, the above matters are given at length as subjects of historical interest and not because they are regarded as of necessarily controlling importance in determining the questions involved in this case. The act of 1892 was a special act authorizing allotments of specific lands, which alone precluded the idea that Congress intended they should be allotted under the fourth section of the act of 1887. The act of 1892 provided for allotment to “any Indian now located upon said reservation,” which removes any question as to whether the lands constituted a reservation, or whether the Indian was a member of a recognized tribe or not. The question of tribal relation becomes of importance only in connection with that portion of the act of 1892 which provides that the allotments therein authorized are to be made to the Indians “under the

provisions of the act of February eighth, eighteen hundred and eighty-seven, entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes,' and, if found entitled thereto, shall have the same allotted as provided in said act or any act amendatory thereof." The act did not provide under which section of the act of 1887 the allotments should be made, but as said act of 1892 in terms recognized the Klamath as a reservation, there ought to be little or no question that it was contemplated that they should be made under the first section of the act of 1887, as the fourth section of said act refers exclusively to Indians not on reservations. Prior to the passage of the act of 1892 the Department had already held that the lands within the Klamath River reservation "should be allotted, if allotment be made, to the Indians thereon, under the first section of the allotment act of February 8, 1887 (Opinion Asst. Atty. Gen'l, January 20, 1891). The wording of the act of 1892 is "any Indian now located upon said reservation." It does not have to be shown under this act that the Indian was a member of a tribe or band, and this shows that all the provisions of the act of 1887 are not applicable, but rather the manner therein prescribed for making allotments. Whatever may have been the status of the lands or the Indians the act of 1892 took them out of the class subject to allotment under the fourth section of the act of 1887. The lands within the Klamath have never been such as could be regarded as "not otherwise appropriated."

At the time the allotments in question were made the husband of Mary Shelton, sr., William Shelton, a white man, was dead, and her daughter, Mary Shelton, jr., was about twelve years of age. The widow was then living with her son-in-law on a tract of land adjoining the present allotments, which tract had been allotted to the latter's daughter. The Sheltons have always been claimed by the Indians as members of the tribe. It seemed to be conceded that the country along the Klamath river is all of the same general character. The lands allotted the Sheltons are similar in all respects to many allotments where the Indians actually live and maintain their families. The fishing privileges are considered by the Indians as of more value in making a living than agricultural pursuits. They also utilize nuts, acorns and berries for food. The evidence tends to show that at time of these allotments there were no lands open more valuable for the purpose of making homes—all of the open lands having been allotted or settled upon by the whites. It appears that there are some good farm lands within six or eight miles of the ocean, but it also appears that the allotting agent commenced at the mouth of the river and worked up. So that when these allottees were reached all the so-called open lands were already claimed by other Indians, the result

before a United States Commissioner at his office in the town of Goldendale, Washington, which is outside of the land district in which the land applied for is situated.

The act of March 11, 1902 (32 Stat., 63), amending section 2294 of the Revised Statutes, provides—

That all affidavits, proofs and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preemption, timber culture, desert land and timber and stone acts, may in addition to those now authorized to take such affidavits, proofs and oaths, be made before any United States Commissioner or Commissioner of the Court exercising federal jurisdiction in the territory or before the judge or clerk of any court of record in the land district in which the lands are situated.

It is contended by the appellant that under a proper construction of the said act, the application in question should have been accepted and approved by your office, as the commissioner before whom the said application was made was, at the time, a United States Commissioner for the district of Washington and had jurisdiction co-extensive with the judicial district for which he was appointed, to-wit, within the State of Washington, the same being composed of one judicial district. Without considering and passing upon the question as to whether or not under the said act the application should have been rejected by your office because it was not made within the land district in which the land applied for is situated, it is sufficient for the purposes of this case to state that since the rejection of the application by the local officers, to-wit, February 10, 1904, and before your said decision of March 21, 1904, was rendered, the act of March 4, 1904 (33 Stat., 59), was passed, which amends the said act of March 11, 1902, and provides that proofs, affidavits and oaths of any kind required to be made by applicants and entrymen under the various land laws named in the said act of March 11, 1902, may be made in the county, parish, or land district in which the lands are situated. And the said act of March 4, 1904, also provides that all such affidavits or proofs, when so made and duly subscribed, or which had theretofore been so made and subscribed, shall have the same force and effect as if made before the register and receiver.

It appearing from examination of the map of Washington, that the town of Goldendale, where the application was executed, is in Klickitat county, Washington, and that the land applied for is also situated in the same county, your office, under the provisions of the said act of March 4, 1904, should have accepted and approved the said application, notwithstanding the fact that it was executed outside of the Walla Walla land district. See Circular of April 1, 1904 (32 L. D., 539).

The decision of your office is accordingly reversed, and if there be no other objection, Ward will be allowed to make entry for the land applied for in his application.

REPAYMENT—DESERT-LAND ENTRY—SCHOOL LAND.

HELEN TIBBALS.

The grant of sections two, sixteen, thirty-two, and thirty-six in every township, made to the future State of Utah by section 6 of the act of July 16, 1894, for the support of common schools, did not become effective until the admission of the State into the Union; and a desert-land entry of a portion of the granted lands, made subsequently to the passage of said act but prior to the date of admission, was not erroneously allowed, but might have been confirmed upon proof of compliance with law, and the entryman is therefore not entitled to repayment of the purchase money paid thereon.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, September 8, 1904.* (C. J. G.)

An appeal has been filed by Helen Tibbals from the decision of your office of May 28, 1904, denying her application for repayment of the purchase money, at the rate of twenty-five cents per acre, paid by her on desert land entry No. 4325, made October 31, 1895, for the SW. $\frac{1}{4}$ of Sec. 32, T. 10 S., R. 1. W., Salt Lake City, Utah.

Section 6 of the act of Congress approved July 16, 1894 (28 Stat., 107, 109), providing for the admission of Utah as a State, is in part as follows:

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.

Section 10 of said act (p. 110) reads:

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 land 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 is urged in the appeal here that the grant to the State of Utah for school purposes became effective upon the approval of the act of July 16, 1894; that the land covered by the Tibbals entry was not subject thereto, the same not having been made until October 31, 1895; and that said entry was therefore invalid and erroneously allowed.

The State of Utah was admitted into the Union January 4, 1896 (29 Stat., 876), by proclamation of the President, as provided in section 4 of the act of admission. In the case of *State of Utah v. Allen et al.* (27 L. D., 53), it was held that by the express terms of the act of July 16, 1894, the grant of school lands to the State of Utah became operative on its admission to the Union. This ruling is followed in the cases of *Law v. State of Utah* (29 L. D., 623), and *Barnhurst v. State of Utah* (30 L. D., 314). In the latter case the record shows that

Barnhurst made a desert land filing, August 29, 1895, for certain lands in the Salt Lake City, Utah, land district. At that time he made an initial payment of twenty-five cents per acre. The Department held:

The allowance of his filing and the acceptance of the first payment was not a final disposition of the land so as to entitle him to a patent, and yet by his acceptance of and partial compliance with the terms of sale offered by the government in the desert land act, he had acquired such a right to complete his purchase and perfect title by further compliance with the terms of the desert land act as to make the lands "sold or otherwise disposed of" to the extent at least that the right of the State, if any, under the school grant, would be subject to his prior right under his desert filing.

Under this construction, Barnhurst's filing having been made prior to the admission of Utah as a State, it was allowed to remain intact subject to proof of compliance with law. There is no warrant for placing a different construction upon section 10 of the act of July 16, 1894. As was said in the case of *Law v. State of Utah*, *supra*, 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. But under section 6, to which section 10 relates, the prohibition does not extend to such lands prior to the admission of the State. In this view, at the time the Tibbals entry was made the land embraced therein was subject thereto. Therefore said entry was properly and not erroneously allowed within the meaning of the repayment statute, and might have been confirmed upon proof of compliance with the desert land law.

The decision of your office is hereby affirmed.

REPAYMENT—DESERT-LAND ENTRY ERRONEOUSLY ALLOWED IN PART.

HEIRS OF GEORGE N. BISSELL.

Repayment of the entire amount of purchase money paid on a desert-land entry will not be made, on the ground that the entry was erroneously allowed and could not be confirmed because in conflict in part with a prior existing entry, where the portion not in conflict was never relinquished and no action was ever taken by the entryman indicating an election on his part to take none of the land because he could not get it all; but repayment may be allowed as to the portion in conflict.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, September 8, 1904.* (C. J. G.)

An appeal has been filed by the heirs of George N. Bissell, deceased, from the decision of your office of February 8, 1904, denying their application for repayment of the purchase money paid by said George N. Bissell on desert land entry No. 306, made May 24, 1884, for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 29, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 30, E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 31, and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 32, T. 18 S., R. 27 E., Las Cruces, New Mexico.

November 14, 1884, Desederio Costello made preemption cash entry No. 735—based on declaratory statement No. 787, filed May 12, 1883—for the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 31, W. $\frac{1}{2}$ SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 32. Repayment is claimed on the alleged ground that because of this conflict Bissell's entry was erroneously allowed and could not be confirmed within the purview of the repayment act. Your office holds that the heirs are entitled to a return of the amount paid on the portion of the entry in conflict, but denies their application for the remainder on the ground that there is no evidence that the portion of the entry not in conflict was ever surrendered, and that the same might have been confirmed if the land had been reclaimed.

There can be no question that Bissell's entry was valid as to the portion of the lands not covered by the Costello entry, and there was no authority to cancel it—except for failure to comply with the law—without the express consent of Bissell or his heirs, on the mere ground that it was invalid as to the portion in conflict. As to that portion the Bissell entry was a nullity and ought to have been canceled to that extent for that reason, but that fact did not affect the validity of the entry as to the portion not in conflict. Bissell, or his heirs, could have relinquished the entry *in toto*, and such act could reasonably have been construed as an election to take none of the land because all of it could not be obtained; in which event repayment of all the money paid could have been allowed. But this was not done; in fact the entry remained intact until June 9, 1892, when it was canceled, not because of the partial conflict, but for failure to submit proof showing that the land had been reclaimed. So far as the land department is concerned, the entry, as to the land not in conflict, was treated by Bissell and his heirs as a valid one, and it stood ready to confirm the same upon proof of compliance with law, in the absence of an election to surrender the whole entry because of the conflict. There was never an offer to relinquish except for the purpose of securing repayment.

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

SOLDIERS' ADDITIONAL RIGHT—ASSIGNEE.

OLE B. OLSEN.

The assignee of two or more soldiers' rights of additional entry may locate them as one right upon the same tract of land, provided they equal in the aggregate the amount of the land so located upon.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, September 9, 1904.* (A. S. T.)

On December 31, 1903, Ole B. Olsen made soldiers' additional homestead entry for the tract of land covered by survey No. 515, Juneau land district, Alaska, containing 18.80 acres, based on the

unused recertified right of William R. Chattin for 9.80 acres, and the unused recertified right of Phoebe Williams, widow of Solomon Williams, for 9.04 acres.

On April 28, 1904, your office rendered a decision wherein it was held that "two soldiers' rights cannot be located on the same tract of land, as each soldier's right is distinct and must be applied to a specific tract of land," and you allowed Olsen sixty days in which to furnish evidence of his citizenship and to show cause why his said entry should not be canceled, and from that decision he has appealed to this Department.

On July 7, 1904, Olsen's attorney informed your office that proper evidence of Olsen's citizenship had been filed in the local office and would be transmitted to your office,

It appears that the soldiers' rights of additional entries upon which Olsen's said entry is based have been regularly recertified by your office and assigned to Olsen, and their validity nor Olsen's ownership of them is not questioned, the principal ground of objection to the entry being that the rights of two or more soldiers, when assigned to the same person, cannot be located upon one tract of land, but each soldier's right must be located upon a separate tract of land.

There seems to be no statute or departmental regulation prohibiting the assignee of two or more soldiers' rights of additional entry from locating them upon the same tract of land, provided their aggregate amount is equal to the amount of land located upon. The Department has held that the owner of a soldier's right of additional entry may sell and assign it in such quantities as he may choose, and it is a well known fact that such rights are frequently sold in quantities less than one acre; where a number of such fractional portions of rights have been assigned to the same person, he is entitled to enter an amount of public land equal to the aggregate amount of all such fractions owned by him. If he be required to make a separate entry for each fractional part of a right, such requirement would not only entail upon the officers of the land department a large amount of unnecessary work, but would greatly impair the value of such rights, because it would be difficult to find tracts of vacant land corresponding in amounts with such fractions of rights.

This Department is unable to see any sufficient reason why the owner of two or more soldiers' rights of additional entry may not locate them on the same tract of land in one entry.

Your said decision is therefore reversed, and upon Olsen furnishing proper proof of his citizenship, said entry will be allowed to stand, unless there be some other objection.

heirs of William H. Davis, deceased. Fridley, however, took no action toward perfecting his application for the land, but died March 7, 1902, and on the following day, March 8, 1902, the said Delbert S. Terry tendered his homestead application for said tracts, which was rejected by the local officers on the ground that the land was not subject to entry because it was held for the benefit of the heirs of William H. Davis. From this action Terry appealed to your office, where on April 27, 1902, a hearing was ordered in order to enable the heirs to rebut certain allegations of abandonment made by Terry. The result of this hearing was a decision by the local officers, and subsequently, on the appeal of Terry, by your office, to the effect that there had been no abandonment by Davis of his homestead claim, and that he in his lifetime had completed the five years' residence and cultivation required by law, and the right to make entry was awarded to George O. Davis, the brother of said William H. Davis, deceased, on behalf of the heirs of the deceased settler. From that decision Terry appealed to the Department, and it was upon this appeal that the decision complained of was rendered.

Said decision held, in effect, that the right to perfect homestead entry of this land was not a property right that passed to Davis's estate on his death, but was a right conferred by section 2291 of the Revised Statutes, to show compliance with the conditions of the homestead law relating to residence and cultivation, and thereby secure a title to the land. At page 7 of the decision it is said:

The Department can not concur in the contention made on behalf of the plaintiff, Terry, that under said section 2291 in case of the death of a duly qualified homestead settler who had valuable improvements on the land, and who had earned title thereto by compliance with the law, his right to the title thereof would escheat to the United States, upon the death of the widow and immediate heirs to the estate of such settler, without having perfected said entry, even though there were parents, brothers and sisters of the decedent living.

It is on the contrary the opinion of the Department that upon the death of the homestead settler, Davis, this homestead claim was left in an inchoate state, the widow having under said section 2291 the right to perfect the entry, and that upon her death without having opportunity to avail herself of such right, the same then passed to the next of kin who were the then "heirs" of said decedent within the meaning of the statute.

Your office was thereupon directed to allow George O. Davis, the brother of the decedent, to perfect entry of the land on behalf of the heirs.

The motion for review complains of this decision, in substance, that admitting and agreeing with the Department that this homestead right was not a property right, an asset of the estate of William H. Davis, deceased, and agreeing and admitting that the only provision of law for the completion of title to said land is section 2291 of the Revised Statutes, yet, inasmuch as the beneficiaries named in that section did

not avail themselves of the privilege thereby conferred to complete the title, it necessarily results that there is no one upon whom the law casts the right to complete it, and that therefore it has, and had at the date of Terry's application, escheated to the United States, was subject to that application, and that his right thereunder should be recognized.

There are some things said in the decision under review which were not necessary to the conclusion reached and which may not support it. It was error to say that this right of homestead in William H. Davis at the time of his death was not a property right. Davis had, at the time of his death, complied with the provisions of the homestead law in the matter of residence and cultivation of the land but he had not submitted proof of such compliance, and had not therefore acquired a vested equitable estate; but he had an inchoate right of property therein which upon his death became an asset of his estate as surely as any other property which he then owned, subject however to completion and appropriation in the manner provided by section 2291 of the Revised Statutes. In so far as applicable to the facts of this case that section provides that the widow, or, in case of her death, the heirs or devisees of the deceased homestead claimant, may prove by two credible witnesses that he, she or they have resided upon or cultivated the land for the term of five years and thereby become entitled to a patent therefor.

In ordinary cases this statute is of easy application. It becomes difficult here because of the fact that the widow of Davis died without having exercised the privilege conferred and because of the fact that there are not now living any "heirs" of Davis within the common law meaning of that term. And it is argued from this that there is now no one to take this estate. This reasoning has strong technical support. The "heirs" of a decedent are those persons upon whom the law casts his estate immediately upon his death, and inasmuch as these heirs died without completing this estate, there is force in the suggestion that there is now no one competent to take it. But there are strong reasons apart from the technicalities of the law which justify the Department in rejecting this analysis. In the first place the purpose of Congress was undoubtedly to provide a definite and certain way to complete the estate, and the construction contended for would forfeit it. The statute was not intended to create an estate but to provide a means of acquiring the legal title to one that already existed. That Congress recognized this inchoate right of property as part of the estate of a decedent, witness the provision that under certain circumstances "devisees" may submit the necessary proof and receive the patent. This is a clear recognition of an existing estate which might have been, under certain circumstances, the subject of devise. Whatever might be said of the power of Congress to destroy a right of property earned by years of labor at the express invitation of the

government, it is obvious that such result was not intended. Whether this estate may be completed in accordance with the *terms* of section 2291 of the Revised Statutes involves but idle discussion.

Under the facts disclosed by the record in this case the Department is satisfied that there are persons now living, some of whom are entitled to the general estate of William H. Davis. Whether it has vested by direct line of descent or through a collateral line is a question for the courts of Montana to decide. Even if section 2291 of the Revised Statutes had never been enacted, this right of homestead would have been part of the general estate, and inasmuch as it was not appropriated or converted under said section it remains a part of such estate and as such is subject to distribution as other property. It is therefore the duty of the land department, upon the submission of the necessary proof that title has been earned, to issue a patent.

The decision under review directs that George O. Davis be permitted to complete the entry of this land for the heirs at law of William H. Davis and there would seem to be no valid reason why he should not.

The final certificate and patent will issue generally to the heirs of William H. Davis, deceased, and any question as to who these heirs may be can be settled by the courts.

The motion is denied.

CITIZENSHIP—MARRIAGE TO AN ALIEN.

KESSLER *v.* MCKAY.

A homestead entrywoman, a citizen of the United States, does not, by her marriage to an alien, become an alien, and disqualified to hold her homestead, where she does not change her domicile to the country of her husband's allegiance, or otherwise indicate an intention to change her citizenship, but continues to maintain residence upon the land covered by her entry.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *September 13, 1904.* (J. R. W.)

Mary B. McKay appealed from your office decision of December 15, 1903, cancelling her homestead entry for the SE. $\frac{1}{4}$, Sec. 23, T. 153 N., R. 68 W., Devils Lake, North Dakota, in the contest of Bowyer Kessler.

March 4, 1898, Mrs. McKay, then unmarried, by her maiden name, Mary B. McIvor, made her entry. May 9, 1902, Kessler filed a contest affidavit charging abandonment for more than six months prior thereto and want of settlement and cultivation required by law, not due to military or naval service in time of war. Notice issued citing the parties to submit testimony June 25, before a United States commissioner at Rolla, North Dakota, and for hearing at the local office

July 2, 1902. At the time fixed both parties appeared in person and with counsel and witnesses and submitted their evidence, which was, June 26, duly certified, and was filed in the local office July 2, 1902. December 2, 1902, the local office served notice of their finding (not dated) that—

After a careful consideration of the testimony we are of the opinion that contestant has failed to prove abandonment for six months prior to contest. Entrywoman was married in April prior to contest and she and her husband lived on [the] land for three days in April and after a visit to Manitoba were returning to the land when served with notice of the contest and had been living on [the] land from that time to time of trial. Entrywoman has in our opinion showed good faith and not being in default case should be dismissed and entry sustained.

Your office reviewing the testimony upon Kessler's appeal reversed that finding and action, finding that defendant failed to establish or maintain a *bona fide* residence on the land and canceled her entry.

The contestant's evidence consists of the testimony of himself and brother and two others. Contestant claims to have known the land since 1898, the year of entry, but his testimony is indefinite as to his nearness of residence and opportunities to observe it except during the period from November 1, 1901, to March 15, 1902. He styled defendant's house as unfit for a pig pen. His brother has known the land for two years, living on the NE. $\frac{1}{4}$ Sec. 23, same township, a mile or more from it. Mackey lived on a quarter in the same section as contestee's claim and has known the land two years and a half. Phillips lived about a mile and a half distant and has known the land three years. These witnesses concur in the general tenor of their testimony that defendant has fifteen to twenty acres of cultivated land which has been cropped each year they have known it; that the house at their times of observation was not habitable in that climate, had no furniture, was open and snow was in it in winter, and that none of them had seen defendant living there and that they had seen the house somewhat frequently. Their manner of answering interrogatories was not candid.

Defendant and her husband testified and she adduced eight other witnesses. Woolsey lived a half mile from her house on an adjoining quarter section and Agarand on a cornering quarter to hers. They had known the land four and five years respectively. All the other witnesses but defendant's husband and Miss Fee had known the land four or five years. The answers of all these witnesses are direct and candid. Defendant testified that in the first year of her entry (1898) she had 15 acres broken, built a house 12 by 14 and in July 1898 a stable 8 by 10, both of boards. The house was floored and tar papered.

In 1900 part of her building, one end and the floor, and her household furnishings, were stolen, but she had the house repaired next April. She worked as a dining-room girl at a near-by town and testi-

fied that she "lived there [on the claim] every six months. I never missed over a week without going out to see the place." In the fall of 1901 the window was stolen from the house and the furnishings were again plundered and she was without means to replace them. In October, 1901, she lived in the house for a time, having two stoves and comfortable furnishings, which is corroborated by Miss Atkins, who was with her three days, and by Mr. Fee. Witness Wydmere's sister lived with her in the house for a time.

All these witnesses concur to the general purport that her house was habitable, and in fact rather better than the general of claim shacks, except when impaired by depredators. She married in April and she and her husband repaired to her house with intention permanently to reside there, and lived there April 9, 10 and 11, when they left to visit friends and to get necessary repairs made of depredations committed on the house. She was served with notice while returning to their house.

In view of the Department the case made by contestant was fully rebutted. Whether residence was or was not well established prior to April 9, 1902, the default, if any before existed, was cured by the establishment of residence by the defendant and her husband with intent then to remain, and the finding of the local office is entitled to stand.

Contestant's counsel contend that defendant's marriage in Canada to a Canadian subject made her an alien, disqualified to hold her homestead, and cite 13th Decisions Attorney General, 128, and the decision by Mr. Justice Brown, sitting at the circuit for the Eastern District of Michigan, in *Pequignot v. Detroit*, 16 Fed., 211. The decision first mentioned is not applicable, as the element of residence abroad in the country of the husband's allegiance is here wanting. In the last above case Justice Brown held that a foreign-born woman alien who becomes an American citizen by operation of law as the result of such marriage might on dissolution of that marriage resume her alienage by marriage to an unnaturalized citizen of her own country resident in the United States.

This decision does not hold that an American citizen, by marriage to an alien, becomes an alien where there is in fact no intent to do so either actually expressed or that could be presumed from a change of domicile to the country of her husband's allegiance. No case so holding is cited nor has one been found by the Department.

The Revised Statutes, section 1999, declares the right of expatriation to be "the natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness." The statute itself implies the right of individual choice, and the exercise of free intelligent election by the citizen in the act of

R. & R. 316, Visalia series. Clarke's selection was in substitution of an earlier one, of February 10, 1900, assigning base, inadvertently as he claimed, which had before been assigned. The State's indemnity list was rejected and canceled, June 13, 1900. While Clarke's selection was pending, July 11, 1902, Finkle presented his application to enter the land under section 2306 of the Revised Statutes, as assignee of Annie L. Carroll, widow of Clarence Carroll, additional to his original homestead. The local officers rejected Finkle's application for conflict with Clarke's pending selection.

Finkle appealed from that action, claiming no error for the receipt by the local office of Clarke's application while the State's list was undisposed of, and claiming only that Clarke's selection was incomplete in that no new proof was filed May 21, 1900, he relying on that filed February 10, 1900, as sufficient. The sole contention was that—as Clarke did not accompany his forest lieu selection with an affidavit, i. e. a new affidavit showing the land to be unoccupied, it is not a legal or valid entry, and consequently does not segregate the land from entry and that the application of Finkle should be received and placed of record. *Gray Eagle Co. vs. Clarke*, 30 L. D., 570.

September 24, 1903, your office, making no reference to the pendency of the State's list at the time of Clarke's application, affirmed the action of the local office. January 28, 1904, the Department affirmed the decision of your office, not discussing the effect of the pendency of the State's list when Clarke's application was filed. June 20, 1904, upon Finkle's motion for review, it was said that:

There was nothing in the record before the Department at the time of said decision to indicate that the State had ever sought to appropriate the land prior to Clarke's application. It is now alleged for the first time.

This statement as to the facts in the record appears to have been erroneous. Assuming, however, the facts as above stated, and that the same were in the record when considered, the Department held:

This allegation, if it be accepted as true, does not however bring a controlling factor into the case. According to the allegation now made, the State's claim, which it is insisted rendered Clarke's application void, was disposed of June 13, 1900, long prior to Finkle's application of July 11, 1902. The acceptance of Clarke's application while another claim to the land was pending was an irregularity, for which the application might have been rejected, but which on the other hand the Department might condone when the question came to be one between the government and the applicant. *Arden L. Smith* (31 L. D., 184); *Maybury v. Hazletine* (32 L. D., 41).

While one application, even though irregular, was pending the local officers had no authority to accept another for the land. Finkle asserted no claim to the land arising prior to rejection of the State's selection or prior to the presentation of his application, which the local officers very properly rejected because their records showed the land to be covered by a pending application. If they had accepted Finkle's application, their action would have been erroneous and no rights would be accorded him as against the pending application based merely upon such erroneous action of the local officers. *Porter v. Landrum* (31 L. D., 352).

For the reasons given and upon the authorities cited herein the further claim of Finkle that Clarke's request, to be allowed to substitute a new base for his selection, constituted a new application which, because not accompanied by a new affidavit, was absolutely void and left the land subject to Finkle's still later application, can not be accepted as presenting sufficient ground for review of the former decision. That proposition was then necessarily considered and was properly decided upon *Porter v. Landrum, supra*.

It is now urged with much warmth and persistence that this holding is erroneous. That contention is not well founded. Careful examination of the twenty-eight or more decisions cited shows that not one of them gives any color of support to the proposition that either a second party like Clarke or a third party like Finkle can acquire any right to public lands while another application prior in time to his own is upon the record or being entertained by the land department. The major part of the decisions cited is to the effect that an application made while another is pending confers no right. This is an elementary proposition, well recognized and so established by an unvarying line of decisions as not to require the citation of twenty or more decisions for its support. Not one of the citations lends color to the contention that something over two years after the first application has been finally rejected, and the obstacle to the second is thus removed, and while the second is being entertained and considered by the land department, a third party may thrust in an application and insist upon its being recognized merely because the second was prematurely made. Finkle himself did not so contend in his appeal from the local office, and not until after the decision of your office, September 24, 1903.

Such irregularity as attended the premature presentation of Clarke's selection is wholly between the applicant and the government. No later intervening party may champion the right of the government and make it a weapon of offense in behalf of himself. This is in principle shown by the decision in *Alice C. Whetstone* (10 L. D., 263), one of Finkle's citations. She attempted to assert that land occupied by some other than herself was excepted from indemnity school selection. It was held that such prior settlement by another could not avail her to defeat the selection.

Southern Pacific R. R. Co. v. Cline (10 L. D., 31), another of Finkle's citations, illustrates this principle. An invalid claim of a Mexican grant operated to withdraw the land from indemnity school selection by the State. The State, however, made a selection of it. It was held that the selection—

though invalid, was not absolutely void, but was only voidable, and that, while it remained intact upon the record, it was a bar to any other disposition of said land by this Department; and, consequently, that said selection excepted the tract in dispute from the withdrawal made for appellant's benefit.

In George Schimmelpenny (15 L. D., 549), another of Finkle's citations, a school land indemnity selection was invalid for want of any assignment of base therefor. It was held, however, that—

The local officers were right in refusing to allow entry to be made by Schimmelpenny under his application, because the selection by the State, as long as it remained of record, reserved the land from other appropriation, until said illegal selection was removed.

There was therefore no error in your office decision, nor in that of the Department, save in the statement of an immaterial part of the record before it, and no cause for exercise of supervisory power exists for conservation of rights.

The petition is denied.

**FOREST RESERVE—TEMPORARY WITHDRAWAL—RESTORATION TO
PUBLIC DOMAIN.**

OPINION.

In restoring to the public domain lands temporarily withdrawn from settlement and entry, the land department, although declaring them subject to settlement from and after the date of restoration, may postpone opening them to entry, filing, selection, or other appropriation under the public land laws, until after the publication of notice declaring them subject to such disposition.

*Assistant Attorney General Campbell to the Secretary of the Interior,
September 14, 1904. (W. C. P.)*

The Secretary of Agriculture, by letter of July 25, 1904, informed this Department that certain lands in Washington, heretofore temporarily withdrawn from settlement and entry for a proposed addition to the Washington forest reserve, are "so situated and controlled as to be undesirable for the purposes of a forest reserve," and recommended that said lands "be released from the order of temporary withdrawal and restored to the public domain at the earliest practicable date, with the provision that they be opened to settlement from the date of restoration, but not subject to entry, filing or selection until after ninety days' notice of such publication as you may prescribe." This letter was referred to me "for an opinion as to whether or not the action herein recommended can be lawfully taken."

Later the Secretary of Agriculture made similar statement and recommendation as to certain lands in California, and that letter was referred to the Commissioner of the General Land Office for report and recommendation. In his report of August 25, 1904, the Commissioner of the General Land Office cites various decisions of this Department having a bearing upon the question, expresses the opinion that such lands may be restored to the public domain at once and the date of settlement or entry or both be postponed to such time as may

be deemed advisable, and recommends that hereafter in making restorations of this character the lands be declared subject to settlement under the homestead laws from and after the date of restoration, but not subject to entry, filing, selection, or other appropriation under any of the public land laws until after publication of notice, which publication should not be made for longer than sixty days.

The Commissioner cites *Newell v. Hussey* (16 L. D., 302); *Smith v. Malone* (18 L. B., 482), and *Crowley v. Ritchie* (22 L. D., 276), as sustaining the proposition that the Secretary of the Interior is authorized, when restoring lands withdrawn within the indemnity limits of a railroad grant, to inhibit both entry and settlement to a later fixed date. The decision in the last case was set aside on review (23 L. D., 346), because of a mistake of fact, it being found that the land involved was a part of those within the granted limits of a railroad grant forfeited by act of September 29, 1890 (26 Stat., 496).

The Commissioner also cites *Mills v. Daly* (17 L. D., 345), and *Curtis v. Greely* (26 L. D., 288). In those cases Congress had declared certain grants to railroads forfeited and the lands restored to the public domain, and this Department had given notice fixing a date upon which such lands would become subject to entry. The power to do this was sustained, it being held that such lands became subject to settlement from and after the date of the forfeiture act, but not subject to entry until the respective dates fixed by such notices.

The Commissioner also cited *Olson v. Traver* (26 L. D., 350), quoting from the syllabus as follows:

A decision of the supreme court of the United States that annuls a patent for lands and restores the title to the government, renders such lands subject to settlement, in the absence of any prohibition; and in such case it is competent for the land department to determine when such lands shall be open to entry, and make due provision therefor.

These authorities fully sustain the Commissioner's conclusion. If, when lands are restored to the public domain by act of Congress or by decision of a court, the land department may fix a later date when such lands shall be subject to entry, it certainly may do the same thing in revoking its own temporary withdrawal.

In *Allen H. Cox* (on re-review, 31 L. D., 114), lands in the Fort Hays abandoned military reservation were by order of March 22, 1895, temporarily withdrawn from settlement and entry. This order was revoked June 13, 1899, it being said: "This action will open to settlement under the act of 1894 all of the lands except those covered by improvements." Speaking of these orders it was said in the decision:

A close examination of the orders relative to this reservation shows that it was not the intention of the Department, by the order of June 13, 1899, *supra*, to thereby restore these lands to entry. They had been withdrawn in terms from "settlement and entry," and the order of June 13, 1899, while revoking the order of withdrawal, declared the effect of this revocation to be to open the land to "settlement."

This distinctly recognized the power of the Department when revoking an order of withdrawal to fix a later date upon which the lands would become subject to entry. This position was adhered to upon further consideration of the case (31 L. D., 193). There are many other cases holding to the same effect, but it is not deemed necessary to cite them, as in those named the questions have been quite fully discussed with numerous references to other authorities.

The decisions mentioned are precedents sustaining the existence of the power to make the order as proposed, and upon consideration of the matter I am convinced those decisions correctly interpret the law of the matter.

Under these authorities an order revoking the withdrawal and stating that the lands affected would be subject to entry at a fixed date, would have the effect of making those lands subject to settlement from the date of such order. In other words, it would not be necessary to incorporate in such orders a statement that the lands shall from and after the date thereof be subject to homestead settlement. If, however, this is the effect, there can be no objection to informing the public of that effect.

I am of opinion, and so advise you, that the action recommended can be lawfully taken.

Approved:

THOS. RYAN,
Acting Secretary.

MINING CLAIM—APPLICATION FOR PATENT—SECTION 2335, R. S.

LONERGAN *v.* SHOCKLEY.

A notary public whose jurisdiction extends throughout a county lying partly within and partly without a land district, is an "officer authorized to administer oaths within the land district," within the meaning of section 2335 of the Revised Statutes; and where the application for patent to a mining claim located in the portion of the county lying within the land district, together with the affidavits filed in support of such application, are sworn to before such notary without the district, but within his jurisdiction, they are not for that reason defective.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *September 14, 1904.* (G. N. B.)

September 21, 1901, J. H. Shockley filed application for patent to the Reservoir, Slide Rockless, and Tram lode mining claims and the Lackawanna placer mining claim, all included in survey No. 15314, and situated in suspended T. 41 N., R. 7 W., N. M. P. M., Durango, Colorado, land district. Notice of application was published and posted for sixty days, and no adverse claim was filed.

December 11, 1902, John Lonergan filed corroborated protest against the application, alleging therein, in substance and effect, that the application improperly includes lode claims and a placer claim; that the applicant has failed to give the notice of the application required by law and the official regulations; that the applicant has failed to post upon the claim, in a conspicuous place or in any place thereon, a sufficient notice of said application, and has failed to keep and maintain such a posted notice thereon during the period of publication; and that protestant is a claimant for a portion of the land embraced in the application by virtue of a location made November 16, 1897, notice of which location was duly recorded as required by the laws of the State of Colorado. The protest concludes:

The protestant prays that the said application for patent be denied; that a hearing be ordered in this office to determine whether such notice, or any notice, of said application has been posted on the premises, and whether sufficient notice of such application has been given as required by law; and protestant shows that by reason of the failure of the said applicant to post notice, this protestant was not advised of and did not learn of the said application until the time allowed by law for adverse thereof had elapsed; and that, as he is informed and believes, such failure to post notice was with the fraudulent intent to enable said applicant to secure title to said premises without notice to this protestant or opportunity to him to adverse, and he prays that opportunity be given him at a hearing ordered for that purpose to establish the truth of the allegations of this protest.

A hearing was accordingly ordered by the local officers, and had January 15, 1903, at which time both parties appeared and submitted evidence. The protestant filed at that time a supplemental protest, in which it is alleged, in substance and effect, that the abstract of title to the Lackawanna placer mining claim, on file with the application for patent, shows that it is owned jointly by J. H. Shockley and John Morton, and that the lode claims are owned solely by J. H. Shockley, the application for patent being made in the name of the latter; that the affidavits in support of the application were sworn to in Telluride, Colorado, which place is not within the Durango land district; that the published and posted notices and the plat of the official survey do not give the names of all the adjoining and conflicting claims; and that the name "J. H. Shockley" is an insufficient designation of the applicant. These questions were embraced in and considered at the hearing.

February 11, 1903, without passing in detail upon the various allegations of the protests, the local officers, from the evidence, found, in effect, that proper notices were duly posted on the claim, and that the affidavits in support of the application were legally verified. They recommended that the application be allowed to pass to entry.

Upon appeal by the protestant, your office, December 23, 1903, held, in effect, that the notices as published and posted were in substantial compliance with law; that the plat and notice were legally posted upon

the claims and that they remained so posted during the period of publication; that the affidavits in support of the application, not being sworn to within the land district where the claims are situated, are defective, and are to be returned to the local officers in order that they "may be properly verified *nunc pro tunc*;" that the fact that the application for patent is made in the name of "J. H. Shockley," instead of the claimant's full name, is not sufficient to warrant the rejection thereof; that the lode claims and placer claims, being contiguous, could properly be included in one application; and that the co-ownership of John Morton, shown by the abstract of title, is not a material objection to the issuance of patent in the name of the applicant.

The protestant has appealed to the Department.

It is contended on appeal that inasmuch as the published and posted notice does not mention, and the official plat of the claims does not show, the placer mining claim of the protestant, which as located, it is alleged, is both an adjoining and a conflicting claim, the notice was fatally defective.

The notice is found, however, to contain the name of the applicant, the number of the survey, the mining district and county and also the township and range in which the claims are situated, a description by metes and bounds of each claim, and a tie line from each claim to an established mineral monument; an adjoining placer claim being also mentioned, three others being shown on the official plat: and it is not alleged that any of such data is erroneous. The notice, taken as a whole, would seem to contain sufficient correct data to enable anyone interested to ascertain with accuracy the positions of the claim, and to satisfy the legal requirements, notwithstanding the failure to note all conflicting or adjoining claims. (See Hallett and Hamburg Lodes, 27 L. D., 104; Nielson *v.* Champagne Mining and Milling Company, 29 L. D., 491.)

It is also contended that the notice was not posted in a conspicuous place on the claim.

The evidence shows that two notices were duly posted, and, together with a copy of the official plat, were enclosed in oil-cloth envelopes, twelve by six inches in size, plainly and appropriately marked on the outside, from which the enclosures could readily be withdrawn, and tacked on the side and close to the top of two posts, both being about two and one half feet above the ground; that these posts were set at exposed points on the claims, free from surrounding brush or trees, where they might readily be seen; that one of them was placed at corner No. 6 of the placer claim, which is also corner No. 3 of the Tram lode claim, and the other was set at corner No. 4 of the Slide Rockless lode claim, which is also corner No. 3 of the Reservoir lode claim. The post set at corner No. 6 of the placer claim was about twenty feet from and in plain sight of a trail leading to two mining properties, and fre-

quently used. Whilst it is true as asserted by protestant, that on December 26, 1902, when Shockley went upon the claims to secure the notices for production at the hearing, they were found to be covered with from three to six inches of snow, the testimony shows that snow sufficient to cover the stakes to which the notices were attached did not fall until after the sixty days of publication had expired. There is nothing in the evidence to indicate that there was any lack of good faith upon the part of the claimant in causing the notices to be placed as described. It appears that the notices were posted and maintained in substantial compliance with law.

It is also contended that inasmuch as the lode claims are owned by Shockley alone and the latter claim by Shockley and Morton, patent could not issue to the former alone.

It is sufficient to say, in answer; that it is shown by a further abstract of title that, January 16, 1903, Morton conveyed all his interest in the placer claim to Shockley; and, apart from other objection, entry may therefore be made by and patent issue to the latter. (John C. Teller, 26 L. D., 484.)

The contention is made that the application made in the name of "J. H. Shockley" is not a sufficient identification of the applicant, the law requiring the given as well as the surname. The evidence and record shows conclusively that the protestant personally knew who "J. H. Shockley" was, and so referred to him in both protests. It does not appear that the protestant was or could have been misled in the matter, and the objection is without force.

There remains for consideration the question respecting the verification of the application for patent and the affidavits made thereunder.

In this case the verification of the application for patent, and the affidavits, was before a notary public in the city of Telluride, located in San Miguel county, Montrose land district, Colorado. An examination of the official plat in your office, defining the boundaries of the land districts, shows that San Miguel county is partly in the Durango land district. A notary public in the State of Colorado has jurisdiction to administer oaths throughout the county for which he is appointed. (Secs. 3277, 3291, and 3280, Revised Statutes of Colorado; In re Notaries Public, 9 Colo., 628, 629.)

It appears that the notary who verified the papers under consideration was appointed in and for San Miguel county, and if so it follows that he was authorized to administer oaths within the land district in which the claims are situated.

Section 2335, Revised Statutes provides, among other things, that—

All affidavits to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated.

August 18, 1894 (28 Stat., 397). McReynolds also stated that record of a power of attorney exists in Beadle County, South Dakota, from Sturr to Charles E. Simmons, empowering him to sell the above described lots 1 and 2, so located, and that C. F. Cleveland, land commissioner of the Chicago and Northwestern Railway Company of Chicago, Illinois, claims that the location by Simmons was made for and the unused portion of the right belongs to that company.

Your office records show that the Springfield entry was made in Sturr's name by Charles T. McCoy as Sturr's attorney in fact under a power executed February 16, 1878, to locate Sturr's "additional homestead right" on said lots 1 and 2, Sec. 4, T. 113 N., R. 63 W., containing 81.56 acres, and to obtain and receipt for the patent to be issued therefor, which power was in terms made irrevocable and with power of substitution, but did not authorize sale of the land. It appeared to have been issued in blank, as the land description and attorney's name are in a different writing than other parts of the instrument.

October 29, 1903, Sturr was notified by your office, and November 6, 1903, replied that he had sold his right to McReynolds, but had not received payment therefor. His signatures to the entry papers and bill of sale, compared by your office, appeared to be genuine.

Your office held that as McCoy's power indicated no right or interest in him he had no interest in the residue of the right and affidavit from him was unnecessary, citing John H. Howell (31 L. D., 105); but as you were advised that—

There is a power of attorney of record in Beadle County, S. D., from Sturr to Charles E. Simmons, authorizing him to sell the land located, and that the C. & NW. Ry. claim ownership of the unused portion of said right, by reason of said power, it does not satisfactorily appear that Sturr is the owner thereof. You are advised that before final action can be taken in this matter it will be necessary to furnish the original power of attorney, given to Charles E. Simmons, or a certified copy thereof from the records, preferably the original power, and a release of all claims to the unused portion of said right from the C. & NW. Ry.

Your office allowed sixty days for furnishing the evidence required or to appeal, in default of which the application would be rejected without further notice. The appeal makes but one assignment, that—

It was error to hold that it was any part of McReynolds's duty to supply the office with evidence otherwise than that necessary to support his claim.

In so far as your office required McReynolds to furnish the original or authentic copy of the record of the power given by Sturr to McCoy the order was eminently proper. Under the rule obtaining in 1879, when the location at Springfield, South Dakota, was made, assignments of these rights were not recognized, and since the decision in *Webster v. Luther* (163 U. S., 331, May 18, 1896), the Department,

recognizing the assignability of the right, is under the necessity of determining from the acts of the parties whether there was in fact an assignment of the right or only a location and transfer of so much land as was then located. The primary and best evidence is obviously the instruments themselves. The device of powers of attorney to locate and to sell and convey the land was the means by which contracts of assignment were effected while express assignments were not recognized. These powers were sometimes drawn to affect the whole right and sometimes were limited to a particular area less than the whole, amounting sometimes to an assignment of the whole right and sometimes to only such part of it as was necessary to enter a tract then in contemplation by the parties, leaving a residue of right not exhausted. Such being the fact, it is entirely competent for your office to require production of the originals or copies of the instruments evidencing the original transaction to determine whether the assignment was entire or not. McReynolds being the claimant of a residue of a right only located in part, was under obligation satisfactorily to prove that the original assignment was not of the whole right but was only of the area actually located, leaving a residue in the soldier from whom he claimed under an assignment admittedly subsequent to a former one. The subsequent declaration of the soldier was but his construction of his former contract and could not be entitled to control or limit it. Proof of the former transaction was a proper requirement whether your office had notice of an adverse claim or not, with due regard to rights of unknown third parties and to the protection of the government against another and better claim for the same right.

Your office is however advised by McReynolds's statement that an adverse ownership of the right is claimed. In requiring McReynolds to obtain a release by the adverse claimant your office decision erred. The adverse claimant should have been notified, by your office or by McReynolds under its direction, of McReynolds's application and to show what, if any, claim it has, and upon the evidence submitted by the parties, including the power to McCoy, the right of the parties should be determined.

Your office decision is so modified.

SOLDIERS' ADDITIONAL RIGHT—ASSIGNMENT OF UNDIVIDED INTEREST.

EDGAR A. COFFIN.

The right to make soldiers' additional entry is a property right, and where not exercised by the soldier during his lifetime, nor by his widow or the guardian of his minor children after his death, it remains an asset of the soldier's estate.

The land department can not deal with or recognize the assignment of an undivided interest in a right to make soldiers' additional entry, made by one of several heirs of the deceased soldier jointly entitled to such right.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *September 17, 1904.* (J. R. W.)

Edgar A. Coffin, assignee of John H. McDuffey, heir of Jasper N. McDuffey, appealed from your office decision of April 26, 1904, rejecting his application to enter the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 24, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 26, T. 64 N., R. 12 W., 4th P. M., Duluth, Minnesota, as additional to his original homestead entry at Camden, Arkansas, March 5, 1868, for the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 6, T. 3 S., R. 21 W., for 56.22 acres.

The papers show that Jasper N. McDuffey died at Yell County, Arkansas, October 3, 1897, leaving a widow who died about November 23, 1898, his son, John H. McDuffey, and two minor grandchildren, John and Columbus Green, born of a daughter. August 6, 1901, John H. McDuffey, as "son and only heir at law" of the deceased, assumed to assign the right to one John C. Bunch, who later assigned to Coffin, who applied to make entry. October 18, 1902, your office required an assignment from the administrator of the estate, or such other evidence as would properly show that John H. McDuffey was the only heir of the deceased and that there was no administrator of the estate. July 16, 1903, John E. Chambers, administrator of the estate of Jasper N. McDuffey, deceased, was licensed by the proper court to sell the right to Frank M. Heaton, of Washington, D. C., and October 24, 1903, he filed his protest against Coffin's application for entry, alleging the existence of the above minor heirs and the consequent invalidity of John H. McDuffey's assignment. November 14, 1903, your office required Coffin to show cause why his application to make the entry should not be rejected. January 14, Coffin responded and alleged that he bought in good faith August 1, 1901, supposing that John H. McDuffey was the sole heir; that if there are other heirs he had no notice of it until June 15, 1903; that seeking to ascertain the fact through John C. Bunch, he is unable to establish the existence or non-existence of said heirs; he charges that a fraud has been or is about to be perpetrated, and asks an investigation through a special agent whether such heirs exist and whether

the purported letters of administration ever issued; that under departmental decision in F. M. Walcott, assignee of Lewis Logan, his assignment is valid to the extent of John H. McDuffey's interest, and that the protest is therefore ineffective to the extent of one half. Your office held the return insufficient, in that it did not show John H. McDuffey to be the sole heir, and rejected the application.

It is assigned as error of said decision to hold, upon Chambers's unsupported protest, that McDuffey is not the sole heir at law; to hold that John H. McDuffey's assignment is not a binding and legal sale of at least one half interest in the right; in not requiring proper evidence that John H. McDuffey is not the sole heir at law, and not requiring the administrator to procure and file proper evidence of his appointment.

Chambers's protest is not unsupported nor could it properly be disregarded. It was positively verified except as to matters stated on information and belief. The only matters stated on information and belief were the making of an assignment of the right by John H. McDuffey, and the attendant circumstances. The administrator's own appointment by the probate court of Yell County, Arkansas, July 13, 1903, was positively averred and was not denied by Coffin, though more than three months had elapsed from the filing of the protest to the filing of his return. If there was in fact no such proceeding in the court indicated, Coffin might have examined the record of the court, and his failure to deny Chambers's appointment was a substantial admission of it, so that formal proof was unnecessary of the fact averred positively and not denied.

There had also been filed, prior to Chambers's appointment, the positive affidavit of one W. C. Brown, May 6, 1903, that he had known Jasper N. McDuffey and his family for fifteen years and that Jasper's children were John H. and a daughter, Dona, who married William Green and died leaving two sons, John and Columbus, then living with their grand-mother at or near Green Forest, Arkansas. This is referred to by Coffin in his return to the order to show cause, and its truth is not denied. He merely says he "made enquiry through John C. Bunch, and he attaches hereto the correspondence from which it appears that he has been unable to establish the existence or non-existence of said heirs." All that such correspondence shows is that July 3, 1903, H. W. Coffin wrote to John C. Bunch advising him of the filing of the W. C. Brown affidavit as to the existence of the Green heirs, and suggesting to Bunch that "possibly it would be best for you to refund the money under your guarantee"; a letter of July 24, 1903, of F. O. Butt to J. C. Bunch, that the postmaster at Green Forest writes him (Butt) that "he knows nothing of John and Columbus Green;" a letter of July 20, 1903, by F. O. Butt to C. B. Grinn, post-

master at Green Forest, Arkansas, enclosing to the postmaster a letter to John and Columbus Green, saying—

I never heard of John and think there is a possibility that the name is not properly Green, but perhaps Grim or Graham. The mother was a Dona McDuffey, and is supposed to be dead, and it is her two sons I am trying to reach. If these facts fill the case of a Grim, or Graham or a Green that you know of, hand the letter to them. If not and there is no John or Columbus Green that gets mail at your office, return the enclosed to me.

Under this in pencil without date is—

I have made diligent inquiry and have failed to locate the party. C. B. Grinn, P. M.

These are all unverified and unauthenticated and the probate records of Yell County, the proper place for inquiry, are not referred to as having ever been examined. It is apparent that no very zealous effort was made to ascertain the facts as to the matters stated in Brown's affidavit and Chambers's protest. But as Coffin was proponent of the claim and assignment the burden was upon him satisfactorily to show his title.

Nor can Coffin claim to be owner of "at least a half interest in the claim." The claim was a mere property right of the soldier. *Webster v. Luther* (163 U. S., 331, 339). The law conferring the right governs its succession to be exercised first by the widow and second by the guardian of his minor children. In default of its exercise by either of such designated successors it remains an asset of his estate. *Allen Laughlin* (31 L. D., 256); *Robert E. Sloan*, June 30, 1902 (unreported).

The laws of Arkansas provide rules of evidence of succession of the heirs of a decedent to title to his property, in respect to personal estate, through its probate court. What persons are his heirs are judicially ascertained, the chattel property is reduced to possession by a person appointed for that purpose, who has power under the order of the court to sell or assign disposable assets for liquidation of his debts, and after due administration there is to be made a distribution of the chattel property to the heirs. (Digest Laws of Arkansas, 1894, Title, Administration, Sections 57, 85, 160.)

Section 15 of the digest, *supra*, provides for an exception to this mode of procedure and permits the heirs of a decedent, when all are of full age, to control assets if they pay all demands of creditors, or if the creditors consent. It is provided in such case that no administration shall be granted. To show good title to the claim it was necessary for Coffin to show existence of the conditions dispensing with the ordinary procedure through administration. This he has not done and therefore has shown no title in himself to the claim as an entirety. Whatever interest he has is an equity to a part of the proceeds of its sale, at most an undivided interest. The land department does not and can not deal

with or recognize undivided interests. It pertains to the probate of the estate, and if Coffin be entitled to the half interest, or its proceeds upon sale, he may assert such right in the distribution of the assets.

The case of David Werner, assignee of the heirs of Lewis Logan (32 L. D., 295), cited by Coffin, does not bear out his contention. That case was controlled by the law of Kentucky, this by that of Arkansas. There was, moreover, probate evidence that the executor of Logan's will never acted; that the particular asset in question was undisposed of and as to that Logan died intestate; that all heirs were of full age and all joined in the assignment. In this case the probate evidence is not only wanting, but there is filed in the appeal a certified copy of a decree for sale of the claim by the administrator. But, as the case stood when decided by your office, there was a protest, by one claiming to be the administrator, supported by two direct and unequivocal affidavits, alleging the existence of minor heirs, with no denial of such fact. The record therefore not only failed to show title in Coffin, but on the contrary sufficiently showed that under the laws of Arkansas Coffin had no title because of want of authority of John H. McDuffey to make such assignment under the law and existing facts.

Your office decision is affirmed.

COOK *v.* STATE OF MINNESOTA.

Motion for review of departmental decision of June 21, 1904, 33 L. D., 47, denied by Acting Secretary Ryan, September 17, 1904.

HOMESTEAD—RESIDENCE—ABANDONMENT—ACT OF JUNE 16, 1898.

GRINDBERG *v.* CAMPION.

The requirement in the act of June 16, 1898, that the allegation of non-military service shall be "proved at the hearing," is sufficiently complied with if at the time of the hearing there is in the record evidence proving the fact, and this may be the testimony of witnesses taken at the hearing, depositions taken prior to the hearing, stipulation of the parties, or admissions by the defendant.

The excuse of sickness set up by a homesteader as a reason for failure to establish residence within six months from the date of entry can be accepted only in the absence of a contest or adverse claim and where the entryman has shown entire good faith and established his residence upon the land.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, September 17, 1904.* (A. S. T.)

On April 30, 1901, Thomas Campion made homestead entry for the NE. $\frac{1}{4}$ of Sec. 3, T. 154 N., R. 81 W., Minot land district, North Dakota.

On January 22, 1902, Olive Grindberg filed an affidavit of contest against said entry, charging abandonment and failure to reside on the land, not due to military or naval service.

Notice issued fixing March 19, 1902, as the time for hearing before the local officers, and on that day John Campion, a brother of the defendant, appeared at the local office and filed his affidavit, wherein he alleged in substance that the defendant was taken sick immediately after making said entry and had not since been able to go to or reside on the land in question; that he had become partially insane, and was therefore incapable of transacting any business, wherefore he (the affiant) made said affidavit for him. He therefore asked for an order to take the depositions of certain persons therein named to prove the truth of said allegations. It was also alleged in said affidavit that the defendant was living in Olmstead county, Minnesota, some five hundred miles from the land in question.

The local officers granted the order to take depositions. Subsequently, and on the same day, the case came on for hearing, both parties being represented by their attorneys. The contestant introduced three witnesses, whose testimony showed clearly that the defendant had never resided on the land, but they did not testify that his absence from the land was not due to his employment in the army or navy of the United States. The attorney for the defendant cross-examined said witnesses, but offered no testimony in behalf of the defendant. The contestant rested, whereupon defendant's attorney moved to dismiss the contest on the ground that the proof failed to sustain the charges in the affidavit of contest; he also moved to withdraw the order to take depositions, which latter motion was denied.

The local officers took no action on the motion to dismiss the contest, but found from the evidence that the defendant had wholly abandoned the land for more than six months next prior to the initiation of the contest, and that he had never built a suitable house on the land, and they recommended the cancellation of the entry. The defendant appealed to your office, where, on December 24, 1903, a decision was rendered wherein it was found that, "in the affidavit of John Campion, the absence of the defendant from the land in question is admitted and his presence with his family in Olmsted county, Minnesota, since immediately after making entry for the land in controversy, is accounted for, which precludes the possibility of his having been absent from his claim due to military service," and you affirmed the action of the local officers and held the entry for cancellation, and from that decision the defendant has appealed to this Department.

It is insisted in behalf of the defendant that the proof taken at the hearing fails to sustain the allegation in the affidavit of contest, that the defendant's absence from the land was not due to military or naval service, and that your office erred in considering the affidavit of John

Campion as evidence in the case, and thereupon finding that the defendant's absence from the land was not due to military or naval service.

The act of June 16, 1898 (30 Stat., 473), requires that the allegation of non-military service shall be "proved *at the hearing*," but this is not understood to mean that it shall be proved by testimony offered *at the time* of the hearing. It is sufficient if, at the time of the hearing, there is in the record evidence proving the fact, and this may be the testimony of witnesses taken at the hearing, depositions taken prior to the hearing, stipulation of the parties, or admissions by the defendant.

In the case at bar John Campion appeared as the agent of the defendant, and acted for him in filing said affidavit; he produced no written authority to act as agent for the defendant, but he seems to have been recognized as such by the local officers, and his authority has never been denied or questioned; his acts and admissions are therefore binding on the defendant. His affidavit shows clearly that the defendant's absence from the land was not due to service in the army or navy, and said affidavit was in the record at the time of the hearing; therefore the fact was proved by the admission of the defendant's agent. But it is insisted that if one portion of said affidavit is considered as evidence in the case, then the whole affidavit must be so considered, and that if the whole of it be accepted as evidence, it clearly shows a sufficient excuse for the defendant's absence from the land. The affidavit clearly shows that soon after making the entry the defendant became sick and has never since been able to establish his residence on the land.

Absence caused by sickness may be excused where residence has been established on the land, but before such excuse can be accepted, residence must be established. Where sickness is offered as an excuse for failure to establish residence within six months from the date of entry, it is incumbent on the entryman to show perfect good faith, and such excuse can only be accepted then in the absence of a contest or adverse claim (*Wilson v. Monahan*, July 18, 1900, not reported). In that case the Department cited the case of *Renshaw v. Holcomb* (27 L. D., 131), wherein it was said that:

The regulation of the Department requiring the establishment of residence within six months from the date of entry is a legal requirement, and can not be relaxed.

If the defendant could be excused from establishing his residence on the land within six months from the date of the entry upon showing his good faith, the burden would be upon him to make such showing, and he has not done so. The affidavit merely shows that he took sick shortly after making the entry, and no proof of good faith is offered.

Your said decision is therefore affirmed, and said entry will be canceled.

STATE OF OREGON.

Motion for review of departmental decision of May 26, 1904, 32 L. D., 664, denied by Acting Secretary Ryan, September 17, 1904.

DESERT LAND ENTRIES—AMENDMENTS BY ASSIGNEES—SECTION
2372, R. S.

INSTRUCTIONS.

The recognition in the act of March 3, 1891, of the right of assignment of desert land entries, does not have the effect to except that class of entries from the prohibition contained in section 2372 of the Revised Statutes, against the amendment of entries by assignees; but as that section applies only to entries where the legal or equitable right has passed from the government and vested in the entryman, the Secretary of the Interior may, by virtue of his supervisory powers in the administration of the public land laws, allow amendments by assignees of desert land or other entries whereof the right of assignment is recognized, provided the legal or equitable title still remains in the government.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, September 17, 1904.* (E. F. B.)

In your letter of August 22, 1904, you state that your office has before it applications for amendments presented by assignees of desert land entries. You express the opinion that the recognition of the right of assignment in the desert land law constitutes an exception to the prohibition against amendments of entries by assignees as declared by section 2372, Revised Statutes, but in view of the expression in the decision in the case of Phidelah A. Rice (21 L. D., 61), that the Department has extended the application of said section to all classes of entries, you say that you do not feel warranted in allowing the amendments in the absence of an authorization from the Department. The matter is therefore submitted to the Department for consideration, with request that you may be authorized to allow amendments of desert land entries, when presented by assignees thereof, in accordance with the existing rules and regulations of the Department.

You base your opinion upon the ground that as the desert land act of March 3, 1891 (26 Stat., 1095), amendatory of the act of March 3, 1877 (19 Stat., 377), expressly recognizes the right of assignment, it may be reasonably urged that the intent of such recognition, and its just consequence, is to vest in the assignee all the cognizable rights and equities of the entryman and *ex necessitate* to clothe the assignee with the right of amendment wherever such right would be recognized and allowed if asserted by the entryman.

Section 2372, Revised Statutes, reads as follows:

In all cases of an entry hereafter made, of a tract of land not intended to be entered, by a mistake of the true numbers of the tract intended to be entered, where the tract, thus erroneously entered, does not, in quantity, exceed one half-section, and where the certificate of the original purchaser has not been assigned, or his right in any way transferred, the purchaser, or, in case of his death, the legal representatives, not being assignees or transferees, may, in any case coming within the provisions of this section, file his own affidavit, with such additional evidence as can be procured, showing the mistake of the numbers of the tract intended to be entered, and that every reasonable precaution and exertion had been used to avoid the error, with the register and receiver of the land-district within which such tract of land is situated, who shall transmit the evidence submitted to them in each case, together with their written opinion, both as to the existence of the mistake and the credibility of each person testifying thereto, to the Commissioner of the General Land Office, who, if he be entirely satisfied that the mistake has been made, and that every reasonable precaution and exertion had been made to avoid it, is authorized to change the entry, and transfer the payment from the tract erroneously entered, to that intended to be entered, if unsold; but, if sold, to any other tract liable to entry; but the oath of the person interested shall in no case be deemed sufficient, in the absence of other corroborating testimony, to authorize any such change of entry; nor shall anything herein contained affect the right of third persons.

Though it is seen that the section is expressly applicable to assignable entries yet it was evidently intended that it should not apply to any entry except where the legal or equitable right had passed from the government and vested in the entryman and where he had a right to assign and transfer whatever right, title and interest he had in the land. The words "when the certificate of the original purchaser has not been assigned" and "shall be authorized to change the entry and transfer the payment," can have reference only to entries where the final certificate had issued. Hence the recognition of the right of assignment in the desert land act does not constitute an exception to the prohibition against amendments by assignees as declared by said section 2372, but the section is applicable to that class of entries, as it is to all other entries, only after the legal and equitable title has passed from the government. The assignable character of the entry does not take it out of the operation of the section.

Many reasons may be suggested why Congress was prompted to limit the operation of the act to the entryman and to exclude from its provisions assignees or transferees. The increased risk and difficulty in securing from a transferee a title free from incumbrance, especially where it has been derived through mesne conveyances might be suggested as a very potent reason. It is sufficient however that the prohibition, in language free from ambiguity and doubt, is contained in the act which furnishes the chart for the guidance of the land department in allowing a change of entry in cases where the legal or equitable title has passed out of the government. As to such entries the

Executive Department is controlled by the terms of the act, which cannot be varied except so far as authorized therein.

This view controlled the decision of the Department in the case of Phidelah A. Rice, *supra*, in which no principle was announced in conflict with the views herein expressed. In that case the application to amend was presented by Rice, a transferee through mesne conveyance, from a preemption entryman to whom a patent had issued. Notwithstanding the strong equities presented by the application, it was denied because it came clearly within the prohibition declared by the section against the right of amendments by assignees, which restrains the exercise of supervisory power by the Secretary in the premises. While it was stated in said decision that the Department "has, by regulation and by judicial action, extended its [Sec. 2372] application to all classes of entries," and the case of Christoph Nitschka (7 L. D., 155) and the General Circular are cited as authority for that statement, inasmuch as that case came within the terms of the statute, it must be considered as having been made with reference to entries where the legal or equitable title has passed from the government, as to which the power and authority of the land department to allow a change of entry is controlled by the terms of the act.

But it was not intended that the provisions of section 2372 should control or restrain the Secretary of the Interior in the exercise of that power of supervision in the administration of the public land laws conferred upon him by the organic law under authority of which he may, before any legal or equitable right has vested, allow amendments and changes of entries, under such rules and regulations as he may prescribe or upon the merits of a particular case, where it will not impair the rights of others or violate any provisions of law.

In Crail Wiley's case (3 L. D., 429, 430) the Secretary said—

I do not deem it advisable to deny by arbitrary rules the right of settlers to apply voluntarily for such amendment as will enable them to secure the right to their homes, where clerical mistakes or conflicting claims have been made to their prejudice. It is the duty of this Department to aid rather than obstruct the prosecution of settlement rights, and all cases should be fairly heard and adjudged upon their merits, without the restriction of technical regulations.

In that case and in other cases through a long line of decisions previously rendered, amendments of entries where final certificate had not issued were allowed by the Secretary, not upon any express statutory authority as to the particular class of cases but in virtue of the inherent power and authority vested in him under section 441, Revised Statutes, which charges him with supervision in the disposal of the public lands. This will be seen by an examination of the long list of cases cited in the case of Christoph Nitschka (7 L. D., 155), in which it is stated that those cases and other cases that might be cited show

that no particular method of procedure was required of applicants for amendment, but each case was decided on its merits as presented, independently of any specified rule as to the form or character of the evidence. "Ordinarily, if no adverse claim appeared, the evidence consisted of the affidavit of the applicant, corroborated by two or more affiants." That practice continued until October 25, 1884, when a circular was approved, prescribing rules and regulations to be observed in applications for amendments, but after being in force for about four months was revoked by the decision in the case of Craig Wiley, above cited, and the former rule of determining each case according to its merits seems to have prevailed, with very few, if any, exceptions, until the decision in the case of Christoph Nitschka, in which the opinion was expressed that a rule similar to that contained in section 2372, Revised Statutes, requiring the written opinion of the register and receiver as to the existence of the mistake and the credibility of the persons testifying thereto, may properly be applied in all classes of the entries to which said section is not made applicable.

A rule was accordingly formulated to govern in all cases of applications to amend which are not specifically provided for by section 2372, which requires certain affidavits to be filed with the local officers, who are required to transmit the same with their joint report as to the existence of the error and the credibility of the witnesses in the same manner as provided by section 2372.

It was not decided in that case that the power of the Secretary in granting amendments was conferred solely by section 2372 or that his power and authority in that respect was limited otherwise than as expressed in that section. He merely adopted the provisions of that section as to the character and extent of evidence required and the manner of presenting it, a safe rule to govern in all cases. He said:

While the statute [2372, Revised Statutes] does not specifically apply to and operate upon timber culture entries, the reasons thereof may be appropriately applied to such cases, and the Department may therefore properly make a rule containing a requirement relative to applications to amend timber culture or homestead claims similar to that contained in said section 2372 of the Revised Statutes.

There is no utterance of the Department in any of the decisions referred to in your letter that prohibits amendments by assignees under the supervisory authority of the Secretary when the right of assignment is recognized, provided the legal or equitable title still remains in the government, and no reason appears why your office should not allow amendments in such cases if a proper case is made.

ROSEBUD CEDED LANDS—DISPOSITION AFTER EXPIRATION OF “SIXTY DAYS’ PERIOD.”

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,*Washington, D. C., September 19, 1904.**Register and Receiver, Chamberlain, South Dakota.*

GENTLEMEN: By the act of Congress approved April 23, 1904 (33 Stat., 254), it was provided that the ceded lands of the Sioux Indians within the Rosebud Indian Reservation—

shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands shall be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry,

and by the proclamation of the President, dated May 13, 1904, after providing for the manner in which these lands might be settled upon, occupied, or entered during the sixty-day period, it was further provided:

After the expiration of said period of sixty days, but not before . . . any of said lands remaining undisposed of may be settled upon, occupied, and entered under the general provisions of the homestead and town site laws of the United States, in like manner as if the manner of effecting such settlement, occupancy, and entry had not been prescribed herein in obedience to law.

According to said proclamation this period of sixty days began on August 8, 1904, and, as a consequence, will expire at midnight of October 6, 1904. Thereafter all lands which have not been entered on the plan provided for in said proclamation may be settled upon, occupied, and entered under the general provisions of the homestead and town site laws of the United States.

While these lands will become subject to settlement immediately after midnight of the 6th of the month, it will not be possible to make entry thereof until the opening of your office on the morning of the 7th of October next.

It may be, and possibly will occur, that on the opening of the office on October 7, next, a number of persons will have assembled at your office seeking to make entry for the remaining and undisposed of land, and the duty will devolve on you to make and enforce such rules and regulations as may be necessary to secure a fair and orderly course of proceedings on the part of all concerned.

The transmission of applications by mail is permissible, but it was not intended to confer upon such applicants a superior right.

You will, therefore, upon opening your office, note the number of

persons in line, and give the filings you may have received by mail the next numbers, to be taken up and acted upon when reached to the exclusion of those who may in the meantime have formed in the line.

Such of the persons present who may be acting as agents of exsoldiers under section 2309, R. S., will be allowed to make one entry in his individual character, and to file one declaratory statement as agent, if properly authorized, and if desiring to make other filings you will require him to take his place at the end of the line and await his proper turn before doing so, and he will be allowed to file but one declaratory statement at a time.

After the disposition of applications presented by persons present at 9 o'clock a. m., which should be proceeded with at once, all other applications presented will be disposed of in the usual way, the time of actual presentation being duly noted on the application.

You are expected to act promptly under the lawful instructions before you as occasions arise, allowing any parties feeling aggrieved by your action, the right of appeal, under the Rules of Practice, without seeking special instructions from this office in the particular cases before acting thereon.

You will, however, bear in mind that until the expiration of three months from the date of opening, or until the closing of the office for business on November 7, 1904, parties making entries will be required to pay at the rate of \$4 per acre in the manner and at the time required by said act; thereafter and until the closing of the office on February 7, 1905, you will require payment in like manner at the rate of \$3 per acre, except as to the tracts which may have been entered or filed upon within said three-month period and subsequently relinquished, for which tracts the entryman will be required to pay the same amount as the person who made the first entry or filing; thereafter in all entries under the homestead laws you will require payment in like manner at the rate of \$2.50 per acre, except on tracts which have previously been entered or filed upon, for which tracts the amount to be paid will be that prevailing at the time said tract was first entered or filed upon.

Although the lands are to be disposed of under the general provisions of the homestead and town site laws after the expiration of the period of sixty days, you will continue to number the entries consecutively in the "Rosebud series."

Your attention is also called to the provision of the second section of the act:

That in case any entryman fails to make such payment or any of them within the time stated, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited and held for cancellation and the same shall be canceled.

In accordance therewith in the event of the failure of any entryman to make any payment when the same shall become due, you will at once report the fact to this office for proper action.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved:

THOS. RYAN,
Acting Secretary.

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

JACOB FIST.

There is no authority for granting a leave of absence to a homesteader who made entry under the provisions of the act of June 17, 1902, of lands believed to be susceptible of irrigation under a contemplated irrigation project, on the ground that he can raise no crops on the land in its present arid state and that it is impossible to procure water for the irrigation thereof prior to completion of the project proposed to be constructed under said act.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, September 20, 1904.* (C. J. G.)

An appeal has been filed by Jacob Fist from the decision of your office of April 20, 1904, sustaining the action of the local officers in denying his application for leave of absence from homestead entry for the NW. $\frac{1}{4}$ of Sec. 36, T. 50 N., R. 11 W., Montrose, Colorado.

The entry was made March 28, 1903, subject to the provisions of the act of June 17, 1902 (32 Stat., 388), entitled, "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands." The entryman applied for leave of absence for one year September 22, 1903, as follows:

That he is the entryman in homestead entry above named and for which he has receivers receipt dated March 28, 1903, and describing the following lands, to wit: N. W. $\frac{1}{4}$ of Sec. 36, in township 50 north of range 11 W., N. M. P. M.; that the date of entry on said land was March 28, 1903, date of settlement March 27, 1903; that the improvements on said land consist of a cabin built of logs and lumber with clapboard roof, size 10 x 10 and of the value of about \$75, also done some clearing and grubbing around the cabin and made other small improvements of the value of \$25, more or less. There has been none of the land cultivated as yet owing to the fact that no water can be had thereon for irrigation purposes at the present time, the said land being embraced in the lands and arid region which is expected to be reclaimed by government projects under the Irrigation Act, and more especially by what is known as the proposed Gunnison Tunnel Project; that it is impossible to secure water on this land for irrigating purposes from any other source, nor are there

any natural streams that can be diverted for such purpose practically except the Gunnison River. Affiant further says it would be useless to live upon said land continuously and secure a support thereon for himself and those dependent upon him for the reason that he can not cultivate any crops thereon without water, and there is reasonable apprehension that the government project reclaiming said land will be put in course of construction under the Irrigation Act aforementioned, in which case an ample supply of water for irrigating purposes will be obtained; that the conditions mentioned are unavoidable and affiant makes this application for leave of absence in good faith and in order to fully and faithfully observe the laws relating to his said entry and subject to the provisions of the act of June 17, 1902, and affiant believes that if given leave of absence for a period of one year he will then be enabled to meet all further requirements and conditions of the laws and regulations of the homestead act.

The act of June 17, 1902, among other things, authorized the location and construction of irrigation works for the storage, diversion, and development of waters, including artesian wells, and the withdrawal from entry, "except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act." It was further provided that if the irrigation project were determined to be impracticable or unadvisable, said lands should be restored to entry; but that upon the determination of the practicability of such project, public notice should be given of the lands irrigable thereunder and the limit of area per entry, etc.

Circular instructions were issued under said act September 9, 1902 [31 L. D., 420], and additional instructions October 25, 1902 [31 L. D., 423]. The latter circular, which the local land officers were directed to post in a conspicuous place in their office and to give the subject-matter thereof such general publicity as might be possible, contained this statement:

The withdrawal of these lands is principally for the purpose of making surveys and irrigation investigations in order to determine the feasibility of the plans of irrigation and reclamation proposed; only a portion of the lands will be irrigated even if the project is feasible; it will be impossible to decide in advance of careful examination what lands may be watered, if any; the mere fact that surveys are in progress is no indication whatever that the works will be built, and this fact can not determine how much water there may be available, or what lands can be covered, or whether the cost will be too great to justify the undertaking until the surveys and the irrigation investigations have been completed.

It was under the above conditions and circumstances that Fist made his homestead entry. Now, there is nothing in the act of June 17, 1902, that may fairly be construed to repeal or modify, by implication or otherwise, the then existing laws relative to homestead entries, or that affects existing regulations. The only law providing for leave of

absence in certain cases applicable here is the act of March 2, 1889, (25 Stat., 854), section 3 of which 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.

Leave of absence in this instance is not asked for on the ground of failure of crops, or of sickness, and certainly, in view of what has been set forth herein, it can not be successfully urged that the entryman has been overtaken by an "unavoidable casualty." In the case of John Riley (20 L. D., 21), it was held (syllabus):

Failure of a settler to get water on his land can not be regarded as a "casualty," within the meaning of the act of March 2, 1889, and hence furnishing a proper basis for a leave of absence under section 3 of said act.

The reasons for disallowing the present or similar applications, are in fact stronger than those in the case cited. Here the entryman not only knew the character of the land to be arid, but he made his entry therefor subject to the provisions of the act of June 17, 1902, and presumably was familiar with the instructions of October 25, 1902, in which persons having homestead entries or intending to make homestead entries for these lands were clearly informed that it was impossible to decide in advance what lands could be irrigated, even if the project were feasible. It was therefore at best a matter of pure speculation or chance on his part as to whether the land entered by him would ever be available for the purposes of a home; and when applying for leave of absence he could not state with any degree of positiveness that water would be obtainable for his claim at the expiration of his leave. In view of the provisions under which this entry was made, and it being possible to foresee the very condition from which this applicant now seeks relief, and therefore one to be guarded against, his application is not one coming within the purview of the act of March 2, 1889, and it must therefore be denied.

The decision of your office is affirmed.

JANETTE W. RILEY.

Motion for review of departmental decision of June 27, 1904, 33 L. D., 68, denied by Secretary Hitchcock, September 22, 1904.

HOMESTEAD CONTEST—ABANDONMENT—PRELIMINARY AFFIDAVIT—
ACT OF JUNE 16, 1898.

WILLIAMS *v.* MANN.

No jurisdiction is acquired by the local officers in case of a contest against a homestead entry, on the ground of abandonment, commenced subsequently to the approval of the act of June 16, 1898, unless there be filed a "preliminary affidavit" to the effect that the settler's alleged absence from the land was not due to his employment in the military service of the United States, or the requirement that such affidavit be filed be waived by the entryman.

Acting Secretary Ryan to the Commissioner of the General Land
(F. L. C.) *Office, September 20, 1904.* (E. P.)

August 4, 1899, Daniel Mann made homestead entry of the NE. $\frac{1}{4}$ of Sec. 29, T. 125 N., R. 68 W., Aberdeen land district, South Dakota.

May 6, 1902, Benjamin A. Williams filed against said entry what purports to be an affidavit of contest, charging that—

the said Daniel Mann has failed to place a house or other building on said premises, and has failed to make any improvements thereon whatever; that he has failed to establish residence on said land and has never resided thereon, and has wholly abandoned the said tract and changed his residence therefrom for more than six months since making said entry and next prior to the date herein; that said tract is not settled upon and cultivated by said party as required by law, and that said failures are not due to the entryman's service in the army or navy of the United States.

Notice issued citing the parties to appear before the local officers June 18, 1902, and submit testimony, which notice was on May 11, 1902, personally served upon the entryman.

On the day appointed the contestant appeared at the local office with his counsel. The defendant appeared specially, by attorney, and before any testimony was introduced, submitted the following motion:

Now comes the contestee Daniel Mann and removes the Hon. Register and Receiver of the U. S. Land Office at Aberdeen, S. D., and the Interior Department to dismiss the apparent contest above named as to H. E. 11032, dated August 4, 1899, for the NE. $\frac{1}{4}$ of Sec. 29, Township 125 N. of Range 68 W., for the reason that no affidavit of contest is filed herein. That the purported affidavit purports to be sworn to before the county auditor of McPherson County, S. D., which said officer, to wit, county auditor, is not an officer authorized by the laws of either South Dakota or of the United States to administer oaths in contest cases or otherwise.

This motion was overruled by the local officers, and the entryman noted an exception.

The contestant introduced the testimony of three witnesses, the entryman taking no part in the proceedings other than to make the motion to dismiss above referred to and to note an exception to the action of the local officers in overruling the same.

July 7, 1902, the local officers found that the entryman had failed to establish a residence on the land and had wholly abandoned the same and recommended that the entry be canceled.

The entryman appealed to your office, alleging that the local officers erred in not sustaining his motion to dismiss the contest.

Your office, in its decision of September 28, 1903, held as follows:

It is not necessary to examine into the question as to whether the county auditor of McPherson Co., S. D., the officer before whom the affidavit of contest was sworn to by plaintiff, is authorized to administer oaths, because jurisdiction is acquired by the service of the notice, and not by the affidavit of contest, citing the cases of *Seitz v. Wallace*, 6 L. D., 299, and *Bridges v. Bridges*, 27 L. D., 654.

You did not err in denying defendant's motion to dismiss plaintiff's contest.

Upon consideration of the testimony submitted at the hearing your office affirmed the action of the local officers and held the defendant's entry for cancellation.

The case is now before the Department on the defendant's appeal.

The Department cannot concur in the ruling of your office to the effect that no affidavit of contest is necessary in a case like the one at bar in order to confer jurisdiction upon the local officers, and that, therefore, it is immaterial whether the paper filed as a basis for this proceeding is or is not, in fact, an affidavit.

The act of June 16, 1898 (30 Stat., 473), provides that—

hereafter no contest shall be initiated on the ground of abandonment, nor allegation of abandonment sustained against any such settler [i. e. a settler under the homestead laws] 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 [meaning service in the army, navy or marine corps of the United States in time of war].

The case at bar is a proceeding, based on an allegation of abandonment, commenced against a homestead entry after the approval of said act. The act clearly inhibits the initiation of a contest against a homestead entry, on the ground of abandonment, unless it be alleged in the "preliminary affidavit or affidavits of contest" that the settler's alleged absence from the land is not due to his employment in the military service of the United States. The language used in said act must necessarily be construed as requiring the filing of a preliminary affidavit, wherein should be set forth, in addition to the charge, the necessary allegation as to non-military service, as the basis of all such contests. This requirement, being statutory, must be strictly complied with, unless the same be waived by the entryman, for whose benefit it was imposed. In the absence of such affidavit, if the filing thereof be not waived by the entryman, no jurisdiction can be acquired by local officers in this class of cases.

The paper, purporting to be an affidavit of contest, filed as a basis for this proceeding, was executed before the county auditor of McPherson County, South Dakota. An examination of the laws of the State of South Dakota shows that at the time said paper was executed county auditors of said State were not authorized by the laws thereof to administer oaths. No authority to administer oaths in

public land or other matters has ever been conferred upon county auditors, as such, by any law of the United States. Said paper was not, therefore, an affidavit, because the allegations therein contained were not sworn to before a person authorized by law to administer oaths.

No preliminary affidavit having been filed as a basis for this proceeding, and said defect not having been waived by the defendant, it must be held, in accordance with the views hereinbefore expressed, that the local officers did not acquire jurisdiction in this matter. All proceedings had herein based upon the mistaken assumption by the local officers of jurisdiction in the case, including the decision of your office appealed from, were irregular and unauthorized and are for that reason hereby vacated and set aside.

HALL *v.* STATE OF OREGON.

Motion for review of departmental decision of April 23, 1904, 32 L. D., 565, denied by Secretary Hitchcock, September 22, 1904.

RAILROAD GRANT—APPLICATION FOR MINERAL PATENT—NOTICE TO RAILROAD GRANTEE.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 9, 1904.

*Registers and Receivers,
United States Land Offices,*

SIRS: Under date of August 31, 1904, the Acting Secretary of the Interior instructed as follows:

Local officers will give prompt and appropriate notice to the railroad grantee of the filing of every application for mineral patent which embraces any portion of an odd-numbered section of surveyed lands within the primary limits of a railroad land grant, and of every such application embracing any portion of unsurveyed lands within such limits (except as to any such application which embraces a portion or portions of those ascertained or prospective odd-numbered sections only, within the limits of the grant in Montana and Idaho to the Northern Pacific Railroad Company, which have been classified as mineral under the act of February 26, 1895, without protest by the company within the time limited by the statute or the mineral classification whereof has been approved).

Should the railroad grantee file protest and apply for a hearing to determine the character of the land involved in any such application for mineral patent, proceedings thereunder will be had in the usual manner.

Any application for mineral patent, however, which embraces lands previously listed or selected by a railroad company will be disposed of as provided by paragraph 44 of the mining regulations, and the applicant afforded opportunity to protest and apply for a hearing, or to appeal.

You will be governed by said instructions, giving notice of the duly authorized representative of the railroad grantee, in accordance with Rule 17 of Practice. When the claims applied for are upon unsurveyed land, the burden of proving that they are situate within prospective odd-numbered sections will rest upon the railroad grantee.

Evidence of service of notice should be filed with the record in each case.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

DEVILS LAKE CEDED LANDS—DISPOSITION AFTER EXPIRATION OF
“SIXTY-DAY PERIOD.”

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 21, 1904.

*Register and Receiver,
Devils Lake, North Dakota.*

GENTLEMEN: By the act of Congress approved April 27, 1904 (33 Stat., 319), it was provided that the lands of the Sisseton, Wahpeton, and Cut-Head bands of the Sioux tribe of Indians of the Devils Lake Indian reservation—

shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry;

and by proclamation of the President dated June 2, 1904, after providing for the manner in which these lands might be settled upon, occupied and entered during the sixty-day period, it was further provided that—

After the expiration of said period of sixty days, but not before, any of said lands remaining undisposed of may be settled upon, occupied, and entered, under the general provisions of the homestead and townsite laws of the United States in like manner as if the manner of effecting such settlement, occupancy, and entry had not been prescribed herein in obedience to law.

According to said proclamation this period of sixty days began on September 6, 1904, and as a consequence will expire on November 4, 1904. Thereafter all lands which have not been entered on the plan provided for in said proclamation may be settled upon, occupied, and

entered under the general provisions of the homestead and townsite laws of the United States.

While these lands will become subject to settlement immediately after midnight of the 4th, it will not be possible to make entry thereof until the opening of the respective land offices on the morning of the 5th of November next.

It may be, and possibly will occur, that at the time of the opening of your office on November 5 next, a number of persons will have assembled at your office seeking to make entry for the remaining and undisposed of land, and the duty will devolve on you to make and enforce such rules and regulations as may be necessary to secure a fair and orderly course of proceedings on the part of all concerned.

The transmission of applications by mail is permissible but it was not intended to confer upon such applicants a superior right.

You will, therefore, upon opening your office, note the number of persons in line, and give the filings you may have received by mail the next numbers, to be taken up and acted upon when reached to the exclusion of those who may in the meantime have formed in the line.

Such of the persons present who may be acting as agents of ex-soldiers under section 2309, Revised Statutes, will be allowed to make one entry in his individual character and to file one declaratory statement as agent, if properly authorized, and if desiring to make other filings, you will require him to take his place at the end of the line and await his proper turn before doing so, and he will be allowed to file but one declaratory statement at a time.

After the disposition of applications presented by persons present at 9 o'clock a. m., which should be proceeded with at once, all other applications presented will be disposed of in the usual way, the time of actual presentation being duly noted on the application.

You are expected to act promptly under the lawful instructions before you as occasions arise, allowing any parties feeling aggrieved by your action the right of appeal, under the Rules of Practice, without seeking special instructions from this office in the particular cases before acting thereon.

You will bear in mind, however, that in all entries made after the expiration of the period of sixty days the parties making the same will be required to pay at the rate of four dollars and fifty cents per acre, in the manner and at the time required by said act, until provision shall be made for the disposition otherwise of said land by proclamation of the President, as provided therein.

Although the lands are to be disposed of under the general provisions of the homestead and townsite laws after the expiration of the period of sixty days, you will continue to number the entries consecutively in the "Devils Lake Indian lands series."

Your attention is also called to the provision of the fourth section of the act:

That in case any entryman fails to make such payments, or any of them, within the time stated, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited and the entry shall be canceled.

In accordance therewith, in the event of the failure of any entryman to make payment when the same shall become due, you will at once report the fact to this office for proper action.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved:

THOS. RYAN, *Acting Secretary.*

TIMBER AND STONE APPLICATION—WITHDRAWAL FOR FORESTRY PURPOSES.

M. EDITH CURTIS.

Lands embraced within applications to purchase under the act of June 3, 1878, at the date of the order of July 31, 1903, temporarily withdrawing certain lands for forestry purposes, are, so long as the provisions of said act are complied with by the applicant, excepted from such order; but where the claimant under any such application fails to submit proof on the day fixed therefor in the published notice, or within ten days thereafter where prevented by accident or unavoidable delay from submitting it on the day set therefor, the application ceases to have any effect to reserve the lands embraced therein from other disposition, and the withdrawal thereupon immediately attaches and becomes effective as to such lands.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *September 30, 1904.* (E. P.)

June 27, 1903, M. Edith Curtis filed an application to purchase under the provisions of the timber and stone act, the SE. $\frac{1}{4}$ of Sec. 7, T. 31 S., R. 15 E., Lakeview land district, Oregon, and in due time notice of her intention to submit proof January 30, 1904, was advertised.

July 31, 1903, the township embracing said land, together with other townships, was temporarily withdrawn for forestry purposes. There were excepted, however, from the operation of said withdrawal all lands within the limits thereof to which any claim had been properly initiated prior to the date thereof, provided the claimants to such lands should continue to comply with the law under which their claims were initiated.

The applicant failed to submit proof on the day fixed in the advertisement, or within ten days thereafter. In explanation of such failure,

she filed in the local office a corroborated affidavit, wherein she alleged that she left her home in Michigan in ample time to reach the place named in the published notice on the day set for the submission of proof, but that upon reaching a point a few miles distant from the place named she became ill, and had ever since been confined to her bed on account of such illness, and for that reason was unable to submit her proof within ten days after the date advertised. She therefore asked that she be allowed to readvertise notice of her intention to submit proof at a later date.

In passing upon this matter your office, by decision of June 30, 1904, held that because the applicant had failed to submit proof on the date advertised, or within ten days thereafter, "or to file her application to readvertise within such time," her application to purchase had expired and the withdrawal of the land for forestry purposes had attached. Your office therefore denied her application to readvertise.

From this decision the applicant has appealed to the Department, alleging that your office erred in finding that her application to readvertise was not filed within "the time required by law," meaning, it is presumed, the ten days after the date advertised for the submission of proof.

Under the exceptional circumstances disclosed, Curtis appears to have been entitled to ten days from January 20, 1904, the date advertised, within which to submit proof upon her application to purchase and to make payment for the land, but, as before stated, she made default. The Department has repeatedly held that it will not authorize the withdrawal from disposition of land applied for under the timber and stone act beyond the period first fixed for proof and payment (John M. McDonald, 20 L. D., 559; Caleb J. Shearer, 21 L. D., 492; James N. True, 26 L. D., 529). Curtis's application, therefore, reserved the land from other disposition until the date advertised and ten days thereafter, but no longer. Hence, upon the expiration of such period, the applicant being then in default in the matter of proof, the withdrawal made July 31, 1903, for forestry purposes immediately attached to the land and the same thereupon ceased to be subject to settlement, entry, sale or other disposition under the public land laws.

In view of this holding the Department deems it wholly immaterial whether Curtis's application to readvertise was filed prior or subsequently to the expiration of said final proof period, for in neither event could her proof have been submitted under a readvertisement until after the withdrawal had attached and the land had become no longer subject to sale under the timber and stone act.

The action of your office in rejecting said application to readvertise, on the ground that the withdrawal had attached, is hereby affirmed.

RECORDS—EXAMINATION BY THE PUBLIC.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 6, 1904.

Registers and Receivers, United States Land Offices.

SIRS: In the instructions (27 L. D., 625) it was held that:

The records of the local land offices should be treated as open to inspection on the part of the public, subject only to the restriction that such examination shall not interfere with the orderly dispatch of public business.

Again, it was said in the circular of special instructions to registers and receivers, July 7, 1900:

Attorneys and the general public are entitled to access to the records of your office for the purpose of obtaining information, or even of making copies thereof, *provided such use does not interfere with the orderly dispatch of business*, but such use of the public records should be permitted by the register and receiver only upon application in each particular instance. The register and receiver, as custodians of the books and records of the office, are responsible for the care and proper use of the same, and the privilege of examining such records should be without favor or discrimination for or against any particular person. . . . Persons who are not in Government service must not be allowed to become acquainted with the contents of any letter from this office until the same has been examined by the register and receiver and noted upon the records of the office, if such notation is required.

Again, in the case of Henry N. Copp (30 L. D., 415), it was said that such inspection should be denied where it "would only tend to advance a purely private or personal interest to the detriment of the larger public interest."

In view of the rules thus laid down you should permit access to your records "only upon application in each particular instance," and in order that you may determine whether such inspection will "not interfere with the orderly dispatch of public business" of your office or be "to the detriment of the larger public interest," you should require all applicants to state specifically the records they desire to inspect, the time which such inspection will probably consume, and the persons for whom and the object for which such inspection is to be made. Such applications should be denied by you in all instances in which the orderly dispatch of public business would be materially interfered with, or in which the disclosure of the knowledge gained by such inspection might serve to injure, jeopardize, or defeat some larger public interest, or embarrass the officers of the Government in the performance of their duties.

In denying any application for such inspection you will advise the applicant of his right of appeal from your action, and in all cases where

you are in doubt as to the action which you should take on any particular application you should refer the matter at once to this office for its consideration and such directions as may be deemed necessary.

Very respectfully,

W. A. RICHARDS,
Commissioner.

Approved:

E. A. HITCHCOCK, *Secretary.*

ARID LAND—FARM UNITS—ACT OF JUNE 17, 1902.

INSTRUCTIONS.

After public notice has been given of the lands irrigable under an irrigation project contemplated under the act of June 17, 1902, and the limit of area per entry has been fixed and farm units designated upon a plat as required by said act, all persons having entries made after the withdrawal of such lands under said act will be required to conform their entries to the farm units so designated, both as to limit of area and the combination of subdivisions prescribed.

Secretary Hitchcock to the Commissioner of the General Land Office.
(F. L. C.) *October 10, 1904.* (E. F. B.)

I transmit herewith a report from the Director of the Geological Survey upon the petition of certain settlers who have made entry of lands lying under the Minidoka irrigation project in the State of Idaho and within the limits of the withdrawal made therefor, protesting against the limit of area per entry of lands under said project as designated by the preliminary plats transmitted to your office by letter of the Department of May 17, 1904 (32 L. D., 633). The subdivision or subdivisions that shall constitute an entry under said project as now contemplated are shown upon said plats and the limit of area per entry of lands within a radius of one and one-half miles from the centre of each townsite is fixed at forty acres and for lands outside of such radius at eighty acres.

The Department in transmitting said plats did not determine absolutely the limit of area that should be prescribed for land lying under said project, as certain preliminary acts required by the statute before the giving of such notice had not then been completed, but the information it had obtained through the investigation of the Reclamation Service was such as to satisfy it that the farm units designated upon said plats would probably be adopted both as to the form and limit of area per entry, and it was deemed advisable in the interest of the settler to direct the local office to give notice of such to all persons applying to enter said lands at the time of their application. Since then the contract for the construction of this project has been awarded,

and under section 4 of the act of June 17, 1902 (32 Stat., 388), the Secretary is now required to give public notice of the lands irrigable under such project and limit of area per entry, which limit shall represent the acreage which in his opinion may reasonably be required for the support of a family upon said lands.

The combination of the several subdivisions lying under said project into farm units constituting specific entries of limited areas as shown upon said plats was made with a view to equalizing in value the several entries and to secure the disposition of all the irrigable land so as to prevent any waste and insure as far as possible the practical operation of the project.

It is believed that the limit of area of each and every unit represented upon said plats is all that should reasonably be required for the support of a family. The combination and classification of these lands was designed with reference to the interest of the greatest number in accordance with the evident purpose of the act to secure homes for the largest number practicable under every project. Inequality in value by reason of distance from a townsite has been compensated for by increase of area.

No sufficient reason is shown in the petition for any modification of the units as designated upon the plats heretofore filed in the local office, but when the notice is given as required by the statute, if inequality be shown as to said units, or that the limit of area as prescribed is not such as may be reasonably required for the support of a family, taking into consideration the probability of the successful irrigation of said tract from the waters of said project, such action will be taken as may be necessary with reference to the rights and interest of all parties who may be affected thereby.

I also return herewith the petition of A. C. DeMary and others asking that settlers on lands lying under said project who have made entry of 160 acres each be required to conform their entries to the farm units recommended by the Reclamation Service. No action will be taken upon this petition at this time but as soon as public notice has been given of the lands irrigable under such project and the limit of area per entry as required by the act has been fixed and farm units designated, either by a new plat or by finally adopting the plats now on file, all persons whose entries were made after the withdrawal of these lands will be required to conform their entries to the farm units designated upon said plat, both as to limit of area and the combination of the subdivisions that may be prescribed.

The testimony, in my opinion, fails to show non-compliance with the law on the part of the claimant, Piatt, or that he knew or believed that he was proceeding for lands chiefly valuable for minerals (stone). He will not be prejudiced by this proceeding in any new claim which he may assert under the preemption law for other lands.

In the case of *Pacific Coast Marble Co. v. Northern Pacific R. R. Co. et al.* (25 L. D., 233), it was said:

That whatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws.

* * * * *

That lands containing valuable mineral deposits, whether of the metalliferous or fossiliferous class, of such quantity and quality as to render them subject to entry under the mining laws—that is, where they are more valuable on account of such mineral deposits than for agricultural purposes—are “mineral lands” within the meaning of that term.

It is now well established that lands containing building stone, or limestone, which renders the same more valuable on account thereof than for agricultural purposes, are mineral lands within contemplation of the mining laws. The act of August 4, 1892 (27 Stat., 348), authorized the entry of lands chiefly valuable for building stone under the placer mining laws. In the case of *Hayden v. Jamison* (on review), 26 L. D., 373, the question under consideration was as to whether land more valuable for the red sand stone it contained than for agricultural purposes was subject to disposition under the placer mining law prior to said act of August 4, 1892, a mineral location and a homestead entry having been made for the land involved prior to that date. It was said in that case, reference being made to the rule in the case of *Pacific Coast Marble Co. v. Northern Pacific R. R. Co., et al., supra*:

It having been found, and not being now questioned, that the land in controversy is more valuable on account of its sand stone deposit than for agriculture, this case comes squarely within the rule above set out, and it results that the homestead entry of Jamison as to the land in conflict was and is unauthorized and can not be upheld.

From the above it must be concluded that the tract embraced in Piatt's preemption entry, being mineral land, was not subject to such entry. Your office found in the contest case that the evidence fails to show that Piatt acted in bad faith under his entry, “or that he knew or believed that he was proceeding for lands chiefly valuable for minerals (stone).” Some of the older departmental decisions, rendered about the time of Piatt's entry, are to the effect that stone, useful only for building purposes, does not render land subject to appropriation under the mining laws nor except it from preemption entry.

In view of all the facts in this case and the above finding of your office that Piatt acted in entire good faith in the premises, the Depart-

In support of his application for repayment, Leonard filed several affidavits, his own being in part as follows:

That at the time of making said desert land entry, I was informed by Mr. George W. Hayes, at that time register of the U. S. Land Office at this place, that I had the right to acquire title to 160 acres of land under the homestead laws of the United States and 320 acres of land under the desert land laws, and that my homestead filing of July 27, 1900, did not in any way whatever preclude me from filing on and acquiring title to 320 acres of land under the desert land laws of the United States, and was further informed that declaration of applicant (4-274) applied only to the desert land act, and simply restricted the amount of land that could be acquired by any one person under the desert land laws at that time, to 320 acres, and that it had been so construed and the practice settled by the Department.

That it was the custom and practice of the register, Mr. Geo. W. Hayes, to advise all applicants for desert lands who asked for information from him pertaining thereto that if otherwise qualified, they had the right to enter and acquire title to 160 acres of land under the homestead laws and 320 acres of land under the desert land laws.

That by reason of such advice and believing the same to be the law, I did honestly, conscientiously and in good faith, make affidavit (form 4-274) fully believing that it applied only to the desert land entries, as advised by Mr. Hayes.

An attorney who practiced before the local land office at the time makes substantially the same statements in his affidavit. The statement of the register is as follows:

I, George W. Hayes, being first duly sworn on my oath say, that from the 1st day of August, 1898, until the 19th day of March, 1902, I was the register of the U. S. Land Office at Burns, Oregon, and that during said time when asked by an applicant who desired to make desert entry that I gave it as my opinion of the law, that any person holding or claiming as a homestead or otherwise, 160 acres of land or more was entitled to file upon and make proof on 320 acres of desert land, either by original application or by way of assignment, and I still believe it is the intention of the law governing desert entries to allow such filing and proof: And further I believe that there were entrymen under the desert law who acted upon my advice in making desert entries.

The facts of this case clearly distinguish it from that class of cases where repayment has been denied because the entries were wrongfully procured upon the false and misleading statements of the applicants in their proofs. There the entries were allowed upon proofs that were accepted by the officials as true and they did not and could not reasonably be expected to know to the contrary. Here the statements made by Leonard in his declaration misled no one, as the officers knew that he had made a prior homestead entry; or whether they knew such to be the fact or not the entry would have been allowed by them under their interpretation of the law. They and the entryman were mutually mistaken in supposing that the restrictions contained in form 4-274 referred only to desert land entries. As a fact their interpretation of the law was an erroneous one. The entry should not have been allowed for 320 acres, and it could not have been confirmed in its

entirety because covering land in excess of the area allowable to Leonard under the law and the circumstances.

In view of the record herein, no element of bad faith can be charged to Leonard on account of the statements contained in his declaration. Besides, prior to and at the time the local officers reported the fact of his two entries, he was engaged in complying with the law as to reclamation and had already placed valuable improvements on the land, thus evidencing his good faith in the purpose for which he entered the land.

The decision of your office is reversed, and repayment will be allowed as applied for.

THOMPSON *v.* SWELANDER.

Motion for review of departmental decision of April 30, 1904, 32 L. D., 583, denied by Secretary Hitchcock, October 14, 1904.

SOLDIERS' ADDITIONAL ENTRY—EXTENT OF RIGHT—EXCESS AREA.

GEORGE HEINRICH SPRENGER.

The right to make soldiers' additional entry is limited to such an amount of land as added to the amount previously entered shall not exceed one hundred and sixty acres, even though the entryman may have paid cash for a portion of the original entry as excess land.

The fact that a homestead entryman pays cash for a portion of his entry as excess land does not constitute such excess a separate entry which may be regarded as having been entered under the private cash system.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 14, 1904.* (C. J. G.)

March 4, 1904, George Heinrich Sprenger, assignee of the soldiers' additional right of Ole Nelson, made homestead entry No. 32,532, for the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 30, T. 149 N., R. 75 W., containing 80 acres, Devils Lake, North Dakota.

The entry was based upon the military service of said Ole Nelson and his homestead entry No. 200, made June 17, 1864, for the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 30, T. 16 N., R. 2 E., containing 92.20 acres, Stevens Point, Wisconsin, which was patented June 1, 1870, under final certificate No. 84. Nelson paid cash for the excess over 80 acres, to wit, 12.20 acres, and the soldiers' additional right assigned by him was for 80 acres.

In your office decision of October 9, 1903, which allowed Sprenger to make entry, it was held that the soldier having paid for the excess

of 12.20 acres, was entitled to an additional right of 80 acres, and that he was entitled to locate said right without payment for any excess. This conclusion appears to have been based upon the case of Royal B. Shute (31 L. D., 26), in which decision was rendered July 15, 1901. Subsequently, to wit, May 24, 1904, the Department rendered decision in the case of Guy A. Eaton (32 L. D., 644), assignee of Erasmus Gaw, wherein it was held, among other things (syllabus):

The right to make soldiers' additional homestead entry is limited to such an amount of land as added to the amount previously entered shall not exceed one hundred and sixty acres, even though the entryman may have paid cash for a portion of the original entry as excess land.

June 23, 1904, your office, referring to the above decision, required Sprenger to pay for an excess of 12.20 acres covered by his entry, the reason given being as follows:

In view of the said decision it appears that my former decision allowing the application was erroneous in holding that the soldier was entitled to an additional right for 80 acres, and said decision is hereby revoked. It appears that he was entitled to only the difference between 92.20 acres and 160 acres, which is 67.80 acres. Therefore the price for the excess in area of the tract entered over the area of the right must be paid.

An appeal has been filed from the said requirement of your office on two grounds:

First.—The entry in question was deliberately allowed under the rule in force for several years and the change of rule should apply only to future entries, especially as this is an *ex parte* matter.

Second.—The Secretary's decision in the cited Erasmus Gaw case (32 L. D., 644), is erroneous, so far as it bears on the question involved in the case at bar.

The rule of law (Sec. 2306 R. S.) as to the area that may be entered as a soldier's additional homestead is, "so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres." Owen McGrann (5 L. D., 10); Edgar A. Coffin (31 L. D., 430). Many other land laws contain similar words of limitation. It sometimes happens that the public surveys result in variations from the regular quantity that a section or its subdivisions should contain. Hence the long established rule of approximation which allows an applicant for soldiers' additional or other entry to include and pay for the excess above the area limited by the statute. Richard Dotson (13 L. D., 275), and many other cases. The case of Guy A. Eaton, *supra*, does not place a different construction upon the law from that previously in force, as to the quantity of land that may be entered as a soldiers' additional homestead, nor does it modify any well established decision. In the case of Royal B. Shute, *supra*, the question of excess in this connection was not in issue, and it was evidently not considered, the decision turning upon the point as to whether the applicant had the right, owing to an adjoining farm

entry, to make an additional entry at all. Therefore, what was incidentally said in that case as to the area to which the soldier was entitled can not be accepted as establishing a rule in the premises.

It is urged in support of the appeal, reference being made to the above case of Guy A. Eaton, that the 12.20 acres excess was not entered by Nelson under the homestead law, as contemplated by section 2306 of the Revised Statutes, but under the private or cash entry system, the argument concluding as follows:

In the case at bar, the 80 acres were entered June 17, 1864, by Ole Nelson, under Homestead Entry No. 200 of the Homestead Entry series of the Stevens Point, Wisconsin, land office. While the 12.20 acres excess in the survey were entered by Cash Entry No. 12,340 of the Cash Entry series of said land office, and the large sum of \$30.50 was paid in money by the entryman.

Hence, Ole Nelson, having entered only 80 acres, *under the homestead laws*, is evidently and clearly entitled to an additional entry, under the homestead laws, of 80 acres more.

Nelson made but one application, No. 200, the land applied for being described by him as the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 30, T. 16 N., R. 2 E., containing 92.20 acres, and it was made under the provisions of the homestead law. The same description appears in all his affidavits and in the receipts issued by the local office. The final certificate, No. 84, dated July 14, 1869, covered the full area of 92.20 acres, and was the only one issued. On the back of receiver's receipt, No. 200, dated June 17, 1864, is the following notation: "Excess paid as per Cash Receipt 12340." The cash for the excess was paid at the same time as the other costs connected with Nelson's homestead entry, and did not constitute a separate transaction or refer to a different entry. The only difference in the proceedings from the case of an ordinary homestead entry was the issuance of a receipt for the cash paid on the excess, and 12340 happened to be the next number for the purpose. Such excess constituted a part of the homestead entry and Nelson could have secured it only because of the practice with reference to irregular subdivisions. It was conveyed to him in one and the same patent. He was simply allowed under the circumstances to pay cash for a portion of the land embraced in his homestead entry, and in no sense can such excess be regarded as having been entered under the private cash system. Hence, under the rule of law the full area of 92.20 acres must be charged against Nelson in determining the quantity of his additional right.

The decision of your office is affirmed.

RESIDENCE—MILITARY SERVICE—SECTIONS 2304 AND 2305, R. S.

JACOB F. PIEL.

Under sections 2304 and 2305 of the Revised Statutes, as amended by the act of March 1, 1901, the military service of a soldier who makes homestead entry may be accepted in lieu of an equal period of residence upon the land embraced in his entry only in case the soldier shall have served for ninety days in the army of the United States during the war of the rebellion, the war with Spain, or during the suppression of the insurrection in the Philippines.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 18, 1904.* (D. C. H.)

It appears from the record that on May 24, 1902, Jacob F. Piel made homestead entry for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 5, T. 4 S., R. 21 W., Camden, Arkansas, land district, and that he made final proof on August 26, 1903, claiming that in addition to the time he had actually resided on the land he should be allowed credit for his service in the regular army of the United States, sufficient to make up the full period of the five years' residence required by the law. The local officers rejected said proof—

because there is no provision of law under which service in the regular army may be counted in lieu of residence on the land embraced in the entry of a soldier.

The claimant appealed to your office, where, on June 14, 1904, a decision was rendered in which you held that the final proof was properly rejected, but allowed the claimant credit for military service in the army during the Spanish war and in the Philippine insurrection, and further held that he should be allowed to submit supplemental proof showing a continuance of residence and cultivation of the land for such period as, when added to the time he had resided on the land and the time of his military service during the Spanish war and the Philippine insurrection, will complete the full period of five years required by the law.

Piel has further appealed to the Department and claims that under a proper construction of Secs. 2304 and 2305 of the Revised Statutes, and the amendments thereto, the proof submitted by him should be accepted and his entry passed to patent. The report from the War Department found in the records shows that claimant enlisted in the United States army on September 6, 1869, and served continuously therein with the exception of a few months (in 1884 and 1885) until March 26, 1900, when he was retired from the service, and the final proof in the case shows that claimant established residence on the land March 1, 1903, and continued same without interruption up to the date of making said proof.

local officers issued notice authorizing Keefe to appear at the office of George W. Downing, in the town of Velva, McHenry county, North Dakota, and make final proof before the clerk of the circuit court of said McHenry county, the county in which said land is situated, which notice was published for six consecutive weeks, commencing April 23, 1903, in the McHenry County Journal, a newspaper published in said town of Velva, North Dakota.

On June 1, 1903 (May 30, the day stated in the notice, and the day following, being legal holidays), Keefe appeared with his witnesses before the officer named, said officer acting by O. B. Jacobson, deputy, and made commutation proof on his said entry. Said proof was, on January 13, 1904, rejected by the local officers for the reason, as stated by them, that the clerk of the district court of McHenry county, North Dakota, had no authority to take proofs at any place other than his official place of business, namely, Towner, North Dakota.

On appeal by Keefe, your office, by its decision of June 28, 1904, sustained the action of the local office, not on the ground that the said officer did not have authority to act, as asserted by the local officers, but because it was contrary to the practice of your office to permit final or commutation proof to be made before the clerk of a court at any place other than his official place of business—that is to say, the place where such officer keeps his seal. The entryman was, however, allowed sixty days within which to submit new proof.

From your said office decision Keefe has appealed.

The Department gives its unqualified endorsement to the strictures contained in your office decision upon the practice, which appears to obtain in some quarters, of judicial officers taking final proofs at places other than their official place of business. Such practice is well calculated, as your office very correctly observes, to serve the purpose of embarrassing those who might desire to participate in final proof proceedings, as well as to involve the Department in serious difficulties, and is therefore highly reprehensible. To the end that said practice may be discontinued wherever the same may be now in vogue, your office will prepare formal instructions to local officers directing that henceforth no notice be issued by them authorizing final or commutation proof to be taken before a judicial officer at any place other than his regular official place of business.

While, however, the local officers should not have authorized the entryman in the case at bar to submit final proof testimony at the place named in the notice, the fact remains that that place was named. Under the terms of the notice, therefore, the entryman could not have made his proof at any other place. He appeared at the proper time at the place designated and made his proof before the officer named. There is nothing in the record that would suggest bad faith on the

part of the entryman, and no protest has been filed against his proof as made. In view of these circumstances the Department does not believe that said proof should now be rejected, and, in the absence of any other objection, said proof will be accepted.

Your decision is accordingly modified.

FINAL PROOF—NOTICE—PLACE OF TAKING.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., November 4, 1904.

*Registers and Receivers,
United States Land Offices.*

SIRS: It appears that the practice of taking final proofs by judicial officers at places other than their official place of business, has obtained to some extent. Such practice is well calculated to embarrass those who might desire to protest against the making of final proof or to participate in any manner in final proof proceedings.

To the end that such practice may be discontinued wherever it may be in vogue, you are directed that henceforth no notice for publication to make final or commutation proof shall be issued by you to be taken before a judicial officer at any place other than his regular official place of business.

A strict compliance with the above instructions will hereafter be required.

Very respectfully,

W. A. RICHARDS,
Commissioner.

Approved:

F. L. CAMPBELL, *Acting Secretary.*

CONFIRMATION—SPECIAL AGENT'S REPORT—PROVISO TO SECTION 7
OF THE ACT OF MARCH 3, 1891.

H. W. COFFIN.

An adverse report by a special agent filed within two years from the date of the issuance of the receiver's final receipt upon a homestead entry, is a "pending protest" within the meaning of that term as used in the proviso to section seven of the act of March 3, 1891, and will defeat the confirmatory effect of said provision.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 18, 1904.* (P. E. W.)

September 3, 1900, Val B. Fleming made homestead entry, No. 5881, for lot 1 and E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 1, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 12, T. 1 S., R. 4 E., B. H. M., Rapid City, South Dakota, upon which final certificate No. 2413 issued October 13, 1900.

In a report dated October 17, 1900, a special agent of your office stated:

Referring to H. E. 5881 by Val. B. Fleming Forest Ranger C. H. Dodge says he has no residence, no cultivation, but has cut about 30 saw logs from timber on this entry.

I will enter a charge of fraud in this case.

October 27, 1900, H. W. Coffin, as transferee of said final certificate, made forest reserve lieu selection 3376 thereon, for the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 10, and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 14, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 15, T. 56 N., R. 9 W., and lot 1, Sec. 24, T. 63 N., R. 3 W., Duluth, Minnesota.

April 15, 1902, a special agent of your office was directed to investigate said homestead entry No. 5881, and on November 22, 1902, he reported that he had made a personal examination of said tract and found that residence was never actually established thereon; that claimant was away from the land for about three years prior to filing thereon, residing at or near Redfern and Hill City, South Dakota, and in the States of Wyoming and Montana the year prior to filing and that the entry was not made with a view to making this land a home but for sale and speculation.

December 14, 1903, Coffin filed his motion that said final certificate No. 2413 be passed to patent on the ground that the same had been confirmed by the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095).

By your office letter "P" of December 30, 1903, the said homestead entry, No. 5881, was suspended and the local officers were directed to proceed in accordance with the instructions contained in your office circular of August 18, 1899 (29 L. D., 141).

From that action Coffin appealed to the Department on the ground that there was error—

in suspending this final certificate which has been confirmed by the proviso to section 7 of the act of March 3, 1891, there having been no pending contest or live protest against the validity of said entry at the expiration of two years from the date of the final certificate.

In your office letter of March 25, 1904, it was held that neither the motion nor the purported appeal could be entertained for the reason that the said report of the former special agent was sufficient to stop the running of the statute invoked by said motion and that the ordering of a hearing being an interlocutory order, the same is not appealable.

April 1, 1904, Coffin filed in the Department his petition for a writ of certiorari directing your office to certify said motion and appeal, and the records connected therewith to the Department for its consideration and action. May 5, 1904, the Department (decision not reported), denied the petition on the grounds that the instructions of the Department of July 9, 1902 (31 L. D., 368), are adverse to the contention of

the motion and that there was no error in ordering a hearing to determine the validity of the entry.

June 9, 1904, the Department (decision not reported) vacated the said decision of May 5, 1904, and granted the petition for a writ of certiorari upon the ground that--

In order that the petitioner may have an opportunity to examine the alleged protest [of the former special agent] and that the Department may determine whether it was such a proceeding against the entry as to suspend the running of the statute, it is deemed advisable that the record be certified to the Department, including all the reports of special agents upon said entry.

The question presented by this appeal is whether the said report of October 17, 1900, by the former special agent of your office, was such a protest or proceeding against the homestead entry as would suspend the running of the proviso to section 7 of the said act.

The said proviso 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 upon any tract of land under the homestead, timber culture, desert land or preemption laws, or under this act, and where there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; 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 construction to be given to this proviso was stated in the instructions of July 9, 1902 (31 L. D., 368-371), where it is said:

The duty of a special agent is to investigate and report upon the condition of all entries of public lands in order that fraudulent entries may be detected and prevented. He is appointed for that special duty. Every report made by him adverse to an entry challenges its validity and is an actual protest against its allowance. No proceeding against an entry of public land comes more directly and strictly within the words of the statute "protest against the validity of such entry" than the adverse report of a special agent. When such report is filed within two years from the date of the final receipt, it is a "pending protest" against the validity of such entry within the meaning of the statute, and your office will be warranted in investigating such entry before passing it to patent.

In the case before us the report of the special agent was filed within a week after the final certificate issued. It states that, by reason of information furnished by a forest ranger to the effect that the homestead claimant had no residence or cultivation but had cut timber from the land, the agent "will enter a charge of fraud in this case." This is clearly an "adverse report" and having been filed within two years from the date of the final receipt, it became a "pending protest" within the meaning of the statute and your office was thereby warranted in investigating the entry before passing it to patent. Such investigation was ordered by your office on April 15, 1902, and the report thereon, dated November 22, 1902, fully establishes the facts stated in said "adverse report," and warrants the action subsequently

taken by your office in suspending the entry. The record does not show that the claimant requested a hearing or in any manner sought to defend the case on its merits.

The action appealed from is accordingly hereby affirmed.

STATE SELECTION—WITHDRAWAL—FOREST RESERVE.

STATE OF UTAH.

Where, after application by the State of Utah for the survey of lands under the provisions of the act of August 18, 1894, but prior to the filing of the plat of survey, a temporary withdrawal embracing the land was made with a view to the establishment of a forest reserve, and the State was thereafter, within due time after the filing of the plat of survey, permitted to make selections of the lands, subject to final determination of the boundaries of the proposed reserve, such selection, being still of record on May 29, 1903, the date of the proclamation creating the Logan forest reserve, embracing the land in question, is a "lawful filing" within the meaning of that term as used in the excepting clause of the proclamation, and the approval of the selection and certification of the lands to the State subsequent to the creation of the reserve was proper.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 24, 1904.* (F. W. C.)

With your office letter of the 21st ultimo was transmitted the answer of the State of Utah to the demand made by your office for reconveyance to the United States of certain lands, aggregating 4,367.51 acres, held to have been erroneously certified under the grant made to the State for an institute for the blind and for reform schools, because of the fact that said lands were, prior to the approval of the lists selecting the same, embraced within the Logan forest reserve. The facts with regard to these lands, as gathered from your said office letter, are as follows:

July 12, 1899, the State of Utah applied for the survey of T. 11 N., R. 2 and 3 E., under the act of August 18, 1894 (28 Stat., 372, 394, 395), and on the 21st of that month your office withdrew said townships from settlement and entry in accordance with the provisions of said act, awaiting the exercise of the State's preferred right of entry thereunder within sixty days after the filing of the plats of survey of said townships. The surveys were executed in the field in June and July, 1901, but the plats thereof were not filed until April 1, 1903. May 7, 1902, these townships, with other lands, were temporarily withdrawn for examination, with the view to their possible inclusion within a forest reserve. Upon the filing of the township plats the question arose as to whether the State should be allowed to exercise its right of selection within the township in view of the temporary withdrawal. On April 10, 1903, under authority of your office letter "G" of June 25,

1902, the State was permitted to make the selection here in question. In your said office letter it was held, in effect, that as the lands were only temporarily withdrawn, the State might be permitted to exercise its right of selection but that the approval of selections made therein would be subject to the final determination of the boundaries of the forest reserve to be created out of the lands withdrawn, if such reservation was deemed advisable. After examination of the lands temporarily withdrawn, a forest reserve was determined upon and the proclamation creating and reserving the lands was made May 29, 1903 (33 Stat.,). Prior to the issuance of said proclamation, however, no action was taken towards the cancellation of the State's selections and by the terms of the proclamation creating the forest reserve, there was excepted from the operation thereof—

all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing or record has not expired. -

Following the creation of the forest reserve, the selections in question were approved and the lands certified to the State. It appears that they have since passed into the hands of *bona fide* purchasers and that at least one-third of the lands have been surrendered and returned under the provisions of the act of June 4, 1897 (30 Stat., 11, 36).

Waiving any question as to the State's right under its application for the survey of these lands under the act of August 18, 1894, *supra*, prior to the selection and approval thereof, it is clear that under the ruling of your office, the State was permitted to make selection following the temporary reservation of the lands, subject, however, to the final determination of the boundaries of the forest reserve, when created, and the only question in this case necessary to be considered is, whether such a selection was a lawful filing within the meaning of that term, as used in the excepting clause of the proclamation creating the forest reserve.

In the opinion of the Department it was. It is clear that your office might have, as soon as the reserve was determined upon, ordered the cancellation of the selections allowed subject to the creation of the forest reserve. In other words, your office could have, before submitting the proclamation creating the forest reserve to the President for his approval, cleared the record of all claims which were then subject to termination. As before stated, however, no such action was taken. That it might have been taken does not seem to be subject to much doubt. This fact, however, did not render the selections thus allowed unlawful, and as a consequence they must be considered as filings lawfully made. Having arrived at this conclusion it is clear that they were not embraced within the reservation as created under

the President's proclamation, and the certification of the State's selections was proper.

The demand, therefore, made upon the State to reconvey these lands must be and is accordingly set aside.

CONFIRMATION—TIMBER AND STONE APPLICATION—ACT OF MARCH 9,
1904.

JOSEPH W. WHITE.

The act of March 9, 1904, confirming certain classes of filings, entries and final proofs, defective because executed outside of the land district in which the lands applied for are situated, applies only to such filings and entries as were in existence at the date of approval of the act.

An application to purchase land under the act of June 3, 1878, excepts such land from other disposition until the date first advertised for the submission of proof, and, in cases where the applicant is prevented by accident or unavoidable delay from submitting proof on such date, ten days additional, but no longer; and upon the expiration of the final proof period, if the applicant is then in default in the matter of proof, a previous withdrawal of the land for forestry purposes immediately attaches thereto, and all rights under the application to purchase cease and determine.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 24, 1904.* (E. P.)

June 26, 1903, Joseph W. White filed in the local office an application to purchase, under the timber and stone act, the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 11, T. 24 S., R. 13 E., Lakeview land district, Oregon. In due time White advertised notice of his intention to submit proof on his said application to purchase, January 29, 1904. Proof was not submitted on the date advertised.

On or about April 22, 1904, White filed in the local office a corroborated affidavit wherein he alleged that on or about January 1, 1904, he was informed by a friend that final proofs on timber and stone sworn statements executed before W. A. Bell, United States Commissioner, at Prineville, Oregon, the officer before whom White's sworn statement was executed, were being rejected by the local officers of the Lakeview, Oregon, land district, for the reason that such sworn statements were illegal because executed outside the land district wherein the land applied for was situated; that he thereupon wrote to the local officers, from his home in Minnesota, asking if he had been correctly informed in said matter; that before the date for the submission of proof on his said application he received an affirmative reply to his letter addressed to the local officers; that upon the receipt of said reply, not wishing to incur the expense incident to a trip from

Minnesota to Oregon, for the purpose of submitting proof which, he believed, would be rejected, he abandoned his intention to submit proof on the date named; that he has since been advised, however, of the passage by Congress of an act entitled, "An act relating to applications, declaratory statements, entries and final proofs under the homestead and other land laws, and to confirm the same in certain cases when made outside the land district within which the land is situated." Wherefore, he asked that his said sworn statement be confirmed under said act and that he be permitted to readvertise and submit final proof on his application.

By decision of July 13, 1904, your office found and held as follows:

As shown by the records of this office the township embracing the land in question was temporarily withdrawn for forestry purposes by office letter "R" of July 31, 1903.

In view of the fact that the party failed to make proof on the date advertised, or within ten days thereafter, the application expired, and the withdrawal above mentioned took effect. The applicant, therefore, cannot be allowed to readvertise and complete his purchase in the presence of such withdrawal of the land.

From said decision White has appealed to the Department, alleging that your office erred in denying him the privilege of readvertising and submitting proof under the provisions of the act referred to in his application to readvertise, namely, the act of March 9, 1904 (33 Stat., 64).

Said act provides as follows:

That whenever it shall appear to the Commissioner of the General Land Office that an error has heretofore been made by the officers of any local land office in receiving an application, declaratory statement, entry, or final proof under the homestead or other land laws, and that there was no fraud practiced by the entryman, and that there are no prior adverse claimants to the land described in the entry, and that no other reason why the title should not vest in the entryman exists, except that said application, declaratory statement, entry, or proof was not made within the land district in which the lands applied for are situated, as provided by the act of March eleventh, nineteen hundred and two, such entry or proof shall be confirmed.

In cases arising under the provisions of section 7 of the act of March 3, 1891 (26 Stat., 1095), confirming all entries of certain classes, the Department has repeatedly and uniformly held that such provisions were applicable only to entries that were alive and subsisting at the date of the approval of the act, and this view was concurred in by the Supreme Court of the United States, in the case of *Parsons v. Venzke* (164 U. S., 89). And in cases that have come before the Department under the act of August 18, 1894 (28 Stat., 397), which declares to be valid "all soldiers' additional homestead certificates heretofore issued under the rules and regulations of the General Land office," the Department has held that such provision applies only to such certificates as were in existence at the date of the approval of the act. (F. W. McReynolds, 33 L. D., 112.)

Claimant made entry of said tract August 24, 1899, and on January 22, 1902, Holcomb filed affidavit of contest against said entry charging that:

Said Mary W. Scott has failed during each and every year since the date of said entry to expend the sum of one dollar per acre upon said land in the necessary irrigation, reclamation, and cultivation of said land by means of main canals and branch ditches and in permanent improvements upon the land and that none of said land is in cultivation or reclaimed.

Notice issued thereon and hearing was had, both parties appearing in person with counsel and witnesses. In substance the testimony thus adduced was to the effect that Warren M. Scott, contestee's husband, made a desert land entry for said tract on September 3, 1895, and shortly afterward established residence thereon and began the preparation and improvement of the land with view to reclamation; that his improvements, variously estimated at from \$400 to \$800, consisted of a substantial two-story house, sixteen by twenty-four feet; a cellar sixteen by thirty-two feet, timbered up, with door and windows; twenty-eight foot well, curbed up and supplied with a windlass; a stable, sufficient to house eight to ten head of stock; tract fenced on one side, with posts supplied in part for the other sides; that he cleared about twenty acres of the land thoroughly of sage brush and leveled about fifteen acres of same; that he secured water from a company that was operating and maintaining a large canal, and irrigated and cultivated ten acres to crop during the year 1896; that during the fall of that year the irrigation company failed, and as a result the water was turned out of the main canal, and by reason of this fact he was unable to submit final proof showing proper reclamation of his entry within the statutory period; that he thereupon relinquished his said entry August 24, 1899, and transferred the improvements to his wife, who on the same date made the desert land entry now in question, and, as shown by the record, submitted first, second and third year proofs, using as a basis therefor the above-described improvements, which, as stated, were placed on the land by her husband but conveyed to her when he relinquished his entry.

There is no material dispute as to the facts in this case. As but little more than half of the statutory life of the present entry had expired at the date of the initiation of Holcomb's contest, his charge that the land is not in cultivation or reclaimed is not material. In fact the only question presented is whether the present claimant can claim the benefit of work done on the land for the purpose of reclaiming it and reducing it to cultivation prior to the date of her entry, where it appears that she now owns those improvements, the same having been voluntarily transferred to her by the prior desert land entryman.

The local officers held in the affirmative, finding that such a showing was sufficient to satisfy the requirements of the desert land law. On appeal therefrom your office affirmed their action, holding by decision now appealed from that:

The proofs show the necessary expenditures so far and it is shown that there is a reasonable assurance of the water company resuming business, and it is shown that the necessary ditches are on the land ready to receive the water.

By the act of March 3, 1891 (26 Stat., 1095), five sections, numbered from four to eight, inclusive, were added to the original desert land act of March 3, 1877 (19 Stat., 377). The question involved in this case is governed by section five of the said amendatory act, which provides:

Sec. 5. That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid, the party so entering shall expend not less than one dollar per acre for the purposes aforesaid: and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register, proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid, the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be canceled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than herein-before prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: *Provided*, That proof be further required of the cultivation of one-eighth of the land.

The object of the desert-land law is to provide for the reclamation of land, arid or desert in character, by conducting water thereon. It will be observed from the above section that as a condition precedent to the issuance of patent, proof of the reclamation to the aggregate extent of three dollars per acre, and cultivation of one-eighth of the entire area, is required; that while at least one dollar per acre each year for three years must be expended in this reclamation and improvement, with proper yearly proof showing such expenditure, yet, claimant is in no way prevented from making the entire expenditure during the first year of his entry, or in fact from entirely reclaiming and reducing one-eighth of same to cultivation within that period of time. Indeed it would clearly seem to follow that should a claimant so desire he might even make this expenditure, prepare a tract for irrigation

and cultivation, prior to making entry thereof, and being the owner of such improvements have the benefit of them as a compliance with the law under the entry. Hence the question which logically follows is, Could not one purchase the improvements placed upon a tract by another in compliance with the requirements of the desert land law, and upon subsequent entry thereof, claim the benefit of such improvements?

While this question does not appear to have been considered by the Department, so far as relates to desert land entries, in the cases reported, the principle has been universally recognized in the adjudication of cases under the homestead law. It is also very similar to the well and long established rule relating to timber culture entries, that the entryman is not restricted as to the period when he shall perform the work, provided that it is done within the required time; and that the law will be satisfied even where work is performed prior to entry. Following this interpretation the Department held that the object of the law being "to encourage the growth of timber," the purpose was satisfied whether the work was performed by the entryman, his agent, or his vendor; and that as it was not a personal requirement, one who purchased land that had been in whole or in part broken, planted and cultivated by another, as fully met the spirit and intent of the law as if he had personally performed the work. *Gahan v. Garrett* (1 L. D., 137); *Joy v. Bierly* (17 L. D., 178); *O'Rourke v. Ingalsbe* (28 L. D., 245); and in many earlier decisions.

There seems to be no good reason why the same line of reasoning should not be applied to desert land entries. The object being to provide for the irrigation and reclamation of the arid or desert portions of the vacant public lands, the law is satisfied whether the necessary labor and improvement is performed by the entryman in person or by his agent; whether he hires the work done or buys such improvements as are contemplated by the statute from a former entryman; or even if he receive them from the latter as a gift. It is sufficient if the improvements are shown to be the property of the entryman, and such as the statute contemplates.

In the case at bar no evidence of bad faith is shown. The improvements placed on the land by the former entryman were far above the average and from the record it appears that he was in good faith endeavoring to secure its reclamation but was prevented from so doing because of the failure of the canal company and the consequent turning off of his supply of water. As the statutory life of his entry was soon to expire it was natural that he should make some provision for the disposition of his improvements. This he did by relinquishing his entry and transferring them to his wife, the contestee herein, who at once made desert land entry for the tract and submitted the required yearly proofs based on the improvements thus conveyed. These annual

On March 12, 1902, and on succeeding days, the hearing was had, at which the Kern Oil Company and Clotfelter appeared and submitted evidence in respect to the character of the lands in the NE. $\frac{1}{4}$ of Sec. 32, T. 28 S., R. 28 E., M. D. M.

Separate proceedings were had upon the protest of Sesnon, as to the other lands above mentioned, and those lands are not involved in this case.

June 5, 1902, the local officers, upon the evidence, found as follows:

After carefully considering all the voluminous testimony submitted in this case, the briefs of protestant, and brief of claimant and his motion to strike out certain testimony, we find that the mineral character of the premises involved in this hearing had not been actually demonstrated on January 5, 1900, the date of the selection thereof, but that the discoveries made thereon and its situation relative to other producing oil land adjacent was sufficient to justify a person of ordinary prudence in the expenditure of time and money, with a prospect of success, in the endeavor to extract mineral (oil) therefrom, and that said land had no value for farming purposes and but little value for grazing purposes. We also find that said land was on January 5, 1900, in the possession and occupation of the mineral claimants, and was therefore not subject to selection at that time under the act of June 4, 1897.

It was thereupon recommended that the selections, as to lands in the NE. $\frac{1}{4}$ of said section 32, be canceled.

Upon appeal by the selector, your office, December 3, 1903, found and held:

That on and prior to January 5, 1900, the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 32, T. 28 S., R. 28 E., M. D. M., were known mineral lands, valuable for deposits of petroleum (oil), and that they were in the possession of and occupied by the Kern Oil Company under its location of the Dewey No. 4 placer claim. Accordingly your decision, with the exception of that part thereof relating to the timber culture entry hereinbefore mentioned and your statement "that the mineral character of the premises involved in this hearing had not been actually demonstrated on January 5, 1900," is affirmed. You will so advise the parties, and that in case this action becomes final Clotfelter's selections will be canceled to the extent of the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 32, T. 28 S., R. 28 E., M. D. M.

The selector has appealed to the Department.

Several assignments of error are made in the appeal, but they need not be considered in detail.

The record shows, and it is not denied by the selector, that the Dewey No. 4 placer mining claim, embracing the NE. $\frac{1}{4}$ of said section 32, was located by eight qualified persons, May 31, 1899; that notice of location was duly recorded, June 1, 1899; and that, August 19, 1899, the Kern Oil Company, by mesne conveyances, acquired whatever rights existed under the location.

It is shown by the evidence that between August 19, 1899, and October 10, 1899, a well was bored by the Kern Oil Company on the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section 32 to the depth of two hundred and seventy feet; that the drill passed through sands impregnated with

oil; that on and after December 22, 1899, a standard steam-drill rig was moved on the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section by the company; that a derrick was erected and active drilling commenced, January 2, 1900, and was continued night and day until some days after January 5, 1900; and that in this well, prior to the last named date, sands impregnated with oil were penetrated by the drill at a depth of about two hundred and eighty feet, the well being drilled to a depth of four hundred and sixty-five feet some days after said date.

The formation through which the drill passed in the well last above named is shown, from tracings kept by the superintendent in charge of the drillers, to be as follows:

From the surface, clay mixed with gravel and sand down to 80 feet; from 80 to 150 feet we found more or less brown sand rock; from 150 to 200 feet brown sand stained with oil; from 200 to 220 feet was magnificent oil sand; from 220 to 230 feet was blue clay; from 230 feet to 275 feet was oil sand.

This was about the depth reached by the drill on January 5, when oil was noted on the tools and it came out from the sand pump.

On the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said section 32 oil in paying quantities was found in a well between 300 and 400 feet deep, November 10, 1899; on the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section about December 15, 1899, at a depth of 700 feet, a seventy-five to one hundred barrel well was finished, sands permeated with oil being found at the depth of 350 feet; on the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of the same section, oil was found, December 21, 1899, in paying quantities; on the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of the section oil was found on December 1, 1899 and thereafter, and prior to January 5, 1900, a well was drilled to a depth of about 500 feet, when a well producing about forty barrels per day was finished.

On the SE. $\frac{1}{4}$ of section 33, T. 28 S., R. 28 E., three wells were drilled prior to January 1, 1900, in all of which oil was found in paying quantities; a "good oil well" was finished at 550 feet and sands thoroughly impregnated with oil were penetrated at a depth of 450 feet.

On the SW. $\frac{1}{4}$ of section 34, T. 28 S., R. 28 E., a well was drilled to the depth of 380 feet in September, 1899, and sand impregnated with oil was found at that depth.

On the SW. $\frac{1}{4}$ of Sec. 28, same township and range, a well producing 75 barrels of oil per day was finished late in December, 1899, at a depth of 870 feet, sand impregnated with oil being penetrated by the drills at a depth of 380 feet.

On Sec. 3, T. 29 S., R. 28 E., a well was drilled by September 1, 1899, in which oil was found in paying quantities, and four oil-producing wells were completed thereon before January 5, 1900.

On the SW. $\frac{1}{4}$ of Sec. 29, T. 28 S., R. 28 E., oil was found in paying quantities, in a well finished sometime in December, 1899.

On Sec. 4, T. 29 S., R. 28 E., an oil well, producing 100 barrels per day, was finished at a depth of 500 feet, sand impregnated with oil being penetrated at a depth of about 100 feet.

On the SE. $\frac{1}{4}$ of Sec. 24 in T. 28 S., R. 27 W., and the SW. $\frac{1}{4}$, Sec. 8, T. 28 S., R. 28 E., wells were finished prior to January 1, 1900, in which oil was found in paying quantities.

From Sec. 3, T. 29 S., R. 28 E., to Sec. 29, T. 28 S., R. 28 E., sands impregnated with oil were found at depths ranging from about 100 feet deep in the former to about 400 feet deep in the latter.

The lands herein involved are situated near the center of the Kern river oil field. The oil-bearing strata lie under the entire field in what is known as a blanket formation, with a slight pitch to the northwest. The surface of the field, as well as of the portion of the section 32 in question, is rolling and broken by deep gulches in which the geological formation is disclosed. The same indications exist on the surface of said quarter section as are found on adjacent lands in which oil has been discovered, in many places, in paying quantities. From about September 1, 1899, the land in said field has been generally regarded as chiefly valuable for its mineral oil deposits. Oil producing wells were completed by the last named date on Sec. 3, T. 29 S., and in Sec. 34, T. 28 S.

The hearing seems to have been conducted along the lines directed by the Department, both parties being fully informed as to the purpose and scope thereof. The evidence showing that prior to January 5, 1900, the surface indications upon the selected lands here involved were identical with those upon surrounding and adjacent lands on which were wells producing oil in paying quantities; that the oil-bearing strata lie in blanket formation under the whole oil field; that oil-bearing sands had been penetrated by drills in two wells upon the quarter section in which the selected lands are situated; and that it had been demonstrated that there were valuable deposits of oil in the immediately surrounding lands in all directions, the Department is of opinion that on the date the selections in question were filed, the lands in question were of known mineral character, and were not, therefore, subject to selection under the act of June 4, 1897.

This much determined, it becomes unnecessary to pass upon the other questions suggested on appeal.

For the foregoing reason the decision of your office is affirmed.

PATENT—NOTICE—SELECTION UNDER ACT OF JUNE 4, 1897.

O'SHEE *v.* COACH.

Lands involved in a contest or other controversy before the land department should not be passed to patent until the defeated party in such proceeding shall have been given notice of the closing of his case, with record evidence of its service, and lapse of reasonable time for him to seek relief against irregularity or error of such final order.

Where, after decision therein by the Secretary of the Interior, a case before the land department is erroneously closed, and patent inadvertently issued to the successful party, during the pendency of a motion for review of such decision, the institution of suit for the cancellation of such patent will not be recommended by the land department unless it appear from an examination of the motion for review that it is based upon grounds which would have warranted entertainment of the same had it been regularly considered and acted upon prior to the issuance of the patent.

While an application to select public lands under the act of June 4, 1897, is pending, and until it is disposed of, the lands involved are not subject to other entry, and no subsequent application not based on antecedent claim of right in the land will be received or recognized.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *October 29, 1904.* (J. R. W.)

In the case of conflict between the cash entry of James A. O'Shee and the selection of William Coach, No. 4178, your office series, under the act of June 4, 1897 (30 Stat., 36), involving the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 22, and SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 26, T. 8 N., R. 1 W., La. M., New Orleans, Louisiana, complaint was made by James A. O'Shee of errors of omission and of commission in procedure by your office, to his great wrong and prejudice, in that your office, among other things, canceled his cash entry without notice to him, examined and approved Coach's selection and patented the land to him while the matter was pending before the Department upon motion of O'Shee for review of departmental decision of February 18, 1904, holding O'Shee's entry invalid and directing its cancellation.

September 30, 1904, the complaint was referred to your office for report upon the matters alleged, and, October 18, 1904, your office reports that a motion for review of said departmental decision was filed in your office and transmitted to the Department, and Coach's attorney advised of the fact; that such facts inadvertently were not noted upon the proper record, in consequence whereof the case was closed by your office July 15, 1904, and O'Shee's entry canceled, but no record exists that notice of such action was given to either Mr. O'Shee or to his attorney; that the land was patented to Coach upon his selection September 1, 1904.

The Department is thus placed in the position of being deprived of jurisdiction to adjudicate a matter properly before it by the inadvertent

issue of patent to the land involved. Such result is wholly due to failure of your office to make proper and necessary record of proceedings had in the case. This unfortunate result would no doubt have been avoided had the rules of procedure been observed requiring service of notice to the party or his attorney of canceling the entry and of closing of the case. Had notice of such action been given, the party might have saved his right to a decision upon his motion for review by calling attention of your office, or of the Department, to the erroneous action of July 15, 1904, canceling the entry and closing the case.

Rules of procedure are intended to assure an orderly conduct of business and the protection of rights of parties. Mere statement of the facts in the present case sufficiently shows the necessity for their observance, and that in this case there was negligent disregard of them. In no case of conflict or contest should lands be passed for patent until the defeated party has been given notice of the closing of his case, with record evidence of its service and lapse of reasonable time for him to seek relief against irregularity or error of such final order.

It remains to consider whether the Department shall order a proceeding at suit of the government for cancellation of the patent erroneously and inadvertently issued, in order that its jurisdiction may be restored and it may be enabled to finally adjudicate the contentions of the parties. That question must be decided upon the same principles and facts as would determine the entertainment or denial, in the first instance, of the motion for review pending before the Department when its jurisdiction was taken away by the issue of patent, for it would be an empty insistence upon formalism to require cancellation of the patent, if examination of the decision and motion discloses that the decision was undoubtedly without error and that the motion must be denied and the patent at once reissued.

The facts are that Coach relinquished to the United States legal title to lands in a forest reserve and filed in the local office his recorded deed, abstract of title and application under the act of June 4, 1897, *supra*, to select in lieu the lands in controversy. His application lacked the required proof that the land applied for was of the character and condition making it subject to selection, and the local office should have rejected it. The papers having been received and transmitted by the local office, your office, July 22, 1902, upon examination of them, found this defect and also that a cloud existed upon the title to the land relinquished—viz., an easement of a right of way; required Coach within sixty days to remove such defect of title and to furnish proof, concurrent in time, of the condition and character of the land selected, and notified him that in default of his compliance his appli-

cation would be rejected without further notice. This rule was served July 26, 1902. He took no action until December 29, 1902, when, no rejection of the selection having in the meantime been made, he furnished the required proofs. Subsequent thereto, March 31, 1903, while Coach's application was pending, the local office erroneously permitted O'Shee to make cash entry for the same land and issued a certificate therefor. June 10, 1903, your office held that the land was not subject to entry by O'Shee while Coach's application was pending, and ruled him to show cause why his entry should not be canceled. His motion for review was denied August 7, 1903, and the former decision adhered to. That action on O'Shee's appeal was affirmed by the Department, February 18, 1904. To this a motion for review was filed and was pending when the jurisdiction of the land department was lost by error of your office in issuing patent to Coach.

The motion for review alleges error in the decision:

1. In holding that the essential elements of transfer to the United States of the base land have ever been concurrently complied with and permitting Coach to perfect his abstract of title non-concurrently with other essential elements of transfer.
2. In not holding that the incumbrance or cloud upon said title has not been removed but yet exists. .
3. In accepting the relinquishment of such cloud filed.
4. In rejecting O'Shee's entry.

All the assignments of error save the last are not pertinent to the decision. A third party can not be permitted to intrude himself into a transaction of exchange of lands pending between another party and the United States, under the act of June 4, 1897. When such a transaction is entered upon, it is for the government alone to determine the sufficiency of the title to the land tendered by the selector. While an application for selection of public lands is pending, and until it is disposed of, the land involved is not subject to another entry, and no subsequent application not based on antecedent claim of right in the land will be received or recognized. *Porter v. Landrum* (31 L. D., 352, 353); *F. C. Finkle* (33 L. D., 233, 235). It follows necessarily that the last assignment of error of the motion for review was without merit, that the departmental decision of February 18, 1904, was indubitably without error, and that the motion could not have been entertained, but must necessarily have been denied had it been reached for proper consideration before jurisdiction was lost.

The complainant therefore lost no substantial right, and the irregular procedure and erroneous issue of patent worked no injury to him. No sufficient reason therefore exists for the Department to order a proceeding for cancellation of the patent for the recovery of the jurisdiction lost by the grave errors resulting in issue of the patent.

DAVIS *v.* NELSON.

Motion for review of departmental decision of July 18, 1904, 33 L. D., 119, denied by Secretary Hitchcock, October 29, 1904.

WHITE EARTH INDIAN RESERVATION—ALLOTMENTS—ACT OF APRIL 28, 1904.

OPINION.

Under the agreement of July 5, 1872, and the provisions of the act of April 28, 1904, members of the Otter Tail Pillager band of Indians residing on the White Earth reservation are entitled equally with members of the Mississippi bands of Chippewa Indians residing on said reservation to the additional allotment of eighty acres each provided for in said act.

Assistant Attorney General Campbell to the Secretary of the Interior,
October 31, 1904. (J. R. W.)

I received by reference of September 22, 1904, with request for further consideration and opinion thereon, the claim of the Otter Tail Pillager Indians to additional allotments, to make the aggregate of one hundred and sixty acres each, on the White Earth reservation, Minnesota, under the act of April 28, 1904 (33 Stat., 539), and protest of the Mississippi Chippewa bands against the same, subject of my opinion of August 29, 1904. In that opinion, under reference of August 3, 1904, I found that the question referred was not clearly stated, and defined it as then understood to be:

Whether the Mississippi Chippewas are entitled to full allotments to make, with former allotments, a total of one hundred and sixty acres, prior to allotments to members of the Otter Tail Pillager band, leaving to the Otter Tail band only such residue as may remain; or shall the lands be pro rated per capita to members of both bands.

The Indian Office letter of September 20, 1904, states that this was not the question intended to be referred, and defines it to be:

Are the Otter Tail Pillagers, in view of the agreement of the Mississippi Chippewas of July 5, 1872, entitled, *equally* with the Mississippi bands, to the *additional* allotments of 80 acres each, as provided for in the said act of April 28, 1904?

The act of January 14, 1889 (25 Stat., 642), provided for allotment of the White Earth reservation lands "in conformity with" the act of February 8, 1887 (24 Stat., 388), which gave to each head of family one-quarter section, each single person over eighteen years of age and each orphan child under eighteen years one-eighth section, each other person under eighteen one-sixteenth section. This act was amended, February 28, 1891 (26 Stat., 794), to give each Indian located on a reservation to be allotted one-eighth of a section of land, with the proviso, among other things:

That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty to certain classes in quantity in excess of that herein provided the President, in making allotments upon such reservation, shall

allot the land to each individual Indian of said classes belonging thereon in quantity as specified in such treaty or act, and to other Indians belonging thereon in quantity as herein provided: *Provided further*, That where existing agreements or laws provide for allotments in accordance with the provisions of said act of February eighth, eighteen hundred and eighty-seven, or in quantities substantially as therein provided, allotments may be made in quantity as specified in this act, with the consent of the Indians, expressed in such manner as the President, in his discretion, may desire.

The White Earth reservation was created pursuant to the treaty of March 19, 1867 (16 Stat., 719), Article VII of which, in respect to allotments, provided that when—

any Indian, of the bands parties hereto, either male or female, shall have ten acres of land under cultivation, such Indian shall be entitled to receive a certificate, showing him to be entitled to the forty acres of land, according to legal subdivision, containing the said ten acres or the greater part thereof, and whenever such Indian shall have an additional ten acres under cultivation, he or she shall be entitled to a certificate for additional forty acres, and so on, until the full amount of one hundred and sixty acres may have been certified to any one Indian.

The Pillager band is not mentioned in the treaty and appears not to have been party thereto. May 29, 1872 (17 Stat., 165, 189), Congress appropriated—

to enable the Secretary of the Interior to carry on the work of aiding and instructing the Indians on the White Earth reservation, in Minnesota, in the arts of civilization, with a view to their self-support, conditioned upon the assent of the Mississippi band of Chippewas, first expressed in open council in the usual manner, to the settlement of the Otter-Tail band of Pillagers upon the White Earth reservation, with equal rights in respect to the lands within its boundaries, twenty-five thousand dollars.

Pursuant to this act, July 5, 1872, the Mississippi Chippewa Indians, in council, made and signed a written invitation or assent, as follows:

We, the chiefs and headmen of the Mississippi Chippewas in open council hereby, for ourselves and our bands, invite the Otter Tail band of Pillager Indians to come and settle upon the White Earth reservation with equal rights in respect to the land within its boundaries.

The Otter Tail Pillager band then settled on the White Earth reservation and has since occupied it with the Mississippi bands. The Indian Office states that each Otter Tail Pillager has been allotted eighty acres of land, which indicates that the allotments were made under the act of 1889, as amended in 1891. The act of April 28, 1904 (33 Stat., 539), called the Steenerson Bill, authorized allotments—

to each Chippewa Indian now legally residing upon the White Earth reservation under treaty or laws of the United States, in accordance with the express promise made to them by the commissioners appointed under the act of Congress entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January fourteenth, eighteen hundred and eighty-nine, and to those Indians who may remove to said reservation who are entitled to take an allotment under article seven of the treaty of April eighteenth, eighteen hundred and sixty-seven, between the United States and the Chippewa Indians of the Mississippi,

one hundred and sixty acres of land; *Provided*, That where any allotment of less than one hundred and sixty acres has heretofore been made, the allottee shall be allowed to take an additional allotment, which, together with the land already allotted, shall not exceed one hundred and sixty acres: *And provided further*, That if there is not sufficient land in said White Earth (diminished) reservation subject to allotment each Indian entitled to allotments under the provisions of this act shall receive a pro rata allotment.

May 31, 1904, the Chief of the Otter Tail Pillagers residing on the White Earth reservation wrote the Indian Office claiming under this act an equal right for members of his band with those of the Mississippi band, by virtue of the above agreement of July 5, 1872. The claim was submitted by the Indian Office to a council of the Mississippi Chippewas, who, July 14, 1904, protested, stating that the action of July 5, 1872, *supra*—

was prompted, not for the monetary consideration involved, but through the hospitable spirit of charity and compassion and to relieve the then existing destitute circumstances and homeless condition of the said Otter-Tail Pillagers. But it was not the intent or purpose of those signatory to said instrument to extend or confer unlimited rights or unrestricted privileges to the members of the said Otter-Tail bands, neither was it the purpose to elevate them to a plane of equality with the members of the Mississippi bands in the matter of treaty privileges then existing or that might thereafter be inaugurated between the latter band and the U. S. Government, especially such rights as related to the proprietary rights of "tribal relation."

They show, as further argument favoring their contention, that the Otter Tail Pillagers classed themselves with the Leech Lake Pillagers in settlement of the Mississippi Reservoir flowage damages, and also in the negotiations between the several Chippewa bands and the United States, under the act of January 14, 1889; that an express promise of allotments of one hundred and sixty acres was made to the Mississippi bands by the commission negotiating the cession under the act of 1889, *supra*, and that neither they nor the commission understood that the rights granted by Article VII of the treaty of 1867 were to be anywise impaired, as is shown by Executive Document 247 H. R., 51st Congress, 1st session, and the letter of April 4, 1892, by the former chairman of the commission to the Commissioner of Indian Affairs, which, among other things, says:

The Chippewas of the Mississippi, at the time of the making of the treaty of 1867, understood that not only *each individual was entitled to 160 acres in severally*, but in their tribal relations to whatever might remain of the thirty-six townships which they had purchased from the United States.

The treaty of 1867 and the act of 1887 (24 Stat., 388), were not affected by the negotiations contemplated by the act of January 14, 1889, except giving permission to other Indians, having no interests heretofore in said reservation, to settle thereon.

I am informed there are not enough lands in the diminished White Earth reservation to fill allotments due Indians removed thereto under the act of 1889, and to give the additional allotments under the act

of 1904, to both the Mississippi and the Otter Tail bands; hence the Mississippi bands object to the claim made.

By Article VII of the treaty of 1867, *supra*, the Mississippi bands were promised allotment of one hundred and sixty acres to each person, whenever they became qualified by bringing into cultivation the stipulated area. The United States became thereby morally bound not to reduce the reservation below an area sufficient to fill such allotments, without provision in some other way to discharge the obligation. But the treaty band might, with consent of the United States, vest in other Indians a right to share with them, thus reducing their own rights. That they did consent is the necessary effect of the words "equal rights in respect to the lands." Whatever rights the treaty Indians had, these words were sufficient to confer upon the Otter Tails, whether that were a mere possessory one or a fee. As the words were adequate to convey, and the United States sufficiently consented by soliciting it upon a consideration of money appropriated and paid, it is clear that the Otter Tail Indians acquired equality in all existing right held by the treaty bands. That the Otter Tails so understood it is clear by the words of Sturgeon, at the 4th Leech Lake council, August 12, 1889 (Ex. Doc. 247, *supra*, p. 125), that:

At the time the White Earth reservation was set aside, and the Mississippi Indians removed there, there was a sum of \$25,000 appropriated to pay for it, giving the Otter Tail Pillagers a right on the White Earth reservation. We think that that land which was paid for at that time belongs to the Otter Tail Indians. We wish to have the Otter Tail Indians here [Leech Lake] with us to participate in interest with whatever might accrue to the Pillager Indians. We wish them to stand with us in all business matters. The Otter Tail Indians ought to have land separate for themselves.

That the Mississippi White Earth bands also understood that the negotiations under the act of 1889 must necessarily result in lessening their interests in the reservation lands "in their tribal relations," is clear by the whole discussion at the White Earth councils, reported by the commission (Ex. Doc. 247, *supra*, pp. 85 to 116). Wah-Ban-ah-quod, spokesman for the Mississippi bands, at the 9th council at White Earth, July 29, 1889 (Ex. Doc., *supra*, pp. 11, 112), compared the different effect upon the Red Lake Indians, who were not required to receive more Indians on their reservation, and upon themselves, and said:

But we now open our reservation to all those who have a right to come, which is the understanding with which we sign. Our understanding was that we opened it to Indians as well as mixed bloods belonging to our bands and being related to us; but come to find out, we are opening the reservation to the whites also.

There are a great many Indians who will remove here because they are destitute of means and because they will be free from taxes.

He was complaining against intrusion of white men, but the context preceding and his remarks here show that he fully understood that

other Indians than those then on the reservation were to be thereto removed and given allotments from these lands, and that this would affect the residual tribal property. Mistake as to the extent to which their rights would be affected can not invalidate the act so far as it affected the rights of others, even though the United States and the Mississippi bands erroneously supposed there was land enough on the reservation to satisfy all obligations to the Mississippi bands after satisfying the claims of those to be removed there.

The title to the White Earth reservation lands remained in the United States, subject to disposal of Congress as sovereign and guardian over the dependent Indian communities residing upon it. No right of property in, or title to the land, was created by the treaty or later acts of Congress up to the act of 1889. All that the Mississippi bands had under the treaty of 1867 was a right of occupancy and a promise that title to one hundred and sixty acres in severalty would be certified to each member whenever the claimant individual complied with the conditions imposed and became qualified thereby to demand title in severalty. As this was all the right they had, it was all the right they could or did confer upon the Otter Tails. But that they did confer such right and with full consent of the United States was the necessary effect of the act of May 29, and the agreements of July 5, 1872.

When, however, the act of 1889 was enacted and a large number of other Indians were to be removed to the White Earth reservation to be given allotments there, this being the then latest disposal of Congress, was necessarily controlling, entitling the new comers to the allotments to which they were entitled, even to the exclusion of right of former occupants so far as they had not become qualified to demand the allotments promised under the treaty of 1867. In other words, the substance and effect of the act of 1889 and negotiations and cession thereunder were to close the transactions under the treaty of 1867, so far as the members of the treaty bands had not complied with the conditions of the seventh article of the treaty, and to substitute other rules contained in that act for disposal of the remaining reservation lands in severalty.

While the letter of the chairman of the commission, April 4, 1892, above quoted, gives color to the contention of the Mississippi band, it is but the opinion of one member of the commission, expressed several years after the event, and can not be regarded as an authoritative construction of the intent and effect of the cession, and still less as an authoritative construction of the act of 1889 under which the commission acted and from which it derived its powers.

The rule established for disposal of the lands of the White Earth reservation in severalty by the act of 1889 was, by section 3, that all Chippewa Indians in the State of Minnesota, except those on the Red

Lake reservation and those who elected to take allotments on the reservations where they resided, were to be—

removed to and take up their residence on the White Earth reservation, and thereupon there shall . . . be allotted lands in severalty to all the other of said Indians on White Earth reservation in conformity with the act of February eighth, eighteen hundred and eighty-seven, . . . and all allotments heretofore made to any of said Indians on the White Earth reservation are hereby ratified and confirmed with the like tenure and condition prescribed for all allotments under this act: *Provided, however*, That the amount heretofore allotted to any Indian on White Earth reservation shall be deducted from the allotment to which he or she is entitled under this act.

In other words, the new rules for disposal of the White Earth reservation lands was that (1) the number of Indians was greatly increased; (2) the condition of reducing land to cultivation was waived and the area of allotments was to be governed by the act of 1887, which, as amended in 1891, limited the area to eighty acres to the individual, unless a larger area was fixed by the law or treaty creating the reservation; and (3) prior allotments to White Earth Indians were to be deducted from the amount to which such allottee was entitled under the act of 1889. This last provision, that "the amount heretofore allotted to any Indian on White Earth reservation shall be deducted from the amount to which he or she is entitled under this act," indicates that the intent of Congress was, so far as was consistent with making allotments to those about to be removed to the White Earth reservation, not to interfere with the former obligations of the United States to the Indians already there, entitled by article VII of the treaty of 1867 and the act and agreement of May 29, and July 5, 1872, *supra*, to allotments of one hundred and sixty acres upon compliance with the conditions respecting cultivation of land. It follows that, under the act of 1889, the right of both the Mississippi and the Otter Tail bands, to allotments in excess of eighty acres, remained as they were before, dependent upon their compliance with the terms of the treaty of 1867, to which the Mississippi bands were party, and to equal right under which the Otter Tail band was admitted by the act of May 29, and agreement of July 5, 1872, such right, however, being necessarily postponed to the right of the new arrivals.

The act of April 28, 1904, authorizes additional allotments to two classes of persons: (1) to each Chippewa Indian legally residing April 28, 1904, upon the White Earth reservation under treaty or laws of the United States, in accordance with the express promise made to them by the commissioners appointed under the act of January 14, 1889; and (2) to those Indians who after April 28, 1904, may remove to that reservation and are entitled to allotments under the treaty of 1867. The Otter Tail Pillagers are Chippewa Indians, and so far as they were residents of the White Earth reservation April 28, 1904, were legally residing thereon under the act of May 29, 1872, and

entitled to equal right with the treaty bands. They come within the first class described in the act, unless excluded therefrom by the words "in accordance with the express promise made to them by the commissioners appointed under the act" of January 14, 1889.

Having recourse to the report of the councils held by the commission with the Indians, included in Executive Document 247, *supra*, pp. 85-6, it appears that at the first council at White Earth, Commissioner Whiting presented the act of 1889, saying:

Men of White Earth, in obedience to the request of our distinguished chairman, I invite your careful attention to this paper.

The act was read and the chairman addressed those assembled, and referring to the treaty of 1867 and the precedent condition for cultivation, said:

Under the present act, as soon as these negotiations shall have received the approval of the President, we are authorized to give to every man, woman, and child 160 acres of land as an allotment, and in case of the death of any person who has received such an allotment, the land passes to his or her legal representatives.

(Page 89) Bishop Marty, of the commission, third White Earth council, said:

By the former treaty you would receive only 160 acres per head of family and the balance of you 80 or 40 acres each, but under this act every man, woman, and child gets 160 acres. Would you take less when more is offered?

Again (p. 104), at the eighth White Earth council, Mr. Rice said:

Our duty under instructions is to allot to each individual, each man, woman, and child 160 acres, with good title, so that when one dies after having taken such an allotment the property will go to the family.

There is nothing in these proceedings at the White Earth councils to show that these promises were confined to the members of the Mississippi bands alone, to the exclusion of other Indians lawfully residing on the White Earth reservation. On the contrary, they are addressed to "The Men of White Earth." There were Pembinas residing on one township of the White Earth reservation who attended the councils there, as appears by the record of the seventh White Earth council (*ib.*, p. 98), when the chief of the Mississippi bands wanted an explanation about the Pembinas having signed and gone home, Rice, chairman, explained. So it appears that the Pembinas were "Men of White Earth," lawfully residing on, and expecting to take allotments on, the reservation within the particular township given to them. It does not so clearly appear whether the Otter Tail band participated in the White Earth councils or not. But it is clear that they were legally resident on the White Earth reservation under pledge of both the United States and of the Mississippi band of an equal right in the land and were "Men of White Earth" reservation.

These pledges to the chiefs and men of White Earth are not the only express promises made by the commission. At the fourth Red Lake council Mr. Rice (*ib.*, p. 73) said:

At White Earth they have taken allotments; one here and one there, scattered over the reservation. Under this act the Pillagers, the White Oak Point, and the Mille Lac Indians are allowed to do the same.

This was not express as to area, but at the sixth Leech Lake council (*ib.*, p. 134), Mr. Rice said:

We are empowered to give you allotments with the title to them. You are to have the first choice. Go and take whatever you please. Take it and it will be given to you. Not given to hold as you hold this land now, but the patent will be given you. Every head of a family takes 160 acres, which is a very large farm. Every single man and woman takes 80 acres, and every child takes 40 acres. . . . Every orphan who is not of age receives 80 acres.

The same, in substance, was promised at the first Cass Lake council (*ib.*, 150); at the third council with the Mille Lacs (*ib.*, 168); the Grand Portage council (*ib.*, 178); and at the second Bois Forts council (*ib.*, 182) the argument was made, for their consent to the cession, that their lands there were not sufficient to give more than "160 acres to a family," thus implying something more by their removal. It is thus clear that there was an "express promise" of allotments of one hundred and sixty acres to classes of Indians other than to the people resident upon, or "Men of White Earth" reservation.

Search has also been made of the proceedings of the two houses of Congress, and of the committees' reports respecting the object of the bill, but nothing there appears to indicate that it was intended for the benefit of the Mississippi bands of Chippewa Indians to the exclusion of the Otter Tail Pillager band, who also are Chippewa Indians residing on the White Earth reservation.

I am therefore of the opinion that the protest of the Mississippi bands against the claim of the Otter Tail Pillager band to benefit of the act can not be sustained, and that the Otter Tail Pillager band is within the class described as "Chippewa Indians now residing on the White Earth reservation in accordance with the express promise made to them by the commissioners appointed under the act of January 14, 1889," etc., and are entitled to the benefits of the act of April 28, 1904.

I deem it proper here to notice that Senate Executive Document 99, 52d Cong., 1st Sess., page 6, discloses that the Indian Office, April 20, 1892, was of opinion that the Otter Tail band of Pillagers "are entitled to the same allotments as the Mississippi Chippewas," and further that:

Insomuch as the promises that were made by the Chippewa Commission were made to all the Indians of the White Earth reservation, it is the opinion of this office that the Pembinas should be given the same allotments as the other Indians on the White Earth reservation.

And my predecessor, April 28, 1892, in an opinion of that date, making reference to this same matter then pending before Congress, in form substantially the same as the act of April 28, 1904, now under consideration, clearly referring to all the Indians residing on the White Earth reservation and not the Mississippi bands alone, said:

The representations [express promise] of the commissioners were undoubtedly made in good faith under a construction of the law which, in my view, is erroneous. . . . It would seem to be equity and justice that additional legislation be had granting the right to allot the Indians 160 acres without conditions.

The matter was thus originally presented to Congress in the behalf of all White Earth Chippewa Indians. It has been renewed from Congress to Congress until its passage, April 28, 1904, without ever being so defined as to be applicable to the benefit of the Mississippi band alone. I am clearly of opinion that it can not be so narrowed by construction.

Approved:

E. A. HITCHCOCK, *Secretary*.

CONFIRMATION—PROCEEDING BY GOVERNMENT—PROVISO TO SECTION
7, ACT OF MARCH 3, 1891.

JOHN S. MAGINNIS.

Any proceeding by the government challenging the validity of any particular entry, or any investigation initiated because of the supposed invalidity of such entry, before the lapse of two years from the date of final certificate, is effective to take the entry out of the confirmatory operation of the proviso to section seven of the act of March 3, 1891.

Acting Secretary Campbell to the Commissioner of the General Land
(S. V. P.) *Office, November 10, 1904.* (C. J. G.)

An appeal has been filed by John S. Maginnis, as assignee through mesne conveyance of William L. Gifford, from the decision of your office of July 11, 1904, holding for cancellation his homestead entry made under section 2306 of the Revised Statutes, for the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 25, T. 62 N., R. 23 W., Duluth, Minnesota.

The entry is based on the alleged military service of said William L. Gifford and homestead entry No. 2235, made by him December 21, 1869, for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 18, T. 17 N., R. 9 W., Little Rock, Arkansas, which was canceled April 26, 1877, for failure to make proof within the statutory period. A report from the War Department gives the military record of a soldier named William Gifford.

October 18, 1901, your office directed the local officers, upon payment of the legal fee and commissions, to allow the entry of John S. Magin-

nis, and to issue the original and final receipts and final certificates, which they did November 9, 1901. The papers were duly forwarded to your office, where they were held to await action in regular order.

November 16, 1902, a special agent of the land department advised your office that one R. T. Fryer, and others, had been convicted in the District Court at Little Rock, Arkansas, of "forgery and fraud in connection with various soldiers' additional homestead assignments," and that he had been sentenced to a term of imprisonment and to pay a fine and the costs in the cases. There was no indication in the agent's letter as to what cases were involved in the court proceedings, and it stated in the decision appealed from that the records of your office do not show that any report was made in this particular case. It is further stated, however, that, in accordance with its practice, note was made by your office of the contents of said letter for consultation in the examination of applications for soldiers' additional entry.

When the case of John S. Maginnis was taken up by your office for examination it was found that the above-named Fryer was the notary public before whom the original assignment papers in said case were executed. Thereupon your office, on February 17, 1903, sent said papers, together with similar papers in other cases, to the special agent with directions to make a careful examination into the *bona fides* of all parties connected therewith. A report by a special agent in the John S. Maginnis case was sent to your office April 15, 1904, wherein it was stated among other things:

Fryer has been convicted in other cases for forgery and presenting false claims to the Government, and in this case I have the honor to report that the papers are complete forgeries committed by James H. Carroll, who is at present a fugitive from justice, and said Fryer. From the lists of homestead entries made previous to June 22, 1874, and the lists of soldiers who served in the federal army, which these parties had, they matched the soldier William Gifford, and the entryman, William L. Gifford, and forged papers and affidavits to make a *prima facie* case.

With his report the agent transmitted an affidavit by Fryer, dated October 20, 1902, in which, at the same time referring to other cases, he says:

I also remember the case of William Gifford which was worked up by James H. Carroll and myself and I done the notary work. This case is also a fraud and forgery.

The agent likewise transmitted a letter from Fryer, dated April 2, 1904, in which he again states that the original assignment in this case was illegal. Also letters from the postmasters at Lexington, and Settlement, Arkansas, the post-office addresses given by the corroborating witnesses whose names appear in such assignment papers, stating that they never knew the parties.

It is claimed on behalf of John S. Maginnis that notwithstanding the foregoing facts his entry is confirmed by the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095, 1098-9), and patent should issue thereon. That proviso is as follows:

That after the lapse of two years from the date of the issuance of the receiver's receipt upon final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, or under this act, and 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.

In the instructions of May 8, 1891 (12 L. D., 450), it was said:

Under the proviso to said section 7, 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 laws mentioned, when there are no proceedings initiated within that time by the government or individuals the entryman shall be entitled to patent; but all "contests" and "protests" against any entries of the classes mentioned, which were pending at the date of said act are excepted from this rule and will be considered and disposed of as if said section had not been passed. . . .

Nothing herein contained shall be construed as to prevent the government from completing proceedings initiated by it within the two years after the issuance of the receiver's receipt.

In the instructions of July 1, 1891 (13 L. D., 1), it was held (syllabus):

In all cases where proceedings by the government have been, or shall be, begun against an entry within two years from the date of the final certificate, said entry will be held to have been taken out of the confirmatory operation of section 7, act of March 3, 1891.

The word "proceedings" as used herein, and in the circular of May 8, 1891, will be construed to include any action, order, or judgment, had or made in the General Land Office, canceling an entry, holding it for cancellation, or which requires something more to be done by the entryman to duly complete and perfect his entry, without which the entry would necessarily be canceled.

It was said in the latter instructions:

In my judgment it was not the intention of the act . . . to confirm all entries after two years from final receipt without regard to their status; nor to confirm entries made without authority of law and which could not have been allowed under the act as it existed at the passage of the act of 1891.

As bearing upon the question under consideration see also *Bulman v. Meagher* (13 L. D., 94); *Jennie Routh* (13 L. D., 332); *United States v. McTee et al.* (13 L. D., 419); *United States v. Smith* (13 L. D., 533); *United States v. Mallett et al.* (13 L. D., 641); *John Malone et al.* (17 L. D., 362); *John W. Green et al.* (18 L. D., 129); *McKinley Mortgage and Debenture Co.* (21 L. D., 345); *John C. Henley* (22 L. D., 81) *Instructions of October 10, 1898* (27 L. D., 522); *Gagnon v. Tillmon* (32 L. D., 280).

The instructions of July 9, 1902 (31 L. D., 368), have reference to an adverse report of a special agent upon an entry, filed prior to the expiration of two years from the date of the final receipt, and it was held that such report was a "protest" against the validity of the entry within the meaning of the proviso to section 7 of the act of March 3, 1891, notwithstanding the fact that the entry was not suspended by your office until after two years from the date of the issuance of the final receipt. It was stated in said instructions:

The purpose of the statute was to protect the entry against any adverse proceedings after the lapse of two years from the date of the receiver's receipt upon final entry, whether such proceeding was instituted and prosecuted through individual efforts or by the government directly through its appointed agents. It did not contemplate that the running of the statute might be suspended by the intervention of individual contests or protests, while the government would be debarred from defeating the confirmation of a fraudulent entry by similar proceedings instituted on its own motion within the time fixed by the statute. To so construe the statute would be to restrict the operation of the land department in the exercise of that just supervision over the disposal of the public lands which is conferred upon it by the organic law. Hence there is no reason for restricting the meaning of the word "protest" as used in the act to proceedings by individuals.

In the instructions of June 3, 1904 (33 L. D., 10), it is held that a general departmental order suspending action in all timber and stone entries in certain States is not a contest or protest within the meaning of section 7 of the act of March 3, 1891, and does not bar the operation of the confirmatory provisions of said section, the said order not being a "proceeding against any specific entry nor yet against all entries within the district of its operation looking to their cancellation." But it is stated in said instructions:

In cases investigated by special agents of your office, where the agent has reported sufficient facts to justify cancellation of the entry, such report is a proceeding that prevents confirmation of an entry under the act. Instructions, July 9, 1902 (31 L. D., 368, 371).

With respect to the claim now under consideration your office concluded as follows:

The fact that Fryer had been found guilty of fraudulent practice in connection with this class of cases; that he had made an affidavit which was in possession of a representative of this office long prior to the expiration of the statutory period, and the fact that the office had within the statutory period directed its special agent to prosecute his investigations as to the validity of this and other cases in which Fryer had appeared as a party to the case, furnish ample warrant for holding that the statute did not attach in this particular case.

In view of all the circumstances surrounding this case the Department concurs in the above conclusion. While the special agent in his letter of November 16, 1902, did not specify the entries that were involved, yet he did call attention to convictions for fraud and forgery

in connection with "various soldiers' additional assignments," and the information furnished by him was of such character as to directly and ultimately form the basis of an investigation instituted by your office, prior to the expiration of the statutory period of two years, against this particular entry. And while the above instructions refer to adverse reports made by special agents of your office, yet the logical and inevitable conclusion therefrom, and the rulings of the Department as herein partially set forth, is that any proceeding challenging the validity of any particular entry, or any investigation initiated because of the supposed invalidity of such entry, before the lapse of two years from the date of final certificate, are equally within the contemplation of the statute and take the entry out of the confirmatory operation of the proviso to section 7 of the act of March 3, 1891.

The judgment of your office is affirmed.

INDIAN ALLOTMENT—TRUST PATENT—ACT OF APRIL 23, 1904.

OPINION.

Under the limitations of the act of April 23, 1904, the Secretary of the Interior has no authority to cancel first or trust patents issued on Indian allotments with a view to allowing the allottee to make homestead entry under section 2289 of the Revised Statutes.

*Assistant Attorney-General Campbell to the Secretary of the Interior,
November 12, 1904.* (C. J. G.)

October 5, 1895, Mack Fearn, an Indian of the Calapooia tribe or band, was allotted the E. $\frac{1}{2}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 34, T. 23 S., R. 4 W., Roseburg, Oregon, under the provisions of the act of Congress approved February 8, 1887 (24 Stat., 388), as amended by the act approved February 28, 1891 (26 Stat., 794), and a first or trust patent issued for the land December 31, 1895.

October 6, 1904, the Commissioner of Indian Affairs recommended that a relinquishment by Fearn of the lands allotted to him be accepted and that the patent issued for the same be canceled, with a view to allowing Fearn to make a homestead entry under section 2289 of the Revised Statutes. The papers have been referred to me for opinion as to whether the Secretary of the Interior may lawfully cancel the patent as recommended.

The authority of the Secretary of the Interior in the matter is controlled by the act of April 23, 1904 (33 Stat., 297), which limits

his power, without the authority of Congress, to cancel first or trust patents issued to Indian allottees, to three causes, viz., where a double allotment of land is erroneously made, where there is a mistake in the description of the land inserted in the patent, and where the conditional patent is relinquished by the patentee or his heirs to take another allotment.

The Commissioner of Indian Affairs is of opinion that the case of Fearn comes under the last-mentioned class, it clearly not coming under either of the other heads, that is, where the conditional patent is relinquished for the purpose of taking another allotment, and in support thereof the case of Jim Crow (32 L. D., 657) is cited. But in that case what are known as Indian homestead laws were being considered, under which Indians as such are allowed to make homestead entries as distinguished from homestead entries made by citizens of the United States. It was said:

This Department has considered Indian homesteads upon practically the same footing as Indian allotments upon the public lands. It is held that the government is bound to protect the rights of the Indian homesteader during the trust period, that no preference right of entry is claimed by contest against an Indian homestead and a relinquishment of an Indian homestead entry does not become effective until approved by this Department. (Doc Jim, 32 L. D., 291.) These rules apply also to Indian allotments. The control, jurisdiction and obligations of the Department are the same in one case as in the other.

The objects of the laws relating to Indian homesteads are the same as those relating to Indian allotments on the public lands, the status of the Indian claimant is the same under both classes of laws, the duties and obligations of the government are the same. Both the legislative and the executive branches of the government have recognized these similarities of purpose in the laws, standing of claimants thereunder, and obligations of the government.

It is not believed the analogy referred to and discussed in the Crow case extends to the case of an allottee who relinquishes his patent for the purpose of making homestead entry under section 2289 of the Revised Statutes as a citizen of the United States, where the Department has no such "control, jurisdiction and obligation" as is the fact with an Indian homestead.

I am therefore of opinion, and so advise you, that under the limitations of the act of April 23, 1904, *supra*, the Secretary of the Interior has no authority to cancel the Fearn patent for the purposes indicated. The case is perhaps a proper one, however, for submission to Congress under said act.

Approved, November 15, 1904:

E. A. HITCHCOCK, *Secretary*.

ABANDONED MILITARY RESERVATION—ACT OF JULY 5, 1884.

OPINION.

Congress having by the act of July 5, 1884, provided for the disposal of lands in abandoned military reservations, the Secretary of the Interior is without authority to dispose of such lands in any other manner, but he may suspend the disposal of the lands under said act with a view to submitting to Congress the question as to whether the lands should be reserved for public uses.

*Assistant Attorney General Campbell to the Secretary of the Interior,
November 12, 1904. (E. F. B.)*

I am in receipt of a letter from the Commissioner of the General Land Office recommending that the portion of Graham's Island in North Dakota formerly included in the Fort Totten military reservation be withdrawn from disposal temporarily for State or Federal purposes. The letter has been referred to me for opinion as to whether the withdrawal recommended can legally be made.

It is stated in a letter of the Commissioner that the portion of the island in question is now subject to disposal under the act of July 5, 1884 (23 Stat., 103), providing for the disposal of useless and abandoned military reservations, and has recently been surveyed, but instructions regarding the disposal of said land have not yet been issued to the local officers.

It has been suggested by the superintendent of the Indian Industrial School at Fort Totten that the portion of the island in question be reserved as a park or forest reserve for the benefit of the State of North Dakota, and the Commissioner of the General Land Office recommends that a temporary withdrawal of such lands be authorized so as to prevent illegal occupancy or use of the lands which might otherwise occur.

If these lands are subject to disposal under the act of July 5, 1884, they are not subject to settlement and entry until they have been surveyed and appraised and can only be disposed of under the provisions of that act. But the Secretary has ample authority to suspend the disposal of the lands for the purpose of submitting to Congress the question whether the land should be reserved for public uses.

The same question was involved in the request of the Geological Survey for the withdrawal of lands in the Fort Sherman military reservation in Idaho for a reservoir site. In that case the Department (33 L. D., 130) refused the request for the reason that the lands could only be disposed of under the provisions of the act of July 5, 1884, and had no authority to dispose of them in any other manner, but it added:

There is no reason why these lands may not be temporarily withheld from disposal under said act of 1884 to await congressional action, if it be apparent that they will be required for public use in connection with any project, and that

if disposed of, the Secretary of the Interior would necessarily be compelled, under the authority conferred by the act of June 17, 1902, to re-acquire the title for the United States by purchase or condemnation. In such case it is evident that the withholding of these lands from disposition to await the action of Congress would be in pursuance of the public good and in the interest of sound and prudent administration.

As the lands are not subject to settlement and entry and can only be disposed of under the provisions of the act of July 5, 1884, the withholding of them from disposal temporarily will be as effective as a formal withdrawal. But if any purpose can be served in giving notice to persons who might be disposed to make settlement upon them, no reason is apparent why such notice might not be given.

Approved, November 15, 1904:

E. A. HITCHCOCK, *Secretary*.

REPAYMENT—COAL ENTRY—ASSIGNEE.

JOHN DAVIS.

One claiming under an assignment of a coal land claim executed prior to entry thereof does not occupy the position of an assignee within the meaning of the repayment statute.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *November 15, 1904.* (C. J. G.)

An appeal has been filed by John Davis, as assignee of Sarah E. Todd, from the decision of your office of August 2, 1904, denying his application for repayment of the purchase money paid on coal entry No. 22, Ute series, for the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 14, T. 13 S., R. 95 W., Montrose, Colorado.

April 14, 1898, the said Sarah E. Todd filed coal declaratory statement No. 431 for the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 14, the E. $\frac{1}{2}$ SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 11, T. 13 S., R. 95 W., and December 5, 1898, she filed various affidavits under the coal-land law and regulations, but covering only the said NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 14, containing 40 acres. The same date, to wit, December 5, 1898, she conveyed by warranty deed the tract covered by the last-named description to John Davis, consideration \$500, and December 20, 1899, she made coal entry No. 22 for said tract, paying the purchase price of \$400. The same date, to wit, December 20, 1899, Davis gave a trust deed covering said tract to George J. Green to secure a one-year note of even date for \$400.

April 12, 1900, your office made the following requirement of Sarah E. Todd:

Claimant will be required to furnish evidence to show whether she is a single or married woman, and, if the latter, she will also be required to furnish her own affidavit that the entry was made for her sole and separate use and benefit and

not for the use and benefit of her husband, and that the money with which she purchased said land was her separate money in which her husband had no interest or control.

It further appears that the application to purchase, and affidavits showing distance of land from a completed railroad, were sworn to on December 5, 1898, more than one year before entry. The coal land regulations, paragraphs 32 and 13, required that these affidavits should be made at date of actual purchase. Said papers are accordingly hereby returned to be resubscribed and sworn to *nunc pro tunc*.

It appears that claimant received notice of this requirement, and having failed to respond thereto or to appeal, her coal entry No. 22 was canceled by your office October 31, 1902.

July 11, 1903, John Davis quit-claimed the tract in question to the United States, and August 7, 1903, the note above referred to was paid and the trust deed given by him released. August 10, 1903, he applied for repayment of the \$400, paid as the purchase price of said tract, claiming to be the assignee of Sarah E. Todd.

Your office denied the application for repayment on the ground that—

The entry in question was not "canceled for conflict," nor does there appear to have been any error in its allowance that would not have been cured by compliance with the repeated demands of this office upon Todd, the only party known to the government in the entry. There is therefore no lawful basis for the application.

Your office also held that Davis is not an assignee within the meaning of the repayment statute, as the term is defined in section 13 of the Instructions of January 22, 1901 (30 L. D., 430, 434).

The facts of this case, with respect to the requirements laid upon the entryman by your office, are similar to those in the case of *The Anthracite Mesa Coal-Mining Company v. The United States* (38 Court of Claims Reports, 56), except that in that case the entryman could not be found, whereas in this case it appears that the entryman was actually served with notice of said requirements. In that case it was said:

Meantime the entryman had sold the premises without notice of any irregularity. With notice, and failure on his part to comply with the requirements of the statute, it might well be said that he was in default and bound to submit to forfeiture of the amount paid for the entry. In such case his assignee would be equally bound. But the entryman having disposed of his interest and being inaccessible, and for that reason without notice, did his assignee forfeit the right to reclamation?

The court held that, in the absence of evidence of fraud, the fact that the defective entry could be corrected by the production of the proper affidavit of the entryman should not defeat the assignee's right to recover if the entryman could not be found to make the affidavit. The court accordingly granted the assignee's claim for repayment not-

if so, in what State or Territory were you born." To that question he answered: "My father was a naturalized citizen before I became of age."

In a footnote upon the final proof blank the substance of rule 6 of instructions to local officers in passing upon final proofs (9 L. D., 123) is set out as follows:

In case the party is of foreign birth a certified transcript from the court records of his declaration of intention to become a citizen, or naturalization, or a copy thereof, certified by the officer taking this proof, must be filed.

As the applicant claimed his citizenship under the naturalization of his father, it was incumbent upon him to submit record proof of such acts performed by his father as would entitle him (appellant) by reason thereof to the rights of citizenship. The local officers, failing to observe the regulations, accepted the scrip in payment of the land and issued the final certificate without evidence of his qualifications other than his oral testimony and the affidavit accompanying his application.

Your office directed the local officers to require applicant to furnish record or other evidence of his own or his father's naturalization, or declaration of intention to become a citizen of the United States, and further, that he, appellant, was residing in the United States at the time of his father's naturalization. To this appellant responded that he was unable to prove that his father was naturalized for the reason that the records were burnt. He was again notified that in the absence of evidence of his father's naturalization it would be necessary for him to furnish record evidence of having filed his declaration of intention to become a citizen of the United States.

Appellant failed to furnish proof but applied for the return of the scrip. Your office canceled the entry for want of sufficient proof and refused to return the scrip for the reason that the land was subject to entry as timber and stone land and that as no reason appears why the entryman could not have perfected his entry, unless he had submitted false statements as to his qualification, the application did not come under the provisions of section 2362, Revised Statutes, as an entry erroneously allowed.

This action was taken by your office April 26, 1898, and no appeal was taken from said decision.

October 30, 1903, Stitt renewed his application, which you denied for the reason that the case had been closed and for the further reason that the applicant was alone responsible for his failure to obtain the land, having refused to submit testimony as to his qualifications.

This is not an application for the return of actual money that has been covered into the Treasury and hence is not controlled by the strict rules governing applications under the second section of the act

of June 16, 1880 (21 Stat., 287). The scrip is in the custody of and under the control of this Department and may be returned in any case where it has not been satisfied by allowing the entry and where equity and justice demand that it be restored to its rightful owner. (Albert Nelson, 28 L. D., 248; Instructions, 1 L. D., 533.)

This entry was allowed upon insufficient proof as to the qualification of the entryman. Your office required him to furnish record or other evidence of his own or his father's naturalization or of his declaration of intention to become a citizen. As no record evidence of naturalization could be produced it was admissible to prove that entryman's father had the requisite qualifications to become a citizen and did in fact prior to the time the entryman became of age exercise the rights belonging to citizens of the United States. (*Boyd v. Thayer*, 143 U. S., 135, 180.) Such testimony, although of the same character as the testimony offered upon final proof, would have been sufficient to warrant your office in inferring that the entryman's father had been naturalized and would have sustained the entryman's claim to citizenship. (*Ibid.*)

It is possible, however, that even such evidence could not have been produced and that entryman's knowledge rested solely upon common repute in the family. He might therefore have felt justified in making his affidavit although his claim to citizenship was not susceptible of other proof. It was clearly the duty of the local officers to have notified the entryman of the regulations before accepting his proof, and when the case came before your office and he gave his reason why the proof required could not be furnished he should have been notified that secondary evidence would be admitted and what facts would be necessary to prove.

But while the granting of applications for the return of scrip rests within the sound discretion of the head of this Department, it will be controlled substantially by the same principle that governs in application for the return of purchase money covered into the Treasury, to this extent at least, that the entryman will not be permitted to relinquish his entry or to allow it to be canceled and withdraw his scrip where the entry can be confirmed and where the only obstacle to confirmation is the arbitrary refusal of the entryman to supply the necessary proof.

It is not shown either by the record of the original entry or upon this application that the necessary proof cannot be supplied, and if the land embraced in the entry is free and unincumbered, the entry should be reinstated and the entryman given an opportunity to perfect his entry. If the land has been disposed of, the scrip will be returned, inasmuch as it was surrendered by the entryman without sufficient information as to what proof would be required of him.

Your decision is modified accordingly.

REPAYMENT—ENTRY WRONGFULLY PROCURED.

LEONARD E. KNOWLES.

Where the allowance of a homestead entry is procured by misrepresentation, the entry is not "erroneously allowed" within the meaning of the repayment statute, and repayment of the fee and commissions paid thereon will not be made.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *November 15, 1904.* (C. J. G.)

An appeal has been filed by Leonard E. Knowles, administrator of the estate of Leonard Knowles, deceased, from the decision of your office of September 1, 1904, denying his application for repayment of the fee and commissions paid by said Leonard Knowles on homestead entry for the SW. $\frac{1}{4}$ of Sec. 30, T. 100 N., R. 39 W., containing 134.66 acres, Sioux City, Iowa.

The entry was made June 22, 1872, under the act of May 20, 1862 (12 Stat., 392), and canceled for abandonment March 23, 1874. Repayment is claimed on the ground that the entry was illegal, said Leonard Knowles having made a prior entry July 22, 1868, for 80 acres, under said act, at the same land office, thus exhausting his right of original homestead entry.

In an affidavit accompanying his homestead application of June 22, 1872, Leonard Knowles stated—

having filed my application No. . . . for an entry under the provisions of the act of Congress, approved May 20, 1862, and desiring to avail myself of the 25th section of the act of July 15, 1870, in regard to land held at the double minimum price of \$2.50 per acre . . . neither have I heretofore perfected or abandoned an entry under this act.

In view of the fact that Leonard Knowles had already made one homestead entry, the latter statement by him brings this case clearly within that class of cases wherein it is held that if the allowance of an entry is procured by misrepresentation, the entry is one wrongfully procured and not "erroneously allowed" within the meaning of the repayment statute. Upon the showing made the entry in question was properly allowed.

Attention is called in the appeal to section 25 of the act of July 15, 1870 (16 Stat., 315, 320-321), referred to in the affidavit of Leonard Knowles, and the belief is expressed that many were undoubtedly of the impression that said act gave a new right of entry. That section provides that certain soldiers and sailors shall—

be entitled to enter one quarter section of land, not mineral, of the alternate reserved section of public lands along the lines of any one of the railroads or other public works in the United States, wherever public lands have been or may be granted by acts of Congress, and to receive a patent therefor under and by virtue of the provisions of the act to secure homesteads to actual settlers on the public domain, and the acts amendatory thereof, and on the terms and conditions therein prescribed.

Section 6 of the homestead act of May 20, 1862, *supra*, is specific in its declaration "that no individual shall be permitted to acquire title to more than one quarter section under the provisions of this act." It has been held that when a party makes entry under the provisions of said act, his homestead privilege is exhausted. In fact, the basis of the claim for repayment is that by the entry of 1868 the homestead right of Leonard Knowles was exhausted. Now the provisions of the act of 1870 are that entry shall be made on the "terms and conditions" prescribed in the homestead act of 1862, which limited the homestead privilege to one quarter section of land and one entry. It must be presumed that Leonard Knowles was aware of these matters at the time of the entry in question and they were possibly the basis for his failure to disclose his prior entry.

It is also claimed that Leonard Knowles may have made his entry of June 22, 1872, under the provisions of the act of June 8, 1872 (17 Stat., 333), but the short interval between the passage of that act and the date of his entry, as well as the fact that he specifically referred in his affidavit to the act of 1870, precludes any such belief.

No proof is submitted to any way overcome the record evidence in this case which shows that the entry was procured upon misrepresentation.

The decision of your office is affirmed.

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

Petition of Alvin N. Bennett *et al.* for the exercise of the supervisory power of the Secretary of the Interior, and for review of departmental decision of March 16, 1903, 32 L. D., 54, denied by Acting Secretary Ryan, November 16, 1904.

RAILROAD GRANT—SETTLEMENT CLAIM—ACT OF MARCH 2, 1899.

WHITEHOUSE *v.* NORTHERN PACIFIC RY. CO.

Lands covered by a *bona fide* settlement claim on the date of their selection by the Northern Pacific Railway Company under section three of the act of March 2, 1899, are not of the class of lands subject to selection under said act; and where, pending proceedings before the land department to determine the rights of the parties under their conflicting claims, the lands are inadvertently patented to the company, and it is subsequently determined by the land department that the settler has the superior right, demand will be made upon the company for reconveyance of the lands to the end that the settler may perfect title thereto.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, November 16, 1904.* (F. W. C.)

The Department has considered the appeal by the Northern Pacific Railway Company from your office decision of December 2, last,

reversing the decision of the local officers and holding that George Whitehouse has such a claim to the NW. $\frac{1}{4}$ of Sec. 22, T. 21 N., R. 8 E., Seattle land district, Washington, as prevented selection thereof by the Northern Pacific Railway Company.

The tract in question was selected by the railway company August 31, 1899, while the land was yet unsurveyed, the selection being made under the provisions of section 3 of the act of March 2, 1899 (30 Stat., 993-4). The plat of the survey was filed in the local land office July 15, 1902, and on that day the railway company presented anew its list of selections, the same being adjusted to the lines of public survey, which selection appears to have been accepted by the local officers and forwarded to your office. On the same day Whitehouse presented his homestead application for the tract in question, alleging in support thereof settlement upon the land May 1, 1897, with continuous residence thereafter and improvements made upon the land of the value of \$350.

Upon said allegation of settlement antedating the railway company's selection hearing was ordered by the local officers for January 24, 1903, and by stipulation the hearing was continued to March 12, 1903, when both parties appeared and the case was proceeded with.

Either the local officers failed to report the fact of the pending contest or your office failed to make proper notation thereof, for it appears that the tract in question was on January 21, 1903, inadvertently patented to the railway company. Notwithstanding the issuance of said patent, as before stated, hearing upon Whitehouse's contest was proceeded with, and upon the record made the local officers found, in effect, that any prior claim that Whitehouse may have had to this land is forfeited and abandoned by his failure to maintain residence thereon as required by the homestead laws.

Upon appeal, your office rendered its decision of December 2, last, wherein you reversed the decision of the local officers, holding that, should the same become final, demand would be made upon the railway company for reconveyance of the land with a view to permitting Whitehouse to complete entry thereof as applied for.

That the patent was erroneously issued while the contest by Whitehouse was still pending can not be seriously questioned, and this fact alone is sufficient upon which to base a suit to set aside the patent to the end that the Government might be reinvested with its title and thus enabled to determine the respective rights of the parties in the premises. See *Germania Iron Co. v. United States* (165 U. S., 383).

Although the Department is now without jurisdiction in the premises, the record has been examined to the end that it might be determined whether, if the jurisdiction were restored to the United States, the contest would be sustained; otherwise, there would be no pur-

pose in a suit which could only result in again patenting the lands to the railway company after disposing of the pending controversy.

As before stated, the selection in question was made under the provisions of the act of March 2, 1899, *supra*, the third section of which limits selections to the public lands "to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection." The record made herein shows beyond question that Whitehouse had initiated a claim to this land long prior to the railway selection; that no real examination of the land was made prior to selection in order to determine whether an adverse right or claim had been initiated thereto, and that the company thereafter supposed its claim to be good because of an examination made in the spring of 1900 and of a purchase of the possessory claim of one Patterson, who, the record shows, did not claim the land in question, but land adjoining, in section 15. There might be some question as to the quality of Whitehouse's compliance with law in the matter of residence during the years preceding the filing of the township plat of survey, if he were offering proof, but, upon the whole, it must be adjudged that such reasonable compliance was shown, under all the circumstances, as would bar a judgment of forfeiture of his claim on the ground of abandonment.

The entire matter considered, it is the opinion of this Department that demand should be made upon the railway company for reconveyance of this land to the end that Whitehouse may be permitted to complete entry thereof as applied for, and you are directed to make such demand and at the proper time report the result of the action taken.

RESERVOIR SITE—ACT OF JANUARY 13, 1897.

CORKHILL *v.* ROHR.

Under a reservoir declaratory statement filed in accordance with the provisions of the act of January 13, 1897, the applicant acquires control only of the land necessary for the use and maintenance of the reservoir, which must be kept unfenced and open to the free use of any person desiring to water animals of any kind.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, November 17, 1904.* (F. W. C.)

The Department has considered the appeal by James A. Corkhill from your office decision of July 2, last, holding for cancellation his reservoir declaratory statement, No. 215, covering the NE. $\frac{1}{4}$ of Sec. 17, T. 7 S., R. 40 W., Colby land district, Kansas, and permitting the

homestead entry made of the said tract by Otto H. Rohr to remain intact upon the record.

October 13, 1899, Corkhill filed his reservoir declaratory statement 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 third section of this act provides that the reservoir shall be constructed within two years after filing the declaratory statement, and for the filing of a map or plat of the reservoir as constructed, and upon the approval thereof by the Secretary of the Interior, for the reservation of the lands upon which the reservoir has been constructed from sale so long as the reservoir is kept in repair and water kept therein.

While the first section of the act makes it possible to reserve lands for a reservoir site for the purpose of furnishing water to the live stock owned or controlled by the party constructing the reservoir, yet it is made clear that such site should not be fenced and shall be open to the free use of any person desiring to water animals of any kind. It is further made clear that the applicant shall have control only of "such reservoir."

The record upon Corkhill's appeal discloses the following: December 30, 1901, the local officers permitted Otto H. Rohr to make homestead entry for the tract in question, being more than two years after the filing of the reservoir declaratory statement by Corkhill. March 27, 1902, your office held said reservoir declaratory statement for cancellation for failure to submit proof of construction within the statutory period; whereupon it was shown that in December, 1901, Corkhill had filed a crude map of a reservoir which, according to the surveyor's certificate thereon, was being built on the land. It seems that later attempts were made by Corkhill to file a sufficient map of a constructed reservoir but it was not until September 16, 1902, that he filed a map accompanied by the field notes of a reservoir site which was transmitted with letter from the local officers dated October 9, 1902. The reservoir shown upon this map or plat covered an area of 1.07 acres near the southwest corner of the NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of said section 17. Acting upon this map or plat your office on October 30, 1902, held

Rohr's homestead entry for cancellation, whereupon Rohr filed an affidavit attacking Corkhill's good faith in the matter of his alleged construction of a reservoir upon the land in question. Upon such affidavit hearing was held, both parties being represented, and upon the testimony adduced both your office and the local officers found that Corkhill had not constructed and maintained such a reservoir as contemplated by the act of January 13, 1897, and for that reason held his reservoir declaratory statement for cancellation; from which he has appealed to this Department.

With regard to Corkhill's occupation and use of the tract covered in his reservoir declaratory statement, it appears that he is the owner of the SE. $\frac{1}{4}$ of Sec. 8, immediately north of the tract in question; that the said southeast of Sec. 8, and the northeast of section 17, the tract in question, are enclosed within a fence, the only part excluded being the reservoir site, comprising, as before stated, a little over an acre. A draw or ravine crosses the southern part of the northeast quarter of the northeast quarter of section 8, and it was upon or near the section line that Corkhill constructed a dam across such draw or ravine, which served to hold the water after heavy rainfall, but it does not appear to have been used by him as a watering place for his own cattle, nor does it appear to have been used by the public, although in times of drought there is perhaps a necessity for a public reservoir for watering cattle in this locality. Within Corkhill's fence, at a short distance from the reservoir site, he sank a well with windmill attachment and the water pumped from this well first passed into a wooden trough or tank from which his cattle were watered. Any water in excess of the capacity of such tank or trough, by natural drain of the land and seepage, found its way into the draw or ravine constituting the reservoir site. The expenses incurred thereby, together with the building of the dam to the reservoir, are said to be about \$200, an amount largely in excess of the real value of the forty acres on which the reservoir site is located.

The entire matter considered it is directed that the reservoir declaratory statement be permitted to stand as to the said northeast of northeast of section 17, which, in the opinion of this Department, is all that is necessary for the use and maintenance of the reservoir. It will be necessary, however, that Corkhill immediately remove his fence enclosing said tract, so that the public may have full and free access, if it desires, equal with himself in the use thereof. See *Wilson v. Parker* (32 L. D., 148).

With this modification your office decision is affirmed.

RAILROAD GRANT—LANDS EXCEPTED—ACT OF FEBRUARY 8, 1887.

NEW ORLEANS PACIFIC RAILWAY CO.

The act of February 8, 1887, confirming the assignment to the New Orleans Pacific Railway Company of the grant made to the New Orleans, Baton Rouge and Vicksburg Railroad Company by the act of March 3, 1871, in excepting from the confirmation all lands occupied by actual settlers at the date of the definite location of the line of road and still remaining in their possession or in possession of their heirs or assigns, did not thereby limit the terms of the grant of 1871, from which there was excepted all lands which had been sold, reserved, or otherwise disposed of by the United States, or to which a pre-emption or homestead claim may have attached at the time the line of said road was definitely fixed, but merely added a new condition; hence the company has no right of selection under the provisions of the act of June 22, 1874, in lieu of lands covered by a homestead entry at the date of the definite location of the line of road, but is relegated to the indemnity provision of the act of 1871 in supplying any deficiency in its grant occasioned by the disposal of such lands.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, November 17, 1904.* (F. W. C.)

With your office letter of the 9th instant was transmitted a request on behalf of the New Orleans Pacific Railway Company to be permitted to select, under the provisions of the act of June 22, 1874 (18 Stat., 194), other land in lieu of lot 1, Sec. 137, T. 9 N., R. 7 W., Louisiana meridian, Natchitoches land district, Louisiana.

From said request and report made in your office letter it appears that the tract above described is within the primary limits of the grant made by act of March 3, 1871 (16 Stat., 573, 579), in aid of the construction of the New Orleans, Baton Rouge and Vicksburg Railroad Company. Said company assigned its rights under said grant to the New Orleans Pacific Railway Company and that assignment was confirmed by the act of February 8, 1887 (24 Stat., 391), as to the portion of the grant within which this tract lies. The latter company definitely located the portion of the line of road opposite to which the tract in question is, November 17, 1882.

There was excepted from the grant of 1871 all lands which had been sold, reserved, or otherwise disposed of by the United States, or to which a preemption or homestead claim may have attached at the time the line of said road was definitely fixed.

January 20, 1879, P. Adolphe Simmons was permitted to make homestead entry for the tract in question, which entry was canceled upon relinquishment August 8, 1889, subsequently to the filing of the map of definite location, and on the same date William G. Porter

made homestead entry thereof, upon which his heirs submitted proof January 18, 1900, and patent issued upon said entry March 7, 1902.

It is true that the act of March 3, 1871, provides for the withdrawal of land upon the filing of the map of general route, and such a map was filed November 11, 1871, upon which withdrawal was ordered November 29, 1871, which withdrawal included the land in question. Such withdrawal, however, created no rights in the railroad company nor did it prevent disposal of the land prior to the attachment of rights under the railroad grant upon definite location. See *Northern Pacific Railroad Co. v. Sanders* (166 U. S., 620).

The act of 1887, in confirming the assignment to the New Orleans Pacific Railway Company, excepted from the lands confirmed all lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession or in possession of their heirs or assigns. This did not limit the terms of the grant of 1871 but added a new condition. As held by this Department in the case of *New Orleans Pacific Railway Co. v. Elliott* (13 L. D., 157) :

While it is true that the act of February 8, 1887, did not make a new grant, it was a confirmation of the grant of March 3, 1871, with certain conditions and qualifications, the principal one being that the confirmation should not take effect upon lands that were free at the date when the grant to the original grantee attached, but only upon such lands as were free when the New Orleans Pacific railway was definitely located, and there is nothing in the act to indicate that it was intended to extend the benefits of the withdrawal in favor of the original grantee to the latter company. Whatever rights the original grantee might have had under the grant of 1871, the New Orleans Pacific Railway Company can only claim whatever rights were granted or confirmed by the act of February 8, 1887, for the reason that by the 3d section of the act, it was provided that the relinquishment of the lands and confirmation of the grant provided for by the 2d section should only take effect when the company has accepted the provisions of the act, and as such acceptance has been signified by the company and patents have been issued in accordance with its provisions, the company is bound by the condition that if a settler was on the land at the date of definite location, it is excepted from the grant.

It is the opinion of this Department that the tract in question was excepted from the grant as assigned and confirmed to the New Orleans Pacific Railway Company by the act of February 8, 1887, *supra*, and as a consequence a right of selection under the provisions of the act June 22, 1874, *supra*, in lieu of a disposal made of the lands by the United States, is not permissible, but that the company is relegated to the indemnity provision of the act of 1871 in supplying any deficiency to its grant occasioned by the disposal of said land.

The company's request is therefore denied.

RAILROAD GRANT—INDEMNITY—ACT OF AUGUST 11, 1856.

VICKSBURG AND MERIDIAN R. R. CO. *v.* MATTHEWS ET AL.

No right attaches to any specific tracts within the indemnity limits of the grant made by the act of August 11, 1856, to the Vicksburg and Meridian Railroad Company, prior to selection thereof in the manner prescribed by said act; and where, after withdrawal of the lands within the indemnity belt, but prior to selection by the company, graduation cash entry was permitted for a portion of the lands so withdrawn, and allowed to stand for many years without objection by the company, such entry will not now be canceled with a view to permitting the company to make indemnity selection of the lands embraced therein.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, November 17, 1904.* (F. W. C.)

The Department has considered the appeal taken on behalf of D. F. Tollos and R. T. M. Simmons, claimants through the cash entry of Lazarus Matthews, to portions of the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 32, T. 5 N., R. 7 E., Choctaw Meridian, Jackson land district, Mississippi, from your office decision of February 11, 1902, holding for cancellation Matthews's cash entry made of the above described land, with a view to permitting an indemnity selection of the land by the Vicksburg and Meridian Railroad Company under the provisions of the act of August 11, 1856 (11 Stat., 30).

From your said office decision it appears that Lazarus Matthews, on March 16, 1858, was permitted by the local officers to make graduation cash entry No. 13777 for the above described land under the provisions of the act of August 4, 1854 (10 Stat. 574), paying therefor at the rate of seventy-five cents per acre, he having alleged at the time of making such purchase that he claimed said land as an adjoining farm, and had built a house thereon in February, 1858.

The money paid to the government on account of the purchase made of this land in 1858 is yet retained, and the decision appealed from holds the entry for cancellation because of a withdrawal of the land for indemnity purposes made under the act of August 11, 1856, prior to the allowance of said purchase.

It appears that even prior to the making of the grant, to wit, on August 9, 1856, blanket withdrawals were made by telegram of lands likely to fall within the limits of the contemplated grants, which were followed by letters August 15, 1856, following the passage of the act of August 11, 1856, the lands being withdrawn from all entry or location. These withdrawal orders were modified August 22, 1856, so as to permit the allowance of preemptions based upon settlements made prior to the filing of the map of definite location. The map of definite location in this instance was filed on October 22, 1856, and

from that date the lands within both the primary and indemnity limits of the grant were considered as withdrawn from all entry and location and such withdrawals continued in force until August 15, 1887, when revoked.

The act of August 11, 1856, making the grant in question, is silent as to the matter of the withdrawing of the indemnity lands, so that there was neither inhibition against the withdrawal nor was there any direction to make withdrawal of the indemnity lands. Such indemnity lands were, however, required to be selected by an agent or agents appointed by the governor of the State, which selections were subject to the approval of the Secretary of the Interior. Under such a grant it is clear that no right attached to any specific tracts within the indemnity limit until selection had been made in the manner prescribed by the statute. *Wisconsin Central R. R. Co. v. Price County* (133 U. S., 496).

At the time of the definite location of this line of road and for many years thereafter, in fact, until 1879, it was held that rights in granted and indemnity limits of land grants made to aid in the construction of railroads, attach at one and the same time, namely, upon the definite location of the line of the road, and it may have been because of such holding that withdrawals were made of both granted and indemnity lands. There can be no question but that the withdrawal was in force at the time of the allowance of Matthews's entry, the allowance of which was seemingly in contravention of the order of withdrawal. The entry stood, however, unquestioned, the government retaining the purchase price without apparent claim on the part of the company, until October 18, 1882, when a list of indemnity selections was proffered at the local land office including, among other tracts, the lands here in question, which list was rejected as to the land here in question, for conflict with Matthews's purchase; from which rejection an appeal was taken.

Following your office decision and the filing of an appeal therefrom an agreement was reached between the parties, who joined in requesting the Department to suspend action upon the appeal in order to afford them an opportunity to secure legislation looking to the protection of those claiming under Matthews's entry, and to grant relief to the railroad company through further selections to be made. No such legislation has been secured and it becomes necessary therefore to consider and dispose of the case upon its merits.

In the case of the Northern Pacific Railroad Company *v. Sanders* (166 U. S., 620, 634, 636), it was adjudged that the railroad 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."

Within the granted limits of these land-grants the right attaches only upon definite location, but in the instance of the Northern Pacific land-grant the act of July 2, 1864 (13 Stat., 365), provided (section 6) :

That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or preemption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preemption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale.

As before stated, however, such withdrawal was held not to be sufficient to bar disposal of the lands until the right of the company had attached upon definite location. Within indemnity limits, as before stated, no right attaches to any specific tracts until selection has been made in the manner prescribed by the act making the grant, and there is no direction to withdraw the indemnity lands.

In the present case there was no proffer of a selection or claim on account of the railroad grant to the lands in question, for more than twenty-four years after Matthews had been permitted to make purchase thereof. It is true that at the time of such purchase there was an outstanding withdrawal resting upon executive order, and, perhaps, based, as before stated, upon the erroneous view then entertained, namely, that the rights under the grant attached in granted and indemnity limits at one and the same time, i. e., upon the definite location of the line of the road; but the equities of the case are so strong that it seems clear that the government should protect its purchaser, if possible, under the law. That the government had the right to revoke such withdrawal, either in whole or part, can not be questioned. Might it not be held that in accepting the purchase money from Matthews there was, in effect, a *pro tanto* restoration? Be this as it may, the long acquiescence on the part of the company, waiting more than twenty-four years after the purchase before proffering claim under its grant, effectually estops it from claiming the land as against such entryman. Especially is this so when it is remembered that there was no right under the grant capable of pre-

venting disposal of the lands prior to selection made thereof in the manner prescribed by the statute.

I must, therefore, reverse your office decision and direct that this cash entry, if otherwise regular and proper, be passed to patent, and the proffered indemnity selection held subject thereto.

SECOND HOMESTEAD—SOLDIERS' ADDITIONAL.

CHARLES P. COLVER.

One entitled under section two of the act of March 2, 1889, to make a second homestead entry for one hundred and sixty acres, and also entitled to make soldiers' additional entry for eighty acres under section 2306, Revised Statutes, can not exercise both rights so as to acquire title to more than one hundred and sixty acres in the aggregate.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, November 19, 1904.* (G. B. G.)

This is the appeal of Charles P. Colver, remote assignee of B. F. Youngblood, from your office decision of April 28, 1902, rejecting his application to enter, under section 2306 of the Revised Statutes, the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 4, and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 3, T. 16 N., R. 18 E., Lewiston, Montana, land district.

It appears that Youngblood, who had served more than ninety days in the army of the United States during the war of the rebellion, on February 8, 1870, made homestead entry for 81.42 acres of land in the Clarksville land district, Arkansas. This entry was canceled on his relinquishment May 8, 1873. On January 8, 1895, he made a second homestead entry under the provisions of section 2 of the act of March 2, 1889 (25 Stat., 854), for 148.29 acres of land in the Harrison land district, Arkansas. He submitted final proof upon this entry and patent therefor issued to him August 9, 1900.

Subsequently to the making of the last-mentioned homestead entry, to wit, on February 25, 1899, Youngblood sold and assigned an alleged right of additional entry for eighty acres, based upon his entry made February 8, 1870, and whatever right this assignment carried has since vested in the appellant, Charles P. Colver. Until Youngblood made his second homestead entry, on January 8, 1895, he was, undoubtedly, by virtue of the provisions of section 2306 of the Revised Statutes, seized of a right of additional entry to the amount of eighty acres. His military service was sufficient, and he had, prior to the adoption of the Revised Statutes, made an entry under the homestead law for but eighty acres. He was therefore, under said section 2306, entitled to enter eighty acres of land without

condition as to residence or cultivation, and the only question presented in this record is, whether he lost or forfeited this right because of his second homestead entry made on January 8, 1895.

In the case of Edgar A. Coffin (31 L. D., 430) it was held (syllabus) :

One entitled under section 2 of the act of March 2, 1889, to make a second homestead entry for 160 acres, does not, by an entry under said act for a less area, affect his right to make a soldiers' additional homestead entry under section 2306, Revised Statutes., where the aggregate of both entries does not exceed such quantity.

It is admitted that the argument of this decision is seemingly inconsistent with the contention of the appellant which is to the effect that the additional right granted the soldier under section 2306 of the Revised Statutes, and the right of entry under section 2 of the act of March 2, 1889, are cumulative, without restriction as to the total amount of lands that may be entered under these several provisions of the homestead law.

The second section of the act of March 2, 1889, *supra*, under which Youngblood made his second homestead entry, provides :

That any person who has not heretofore perfected title to a tract of land of which he has made entry under the homestead law, may make a homestead entry of not exceeding one quarter section of public land subject to such entry, such previous filing or entry to the contrary notwithstanding.

After the passage of this act Youngblood was in the position that he might have initiated a homestead entry and enjoyed it in its fullness with the privilege of crediting his military service on account of the residence required under the homestead law, not having exercised the right to make an additional entry under the provisions of section 2306 of the Revised Statutes; or, as held in the Coffin case, he might have made a homestead entry for the same amount as embraced in his original entry made in 1870, and still retained his right to an additional entry under the provisions of section 2306 of the Revised Statutes. He could not, however, make an original homestead entry under the act of 1889 and an additional entry under the provisions of section 2306 of the Revised Statutes and thereby acquire title to lands under the homestead laws in excess of one hundred and sixty acres or one quarter-section; for the reason that the general intent to limit the amount that may be acquired under the homestead law to one hundred and sixty acres or one quarter-section, is clearly apparent from an examination of those laws, and for a further reason that a right of additional entry granted by section 2306 of the Revised Statutes is based wholly upon the fact that the soldier had theretofore exercised a limited homestead right.

The record in this case shows that Youngblood's second entry covered only 148.29 acres, and it may be that his assignment carried

soldier, by his surviving adult heirs. Your action, rejecting the application, is approved, of which you will advise the party in interest, allowing the usual time for appeal.

The question to be determined in this case is, whether upon the death of Philip Mulnix shortly after the filing of his declaratory statement and prior to entry, there was cast upon his heirs the right to complete the homestead entry he had so initiated, and thus be afforded opportunity to secure title to the tract in question. Section 2307 of the Revised Statutes, upon which your said decision appears to have been based, applies only where one who is entitled to a homestead under the provisions of section 2304 of the Revised Statutes dies without having exercised said right. The Department, however, has uniformly and very frequently held that the filing of a soldiers' declaratory statement exhausts the homestead right. Circular of December 15, 1882 (1 L. D., 648); Maria C. Arter (7 L. D., 136); Truman Wheeler (19 L. D., 60). Even though an agent to whom he entrusts the matter should select a worthless tract, the person filing such declaratory statement is bound thereby and disqualified to exercise the homestead right on another tract. John Benham (19 L. D., 274).

Congress has seen fit to grant to certain persons because of military or naval service the special or additional privilege of selecting land and holding it for a period not exceeding six months before making actual entry thereof, upon the filing of a soldiers' declaratory statement for the same. In this way the land is held for the declarant, and his rights, if entry be made at any time within the six months' period, relate back to the date of filing. One entitled to this additional privilege, however, as hereinbefore stated, is held to have exhausted his homestead right by the filing of the declaratory statement. He can make but one such filing, and can not thereafter abandon such selection and make another homestead entry. It logically follows therefore that by such filing a homestead claim is initiated, which, upon the death of the soldier prior to completion of entry, not leaving a widow, is cast upon his heirs, who may do any and all things necessary to its completion under the provisions of section 2291 of the Revised Statutes, in the same manner and upon the same basis as the heirs of an ordinary homesteader who dies before the consummation of his claim.

The following from the circular of the General Land Office, issued January 25, 1904 (page 23), would seem clearly to indicate that such a filing, upon the death of the declarant, could be completed by his widow, or upon certain conditions by the guardian of his minor children:

The widow or, in case of her death or remarriage, the guardian of minor children, may complete a filing made by the soldier or sailor as above, and patent will issue accordingly.

Moses's application to make selection was finally rejected, May 21, 1904, for defect of title to the land. William E. Moses (32 L. D., 642). He then applied for return to him of his deed and abstract of title, which your office refused:

1st. Because they are essential to the record as showing the facts upon which the action of this office in rejecting the selection is based; they comprise the evidence in the case.

2nd. That such papers, held to be insufficient, may not in the same form be again tendered as basis for another selection. When the selector has done all that is required by the regulations and the evidence of title to the base land is sufficient, but the selection can not be allowed because the land applied for is for any reason not subject to such selection in such case, there appears to be no sufficient reason why the deed of relinquishment and abstract of title may not be returned to the selector, and this contingency does not exist in the present case, and your request must accordingly be denied.

The possession of a deed by one of the parties thereto is an important fact in controversies relative to titles to land. Possession by the grantor is presumptive evidence that the deed was never delivered to, or was never accepted by the grantee, and so never took effect as a transfer of title. *Byars v. Spencer* (101 Ill., 429; 40 Am. Dec., 212). Possession by the grantee is presumptive proof of the delivery and acceptance of the deed and that title passed to the grantee. *Games v. Stiles* (14 Pet., 322, 327); *Sicard v. Davis* (6 Pet., 124, 137). The deed is thus a muniment of the grantor's own title—evidence that title has not passed from him so long as he has possession of it, and is muniment of the grantee's title when in his possession. The owner of land is entitled to possession of his muniments of title.

Equitable title to land relinquished to the United States under the exchange provisions of the act of June 4, 1897, does not vest until examination and acceptance of the title by an authorized officer of the United States. In *Cosmos Exploration Company v. Gray Eagle Oil Company* (190 U. S., 301, 312), the court held that:

There must be a decision made somewhere regarding the rights asserted by the selector of land under the act, before a complete equitable title to the land can exist. The mere filing of papers cannot create such title. The application must comply with and conform to the statute, and the selector cannot decide the question for himself. . . . [313] It is certain, as we have already remarked, there must be some decision upon that question before any equitable title can be claimed—some decision by an officer authorized to make it.

It is a transaction of exchange and it is a necessary condition of title by exchange that there is "a concurrent vestiture of title" to the things exchanged. The New Madrid Act (3 Stat., 211) provided for exchange of private for public lands, and the court held in *Lessieur v. Price* (12 How., 59, 74) that such vestiture of title occurred when "the United States assented to the exchange and not until then."

The deed having been delivered to officers of the United States for their inspection and acceptance and being found not acceptable, the

United States has no claim to the land nor right to possession of the deed. The transaction, of which the conditional delivery was a part, having wholly failed, the deed never became operative, and the grantor is entitled to its return that the grantee may be divested of the presumptive evidence of ownership. *Devlin on Deeds*, Sec. 271; *Graves v. Dudley* (20 N. Y., 77); *Ford v. James* (2 Abb., N. Y. App., 159); *Freeland v. Charnley* (80 Ind., 132).

The principle involved is no new doctrine. Where the relinquishment of an entry was made as part of the transaction of claim for reimbursement, it was held erroneous to deny reinstatement of the entry on the refusal of repayment, or to accept and enter the relinquishment of record. *J. Harvey Allen*, November 3, 1903 (unreported). The relinquishment of an entry made as part of a transaction of exchange under the act of June 4, 1897, is effective only when the proposed exchange is allowed, and if prematurely entered of record, the entry must be reinstated. *Mary Stanton* (32 L. D.; 260). The controlling principle is that when such proposed transaction fails, the proponent must, as far as possible, be restored to the *status quo* of the time when the transaction originated.

Your office decision is reversed, and the original deed and abstract will be returned to the applicant. If necessary, in opinion of your office, to preservation of its records, copies may be made and retained.

HOMESTEAD ENTRY—MARRIED WOMAN—RESIDENCE.

ANDERSON *v.* HILLERUD.

Where a woman, having an unperfected homestead entry, marries a man having a similar entry, and thereupon abandons her claim and resides with her husband upon his claim until he offers final proof thereon, and they then establish residence upon her claim, long prior to the initiation of a contest against the same, she thereby cures her default in the matter of residence and is entitled to perfect her entry.

Acting Secretary Ryan to the Commissioner of the General Land (S. V. P.) Office, November 26, 1904. (J. L. McC.)

The Department is in receipt of your office letter of August 16, 1904, transmitting the record in the case of *Edward S. Anderson v. Aasine Hillerud, nee Aasine Myhro*, involving the homestead entry of the latter for certain land in the Devils Lake land district, North Dakota.

The facts of the case are set forth in the following agreed statement filed with the local officers by the parties in the case:

That Halgrim K. Hillerud made homestead entry No. 5722, December 18, 1893, for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 33, and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 34, T. 151, R. 68, and established residence thereon immediately after filing. That Aasine Myhro made homestead entry No. 8899, April 22, 1879, for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 30, T. 151, R. 68. That April 26, 1897,

the said Aasine Myhro and the said Halgrim K. Hillerud were married, and ever since said time have lived together, and now are, as husband and wife. That on June 23, 1898, Halgrim K. Hillerud made final proof of said homestead entry No. 5722, upon which was issued final certificate 2437. That immediately after making said proof said Halgrim K. Hillerud and said wife Aasine Hillerud (formerly Aasine Myhro) moved upon the claim in controversy. That ever since said time they have resided continuously upon said premises up to the present time, with their family of two children. That during said time Aasine Hillerud (formerly Aasine Myhro) and said husband have placed upon said premises a two-story frame dwelling-house 24 by 14, plastered and furnished the same, and other buildings and improvements. . . . That said improvements are reasonably worth from \$1,500 to \$2,000. That said parties have continuously made the claim in dispute their residence and cultivated the same since June 23, 1898, more than four years prior to the commencement of this contest.

Upon the preceding agreed statement of facts, the local officers held that "the parties have elected which of the two claims they will maintain by the husband making final proof of his entry," and recommended that the entry under contest be canceled.

From this decision the defendant appealed to your office, which, on March 31, 1904, reversed said decision and dismissed the contest. The contestant has appealed to the Department.

The local officers based their action upon the departmental decision in the case of Jane Mann (18 L. D., 116), from the syllabus of which they quote:

Where a woman, having an unperfected homestead entry, marries a man having a similar claim, the parties should elect which of the two claims they will maintain, as both entries can not be carried to patent.

The decision of your office is based upon the departmental decision in the case of Katie Williams (formerly Katie Kusha), rendered November 7, 1903, but not reported, which is, in its essential features, similar to that here under consideration. Katie Kusha's entry was made November 24, 1899. On December 23, 1899, she was married to Ervin T. Williams, who then had an unperfected homestead entry upon which he was residing. His wife took up her residence with him there, and they continued to reside there until he offered final proof in support of his entry. His five years' term of residence expired two months and two days after his marriage to Miss Kusha. After making his final proof he and his wife took up their residence upon the land embraced in her entry, and continued to reside thereon thereafter. When she submitted her final commutation proof the local officers rejected the same. She appealed to your office, which affirmed the action of the local officers, and held her entry for cancellation. She appealed to the Department. Upon careful and exhaustive consideration of the facts and the laws, the Department reversed the action of your office, holding as follows:

The law does not prohibit a husband and wife from each owning a homestead; but they can not earn separate homesteads by residence on two tracts at the

executed November 21, 1902) charging that the entryman had failed, during the fourth year of said entry, to cultivate or plant any trees, tree-seeds, or cuttings on said tract or any part thereof. At the same time he made and filed an affidavit alleging that the defendant was a non-resident of the State, and that personal service of notice could not be made.

Notice of contest issued February 2, 1903, citing the parties to appear on March 26, 1903, before W. O. Bource, a notary public for Scott county, Kansas, and submit their testimony—final hearing to be had before the local officers April 2, 1903.

As the result of said hearing the local officers found that the entryman had failed to cultivate or plant any trees, tree-seeds, or cuttings on said land since the fourth year of the entry, and that there were no trees thereon at the time of the hearing; and they recommended the cancellation of the entry.

Notice of said decision was addressed to the entryman at Lobdell, Kansas, but the latter was returned unclaimed. Then the record was transmitted to your office.

On December 21, 1903, your office, upon consideration of the record, held that, "as notice of contest was not first published until more than sixty days after the execution of the affidavit therefor, no jurisdiction was acquired by the substituted service"—citing the departmental decision in the case of *Christner v. Metz* (29 L. D., 693), and circular of November 14, 1902. Therefore your office remanded the case, with directions to notify the contestant that he would be allowed sixty days within which to apply for a new notice and proceed anew in strict accordance with the Rules of Practice; and that in case of his failure to do so, or to appeal, his contest would be dismissed.

The contestant filed a motion for reconsideration, based mainly upon the allegation that the newspaper notice first published February 13, 1903, was not based upon the affidavit made November 21, and filed three days later, but upon an affidavit filed February 2, 1903, upon which a new notice issued; so that first publication by newspaper advertisement, February 13, 1903, was only eleven days, not "more than sixty days," after the execution of the affidavit therefor.

Your office on June 1, 1904, upon consideration of the record, and especially of the affidavit upon which the second newspaper notice was published, found that said affidavit merely—

states as a conclusion "that it is impossible to get service on said Arnold Langel in the State of Kansas," not facts from which such conclusion could be deduced, and hence is fatally defective as a basis for notice by publication.

The contestant has filed an appeal to the Department, the essential portions of which are:

It was error to hold that the supplemental affidavit is insufficient when it is direct and positive, and made a part of another affidavit which is direct and positive.

A hearing was had, upon which the local officers held that the contest should be dismissed and Anderson's homestead application rejected.

March 22, 1904, your office affirmed that decision and dismissed the contest.

Anderson has appealed to the Department.

There is practically no dispute as to the facts in the case. The local officers found that—

It appears from the evidence that, for some reason and for some time past, this land had been regarded as belonging to the State of Washington; that it was so understood by both parties to this contest and also regarded and considered as such by the Honorable Commissioner of Public Lands in this State, and that in the month of June, 1901, the contestant leased this land from the State for a term of five years and under said lease made some improvements on the land in the way of clearing and planting crops, but it does not appear that he at any time established his residence thereon or exercised any authority over the land except under and by authority of his said lease from the State and was not aware that there was any question as to the title being in the State at all, till after the entryman Roray had filed his said homestead entry.

So far as claimant's residence, improvement and cultivation are concerned, the six months from date of entry had not elapsed at the time of the hearing and the charges and testimony in that regard need not be considered.

The only question properly presented by this appeal is as to the right of Roray to enter the tract.

In the case of *Jones v. Arthur* (28 L. D., 235) it was held that—

Land in the actual possession and occupancy of one holding the same under claim and color of title is not subject to homestead entry.

Where the State has sold a tract as school indemnity land, and it subsequently appears that the record discloses no selection thereof, it may be permitted to select such tract, on due assignment of basis, where such action is necessary for the protection of its vendee, and is in pursuance of its original intention.

In that case, as in the case before us, the State (Oregon) had no title to the land in controversy, not having selected, nor having, at the time of entry thereof as a homestead, made application to select, the same as indemnity land. Moreover, when a year after said entry the State made application to be allowed to select said land in order to make good its conveyance, the application was rejected and no appeal was taken. The Department further held therein, that the entry of Arthur should be canceled and the State should be allowed to make selection of the land for the protection of the title it had conveyed to Jones, and, failing to do so, Jones should be allowed to make entry therefor, if qualified.

The case before us differs from the foregoing only in that Anderson holds by lease and not by deed from the State.

In the enabling act of Congress, approved February 22, 1889 (25 Stat., 676), providing for the admission of Washington and other States, it was provided that all school lands and indemnity lands selected in lieu thereof,

may . . . be leased for periods of not more than five years . . . and such land 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.

Thus a lease, such as that held by Anderson, was one of the recognized methods by which the State of Washington disposed of its school or indemnity lands.

The case before us is therefore clearly within the reason and rule of the case cited.

The evidence clearly shows that Roray was fully aware of Anderson's possession and occupancy and for about a year shared in the latter's belief that he had a valid lease from the State of Washington as the owner of the land, and in that belief sought to buy from Anderson the timber thereon; that, failing to make satisfactory terms with Anderson for said timber, Roray informed the State authorities of Anderson's procedure with a view to prevent him from selling the timber to others, and himself made application to purchase the timber from the State; that it was then found that the State had not, in fact, made selection of this tract, and thereupon Roray made the entry in question; that in the meantime Anderson in good faith made the payments due on his said lease, made a road in to the land, slashed some five acres of timber, cleared one acre of land and cultivated it to a crop of potatoes, and had brought the lumber on this land with which to erect his house thereon before he was notified of Roray's entry.

Considering his open and undisputed occupancy of this land, for the lease of which he paid in good faith, relying upon the State's title, it must be held on equitable grounds that Anderson's right thereto is superior to that of Roray, who, with full knowledge of the circumstances, sought to deprive him of the same by making the entry in question.

The entry will be canceled and the State of Washington will be permitted, if it so elects, to make selection of the land as school indemnity land, upon a proper base furnished therefor, within a time to be limited by your office, and failing so to do Anderson's said application to make homestead entry for the land will be allowed, his qualifications to make such entry being shown.

The decision of your office is reversed.

HOMESTEAD—DEVISEE—WILL.

EBERHARDT *v.* HEIRS OF SELICH, ET AL.

Where an instrument purporting to be the last will and testament of a deceased homestead entryman is duly admitted to probate in the proper court, it will be recognized by the Department as legally established.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) December 5, 1904. (E. J. H.)

July 1, 1899, Julius Selich made homestead entry for the NW. $\frac{1}{4}$ of Sec. 23, T. 152 N., R. 75 W., Devils Lake, North Dakota, land district.

November 21, 1901, Henry F. Eberhardt filed his affidavit of contest against Selich's entry, alleging that—

The said Julius Selich, entryman, died intestate on or about January 12, 1901, leaving no widow, children, heirs-at-law, nor beneficiaries under provisions of section 2291 of the Revised Statutes of the United States, who are entitled to perfect said homestead entry, and that during the eleven months that have elapsed since his death, no heirs of any class have laid any claims to said above described land.

That no heirs of said entryman are residing upon or cultivating said tract as required by law.

That the Evangelical Lutheran Zion Church of McHenry Co., North Dakota, an alleged religious corporation, and one George Kreuger, as an alleged executor of said entryman's last will and testament, claim a certain right or interest in said tract, the exact nature of which said alleged claims is unknown to affiant, but which alleged rights or interests, if any, are insufficient to entitle said church or Kreuger, to perfect said homestead entry.

A hearing was ordered thereon for the submission of testimony before A. J. Clark, a notary public, on January 4, 1902, and final hearing before the local officers January 11, 1902. Notices were issued and service was made upon the "unknown heirs" in the manner provided by law. Service thereof was also made upon Kreuger, the executor, and upon the trustees of the church.

On the day fixed for the hearing, the contestant appeared with his witnesses. Kreuger and one Peter Riba, one of the trustees of the church, appeared specially and moved to dismiss the contest on the grounds that the allegations of the affidavit of contest were not sufficient to constitute a cause of action, and that said office had no jurisdiction in the case for the reason that the allegations of the affidavit did not charge any non-compliance with the homestead law upon the part of the devisees of Julius Selich.

The officer appointed to take the testimony being without authority to rule upon said motion, the case was proceeded with and the contestant submitted the testimony of two witnesses to the effect that they did not know of the entryman leaving at his death any widow, children,

or other heirs-at-law in the United States, or of any heirs claiming, residing upon or cultivating the land.

A certified copy of the will of Selich was introduced by the contestant, which is as follows:

All my property, personal and real, and especially my interest in my homestead, to wit, NW. $\frac{1}{4}$, Sec. 23, T. 152 N., R. 75 W., shall go after my death to the Evangelical Lutheran Zions Church of McHenry Co., North Dakota, of which congregation I am a member, and my said Devisees shall pay all funeral expenses and all my debts I may have contracted before my death. After the expiration of a period of twelve years said Devisees shall be held to turn my farm over to the Missionary Board of the Synod of Ohio and other States, and said Board shall then become the sole owner thereof.

Johann Oberhammer, Peter F. Riba, Joseph Riba and Charles Kreuger, being first duly sworn, deposes and says each for himself, that they have been present at the death of Julius Selich, that he was at the time in a condition that he could not sign any testament for the reason that his death occurred very sudden and very unexpected, but that he made the above testament; the words spoken at the time were reduced to writing the same time they were spoken.

Certified copies of the proceedings had before the probate court of McHenry County, North Dakota, in probating said last will and testament, together with the laws of the State relative to the execution and probating of nuncupative wills, were also introduced by said contestant for the purpose of showing that said alleged will, not having been executed or proven in accordance with the statutes of the State, was void; that the probate court was without authority in the matter; that there being no will in law there was none in fact; and that in the absence of heirs-at-law there was no one who could perfect the entry, or to whom patent for the land could issue.

After the submission of contestant's testimony, the trustees and executor renewed their motion to dismiss the contest, mainly upon the grounds that said testimony did not substantiate any of the allegations set forth in the affidavit of contest, and that the United States land office had no jurisdiction in the case for the reason that any irregularities in a case before the probate court can only be remedied in the district court of said State. The local officers overruled said motion and recommended the cancellation of the entry, from which action an appeal was taken by said Evangelical Lutheran church.

September 24, 1903, your office decision cited section 3644 of the Revised Code of North Dakota, with reference to the making of nuncupative wills, in which, among other things, it is provided that—the decedent must at the time have been in actual military service in the field, or doing duty on shipboard at sea, and in either case in actual contemplation, fear or peril of death, or the decedent must have been at the time in expectation of immediate death from an injury received the same day.

It was found from the showing that the entryman in this case was not in the military or naval service, and that he received no

injury, but was sick for a week prior to his death, and it was held that the paper purporting to be Selich's last will and testament did not convey any interest in the land.

It was also held that the church had failed to show compliance with the law in the matter of cultivation of the land during the period since the entryman's death. The decision of the local officers was affirmed and the entry held for cancellation; from which an appeal has been taken to the Department.

Section 2291 of the Revised Statutes of the United States provides that in case of the death of a homestead entryman who leaves no widow, the patent shall issue to "his heirs or devisee" upon the submission of the required proof, and under departmental rulings heirs and devisees are not required to reside on the land but simply to keep up the improvements and cultivation thereon.

It is claimed on behalf of contestant that the instrument under which the church claims the land is, if a will of any class, nuncupative, and that under the laws of North Dakota real estate can not be devised by such a will. Under the laws of Congress, however, the devise of a homestead is not limited to such as may be made by a written and attested will, but the scope of the law is general and includes all classes of wills legally established. Moreover, section 3642 of the code of North Dakota, provides that "every estate and interest in real or personal property, to which heirs, husband, widow, or next of kin might succeed, may be disposed of by will." In the sections immediately following, the different classes of wills, including nuncupative, are defined, and the steps necessary for their execution prescribed. Section 3644, which provides for nuncupative wills, declares that an estate exceeding \$1000 in value, may not be disposed of thereunder, but does not discriminate between real and personal estate. Under this situation it must be held that it was intended to permit the disposal of any estate, not exceeding \$1000 in value, by nuncupative will.

It is, moreover, strongly urged, that the admission of said instrument to probate by the court of McHenry County, North Dakota, was without authority of law, because the same does not possess the requisites prescribed by the statutes of said State for a nuncupative will, and that said will could not be and was not validated by the erroneous action of said court thereon.

Without considering the question as to what class of wills the instrument under consideration belongs, it appears that the law of North Dakota confers jurisdiction in all probate matters upon the county court, and from the documentary evidence submitted in this case it is shown that the instrument in question was duly admitted to probate in the proper county court, and that the said action stands unappealed from.

It is further contended that said instrument attempts to create a trust, contrary to the Revised Code of 1899 of North Dakota, which provides (section 3383) that "every disposition of real property, whether by transfer or will, must be made directly to the person in whom the right to the possession and profits is intended to be vested, and not to any other, to the use of or in trust for such person."

The above section should be read in connection with section 3381 of said code, which provides that "every person who by virtue of any transfer or devise is entitled to the actual possession of real property and the receipt of the rents and profits thereof is deemed to have a legal estate therein of the same quality and duration and subject to the same conditions as his beneficial interest."

The language of the will does not seem to create a trust. The property is not to be held by the church for the use and benefit of the Missionary Society, and no accounting for the rents and profits is provided for. The first sentence makes an absolute, unconditional devise to the church. Whether the provisions of the following sentence, which seeks to limit the right of the church to twelve years with remainder over to the Missionary Society, can be given operation, is not now presented to the Department for decision. Certainly, no trust relation between the church and Missionary Society is created, consequently, said will does not violate the provisions of the State law in regard to the creation of trusts.

Again, it is claimed that the church is not incorporated, and that there is, therefore, no one in whom the title could be vested; but in support of this allegation no evidence is found in the record.

Section 3174 of the code of North Dakota, under the title of "Religious, Educational and Benevolent Corporations," provides that—
all such corporations shall have power to acquire property, both real and personal, by purchase, devise or bequest, and to hold the same, and may sell, exchange or mortgage any or all property held or owned by them in the manner determined by their by-laws, or by a majority vote of their members at a meeting called for that purpose.

Paragraph 144 of article 7 of the constitution of the State of North Dakota provides that—

the term "corporation," as used in this article, shall not be understood as embracing municipalities or political sub-divisions of the State unless otherwise expressly stated, but it shall be held and construed to include all associations and joint stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships.

Whilst the matter of final proof is not now before the Department, in answer to the contention of counsel in relation thereto it may be stated that the Department has held that an administrator or executor, acting merely as such, can not make final proof. This is for the reason that the *legal title* to real estate does not vest in the adminis-

trator or executor. The right of a party, however, to submit final proof, who either has a part interest in the legal title or is the holder of the legal title in trust for the benefit of the owner is recognized in departmental practice.

One of several heirs may make final proof for the common benefit of all the heirs; the transferee of a homestead claimant, who has made incomplete final proof, may make proof, even to the extent of showing compliance with the law by the homestead claimant, and in case of a corporation which has bought lands of a railroad company and applies to purchase the same under section 5 of the act of March 3, 1887, the officers or directors of such corporations may make the required proof.

With reference to the holding by your office decision that the evidence is sufficient to warrant the cancellation of the entry for failure, on the part of the officers of the church, to comply with the law in the matter of keeping up the improvements and cultivation, examination shows that the affidavit of contest avoids making any charge of such failure against the devisee. In the first paragraph of said affidavit it is alleged, among other things, that "no heirs of any class have laid any claim to said land; that no heirs of said entryman are residing upon or cultivating said land as required by law." In the next paragraph, wherein it is alleged that the church claims some interest in the land, there is no allegation that it has not, through its officers, taken possession of and cultivated the same. Counsel for contestant was equally careful not to ask his witnesses in regard to the matter of such possession and cultivation by the officers of the church. They were simply asked as to any "heirs" of the entryman, and evidently understood the questions to merely have reference to "relatives" who would naturally succeed to the entryman's claim upon his decease. The Department is of opinion that under the circumstances the church was not bound to make any showing in the matter; but in explanation of its attitude on this subject at the hearing, it is proper to state that there has been filed in the case the joint affidavit of three trustees of said church in which it is stated that upon learning of the provisions of the will in question, the church, through its trustees, took possession of the land and has ever since held the same, kept up the improvements and cultivated and cropped the land; that they did not at the hearing offer evidence of these facts for the reason that it was distinctly understood that no such charge of failure on the part of the officers of the church was made or claimed, and that the testimony introduced at the hearing as to failure to cultivate, etc., related solely to the "heirs" of the entryman and not to the trustees of the church. This is not denied in the argument subsequently filed on behalf of the contestant.

Your office decision in favor of the contestant is reversed and the contest dismissed.

HOMESTEAD—ADDITIONAL ENTRY—SECTIONS 5 AND 6, ACT OF MARCH 2, 1889.

KATE GAD.

The right to make additional entry of contiguous land under section five of the act of March 2, 1889, exists only where the original entry was made prior to the passage of said act.

The right to make additional entry under section six of the act of March 2, 1889, can be exercised only by one who has made final proof and received the receiver's final receipt for the land embraced in his original entry.

A married woman, not the head of a family, is not entitled to make additional entry under section six of the act of March 2, 1889.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) December 5, 1904, (E. P.)

March 26, 1903, Kate Donovan made homestead entry of lots 1, 2 and 3 and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 1, T. 148 N., R. 63 W., Fargo land district, North Dakota, containing 143.39 acres.

August 5, 1903, the entryman presented at the local office an application to make an additional homestead entry of lot 4 of said section 1, containing 20.87 acres, which tract adjoins the land embraced in her original entry. This application the local officers rejected because the applicant "has exhausted her homestead right, having made H. E. No. 25582, Mch. 26, 1903, for lots 1, 2 and 3 and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ of same Sec., T. & R., and upon which final proof has not been submitted."

From this action the applicant appealed to your office, alleging that it was error to hold that she had exhausted her homestead right by making said original entry covering only 143.39 acres, and contending that she "is entitled to have the full benefit of the homestead law and should be allowed to file on land enough to make up the deficiency."

It was also urged that—

It was error to hold that because applicant had not submitted final proof to Homestead Entry No. 25582, which was less than 160 acres, that she should not make an additional entry according to section 5 of the act of March 2, 1889 (25 Stat., 854), and as this applicant still occupies her original entry as shown by her affidavit in her application for additional entry, and as the land in the rejected application for additional entry is contiguous to the land embraced in the original entry, and as the original entry is deficient in almost the amount applied for in the additional entry, in accordance with said act, and the said rule of approximation, this application should be allowed.

Your office, in its decision of December 24, 1903, held that section five of the said act of March 2, 1889, permits a person to make an additional entry of land lying contiguous to a tract covered by his original entry only where the original entry was made prior to the

passage of the act; and that section six of said act provides for the allowance of an additional entry only in cases where the original entry has been perfected and final receipt has issued thereon. It was found that the applicant was not qualified under either of said sections to make an additional entry, and the action below was accordingly affirmed.

From this decision the applicant has appealed, alleging that—

It was error to hold that because the applicant had not submitted final proof for her H. E. No. 25582, that she could not make an additional entry for the reason that according to section 5, act of March 2, 1889, this applicant still occupied her original entry, as shown by her affidavit in her application for additional entry, and the land applied for in the rejected application for additional entry is contiguous to the land in her homestead entry No. 25582, which are all the qualifications necessary according to Sec. 5 of said act of March 2, 1889. The decision of the Hon. Commissioner of the General Land Office holds that final proof would have to be made on the original entry according to Sec. 6 of the act of March 2, 1889, which seems to us an error, for the reason that Sec. 6 of said act seems to apply to land that does not lie contiguous to the original entry, and in that case said section requires that the applicant shall actually reside on the additional entry, which, of course, he could not do until proof was made for the original entry. Sec. 5 of the said act of March 2, 1889, under which we claim to make this entry, does not provide that the applicant shall make final proof on the original entry and then reside on the additional entry, but states that if the land is contiguous to the original entry that patent may issue without proof of residence upon, and cultivation of the additional entry, and if final proof of settlement has been made for the original entry, then the patent shall issue without further proof, and as the original entry of this applicant is deficient in almost the amount applied for in the additional entry this applicant should be allowed in accordance with said section 5 of said act of March 2, 1889.

Sections five and six of the said act of March 2, 1889 (25 Stat., 854), read as follows:

SEC. 5. 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; and if final proof of settlement and cultivation has been made for the original entry when the additional entry is made, then the patent shall issue without further proof: *Provided*, That this section shall not apply to or for the benefit of any person who at the date of making application for entry hereunder does not own and occupy the lands covered by his original entry. . . .

SEC. 6. 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 hun-

dred and sixty acres: *Provided*, That in no case shall patent issue for the land covered by such additional entry until the persons making such additional entry shall have actually and in conformity with the homestead laws resided upon and cultivated the lands so additionally entered, and otherwise fully complied with such laws.

Your office correctly held that because the applicant's original entry was made subsequently to the passage of the act of March 2, 1889, she is not entitled to make an additional entry under the provisions of section five thereof. See John B. Doyle (15 L. D., 221); Sandford J. Jackman (16 L. D., 530). Your office was also correct in holding that the applicant was not entitled to the benefit of the provisions of section six of said act because she had not made final proof and received the receiver's final receipt for the land embraced in her original entry. *Caesar v. Sales* (26 L. D., 604); *Charles Boos* (28 L. D., 555).

June 4, 1904, the applicant submitted commutation proof on her original entry, for which final receipt issued June 21, 1904. It is quite probable that this action was taken for the purpose of overcoming what she evidently misconceives to be the objection of your office to the allowance of her application for an additional entry under the fifth section of said act of March 2, 1889, or for the purpose of complying with that clause in section six of said act which requires that an applicant to enter under the provisions of said section shall have received the receiver's receipt on his original entry.

It appears from the final proof papers, however, that on a date prior to the submission of said proof, to wit, December 26, 1903, the applicant intermarried with one Albert A. Gad. The right to make an additional entry under the provisions of section six of said act is conferred only upon a "person entitled, under the provisions of the homestead laws, to enter a homestead." The applicant being a married woman at the time the disability above referred to was removed, was not then qualified to make homestead entry. It must therefore be held that she is not entitled to the benefits conferred by said section six, notwithstanding the fact that she has completed her original entry. *Sarah J. Walpole* (29 L. D., 647).

The action appealed from is affirmed.

of reasoning, official action by a selector in the administration of the oath to the proof witness and attestation of the affidavit is equally objectionable, and for the same reason. The affidavit was therefore simply void paper, not constituting even defective proof, and ineffectual for any purpose. The affidavit for all evidential purposes was not merely "somewhat irregular," but simply void. The case must be regarded as one of an application without any proof of either the character or condition of the land.

It is further contended that as the pendency of an application, even without the requisite proofs, segregates the land and reserves it from other appropriation by individuals, the government should be bound by the same rule. In this connection citation is made of the decision in *Porter v. Landrum* (31 L. D., 352), and *Charles H. Cobb* (31 L. D., 220).

Counsel mistake the effect of both decisions. The rule in the case first mentioned is one for economic and convenient administration and the orderly conduct of public business. When the land department has before it an application for public lands, it will not permit third persons who have no prior right to interfere in such transaction and attempt to intermeddle with its business because of any alleged irregularity of the proceedings. The rule in the other case cited relates only to lands still remaining subject to the same mode of appropriation. It is obvious that if a selection be rejected for mere matters of form, but may still be taken under a new application, the speedier and more rational disposition of the business is to permit the irregular and incomplete proceeding to be cured. This never is done where the land is no longer subject to such appropriation. In the case cited it was held that the perfected, or amended, proceeding could have effect only from the time that it was so perfected.

In the present case the land has ceased to be subject to such form of appropriation. The United States has in contemplation a project for reclamation of a large area of arid lands. In such project, if carried out, the cost is to be charged upon the lands reclaimed and to be paid by their future owners. Pending determination of the many questions arising in so great and useful an undertaking, the government has declared the lands no longer subject to private appropriation in any other manner than as provided specially in the irrigation act. The selector having acquired no right by his attempted proceeding can not now acquire any.

Your office decision is affirmed.

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

WILLIAM A. ORSER.

A relinquishment of lands in a forest reserve, under the exchange provisions of the act of June 4, 1897, should be accompanied by a selection for an equal area of land; and where the selection is for a less area, the selector should be given opportunity to elect either to amend and fill his selection to equal the area of the land relinquished, or to waive his right to make selection for the excess.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) December 9, 1904. (J. R. W.)

William A. Orser appealed from your office decision of August 22, 1904, rejecting his selection of the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 24, T. 3 N., R. 9 E., W. M., Vancouver, Washington, as supplemental to his original selection, number 2858, your office series, which but partially satisfied the base assigned therefor.

March 27, 1900, Orser filed in the local office his recorded deed, under the act of June 4, 1897 (30 Stat., 36), relinquishing to the United States lots 4 and 5, Sec. 1, and lots 1, 8, and 9, Sec. 2, T. 4 N., R. 9 E., W. M., 153.73 acres, in the Mt. Rainier forest reserve, with abstract of his title thereto, and selected in lieu thereof the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 1, T. 3 N., R. 9 E., and lots 4 and 5, Sec. 6, T. 3 N., R. 10 E., W. M., 119.83 acres, at Vancouver, Washington. October 25, 1902, your office required Orser to waive his right to make a selection for the unsatisfied 33.90 acres excess of land he relinquished. Such order was served by registered mail, November 14, 1902, and November 26, 1902, he presented at the local office his application to select the land here in question (forty acres), paying for the excess of 6.10 acres. Your office held that the local office erred in not rejecting the selection, and it was rejected.

The original selection was made after the instructions of March 6, 1900 (29 L. D., 578), which, by paragraph 2, provides that:

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 pending relinquishments and partial selections thereunder will be rejected.

It does not appear when the instructions of March 6, 1900, were received by the local office. That is, however, immaterial, as your office, January 16, 1900 (29 L. D., 579), directed all local officers "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

July 29, 1904 (not reported), affirming the action of your office in holding for cancellation his Umatilla cash entry, No. 352, made August 22, 1902, under the act of July 1, 1902 (32 Stat., 730), for the NE. $\frac{1}{4}$ of Sec. 34, T. 2 N., R. 32 E., Lagrange, Oregon.

Said decision followed the case of *Davis v. Nelson* (33 L. D., 119), wherein an application to purchase 160 acres under the act named was rejected because the applicant had already purchased 160 acres under the act of March 3, 1885 (23 Stat., 340), which also has reference to Umatilla lands. A motion for review was filed in that case on the ground that the applicant being a settler on the land applied for under the act of July 1, 1902, was entitled to purchase the same under the proviso to said act, and that the Department failed to consider this point. The motion was denied October 29, 1904, and therein it was said:

This point was fully considered by the Department when the case was here on appeal, and while not specifically referred to in said decision the Department had the same in mind when it held that under the combined provisions of the said acts of March 3, 1885, and July 1, 1902, no individual was entitled to purchase more than two hundred acres of land embraced within the limits of said reservation.

The identical question is raised by the motion for review now under consideration. The proviso to the act of July 1, 1902, merely gave a *preference right* to purchase for a limited period to settlers. It did not bestow an additional privilege upon those who had already exhausted the right of purchase under the act of March 3, 1885, which limited the quantity of these Umatilla lands that could be acquired by one individual to not exceeding two hundred acres. This question was fully discussed in the decision of your office of December 8, 1903, which was affirmed by the decision now complained of.

The motion for review is denied.

HELEN TIBBALS.

Motion for review of departmental decision of September 8, 1904, 33 L. D., 223, denied by Secretary Hitchcock, December 14, 1904.

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

CORA E. WHITAKER.

Lands withdrawn from entry with a view to the establishment of a forest reserve are not, prior to executive proclamation creating the reserve embracing the lands, a proper basis for the selection of lieu lands under the exchange provisions of the act of June 4, 1897; and an application to make selection in lieu of lands so situated will be rejected, and not merely suspended pending final action as to the creation of the contemplated reserve.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) December 14, 1904. (J. R. W.)

Cora E. Whitaker appealed from your office decision of June 25, 1904, rejecting her application under the act of June 4, 1897 (30 Stat., 36), to select the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 35, T. 13 N., R. 30 E., and lots 2, 3, 4, and S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 2, T. 12 N., R. 30 E., Lewiston, Montana, 237.26 acres, in lieu of the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, and N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 7, T. 12 N., R. 17 E., M. M., the relinquished land being an unperfected claim held under desert land entry.

The land is within the area withdrawn from entry February 12, 1904, with view to creation of the Big Snowy Mountains forest reserve, but such proposed forest reservation has not yet been established, and its creation is merely under consideration. Your office for that reason rejected the application. Two assignments of error are made: (1) that it was error to hold that no reserve was created, and that the withdrawal was merely temporary in character; (2) that in any event the application should not have been rejected, but merely suspended until final action as to the creation of the contemplated reserve.

There is no ground for the first contention. A forest reservation under the law can be created only by executive proclamation, and no such proclamation is or can be cited, for none has been made. There is no such forest reservation, and therefore no authority under the act of June 4, 1897, *supra*, for exchange of lands under its provisions.

Nor is it permissible to regard the matter as initiate to be suspended until such final action. The proposed reserve may never be created, and in the meantime there would be a double quantity of public land segregated from other appropriation upon a single claim—that embraced in her desert land entry, and that she seeks to select. While the matter was suspended there could be no attack upon her entry for non-compliance with the law, and she would thus be relieved of obligation to comply with the law of her entry and immune from attack for such non-compliance while holding from other appropriation a double quantity of land.

Your office decision is affirmed.

are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its rights to said sections.

In the case of the State of California (on review, 28 L. D., 57) it was held that where a forest reservation included within its limits a school section surveyed prior to the establishment of the reservation, the State, under the authority of the first proviso to section 2275 of the Revised Statutes, as amended by act of February 28, 1891, may be allowed to waive its right to such section and select other land in lieu thereof. In said decision it was said:

While it is not within the power of Congress or of the executive to divest the State of school lands after its right thereto has attached, the thing contemplated by this statute is an exchange made at the solicitation of the State and not a taking of its property against its will. Such an exchange is not wholly new.

This proviso, before quoted, plainly recognizes that the several states may be entitled to mineral lands and authorizes the waiver of claim thereto. Nothing else could be fairly imputed to that proviso, which reads—

Provided, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its rights to said sections.

In this connection the attention of the Department has been invited to the act of the legislature of the State of California approved April 1, 1897, repealing all previous legislative enactments providing for the sale of those portions of sections 16 and 36 mineral in character, the third section of which provides that:

The sixteenth and thirty-sixth sections belonging to the State, in which there may be found valuable mineral deposits, are hereby declared to be free and open to exploration, occupation, and purchase of the United States, under the laws, rules, and regulations passed and prescribed by the United States for the sale of mineral lands.

This would seem to be a waiver of claim on the part of the State to such of the sections 16 and 36 in place as were shown to be mineral in character after their identification, presumably with the intention of encouraging the exploration and development of mineral lands and indemnifying itself for any loss on account thereof through selections under the act of 1891.

After full and careful consideration of the matter the Department is of opinion that under the plan of adjustment provided for in the act of February 28, 1891, it is possible for the State, if she so elects, to waive her right to portions of sections 16 and 36 in place and select other lands in lieu thereof, upon a showing of the mineral character of the lands as a present fact, without regard to their known condi-

11 north, ranges 2 and 3 east, under the act of August 18, 1894 (28 Stat., 372, 394-395). On the 21st of that month your office withdrew said townships from settlement and entry in accordance with the provisions of said act, awaiting the exercise of the State's preferred right of selection thereunder within sixty days after the filing of the plats of survey of said townships. The surveys were executed in the field in June and July, 1901, but the plats thereof were not filed until April 1, 1903. May 7, 1902, these townships, with other lands, were temporarily withdrawn for examination with a view to their possible inclusion within a forest reserve. Following the filing of the township plats the State made selections as above stated, the same being permitted under the authority of your office letter "G" of June 25, 1902.

After the examination of the lands temporarily withdrawn, a forest reserve was determined upon, and the proclamation creating and reserving the lands was made May 29, 1903 (33 Stat., —). Prior to the issue of said proclamation, however, no action was taken toward the cancellation of the State's selections, and by the terms of the proclamation creating the forest reserve there was excepted from the operation thereof—

All lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States land office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired.

The selections in question, with the exception of those made June 1, 1903, and the further exception that they have not received departmental approval, are in the same condition as those considered in departmental decision of October 24, last (33 L. D., 283). Said decision set aside and annulled the demand made by your office upon the State of Utah to reconvey to the United States certain lands held to have been erroneously certified on account of the grant to the State for an institute for the blind and for reform schools, because of the fact that said lands were, prior to the approval of the selections, embraced in the Logan forest reserve, and held that the certifications were properly made. For the reasons given therein, your office decision appealed from must be and is accordingly hereby reversed, so far as it affects selections of record prior to the proclamation creating the forest reserve made, as before stated, May 29, 1903.

Some of the selections, however, appear to have been made on June 1, 1903. They are not specifically described, however, and as to such selections your office decision is affirmed. Where the lands had not been selected prior to the proclamation creating the forest reserve, the sole claim of the State thereto rests upon its application for the survey of the land under the act of 1894, to the end that it might be

permitted to select such of the lands when surveyed as might be desirable or necessary in the satisfaction of its several grants.

Waiving the question as to whether the record shows sufficient compliance with the act of 1894 on the part of the State in the matter of the publication of notice, it is clear that the only right intended to be granted the State was that of a preference over other intending claimants under the public land laws, to make selections of such lands as it desired and needed, within the period of sixty days after the filing of the township plats of survey, and that under the State's application no such claim attached as prevented the appropriation of the lands by the United States under an act of Congress until formal selection thereof had been made by the State. In fact, the Department is of opinion, as expressed in the decision of October 24, last, hereinbefore referred to, that the United States might have, prior to the creation of the forest reserve, canceled the State's selections, the same having been permitted upon the condition that the approval thereof should be subject to the final determination of the boundaries of the forest reserve to be created out of the lands withdrawn, if such reservation was deemed advisable. As to the selections made after the creation of the forest reserve, the Department therefore directs that the same be canceled.

ARID LAND—WITHDRAWAL—ACTS OF JUNE 17, 1902, AND JUNE 4, 1897.

SANTA FE PACIFIC R. R. Co.

Lands withdrawn from entry, except under the homestead laws, in accordance with the provisions of the act of June 17, 1902, are not subject to selection under the exchange provisions of the act of June 4, 1897, in lieu of lands relinquished to the United States in a forest reserve.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 28, 1904.* (J. R. W.)

The Santa Fe Pacific Railroad Company appealed from your office decision of April 2, 1904, rejecting its application, number 9189, your office series, under the act of June 4, 1897 (30 Stat., 36), to select the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 9, T. 1 N., R. 4 E., G. & S. R. M., Tucson, Arizona, in lieu of land relinquished to the United States in a forest reserve.

February 23, 1904, the application was presented at the local office. The land is among the tracts withdrawn from entry for reclamation purposes, August 30, 1902, under the act of June 17, 1902 (32 Stat., 388). Your office held that:

Land withdrawn under said act of June 17, 1902, is only subject to appropriation under the homestead law and then with certain restrictions and limitations.

Inasmuch as such land is not subject to selection under the act of June 4, 1897, *supra*, and the land covered by selection No. 7189 being of that class, the same is hereby rejected, subject to appeal.

This ruling is alleged to be erroneous, as the act of June 6, 1900 (31 Stat., 614), allows selection of "vacant, surveyed, non-mineral lands which are subject to homestead entry."

The act of June 17, 1902, *supra*, provides that:

the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works.

The withdrawal from entry, except under the homestead laws, clearly precludes any other form or mode of entry or appropriation of the lands so withdrawn, and as to such lands suspends the operation of the general laws for their disposal. The act has as its special object the reclamation of areas of fertile but arid lands, now not suitable for support of population by the arts of husbandry, by works of conservation and distribution of waters. When so reclaimed, they are to be charged with the cost of their reclamation, and the area of homestead entries may be reduced from that fixed by the homestead laws to such less area as may be found sufficient by aid of irrigation for support of a family. The entire scheme of the act precludes the construction that selections may be made of such lands under the exchange provisions of the act of June 4, 1897. There, therefore, was no error in your office decision.

Annexed to the appeal is a petition representing that the tract in question is worthless for agricultural purposes and can not be successfully irrigated from any reservoir that may be constructed in its vicinity, and is valuable only for its gravel and sand, which the applicant desires to use for ballast of its tracks. This question was not presented upon the record as originally made, nor were the facts in that respect found, and the Department is unable to pass upon it.

In view of the Department, if the facts are as stated, and the land is not within the reach of practicable irrigation lines of the project within which it is situated, or if its material character is such that it is clearly unsuitable to agricultural use, though water could be conducted to it, in such case it may be excluded from the withdrawal and irrigation project, and its selection permitted for the improvement of the track and service of the applicant.

The case is therefore remanded to your office for examination into the facts stated, consulting with the Director of the Geological Survey as may be necessary, and for report thereon for advice of the Department and its final action.

CRICHTON *v.* SHELTON.

Motion for review of departmental decision of August 30, 1904, 33 L. D., 205, denied by Secretary Hitchcock, December 22, 1904.

SECOND HOMESTEAD—SOLDIERS' ADDITIONAL—ASSIGNEE.

HERMAN DIERKS.

Where one entitled to make soldiers' additional homestead entry for eighty acres under section 2306, Revised Statutes, assigns such right and the assignee files application to make entry thereunder, and the land department thereafter, notwithstanding the pendency of the additional homestead application, erroneously permits the original, entryman to acquire title to one hundred and sixty acres under the act of March 2, 1889, the rights of the assignee under the assignment and the application based thereon are in no wise affected by such erroneous action.

Directions given for the preparation of regulations requiring all persons entitled to make additional entry under section 2306, Revised Statutes, who seek to make a second entry under the provisions of the act of March 2, 1889, for a greater amount of land than was embraced in the entry made prior to the adoption of the Revised Statutes, to furnish an affidavit to the effect that the applicant has not sold or assigned his additional right of entry.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *December 22, 1904.* (F. W. C.)

The Department has considered the appeal by Herman Dierks, as assignee of James Frazier, from your office decision of January 12, last, rejecting his application to enter, under the provisions of section 2306 of the Revised Statutes, the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 12, T. 7 S., R. 28 W., Camden land district, Arkansas.

From the statement of facts contained in your said office decision it appears that James Frazier served in the army of the United States more than ninety days during the War of the Rebellion and that on April 20, 1872, he made an original homestead entry at Topeka, Kansas, for the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 18, T. 18 S., R. 10 E., containing 80 acres, which entry was canceled upon his relinquishment November 22, 1877. He was therefore entitled, by reason of said homestead entry, to make an additional homestead entry for 80 acres under the provisions of section 2306 of the Revised Statutes.

March 29, 1899, he sold and assigned this additional right of entry to one J. Vance Lewis, and on April 10, 1899, Lewis sold and assigned said right to Herman Dierks.

March 13, 1901, Dierks filed in the local land office at Camden, Arkansas, his application here under consideration, which was forwarded to your office early in the following month, where it remained unacted upon until rejected in your office decision appealed from.

October 24, 1900, Frazier made a second homestead entry at Durango, Colorado, under the provisions of section 2 of the act of March 2, 1889 (25 Stat., 854), for the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 36, T. 33 N., R. 10 E. Prior to making said entry he had tendered a homestead application for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section 36, in addition to the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of that section, for which he made entry, as above stated. This application was rejected because of a prior entry covering the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$. Frazier contested said entry and upon securing its cancellation tendered an application to amend his second homestead entry so as to embrace in addition to the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section 36. This application, after having been considered by your office, was returned for allowance with your office letter of March 23, 1901, ten days after Dierks had filed in the local land office his application, here under consideration, to make an additional entry of 80 acres as assignee of Frazier. Frazier's second entry was amended April 1, 1901. He thereafter submitted final proof upon the entry as amended and the patent of the United States was issued thereon January 17, 1902.

Your office decision finds that "before the assignee had located the right purchased from the soldier, the soldier had, in person, exercised his homestead right to the extent of 160 acres under his second entry, as above described, thereby exhausting his right in question" (Edgar A. Coffin, 31 L. D., 430), and for this reason rejected Dierks's application to make an additional homestead entry under the assignment from Frazier.

In the case of *ex parte* Charles P. Colver (33 L. D., 329) it was held that an original homestead entry could not be made under the act of 1889 and an additional entry under the provisions of section 2306 of the Revised Statutes, and title be thereby acquired to lands under the homestead laws in excess of 160 acres or one quarter-section.

Upon the facts of this case it appears therefore that as Frazier had disposed of his additional right of entry under the provisions of section 2306 of the Revised Statutes, for 80 acres; he was only entitled to make entry under the provisions of section 2 of the act of March 2, 1889, *supra*, for 80 acres. It may be that had the purchaser of the additional right failed to give notice to the Department of his purchase until after the soldier had acquired title to 160 acres under the homestead laws, the Department would be justified in refusing to recognize any rights under such purchase. The facts in this case, however, show that an application to make entry under the assignment of the additional right from Frazier was filed in the local office ten days prior to the granting of Frazier's application to amend his existing homestead entry of 80 acres so as to embrace 160 acres, and that, notwithstanding the pendency of said application to make additional entry by the purchaser, Frazier was permitted to carry said amended

entry to final entry and to receive patent thereon nearly a year thereafter.

The fact that your office, overlooking the pending application by Dierks, erroneously permitted Frazier to acquire title to 160 acres under the homestead law, is not sufficient reason for rejecting such application. The land department was fully apprised of the sale of the additional right by Frazier prior to the patenting of his homestead entry as amended, indeed, prior to the allowance of the amendment. It is therefore directed that if Dierks's application is otherwise regular and proper, the same be accepted. Your office decision is accordingly reversed.

In this connection it is deemed advisable for the protection of the interests of the United States to direct that suitable regulations be prepared requiring of all those entitled to make an additional entry under the provisions of section 2306 of the Revised Statutes, who seek to make a second entry under the provisions of the act of March 2, 1889, for a greater amount than that included in the entry made prior to the adoption of the Revised Statutes, an affidavit to the effect that the applicant has not sold or assigned his additional right of entry.

APPLICATION TO MAKE SECOND HOMESTEAD ENTRY--SOLDIERS'
ADDITIONAL RIGHT--CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., January 27, 1905.

Registers and Receivers, United States Land Offices.

SIRS: The following regulations are issued under authority of departmental ruling of December 22, 1904, in the case of Herman Dierks, assignee of James Frazier (33 L. D., 362).

Hereafter any person entitled to make additional entry under the provisions of section 2306, Revised Statutes, who seeks to make a second entry for a greater amount than that included in the entry made prior to the adoption of the Revised Statutes, June 22, 1874, must file with such second entry an affidavit that he has not sold or assigned his additional right of entry under said section 2306. If such affidavit is not filed you will proceed as in the case of other entries wherein the requisite proof is not submitted.

This action is based upon the ruling that title can not be acquired to lands under the homestead laws in excess of one hundred and sixty acres or one quarter section. (See Charles P. Colver, 33 L. D., 329.)

Very respectfully,

W. A. RICHARDS, *Commissioner.*

Approved:

E. A. HITCHCOCK, *Secretary.*

TIMBER AND STONE APPLICATION—FINAL PROOF—NOTICE—DEFAULT.

JENNIE M. WELLS.

Under the provisions of section 3 of the act of June 3, 1878, the register is required to furnish a timber and stone applicant a copy of the final proof notice, which notice the applicant shall cause to be published as prescribed by the act; and where an applicant acquires no knowledge that such notice has been issued until after the date set for the submission of proof, he is not in default merely because he fails to submit proof on such date.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 7, 1905.* (E. P.)

On or about November 21, 1902, Jennie M. Wells applied to purchase, under the timber and stone act, the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 11, and the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 14, T. 21 S., R. 11 E., Lakeview land district, Oregon. Notice issued, setting December 5, 1903, as the date for the submission of final proof on said application, and designating the officer before whom the testimony should be taken, which notice appears to have been published in a certain newspaper, but at whose instance the record is silent. The applicant failed to appear at the time and place stated in the notice and offer her proof.

February 5, 1904, she filed in the local office an application to readvertise notice, alleging, in a corroborated affidavit filed in support thereof, that she had never been furnished a copy of the final proof notice, and had no knowledge that such notice had issued until more than a month after the date fixed for the submission of proof.

In transmitting said application to readvertise to your office the register reported that no legal final proof notice had ever been furnished the applicant.

Your office, in its decision of September 19, 1904, found that the land applied for had been, by order of July 31, 1903, withdrawn for forestry purposes, subject only to the applicant's continued compliance with the law under which her claim was initiated, and held that because of her failure to submit proof on the date advertised, or within ten days thereafter, the withdrawal attached to the land and that her application to purchase the same thereupon expired. Her application to readvertise was therefore rejected. From this decision the applicant has appealed to the Department.

In an unreported decision rendered November 5, 1904, in the case of Henderson W. Murphy, which case is in all essential respects similar to the one at bar, the Department held that under the provisions of section 3 of the act of June 3, 1878 (20 Stat., 89), the register is required to furnish a timber and stone applicant a copy of the final proof notice, which notice the applicant himself shall cause to be

published for the necessary length of time in the newspaper described in the act, and that where a timber and stone applicant acquired no knowledge that such notice had issued until after the date set for the submission of proof, he was not in default merely because he failed to submit proof on such date. In the absence therefore of any objection other than the one raised by your office, the application to advertise will be allowed and the applicant will be permitted to complete her purchase.

The decision appealed from is accordingly reversed.

PARAGRAPH 37 OF MINING REGULATIONS AMENDED.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 9, 1905.

*United States Surveyors-General,
Registers and Receivers,
United States Land Offices:*

Paragraph 37 of the Mining Regulations, approved December 18, 1903, was, on December 23, 1904, amended by the Secretary of the Interior to read as follows:

37. (a) Promptly upon the approval of a mineral survey the surveyor-general will advise both this office and the appropriate local land office, by letter (Form 4-286), of the date of approval, number of the survey, name and area of the claim, name and survey number of each approved mineral survey with which actually in conflict, name and address of the applicant for survey, and name of the mineral surveyor who made the survey; and will also briefly describe therein the *locus* of the claim, specifying each legal subdivision or portion thereof, when upon surveyed lands, covered in whole or in part by the survey; but hereafter no segregation of any such claim upon the official township-survey records will be made until mineral entry has been made and approved for patent, unless otherwise directed by this office.

(b) When an application to make agricultural entry of the residue of any original lot or legal subdivision of forty acres, reduced by mining claims for which patent applications have been filed and which residue has been already relotted in accordance therewith, the local officers will accept and approve the application as usual, if found to be regular. When such an application is filed for any such original lot or subdivision, reduced in available area by duly asserted mining claims but not yet relotted accordingly, the local officers will promptly advise this office thereof; and will also report and identify any pending application for mineral patent, affecting such subdivision, which the agricultural applicant does not desire to contest. The surveyor-general will thereupon be advised by this office of such mining claims, or portions thereof, as are proper to be segregated and directed to at once prepare, upon the usual drawing-paper township blank, diagram of amended township survey of such original lot or legal forty-

acre subdivision so made fractional by such mineral segregation, designating the agricultural portion by appropriate lot number, beginning with No. 1 in each section and giving the area of each lot, and will forthwith transmit one approved copy to the local land office and one to this office. In the meantime the local officers will accept the agricultural application (if no other objection appears), suspend it with reservation of all rights of the applicant if continuously asserted by him, and upon receipt of amended township diagram will approve the application (if then otherwise satisfactory) as of the date of filing, corrected to describe the tract as designated in the amended survey.

(c) The register and receiver will allow no agricultural claim for any portion of an original lot or legal forty-acre subdivision, where the reduced area is made to appear by reason of approved surveys of mining claims and for which applications for patent have not been filed, until there is submitted by such agricultural applicant a satisfactory showing that such surveyed claims are in fact mineral in character; and applications to have lands asserted to be mineral, or mining locations, segregated by survey, with the view to agricultural appropriation of the remainder, will be made to the register and receiver for submission to the Commissioner of the General Land Office, for his consideration and direction, and must be supported by the affidavit of the party in interest, duly corroborated by two or more disinterested persons, or by such other or further evidence as may be required in any case, that the lands sought to be segregated *as mineral* are in fact mineral in character: otherwise, in the absence of satisfactory showing in any such case, such original lot or legal subdivision will be subject to agricultural appropriation only. When any such showing shall be found to be satisfactory and the necessary survey is had, amended township diagram will be required and made as prescribed in the preceding section.

W. A. RICHARDS, *Commissioner*

SETTLEMENT ON RAILROAD GRANT—ACTS OF JULY 1, 1898, JUNE 4,
1897, AND APRIL 15, 1902.

ELIZA J. STEWART.

One who settles upon land within the primary limits of the grant to the Northern Pacific Railroad Company after its right thereto has attached, and through ignorance of the law fails to claim the benefit of the act of July 1, 1898, prior to patenting the land to the company, and title to the land, which is within the limits of a forest reserve, thereafter reverts in the United States under the exchange provisions of the act of June 4, 1897, may be permitted, under the act of April 15, 1902, to carry his claim to completion.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 12, 1905.* (J. R. W.)

Eliza J. Stewart appealed from your office decision of September 30, 1904, rejecting her application for homestead entry for the W. $\frac{1}{2}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, and lots 4 and 5, Sec. 3, T. 59 N., R. 4 W., B. M., Coeur d'Alene, Idaho.

The land is in the Priest River forest reserve, created by executive proclamation of February 22, 1897 (29 Stat., 903). The application was made October 26, 1903, and therewith she filed an affidavit that

she is the mother of Alexander Coolin, deceased, who made settlement and established residence on the land about August 15, 1893, and maintained such residence continuously to his death, September 6, 1900; that he was unmarried and she lived with him from July, 1897, to his death, and since that time has kept up the improvements, cultivated the land, and lived there a large part of the time; that her son applied for homestead entry of the land at the date of filing of the township plat in the local office, December 29, 1897. The local office rejected her present application, and this action was affirmed by your office.

Your office states that its records show the land to be within the primary limits of the grant by the act of July 2, 1864 (13 Stat., 365), and the company's right attached thereto August 30, 1881, by filing its map of definite location of its line coterminous with the land. The land was listed (list 21), approved to the company June 27, 1899, and patented June 30, 1899.

September 28, 1900, the company assigned these tracts as base, in part, for its selection, numbered 3214, your office series, under the act of June 4, 1897 (30 Stat., 11, 36), made at Lewiston, Idaho, a State through which the line of its road passes, and June 12, 1903, its selection was approved and complete title vested in the United States.

The case was referred by your office to a special agent, who investigated it in the field, and reported that settlement was made and residence maintained by the applicant's son, as claimed; that he is deceased, and she is his heir at law; that the improvements consisted of two log houses, comprising four rooms, floored, and lighted by glass windows, a barn, and one acre of cultivated land—all reasonably worth \$600; that the applicant lived with her son, as stated, and he recommended that the application be allowed. Your office held that:

If a claim had been asserted to this land within a proper time before patent to the railway company by the applicant's son in his lifetime, the case would have come within the provisions of the act of July 1, 1898, and the company required to relinquish the land in his interest, but, as he did not do so, and the land was patented to the company, June 30, 1899, and has been exchanged by it for other land under the provisions of the act of June 4, 1897, his mother, the applicant in this case, and heir at law, can not now be heard to assert any claim, being precluded by laches.

It is immaterial also that settlement by the applicant's son was made in July, 1893, as she avers, long prior to the establishment of the Priest River forest reserve, that gave him no right to the land as against the railway company, whose right attached, as stated, on August 30, 1881, and precluded legal settlement.

This office fully realizes the equitable and meritorious claims shown in this case, and the hardship likely to ensue to the applicant in denying her application, but, under the law, there is no authority for any other action.

The claim of the railway company under its grant was fully satis-

fied by its selection of other lands in exchange. That being eliminated, the only parties concerned are the applicant and the United States. The situation is precisely what it would have been had proceedings been taken under the act of July 1, 1898 (30 Stat., 597, 620), and had the railroad company elected to select other lands in lieu of that so settled upon and claimed before survey. The United States has parted with only what it would in such case have parted with for the protection of such settler. What was done by the railway company and the United States under the act of June 4, 1897, *supra*, is in effect and substance what might properly have been done, and would have been done, under the act of July 1, 1898, for the settler's protection. In view of the Department it is entirely competent to regard it as having been so done, having regard to the clear intent of Congress by the act of July 1, 1898, to afford protection and relief to such settlers, rather than to the act of Congress actually assumed to be authority for the exchange made.

The substance of the transaction between the railway company and the United States was an exchange of lands. The intent of Congress by the act of July 1, 1898, was to authorize such exchange for protection of the rights of such settlers. Had all the facts been then known, an exchange under the act of July 1, 1898, must have been directed in due observance of that act and regard for its intent. It is in the power of the United States now to regard the exchange as having been made under the act of July 1, 1898, and for the settler's protection. To regard the exchange as having been made under authority of the act of July 1, 1898, is merely to regard that as done which Congress thereby directed should be done in such case, and which would have been done had Coolin or his mother after his death applied for such relief at any time between July 1, 1898, and June 30, 1899, when patent issued under the railway grant. Their failure to do so was evidently due to ignorance of the law, which is relieved by the act of April 15, 1902 (32 Stat., 106). The Department therefore can not concur in the view of your office that "under the law there is no authority for any other action" than rejection of her application. There is ample power in the land department to recognize and protect equitable rights in lands the legal title to which is held by the United States, and which are subject to its administrative jurisdiction. *Brown v. Hitchcock* (173 U. S., 473, 476, 478); *Williams v. United States* (138 U. S., 514, 524).

Your office decision is therefore reversed, and the application will be allowed to her on behalf of the heirs of the settler, her son, which will inure to her if she be, as claimed, his sole heir.

PUBLIC LAND—LIMITATION OF AREA—ACT OF FEBRUARY 30, 1890.

MATTHEW CROCKER.

In determining the quantity of land to which title may be acquired under the public land laws within the limitation contained in the act of August 30, 1890, as amended by the act of March 3, 1891, lands secured by the applicant under section 3, act of September 29, 1890, should be taken into consideration.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 13, 1905.* (F. W. C.)

The Department has considered the appeal by Matthew Crocker from your office decision of July 11, last, affirming the action of the local officers rejecting his homestead application for the NE. $\frac{1}{4}$ of Sec. 14, T. 6 N., R. 15 E., W. M., Vancouver land district, Washington, for the reason that the applicant is disqualified from making such entry, he having since March 3, 1891, entered under the act of September 29, 1890 (26 Stat., 496), a tract of land containing 319.57 acres.

By the act of August 30, 1890 (26 Stat., 391), it was provided:

No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry or settlement, is validated by this act.

Section 17 of the act of March 3, 1891 (26 Stat., 1095), provides:

That reservoir sites located or selected and to be located and selected under the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs; excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs and that the provision of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes," which reads as follows, viz: "No person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all said laws," shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands and not to include lands entered or sought to be entered under mineral land laws.

There can be no question but that the application under consideration was made with a view to occupation, entry and settlement under the land laws, and the sole question for consideration in this case is whether the land purchased by Crocker under the provisions of sec-

tion 3 of the act of September 29, 1890, *supra*, is to be reckoned as land to which title was acquired under the land laws after August 30, 1890, within the limitation contained in the act of that date as amended March 3, 1891.

The third section of the act of September 29, 1890, provides:

That in all cases where persons being citizens of the United States, or who have declared their intentions 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.

Acting under the provisions of this act, Crocker made purchase on December 22, 1892, of certain tracts aggregating 319.57 acres, upon which patent was issued April 29, 1893. He therefore "acquired title" to this land at that time. It is urged, however, that as it was shown in the proof submitted under said purchase that he settled upon the land purchased August 20, 1884, with a view to purchasing the same from the railroad company, the limitations of the acts of August 30, 1890, and March 3, 1891, do not include such purchase, because to hold otherwise would deprive him of that provision in the act of August 30, 1890, which provides that "this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands or whose occupation, entry or settlement is validated by this act." This contention is unsound for the following reasons: First, Crocker's settlement in 1884 was not on public lands nor with an intention of perfecting title thereto under the public land laws, but upon lands that had been granted in aid of the construction of the Northern Pacific railroad; and second, the limitation was designed solely for the protection of the settlements made prior to the passage of the acts which limited the amount of lands to which title might be acquired under the public land laws, and did not have the effect of excluding such lands afterwards entered from the computation.

By the act of September 29, 1890, the title to all unearned lands within the limits of the several land grants made in aid of the construction of railroads was forfeited and the lands thereby restored to the public domain. The act dealt with the several conditions pre-

sented, namely, of persons who had theretofore settled upon the lands forfeited with intention of entering the same under the general land laws, and those who had purchased, or contracted with the railroad grantee or settled the lands with the intention of buying of such grantee. The several provisions found in the act of 1890, for the disposal of lands thus forfeited, are clearly portions of the land laws, and any title acquired thereunder must be reckoned in determining the quantity of lands to which title may be acquired under the public land laws within the limitations provided by the acts of 1890 and 1891, above quoted. As Crocker had practically exhausted his rights to acquire agricultural public lands by the purchase made under the act of September 29, 1890, prior to the tender of his homestead application, your office and the local officers properly rejected that application, and the decision appealed from is therefore affirmed.

REPAYMENT—TIMBER-CULTURE ENTRY—FRACTIONAL SECTION.

WEBSTER C. BELKNAP.

A timber culture entry is limited in acreage to one fourth of the land embraced in any section, except where the entry is of a technical quarter-section; and an entry not of a technical quarter-section, but embracing all of a fractional section, is in violation of law and can not be confirmed, and repayment of the fee, commissions and excess purchase money paid thereon may be allowed.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 24, 1905.* (C. J. G.)

An appeal has been filed by Webster C. Belknap from the decisions of your office of January 30, 1902, and December 17, 1904, denying his application for repayment of the fee, commissions and excess purchase money paid by him on timber-culture entry No. 638 for lots 1, 2, 3 and 4, Sec. 18, T. 22 N., R. 46 E., Colfax, Washington.

It appears from said decisions that the entry was made February 5, 1880, and that contest was brought against the same on the ground, among other things, that it was illegal because covering all the land in the section. The contest was dismissed by your office November 3, 1881, for the reason:

It is true that Belknap's entry embraced all the land in section 18 shown to be in Washington Territory, but the section was made fractional by the boundary line between Washington and Idaho Territories, the residue of which is in Idaho, and no timber culture entry has been made therein as shown by our records, and I am therefore of the opinion that you erred when you decided that said entry was void *ab initio*. . . . Your decision is . . . modified as to that portion which required the applicant to relinquish a part of his entry.

and the same will be allowed to remain of record without relinquishing any part thereof.

An appeal was taken to the Department and while the same was pending here Belknap relinquished his entry. Thereupon the Department merely dismissed the appeal and directed the cancellation of the entry. Repayment is denied by your office for the reason that—

the entry was not in conflict. The question of its legality is a matter *res adjudicata*, in that the said decision of November 3, 1881, adjudging the entry valid still stands and has not been overruled.

It is provided in section 1 of the timber-culture act (20 Stat., 113):

That not more than one quarter of any section shall be thus granted, and that no person shall make more than one entry under the provisions of this act.

In the case of George M. Simpson (29 L. D., 407), which followed the cases of John W. Snode (13 L. D., 53), Weaver *v.* Price (16 L. D., 522), and Elbert S. Lamon (20 L. D., 337), it was held that 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. The entry in question is not for a "technical quarter-section" but embraces several lots. The plats of survey and field notes show that section 18, T. 32 N., R. 46 E., in Washington, is on the line between that State and Idaho, while the adjoining lands in Idaho are located in fractional Sec. 24, T. 57 N., R. 6 W. The theory of the decision of your office of November 3, 1881, that the land in question constitutes a portion of Sec. 18 in Idaho, appears therefore to be incorrect. The fact is that section 18 in Washington, the land in question, is itself a technical section, and the adjoining land in Idaho is in a different section. Section 24 in Idaho is also made up of different lots aggregating 149.76 acres, while the area of the lots in Sec. 18 in Washington is 178.82 acres, the total being 328.58 acres. So that, even if the theory of the decision of your office of November 3, 1881, were correct as to the location of these lands, still under the decisions above referred to Belknap should not have been allowed to enter all of lots 1, 2, 3 and 4, as they would cover more than half of the section, his entry not being for a "technical quarter section." One-quarter of the section under such circumstances would be about 82.14 acres. It appears that in the allowance of the entry herein there was a violation of the statutory prohibition, which precluded its confirmation.

The decision of your office is reversed, and repayment will be allowed.

REPAYMENT—STATE SELECTION—SECTION 4, ACT OF AUGUST 18, 1894.

STATE OF OREGON.

In making selections of desert lands under the provisions of section 4 of the act of August 18, 1894, the burden of proof is upon the State to show that the selected lands are of the character contemplated by the act; and where the lands selected are not of such character, but are expressly represented by the State to be of that character, and upon such representations the selections are accepted by the local officers, such selections are not "erroneously allowed" within the meaning of the repayment act, and the State is not entitled to repayment of the fees paid thereon.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 24, 1904.* (C. J. G.)

The State of Oregon, by its selecting agent, has appealed from the decision of your office of October 18, 1904, denying an application for repayment of a portion of the fees paid on selection list No. 11, being for lands within the districts of Lakeview and The Dalles, Oregon.

The selections were made under the "Carey Act" of August 18, 1894 (28 Stat., 372, 422)—amended by acts of June 11, 1896 (29 Stat., 434), and March 3, 1901 (31 Stat., 1133, 1188)—which provided in section 4 thereof:

That to aid the public land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior * * * is authorized and empowered, upon proper application of the State to contract and agree * * * with each of the States in which there may be situated desert lands * * * binding the United States to donate, grant and patent to the State free of cost for survey or price such desert lands, etc.

Under date of September 9, 1901, the State land agent of Oregon addressed a letter of inquiry to the Department in which he stated, among other things, referring to a large tract of land the State contemplated selecting under the above act:

It is entirely destitute of water and is strictly a desert, but on certain portions of it there is a scattering growth of Junipers. The Juniper, and especially the scrubby variety growing on this desert, is not suitable for lumber, can be used only for wood and fence posts, and there is no more of such wood on any quarter section than will be necessary for the use of the settler on that quarter section; it can not be made into lumber and shipped away, and can be used only in the immediate vicinity of its growth. The question now arises, does this scattering Juniper make these lands not subject to selection by the State. In every respect they are strictly desert.

After receiving a report on said letter from your office, the Department on December 5, 1901 (31 L. D., 149), instructed your office, among other things, as follows:

A growth of ordinary forest trees on land in the arid region may, as a general rule, be accepted as evidence of the non-desert character of the land. It is,

however, a mere presumption that lands containing sufficient moisture to produce trees will produce agricultural crops, but, like all presumptions of fact, it may be rebutted by proof showing that the land is actually desert in character and will not produce agricultural crops without irrigation.

* * * * *

A sparse and stunted growth of trees which may exist with little moisture and is frequently found upon arid lands actually unfit without irrigation for ordinary agricultural purposes, is not within the spirit and intent of the rule.

There being no application before the Department for its approval as to any particular tract or tracts, no decision is hereby made with reference to the tracts referred to by the State agent.

It appears that on January 9, 1902, your office communicated the substance of the above instructions to the State land agent, it being concluded as follows:

In the selections which may be made on behalf of the State where such timber may be found, the proper affidavits and showings should be made in order to advise this office of the true character of the land, and upon consideration of the selections, these facts will be duly taken into consideration.

The list of selections was filed by the selecting agent February 13, 1902, accompanied by his affidavit to the effect:

That the lands are vacant, unappropriated, are not interdicted timber nor mineral lands, and are desert lands as contemplated by the said act of Congress.

Subsequently, upon the report of an inspector of the Department as to the character of the lands selected, who found that said lands should properly be classed as forest lands, the State was called upon to show cause why its list should not be rejected. Thereupon the State filed relinquishments of a portion of the land selected, which were accepted October 3, 1904.

In the application for repayment it is recited:

That after said lands had been so selected and the selection fees paid and after said list had been forwarded to the General Land Office, Colonel A. R. Greene, as agent of the United States, inspected said lands and reported that they were not eligible to selection under the provisions of the said act of Congress hereinbefore recited and the acts amendatory thereto, as certain areas of said land contained merchantable timber, contrary to the intent of said act and regulations thereunder.

The application was denied by your office for the reason that no error was committed by the local officers in accepting the list of selections in face of the sworn statement of the selecting agent that the lands were desert in character. The appeal here contains the following specifications of error:

First: That the decision of the Honorable Commissioner of the General Land Office refusing the repayment of the money claimed by the State of Oregon was erroneous in that said decision amounts to an act of forfeiture by the United States of the property of the State of Oregon.

Second: That the said decision is erroneous for the reason that the fees which

the State of Oregon is now seeking to have repaid to it were demanded and received by the register and receiver in violation of law.

Third: That the said decision is erroneous for the reason that under the circumstances of this case the obligation to repay the money in question was tantamount to a contract which the United States is estopped from repudiating.

Fourth: That the said decision is erroneous because the facts here bring the matter clearly within the letter as well as the spirit of the statute of June 16, 1880 (21 Stat., 287), as to "erroneously allowed."

It is not necessary to discuss all of these specifications. So far as the terms of the repayment statute are concerned, the State does not occupy a different position from any other claimant thereunder. In the case of *T. J. Foster et al.* (24 L. D., 66), it is held that on the location of desert lands by a State under section 4 of the act of August 18, 1894, the register and receiver are each entitled to the fees provided for in section 2238 of the Revised Statutes. It was said in said case:

There is nothing in this act tending to repeal, modify or in any way affect the law contained in section 2238 aforesaid. The express limitations—*free of cost for survey*, and *free of price*—by necessary implication exclude any other exemption from the usual costs, fees, charges and expenses attending the administration of the land department in such matters.

In the absence of express statutory authority money once covered into the United States Treasury can not be repaid. It will not do to say that the Department may refund simply because it is just that the money should be repaid, or that it is in the hands of the Government by mistake or without consideration (4 Op. Atty. Genl., 233). There was nothing in the instructions of the Department nor in the communication from your office that could possibly mislead the State agent into selecting lands containing merchantable timber. In the case of *George A. Stone* (25 L. D., 110), it is said:

Stone's desert land entry was not "erroneously allowed." The "allowance" is the act of the local officers, and not the act of the entryman. Upon the showing made by Stone and his two witnesses, the land appeared to be desert in character and it became the duty of the local officers to allow his application to enter. Had the entryman sustained the allegations made in his application, the entry would not have been canceled. Unfortunately for him these allegations were not sustained, and the entry was canceled because the land was not desert in character. Upon the proofs presented the allowance of the entry was correct. The error was not in the "allowance," but in the proofs presented by the entryman. This, then, is not a case where the entry was "erroneously allowed," and it is not one in which the law authorizes me to cause repayment to be made. The application is, therefore, denied.

And in the same case on review (25 L. D., 111), is:

Where the land entered is not of the character contemplated by the law under which the entry is made, but is expressly represented by the entryman to be of that character, and the allowance of the entry is procured by such representations, the entry is wrongfully procured and is not "erroneously allowed" within the meaning of the repayment law.

This does not necessarily mean that the misrepresentation must be wilful or fraudulent. The desert land act places the burden of proof as to the character of the land taken thereunder upon the applicant therefor. It was said in the case of *Kern Oil Company et al. v. Clarke* (on review, 31 L. D., 288, 300) :

Wherever, by act of Congress, provision is made for the disposal by selection, entry, and patent, of portions of the public lands of a designated class and character * * * it is the duty of the land department to ascertain and determine whether lands sought to be acquired under the act are of the class and character thereby made subject to disposal. Until such determination has been made and the lands found to be such as the act describes, entry thereof can not be lawfully allowed. The evidence to enable this to be done, when such evidence does not, and could not from the conditions to be inquired into, appear from the land office records, must of necessity be furnished by those who seek title under the act. The land officers are not required, and from the nature of things could not be required, to take judicial cognizance of the physical condition of lands with respect to which, in the discharge of their duties, they are called upon to act.

* * * * *

For the purpose of such determination resort must generally be had to outside evidence. This evidence must be furnished by the selector. It is his duty to show, in so far as physical conditions are concerned, that the land to which he seeks title is of the class and character subject to selection.

The same rule, above indicated, controls in the matter of State selections under the act of August 18, 1894. There is no question of forfeiture in this case but it merely involves the extent of the power of the Secretary of the Interior to repay money that has been covered into the Treasury, which power is defined and limited by law. The claim for repayment herein is not one coming within the purview of the repayment statute. The decision of your office is therefore affirmed.

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OCCUPATION AND USE OF PUBLIC LANDS—EQUITABLE RIGHTS—HOMESTEAD ENTRY.

FRITCHMAN v. ZIMMERMAN.

The long-continued occupation and use of public lands, under color of title and claim of right, and the expenditure of large sums of money in the construction and maintenance of reservoirs thereon for the purpose of furnishing a water supply to a nearby city, constitute equitable considerations which should be recognized by the land department; and the rights acquired by such occupation, improvement and use will be protected as against one who, with full knowledge thereof, seeks to acquire title to the lands under the homestead laws.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *January 30, 1905.* (E. J. H.)

August 26, 1903, John L. Zimmerman made homestead entry covering lots 1 and 2 of Sec. 20, and lots 1 and 2 and the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 21, T. 17 N., R. 10 E., Santa Fe, New Mexico, land district.

September 23, 1903, William H. Fritchman filed affidavit of contest against Zimmerman's entry, alleging, in substance, that said entry was illegal and fraudulent; that the land was unfit for homestead purposes and the entry thereof was not made with the *bona fide* intention of making a home thereon but for purposes of speculation; that lots 1 and 2 of said Sec. 20 and part of lot 1 and the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of said Sec. 21, are not public domain but private property and within the limits of the grant to the city of Santa Fe, under the act of Congress of April 9, 1900; that lots 1 and 2 of said Sec. 21 and lot 2 of said Sec. 20, are and for many years have been used and occupied as a public reservoir and for reservoir purposes, from which the city of Santa Fe and the inhabitants thereof, in which city are several public buildings belonging to the United States, are supplied with water for domestic and irrigation purposes and the extinguishment of fires; that said reservoir is partly located upon said grant to the city of Santa Fe, partly upon the Talaya Hill grant and partly upon said lots 1 and 2 of said section 21, and was until recently believed to be entirely upon said grants; that the said Zimmerman is the county surveyor and has acted in the capacity of city engineer of the city of Santa Fe; that the owners of said reservoir and the pipe lines and ditches connected therewith employed Zimmerman to make a survey of the land covered by said improvements in order to ascertain what portion thereof, if any, was located upon the public domain, with a view to taking the necessary steps to protect their rights therein; that Zimmerman made a survey of said lands and a plat thereof from which it appeared that a portion of the reservoir was located upon said lots 1 and 2 of Sec. 21; that subsequently Zimmerman made the entry in question, basing his knowledge of the description and status of said land upon the information thus obtained under the employment of the owners of said reservoir, and with the view of interfering with their rights and ultimately selling said lands to them, and it was asked that said entry be canceled and that the portion of said land found to be public domain be declared subject to the rights of the owners of said reservoir.

A hearing was ordered to be held November 3, 1903, and notices thereof served, and on that day the parties appeared and by agreement the case was continued to November 24, 1903, when said hearing was begun and with various continuances lasted until February 4, 1904.

March 12, 1904, the local officers rendered decision recommending the cancellation of the entry, and that the Santa Fe Water and Light Company, of which the contestant, Fritchman, was the general manager, be allowed a reasonable time within which to acquire title to the land covered by their improvements. From this decision Zimmerman appealed.

In the meantime, however, under date of August 28, 1903, the surveyor-general advised the local officers by letter, that it had just been discovered that on October 25, 1899, Candelario Martinez had filed small holding claim for several tracts, including lot 2 of Sec. 21, covered by the entry of Zimmerman, notification of which should have been furnished the local office, but had been overlooked. The local officers on September 1, 1903, rejected said claim and Martinez appealed.

It appears that on October 1, 1903, Martinez also filed an affidavit of contest against Zimmerman's entry, claiming that he had been in possession of the land covered by his small holding claim for more than thirty-seven years, and that Zimmerman's homestead entry should be canceled as to the land in conflict therewith. This affidavit of contest was suspended by the local officers because the contest of Fritchman was pending against the same entry.

July 18, 1904, your office decision found that of the lands embraced in Zimmerman's entry, lots 1 and 2 of Sec. 21 and lot 2 of Sec. 20, had for many years been used by the Santa Fe Water and Light Company and its grantor, the Santa Fe Water and Improvement Company, which corporations have furnished the city of Santa Fe with its water supply and electric lights; that Fritchman, the contestant, is the general manager of said Water and Light Company, and in that capacity brought this contest for the purpose of securing title to the land for the benefit of said company; that the land upon which the old reservoir is located has been so used for over twenty years, and that upon which the new reservoir is located for over thirteen years; that said corporation and its assignors have expended large sums of money, approximately \$300,000, in building dams, reservoirs, and other works necessarily incident to the establishment and maintenance of a large water plant, of all of which Zimmerman was fully advised; that as city and county surveyor he had surveyed the lands and first advised the officers of the company that a portion of their improvements were located upon the public domain; that he obtained this information while acting as the company's agent, or as the city surveyor whose duty it was to survey individual holdings within the limits of the Santa Fe grant.

It was further found from the testimony that the land in conflict is practically worthless for agricultural purposes, the only piece susceptible of cultivation being a part of lot 2 of section 21, which is included in the small holding claim of Candelario Martinez, hereinbefore mentioned; that Zimmerman admitted to Martinez that he built his house on said lot for the reason that he did not have any other place to build it; that the only improvement made by Zimmerman is a pole shanty worth about twenty-five dollars, erected on said lot; that the land was not only improved by the Water and Light

Company at the date of Zimmerman's entry, but had long been so held by said company and its predecessor, and said company was exercising ownership thereto under deeds which constituted at least color of title and claim of right.

It was held that while the legal title to said lands is still in the United States, the large expenditures of money and labor thereon, and the long continued occupation and use thereof, under color of title, constitute equitable considerations which should be recognized; that such considerations have repeatedly been recognized by the Department and the courts. The action of the local officers recommending the cancellation of Zimmerman's entry was affirmed, from which he has appealed to the Department.

The action of the local officers in taxing the costs in the case against the contestant, Fritchman, under rule 54, was likewise affirmed; from which appeal has been taken to the Department.

The record in this case is voluminous. A large number of witnesses testified at the hearing on behalf of the contestant, and on behalf of the entryman, two besides himself. The testimony adduced relates chiefly to the character of the land, the improvements placed thereon by the Water and Light Company, and the good faith of the entryman in making the entry. By a strong preponderance thereof it was shown that the land was generally rough and hilly, and that not to exceed three or four acres thereof were susceptible of cultivation, nearly all of that which could be cultivated being situated on the small holding claim of Martinez (lot 2 of section 21). It is evident from the character of the land and the action of Zimmerman, as set forth quite fully in your office decision and in that of the local officers, that he did not make the entry in question for the purpose of cultivating the land and making his home thereon. He was well aware that a portion of the land had for many years been held by the Water and Light Company and its predecessors, under deeds which at least constituted color of title and claim of right, and that large sums of money had been expended thereon.

The departments and the courts have repeatedly held that lands thus occupied and improved are not subject to entry, but that the government will retain the title thereto until a party who has placed extensive improvements thereon, under claim of right, shall be enabled to obtain the title from the government. *Williams v. United States* (138 U. S., 514).

In the case of *J. M. Longnecker*, on review (30 L. D., 611), the Department held that "in the administration of the public land laws the Department may, and in a proper case should, recognize and protect equitable rights acquired through a long continued occupancy of public land with the knowledge and consent of the government."

It appears from your office decision that at one time the land occupied by the Water and Light Company which is outside of the limits of the Santa Fe grant, was included within the limits of the Gonzales grant, as shown by the preliminary survey thereof on file in your office. This fact tends to show the good faith of said Water and Light Company and its grantors in purchasing the land as a reservoir site.

Your office decision holding Zimmerman's entry for cancellation is affirmed.

With reference to the taxation of the entire costs in the case to the contestant, Fritchman, under rule 54 of the Rules of Practice, the Department does not concur therein. It does not appear that Fritchman claimed the preference right of entry under the second section of the act of May 14, 1880 (21 Stat., 140). In his affidavit of contest he asked the cancellation of Zimmerman's entry and that the "portion of the land which is found to be public domain be declared subject to the rights of such water company," etc. Fritchman was shown to be a stockholder and the general manager of the company and testified that he brought the contest solely on behalf of the company and that he had no interest in the result thereof; except as a member of said company.

It is evident, under this situation, that the costs should have been taxed under rule 55. Your office decision upon that point is accordingly modified, and it is held that each party pay the costs of taking testimony upon his own direct and cross-examination.

GREAT SIOUX INDIAN RESERVATION—DISPOSAL OF CERTAIN LANDS THEREIN.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January 31, 1905.*

*Register and Receiver,
Pierre, South Dakota.*

GENTLEMEN: In the President's proclamation of February 10, 1890 [26 Stat., 1554], providing for the disposal of the land in the ceded portion of the Great Sioux Indian reservation under the provisions of the act of March 2, 1889 (25 Stat., 888), there was reserved from disposal the following described tract, within which the Cheyenne River Agency, school and certain other buildings are located, to wit:

Commencing at a point in the center of the main channel of the Missouri River opposite Deep Creek, about three miles south of Cheyenne River; thence due west five and one-half miles; thence due north to the Cheyenne River;

thence down said river to the center of the main channel thereof to a point in the center of the Missouri River due east or opposite the mouth of the said Cheyenne River; thence down the center of the main channel of the Missouri River to the place of beginning.

Said lands are more particularly described as follows:

The unsurveyed portions of T. 8 N., R. 28 E.; Lot 1, Sec. 3; Lots 1, 2, 3 and 4, and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 4; Lots 1, 2, 3, 4 and 5 and the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 5; Lots 1, 2 and 3, Sec. 6; Lots 1, 2, 3 and 4 of Sec. 7; Secs. 8, 9, 10, 11, 13, 14, 15, 16 and 17; Lots 1, 2, 3 and 4, Sec. 18; Lots 1, 2, 3 and 4, Sec. 19; Secs. 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29; and Lots 1, 2, 3 and 4, Sec. 30; Lots 1, 2, 3 and 4, Sec. 31; and Secs. 32, 33, 34, 35, 36, T. 9 N., R. 28 E., and the unsurveyed portions of Ts. 8 and 9 N., R. 29 E.

By the President's proclamations of February 7, 1903 [32 Stat., 2035], and March 30, 1904 [33 Stat., —], all of the reserved lands above described have been released from reservation and declared subject to disposal under the provisions of the act of March 2, 1889, *supra*. Under section 21 of said act of March 2, 1889, each settler upon the ceded portion of the Great Sioux reservation under the provisions of the homestead laws was required to pay for the land so taken by him, in addition to the fees provided by law, the sum of \$1.25 per acre for all lands disposed of within the first three years after the taking effect of said act; the sum of seventy-five cents per acre for all lands disposed of within the next two years following thereafter; and fifty cents per acre for the residue of the lands then undisposed of. The act was declared to be in full force and effect by the President's proclamation of February 10, 1890, but the lands now under consideration having been reserved under said proclamation, said act as to these lands did not go into effect until the date of the President's proclamations of February 7, 1903, and March 30, 1904, respectively, and the periods fixing the price of said lands would begin to run as to the lands affected by said proclamations from the respective dates thereof.

Under the free homestead act of May 17, 1900 (31 Stat., 179), settlers on the ceded portion of the Great Sioux reservation were relieved from the payment of the Indian price per acre required under section 21 of said act of March 2, 1889, upon all lands opened to settlement prior to the date of said act of May 17, 1900. As the lands reserved, above described, were not opened to settlement prior to the date of the free homestead act, settlers thereon would be required to pay for the land under the provisions of section 21 of the act of March 2, 1889, at the rate of \$1.25, seventy-five cents or fifty cents per acre, according to the date of entry with reference to the date when the lands entered became subject to the operation of the act of March 2, 1889, were it not for the provisions of section 2 of the act of March 30, 1904 (33

Stat., 154), entitled "An act to authorize the State of South Dakota to select school indemnity lands in the ceded portion of the Great Sioux reservation, and for other purposes," which read as follows:

Sec. 2. The general laws for the disposal of the public lands of the United States are hereby extended and made applicable to the said ceded portion of the Great Sioux reservation in said state.

In my opinion said act relieves the settlers on said lands from the special payment required under section 21 of said act of March 2, 1889, on all homestead entries perfected subsequent to the date of said act of March 30, 1904.

You will not, therefore, require them to make such payment for their lands upon making final proof.

Very respectfully,

W. A. RICHARDS, *Commissioner*.

Approved:

E. A. HITCHCOCK, *Secretary*.

DESERT LAND ENTRY—ASSIGNMENT—CORPORATION.

JACOB SWITZER COMPANY.

A corporation seeking to hold lands under an assignment of a desert land entry, must show that the members composing the corporation do not hold, in the aggregate, by assignment or otherwise, more than three hundred and twenty acres of land under the desert land law.

Secretary Hitchcock to the Commissioner of the General Land Office.

(F. L. C.)

January 31, 1905.

(J. L. McC.)

Horace C. Willitts, on February 10, 1902, made desert-land entry for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of Sec. 12, and the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 11, T. 31 N., R. 32 E., Great Falls land district, Montana.

On February 11, 1904, said Willitts executed an assignment of said land to "Jacob Switzer, President of the Jacob Switzer Company, a corporation organized under the laws of Montana." Said corporation, by its president, executed, on April 20, 1904, an affidavit stating:

That since August 30, 1890, it has not entered under the land laws of the United States, nor filed upon, nor has there been assigned to it, a quantity of land, agricultural in character, and not mineral, which, with the tract now assigned, would make more than three hundred and twenty acres.

The record in the case was transmitted by the local officers to your office, which, on August 4, 1904, directed attention to the language of Sec. 2 of the statute approved March 3, 1891 (26 Stat., 1095), which provides:

No person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands.

And in view of said provision of this act, your office held and decided (citing as precedent its prior action in the case of the Hillside Land Company, of Great Falls, Montana) :

A corporation, to be qualified to make such entry, must show the qualification of each member of such corporation; and if one member is disqualified to make such entry, then such corporation is not qualified to make entry. If a corporation may not make an entry by reason of the limitation as to the area of desert-land that may be entered, without showing that each member is qualified to make entry, neither may such corporation take desert-land except under the same conditions. You will, therefore, notify the J. Switzer Company that it should file with you affidavits . . . showing the extent to which each individual member of said corporation has exhausted his right to desert-land entry, and that the members of said corporation, in the aggregate, do not hold, by assignment or otherwise, more than three hundred and twenty acres of land under the desert land act.

From the above action by your office the Jacob Switzer Company has filed an appeal, alleging:

That the same is in conflict with a large number of similar cases that have been passed upon by the Department of the Interior, and allowed to go to patent;

That said decision overturns long established precedent permitting such entries to be made without any restrictions as to the assignee;

That said transfer to the Jacob Switzer Company was made long prior to June 29, 1904, when the case of the Hillside Company was passed upon;

Because the decision even in the Hillside Company case does not go so far, nor does it justify the conclusions reached by the Acting Commissioner in this case;

Because the appellant has paid a considerable sum of money in the purchase of improvements, water-rights, etc., appertaining to this land, and said expenditures were so made at a time when the law as construed by the Department of the Interior permitted the same to be made in said manner, and should this decision be upheld the appellant will suffer great and irreparable losses, because in the transfer to it of said lands the conveyance contains no warranty clause;

Because said interpretation of the law of the United States permitting an assignment of a desert-land claim before proof is not reasonable, justifiable, nor proper;

Because the Department of the Interior, in holding that a corporation is a "person" within the meaning of the law . . . is estopped from adding any further qualifications than the law interposes in restriction upon the corporation or person so designated, to prevent it from taking such assignment and holding the same.

The articles of incorporation of the Jacob Switzer Company (a copy of which is made a part of the record) show that the capital stock of said company consists of fifty thousand dollars, divided into five hundred shares of one hundred dollars each, of which Jacob Switzer has 498 shares, H. N. Lombard one share, and H. D. Shaffer one share. The directors are Jacob Switzer, H. N. Lombard, and H. D. Shaffer.

The Department has repeatedly held, as set forth in the case of the Nevada Southern Railway Company, assignee (22 L. D., 1, syllabus) :

A corporation organized under the laws of a State is, in contemplation of the law, a citizen of the United States, and as such can take and hold by assignment a desert entry.

Said decision does not, however, discuss the terms and limitations upon which a corporation may take and hold by assignment a desert-land entry.

Whilst a corporation is described as an artificial person, or entity, apart from its members, when spoken of as a collective body, yet it is in fact an association of persons; and courts of equity will, under proper circumstances, look beyond this technical rule in order to do justice in matters of contractual obligations or liabilities. (See Morawetz on Corporations, Sec. 227-229.)

It is to be regretted that the appellant has failed to specify, by reference to the printed decisions of the land department, some at least among the "large number of similar cases that have been passed upon by the Department of the Interior, and allowed to go to patent."

The Department has repeatedly held, as in the case of William J. Sparks (7 L. D., 337, syllabus) :

A person is permitted to make but one entry under the desert land act; and it is clearly in violation of law for an individual or corporation to secure *by indirection* more than one entry.

The demand of your office in the case here under consideration appears to be simply the enforcement of a measure to prevent the appellant company and those composing it, and for whose benefit it was created through its act of incorporation, from securing by indirection more than one entry. That it—or some person connected with it—would, but for the restriction imposed by your office decision, secure by indirection more than one entry, is apparent from the allegation of the appeal, that if the said restriction is insisted upon, "the appellant will suffer great and irreparable losses."

The Department is advised that instances have occurred where a number of individuals, each of whom had obtained three hundred and twenty acres of land under the desert land law, have thereafter formed themselves into a corporation, which thereupon obtained by assignments as much more desert-land; then the several individuals became members of other several corporations, each of which obtained by assignments still additional desert land; but such facts became known to the Department too late for it to interfere and prevent the consummation of the fraud. The action of your office appears to have been in accordance with the decisions of the Department, and the purpose of Congress, in that it tends to prevent parties from obtaining by such indirect methods land that could not under the law be obtained directly. It is therefore hereby affirmed.

CERTAIN LANDS IN NEBRASKA WITHDRAWN UNDER SECTION 1, ACT OF APRIL 28, 1904, RESTORED TO ENTRY.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 1, 1905.

*Register and Receiver,
Sidney, North Platte, and Alliance, Nebraska.*

GENTLEMEN: With reference to the lands within your district which were withdrawn under the provisions of section 1 of the act of April 28, 1904 (33 Stat., 547), for consideration as to their adaptability for irrigation, and which were subsequently released from such withdrawal, and are by the order of the Secretary of the Interior to become subject to entry under the provisions of said act on February 5, 1905,^a you are directed to allow parties who are entitled under the provisions of section 2 of the act of April 28, 1904, to make additional entry of a quantity of land contiguous to their original entries, which added to the area of the same, shall make an aggregate area of not to exceed 640 acres, the preferential right for thirty days from the 5th day of February, 1905,^a within which to make such entries, and will require from all parties applying to make entries of the lands so restored until said period of thirty days from the 5th of February, 1905, shall have elapsed, a special affidavit to the effect that the lands applied for are not adjoining the lands of any entryman other than himself or herself who is entitled to such preferential right, and with such modification you will strictly observe the requirements of the circular of May 31, 1904, in connection with the entries of said lands.

Very respectfully,

W. A. RICHARDS, *Commissioner.*

Approved:

E. A. HITCHCOCK, *Secretary.*

RESIDENCE—LEAVE OF ABSENCE—SECTION 3, ACT OF MAY 14, 1880.

JAMES McCOURT.

Under section 3 of the act of May 14, 1880, the rights of a homesteader who settles upon land prior to making entry thereof relate back to the date of settlement.

A second and third year's leave of absence may be granted a homestead entryman, upon proper showing therefor, without requiring an intervening period of residence on the land, provided sufficient time remains within which to comply with the law.

^aThe lands in the Sidney land district become subject to entry February 5, 1905, those in the North Platte district, February 14, 1905, and those in the Alliance district, May 18, 1905, and the preferential right of entry for thirty days begins to run from those dates, respectively: otherwise the instructions to the register and receiver of the several districts are precisely the same.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 2, 1905.* (C. J. G.)

An appeal has been filed by James McCourt from the decision of your office of September 20, 1904, reversing the action of the local officers in granting him leave of absence for one year—July 3, 1904, to July 3, 1905—from his homestead entry on the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and lot 3, Sec. 27, T. 13 S., R. 10 W., Oregon City, Oregon.

McCourt's homestead entry was made June 28, 1902, and your office denied the present application for the reason that as he has already been granted continuous leave of absence from December 8, 1902, to June 15, 1904, the additional leave if granted would render it impossible for him to make final proof of five years' residence within the statutory period.

It appears from fully corroborated affidavits filed with his various applications for leave of absence that McCourt settled on his homestead claim August 20, 1900, and continuously resided thereon with his family until July, 1902. During that period he placed valuable improvements on the land, consisting of a dwelling house, barn, milk-house, and other outbuildings, clearing and fencing. Also since that time he has had some cultivation done and further improvements made. In July, 1902, he was afflicted with failing eyesight, so much so that he was threatened with total blindness, which rendered him unfit for farm work. At that time his family consisted of his wife, who was not strong, and four children, the oldest being a girl fourteen years of age. He was a poor man, his only income being from manual labor, and he was therefore compelled to leave his homestead and remove to Albany, Oregon, where he could obtain medical treatment and his family could earn support for themselves and him. His wife, by running a little fish market, has been able to make a living for the family. McCourt's eyesight has apparently not improved during his absence from the land, but under the advice of his physician he wishes to remain away a while longer awaiting the proper time for an operation on his eyes, after which he hopes they will be sufficiently improved to enable him to move back to and look after the farm himself.

The good faith of this applicant is not questioned by your office, but his application is denied solely on the ground that if granted there would not remain enough of the statutory period of the entry within which to comply with the homestead law, as incorporated in section 2291 of the Revised Statutes, which requires five years' residence from date of entry. It allows two years additional in which to submit proof of the fact of such residence. Seven years from the date of McCourt's entry will expire June 28, 1909. According to the computation of your office, if the present application be granted he

will then have had leave of absence for two years, six months and seven days. This period deducted from the seven years from date of entry within which McCourt has to submit proof would, it is true, leave less than five years. But in this computation your office fails to give McCourt credit for the nearly two years he had resided on the land prior to making entry, as set forth in the corroborated affidavits filed with his applications for leave of absence, and also in construing said section 2291 apparently overlooks 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 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).

Then, too, there is no question that after the expiration of the time now applied for by McCourt sufficient time would remain in which to comply with the law so that he could commute his entry in the event of his desiring to do so. In view of the fact that it has already been held that upon a proper showing a second year's leave of absence may be granted without requiring an intervening period of residence on the land, there would seem to be no good reason why upon such showing a third year's leave of absence may not be granted, provided a sufficient period remains in which to comply with the law. *May Lockhart* (22 L. D., 706); *Esther L. Wilson* (23 L. D., 200).

The decision of your office is hereby reversed, and the action of the local officers upon McCourt's application for leave of absence herein is approved. He will be protected as to his absence during the period covered by said application. *Esther L. Wilson, supra.*

FOREST RESERVE—RIGHT OF WAY—ACTS OF FEBRUARY 15, 1901, AND
JUNE 17, 1902.

OPINION.

Under the act of February 15, 1901, lands in forest reserves created under authority of the act of March 3, 1891, may be appropriated and used for irrigation works constructed by the United States under authority of the act of June 17, 1902, as well as for works constructed by individuals.

The Secretary of the Interior has the same right to withdraw lands within the Yosemite National Park, created by the act of October 1, 1890, for the uses and purposes contemplated by the act of June 17, 1902, that he has to withdraw lands for such purposes within forest reservations created under authority of the act of March 3, 1891.

The use of rights of way over public lands within reservations of the United States for the purposes contemplated by either the act of February 15, 1901, or the act of June 17, 1902, will not be permitted if such use is incompatible with the public interest; and if at any time the public interest is jeopardized by the use of such rights of way after they have been granted, they may be revoked by the Secretary of the Interior.

*Assistant Attorney-General Campbell to the Secretary of the Interior,
December 30, 1904. (E. F. B.)*

A letter from the Director of the Geological Survey of October 18, 1904, recommending that certain lands within the Yosemite National Park be reserved from private appropriation and set aside as public reservoir sites, has been referred to me "for an opinion whether or not public lands in the National Parks in California can be legally withdrawn for reservoir sites or irrigation works under the act of June 17, 1902 (32 Stat., 388)."

Under date of November 12, 1904, I submitted an opinion as to the right of the Secretary of the Interior to make a similar withdrawal of lands situated in the Sierra Forest Reserve in California, advising that under the act of February 15, 1901 (31 Stat., 790), which authorizes the Secretary of the Interior to permit under certain conditions and restrictions the use of rights of way for canals and ditches through reservations of the United States for irrigation and other beneficial uses, lands in forest reserves created under authority of the act of March 3, 1891 (26 Stat., 1095), may be appropriated and used for irrigation works constructed by the United States under authority of the act of June 17, 1902, as well as for works constructed by individuals.

The lands in question are within the Yosemite National Park, created by the act of October 1, 1890 (26 Stat., 650), but the authority to permit the use of rights of way over public lands within this reservation is not controlled by the organic act but by the act of February 15, 1901, which specifically designates the Yosemite National Park as

one of the reservations subject to the operations of that act in common with other reservations of the United States. So that, the Secretary of the Interior has the same right to withdraw lands within this reservation for the uses and purposes contemplated by the act of June 17, 1902, that he has to withdraw lands within forest reservations created under authority of the act of March 3, 1891. In either case the use of rights of way over public lands within reservations of the United States for the purposes contemplated by the act of February 15, 1901, will not be permitted if such use is incompatible with the public interest, and that question must in every instance be determined by the Secretary of the Interior with due regard to the purpose and use for which the reservation was created, who will grant or withhold his approval accordingly and will revoke the permit whenever the public interest is jeopardized by the use of such rights of way, under the proviso—

That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

Lands in such reservations are withheld from the operation of the land laws generally but are subject to appropriation for specific purposes. The power to withhold such lands from such appropriation that they may be subjected to use under the act of June 17, 1902, *supra*, can not be successfully questioned.

It may be well to add further that while a withdrawal or reservation of lands for irrigation purposes can only be made by the Secretary of the Interior by virtue of the authority conferred by the act of June 17, 1902, and for the purposes and in the manner contemplated by that act, the act of February 15, 1901, confers no absolute right to the use of a right of way over public lands within reservations of the United States, but the granting of such permit rests in the sound discretion of the Secretary of the Interior, who may withhold generally from such privilege the lands in any particular reservation, if in his judgment the granting of a permit for use of a right of way for certain purposes would be "incompatible with the public interest," and accomplish by this means all that would be accomplished by a formal withdrawal or reservation.

Approved:

E. A. HITCHCOCK, *Secretary*.

IRRIGATION PROJECT—PURCHASE FROM RECLAMATION FUND—ACT OF
JUNE 17, 1902.

CALIFORNIA DEVELOPMENT COMPANY.

- The authority of the Secretary of the Interior respecting the use of the reclamation fund, as defined and limited by the act of June 17, 1902, is to make preliminary investigations to determine the feasibility of any contemplated irrigation project, to construct reservoirs and irrigation works and operate and maintain those thus constructed, and to acquire "for the United States by purchase or condemnation under judicial process" rights or property necessary for these purposes.
- Where an irrigation system already constructed and in operation may be utilized in connection with a greater system to be constructed under the provisions of the act of June 17, 1902, its purchase for such purpose comes within the purview of the act.
- Congress has control over navigable streams and the waters thereof, and no claim based upon appropriation of such waters for irrigation purposes, made without the sanction of Congress, should be recognized by the Secretary of the Interior as valid.
- The Secretary of the Interior has no authority under the provisions of the act of June 17, 1902, to embark upon or commit the Government to any irrigation enterprise that does not contemplate the absolute transfer of the property involved to the United States.
- The act of June 17, 1902, does not authorize the use of the reclamation fund for the purchase of any land except such as may be necessary in the construction and operation of irrigation works.
- There is no authority for the use of the reclamation fund, either directly by the Secretary of the Interior or indirectly by advancement to others, for the purchase of lands or other property outside of the territorial limits of the United States.
- A promise, expressed or implied, by an officer or employee of the Interior Department, that certain results shall follow a certain line of action, can not bind the head of the Department or control him in determining the scope of his jurisdiction or the extent of his power.

*Assistant Attorney-General Campbell to the Secretary of the Interior,
February 6, 1905. (W. C. P.)*

I have considered the matter of a proposed transaction by which certain property and rights held by the California Development Company are to be transferred, part to the United States and part to the Imperial Valley Water Users' Association, the money consideration for the whole to be advanced from the reclamation fund accumulated and to be expended under the act of June 17, 1902 (32 Stat., 388).

The California Development Company claims to have appropriated from the Colorado river, under the laws of California, 10,000 cubic feet of water. Water has been diverted from the river under this claimed appropriation at a point in California about three hundred feet above the boundary line between the United States and Mexico. The canal constructed to convey this water passes imme-

diately into Mexican territory, through which it runs for a distance of about fifty miles, when it reenters the State of California. That portion of the canal within Mexico is owned and held by the Sociedad de Riego y Terrenos de la Baja California, S. A., a corporation formed and existing under the laws of Mexico, which corporation, it is stated, also holds and owns a tract of land in Lower California, containing 100,000 acres, through which said canal runs in Mexican territory. It is alleged that all the stock of the Mexican corporation is owned by the California Development Company. The main canal extends some distance into the United States and an extensive system of lateral canals has been constructed for irrigating lands in the Imperial Valley in southern California. It is stated that this system is irrigating about 100,000 acres of land and that it has capacity for irrigating a very much larger area.

Under the plan adopted the territory to be irrigated is divided into districts and the water users in each district form a mutual water company. To acquire a right to receive water from the system, and thus to become a water user, the individual is required to make a payment, at this time \$20.00, for each acre of land to be irrigated. Each district or mutual company makes a contract with the California Development Company and the Mexican corporation, by which those corporations or carrying companies agree to deliver a supply of water to the district company at a fixed price of fifty cents per acre foot. The district company owns the distributing canals and delivers the water to its members at the cost price of fifty cents per acre foot plus the cost of distribution, maintenance of the distributing system and administration of its affairs. The district company is required to pay for one acre foot of water each year for each acre represented by its stock and is entitled to receive four acre feet for each acre. The foregoing statement, though sketchy, will serve to indicate the diversity of interests in the subject-matter under consideration and the complications likely to be encountered in the present inquiry. The California Development Company, a corporation organized under the laws of the State of New Jersey, claims a right to take water from the Colorado river at a point within the United States, and owns the land upon which the intake and a small portion of the canal constructed to carry this water are located. The Mexican corporation owns the land upon which that portion of the canal lying in Mexican territory is located and all franchises pertaining to that portion of the canal. The California Development Company owns the main canal located in California from the point where it reenters that State. The various mutual or district water companies organized under the laws of California own the lateral or distributing canals. The Imperial Valley Water Users' Association, in whose interest and for whose benefit the proposed purchase is to be made,

represents and is made up of the land owners in the area irrigated or to be irrigated by this system within the United States.

It seems that some question arose as to the rights of the California Development Company under its claimed appropriation of water from the Colorado river. February 8, 1904, a bill was introduced in the Senate (S. 4193) to authorize said company "to divert, take and appropriate water from the Colorado river for the purpose of irrigation, in such quantity, subject to and under the State appropriation of the State of California as now in force under the laws of said State." March 8, 1904, a bill was introduced in the House of Representatives (H. R. 13627) to declare the water of the Colorado river to be of greater public use and benefit for irrigation than for navigation, to legalize the diversion of water from said river theretofore or thereafter made for irrigation purposes in accordance with the laws of the respective States and Territories where made and to authorize any person, firm or corporation to divert, take and appropriate water from said river "for the purpose of irrigation, in such quantity, subject to and under the State appropriation of the State of California as now in force under the laws of said State."

Extended hearings were had upon these bills before the Committees of the Senate and House having the matter in charge. The Senate bill was submitted to this Department for report and referred to the Director of the Geological Survey, whose report of March 19, 1904, was transmitted to the chairman of the Senate Committee on Irrigation with your letter of March 26, 1904, expressing concurrence with the views held by the Director.

It is stated in said report that measurements had been taken of the flow of the Colorado river above the point of diversion of the California Development Company, which show that during the period of 311 months covered by the investigation, a diversion of 10,000 cubic feet per second would have taken all the water for 245 months; that the diversion of this quantity of the water would mean the absolute prevention of any irrigation beyond that now practiced, which is dependent on the normal flow of the river, and would seriously interfere with any system dependent on storage; that with a grant from Congress of the kind proposed the company "would undoubtedly be able to prevent any further appropriation of the water in the Upper Colorado river or its tributaries, because the low water flow for many months in the year when the water is most needed for agriculture is considerably below 10,000 cubic feet of water per second;" that the wholesale diversion of water from the stream would destroy what little navigation can now be carried on, reference to H. R. 13627 being made in this connection, and that if the water of this river should be open to general appropriation without supervision on the part of the government, large appropriations

would be made resulting in very serious interference with the proposed irrigation system of the reclamation service on this river.

The Director concludes from the premises that although the rights under which the water is claimed by the California Development Company may be subject to question from a legal standpoint, it is not advisable to destroy the improvements already established upon the lands and to prevent further development; that the appropriation of the waters of this river should be permitted only under the supervision and subject to the approval of the Secretary of the Interior and then only for actual beneficial use by settlers on the public lands and owners of land residing in the immediate vicinity, as is required by the terms of the reclamation act; that the right to the use of the water should be made appurtenant to the land irrigated; that any grants made by Congress such as contemplated by this law, should be, not to a corporation but to the settlers on the land, and should be limited to the quantity which can be put to beneficial use. Said report concludes as follows:

In this view of the case there are several interests to be considered.

First. Those of the people of the United States who are the owners of the water and in whose interest it should be used toward the creation of the largest possible number of homes.

Second. The settlers upon the vacant public land, who are putting or may put the waters to beneficial use in reclaiming these lands and making homes.

Third. The corporation building the works and transporting the water.

It is believed that these three divergent interests can be protected, but in order to do so great care must be taken in framing legislation not to donate the water to the transporting company, whose interests in the matter is simply that of profit on the investment. They have taken large risks, with the hopes of making accordingly great profits. It is believed that no injustice will be done the investors by denying them the exclusive right to the Colorado river, such as might result from the passage of the proposed bill.

The matter is one requiring very careful consideration, as in it is involved the future of one of the most fertile portions of the United States. The reclamation service is and has been obtaining a large amount of data upon the best use of the Colorado river and is bringing this information together in form for treating definite conclusions. Some time must elapse before the surveys now under way are completed, but it is hoped that by the beginning of the next session of Congress full maps and details of the area under consideration will be completed and available for distribution. It is believed that a plan can be devised which will protect the interests of the settlers on the ground and will bring about the largest possible development of arid land in the United States and at the same time protect the investors who have already begun work along the river.

The chairman of the House Committee on the Irrigation of Arid Lands submitted H. R. 13627 to the Attorney General, with request for his views, first, relative to the effect of the passage of the proposed legislation, and second, as to whether any treaty obligations of the United States would be affected thereby. In his response of

April 8, 1904, the Acting Attorney General said that an investigation recently made by that Department, at the request of the Department of State, had elicited the fact that there was practically no navigation of the Colorado river except that which was carried on through the medium of a few small light-draft stern-wheel vessels; that it was determined by the experts who conducted the investigation that while the river may technically be classed as navigable, it is not so for ordinary practical and business purposes such as come within a broader meaning of the word "navigable," and that to make it navigable in this latter sense would require a gigantic and perhaps futile financial outlay; that the State Department was informed that the interests of navigation were so infinitely less than, and of such insignificant importance as compared with, those of irrigation, and that as the operations of the Imperial Land Company (California Development Company) were not materially affecting navigation, it was not deemed advisable to enjoin it from taking water from the stream, but that the effect of the passage of the bill under consideration would be to encourage the taking of water to such an extent as to place the navigation thereof beyond all possibility.

In response to the second inquiry the Acting Attorney General referred to Article VII in the treaty of Guadalupe Hidalgo, and Article IV of the subsequent treaty proclaimed June 30, 1854, and said:

It is apparent from these treaty stipulations that we may not without the consent of Mexico, take any action on the Colorado river where it forms the boundary line between the United States and Mexico, which would impede or interrupt navigation in whole or in part and this would necessarily be the ultimate effect of subjugating the river absolutely to the purposes of irrigation where it forms such boundary line.

After stating that an amendment to the bill limiting its scope to that portion of the river lying entirely within the United States would present the question whether such action would technically violate these treaty stipulations and that a strict construction of the treaty would necessarily hold that the inhibition applies only to the construction of any such work, on said boundary line, the Acting Attorney General said:

I have refrained from expressing any opinion on this point because the practical effect of irrigation works generally along the Colorado river, such as this bill involves, would seem necessarily to be an impairment of navigation where the river forms a boundary line.

After referring to Article I of the convention of March 1, 1889, between the United States and Mexico, providing for an international boundary commission, to which is to be submitted all differences of questions that may arise on that portion of the frontier between the

United States and Mexico, where the Rio Grande and Colorado rivers form the boundary line, the Acting Attorney General said:

In view of these provisions and of the important irrigation projects now and hereafter to be carried on by the United States government, I seriously doubt the wisdom of the surrender by Congress at this time of all control of the waters of the Colorado river.

The House bill, 13627, was also submitted to this Department by the chairman of the Committee on Irrigation of Arid Lands, with a request for an expression of views and opinions relative to the propriety and advisability of the legislation, "particularly as to whether it would conflict with the obligation to the government under the treaty with Mexico; and also as to whether, if enacted in its present form, it insures the use of the waters diverted within the boundary of the United States."

In the report of April 11, 1904, the various treaties between the United States and Mexico were referred to and quoted from, and it was said that the bill, if enacted in its present form, would seem to authorize the erection of works and obstructions that would tend to artificially change the navigable course and deflect the current of the river where the same forms a dividing line between the two countries, and to this extent would be in conflict with treaty obligations; that the law would be effective to insure the use of water diverted within the boundary of the United States in so far as the rights of irrigators within the Republic of Mexico and the rights of other appropriators therefrom are concerned, reference being made in this connection to opinion of Attorney General Harmon (21 Ops. Atty. Gen., 274), and that whether the bill should be enacted, and, if so, would be effective in view of the rights of citizens of Mexico to the use of said water for navigation purposes, "are questions in respect to which the Department does not feel that it should express any opinion or offer any suggestions, for the reason that they involve the consideration of international relations of this government with the Republic of Mexico." Proceeding, however, the Department said in that report:

But aside from the considerations mentioned, the Department is of the opinion that the proposed legislation is not advisable. The bill, if enacted in its present form, would be a radical departure from any previous legislation by Congress in respect to irrigation. It has not heretofore authorized the appropriation of the waters of navigable streams for the purposes of irrigation. See *United States v. Rio Grande Dam and Irrigation Company* (174 U. S., 690-706); *Same v. Same* (184 U. S., 416, 419). The present bill, if enacted, would not only confer such authority but would permit the impairment, if not the destruction, of the entire river so far as navigation is concerned. Even though it be conceded that Congress has the power to permit the river to be destroyed for navigation purposes when it deems the waters thereof "to be of greater public use and benefit for" irrigation than for navigation, such waters, if deemed to be more valuable for irrigation should be preserved for the pur-

pose of applying the same to the reclamation and irrigation of public lands under the provisions of the so-called Reclamation Act of June 17, 1902 (32 Stat., 388), rather than to permit such waters to be appropriated by individuals or corporations under State laws.

Neither of the bills in question became law, but instead a joint resolution was passed April 28, 1904 (33 Stat., 591), as follows:

That the Secretary of the Interior is hereby directed to institute an investigation of and report to the Congress on the various questions involved in connection with the use of the waters of the Lower Colorado river for the irrigation of arid lands in the State of California and the Territory of Arizona, with the view of determining the extent to which the waters of the said stream may be made available for the said purpose through works under the national irrigation act and by private enterprises, and as to what legislation, if any, is necessary to grant or confirm to present and future appropriators and users thereof perpetual rights to the use of said waters for irrigation.

May 17, 1904, contract was entered into between the Mexican Secretary of State and of Development and one Sepulved, as representative of the Sociedad de Riego y Terrenos de la Baja California, S. A., "to carry the waters of the Colorado river through Mexican territory and for use of said waters."

Articles I and II of this contract read as follows:

Article First. The Sociedad de Riego y Terrenos de la Baja California, S. A., is authorized to carry through the canal which it has built in Mexican territory, and through other canals that it may build, if convenient, water to an amount of two hundred and eighty-four cubic meters per second from the waters taken from the Colorado river in territory of the United States by the California Development Company, and which waters this company has ceded to the Sociedad de Riego y Terrenos de la Baja California, S. A. It is also authorized to carry to the lands of the United States the water with the exception of that mentioned in the following article.

Article Second. From the water mentioned in the foregoing article, enough shall be used to irrigate the lands susceptible of irrigation in Lower California with the water carried through the canal or canals, without in any case the amount of water used exceeding one-half of the volume of water passing through said canals.

Article IV authorized the company to connect in Mexican territory its canals with the Colorado river so that it may be able, without injuring the right of a third party, nor the navigation, so long as the river is destined for navigation, to take from said river as much as 284 cubic meters of water per second, which waters are to be used in the irrigation of lands in Mexico and the United States in the proportions mentioned in the first and second articles. Many other rights are given and conditions imposed upon the company not necessary to recite in detail.

The company was granted the right to transfer all or part of the concessions granted with the previous permit of the Secretary, and to mortgage its property to individuals or private parties.

Article XXII reads as follows:

Article twenty-second. At no time nor by any reason can the company, grantee, sell or mortgage the concessions made in the present contract to any government or foreign state, nor admit it in partnership, it being null and of no value nor effect whatever, any stipulation made to that end.

Article XXIV provides that the company shall guarantee the obligations assumed by it, making a deposit in the National Bank of Mexico, of ten thousand dollars, in funds of the Consolidated Public Debt, which said deposit is to be returned when the hydraulic works referred to in said contract are finished.

Article XXV reads as follows:

Article Twenty-fifth. This contract shall have no force if the deposit is not made within the term fixed in the foregoing article, and shall become extinct by the following reasons:

1. For not beginning the works for the surveying and construction of the works and by not finishing the same in the term fixed in Article Seventh and Eighth.
2. For not making use of the waters in a term of ten consecutive years.
3. By the transfer of this contract to an individual or corporation without the previous permit of the Secretary of Development.
4. By the transfer or mortgage of this contract and the concessions herein contained to a government or foreign state.

Article XXVI provides that if cancellation shall take place for the reasons expressed in paragraph 4 of Article XXV, the company shall incur the loss of all rights, estates and properties of any kind related with this contract.

Article XXX reads as follows:

Article thirtieth. The company, grantee, and its company assigns, shall always be considered as Mexican corporations, though all or any of its stockholders should be foreigners, and the corporation shall be subject to the jurisdiction of the courts of the Republic in all the affairs emanating and to be decided within the territory of the Republic.

They would never be able to allege in all the affairs in relation to the present contract the rights of foreigners under any circumstances, and they shall only have the rights and the way to establish the same as the laws of the Republic grant them to the Mexicans, and consequently, in any of said affairs the diplomatic foreign agents shall not have any interference.

This contract was approved by the Mexican Congress and proclaimed by the President June 7, 1904.

The contract proposed to be entered into between the Imperial Valley Water Users' Association and the California Development Company contemplates the purchase by the first company of all the property, franchises, rights and interests of the latter company, with certain exceptions and reservations specifically mentioned, the consideration being three millions of dollars. The plan is dependent, however, upon the United States adopting this irrigation project under the reclamation act of June 17, 1902 (32 Stat., 388), and

advancing the money necessary for carrying it out. It is provided that the property of the Development Company within the United States shall be conveyed to the United States under said act of 1902, and that all the stock of the Mexican corporation which holds the title to the property located in Mexico shall be transferred to the Water Users' Association. This association proposes to enter into an agreement that its organization and conduct shall be subject entirely to such rules and regulations as may be prescribed by the Secretary of the Interior under the provisions of the act of 1902; that the irrigated lands shall be assessed under said act for the restitution of the purchase price to the United States; that it improve and maintain the main canal in Mexico and provide the necessary funds to that end under whatever plan the Secretary of the Interior may suggest; that the work of maintaining and improving the Mexican system shall conform to the requirements prescribed by the Secretary of the Interior and shall be conducted by a chief engineer selected by said Secretary and employed by the association, at such salary as shall be fixed by the Secretary of the Interior.

The proposed contract was referred to the Director of the Geological Survey who made report thereon September 15, 1904, stating that a thorough examination was being made by the engineers of the reclamation service on the ground; that the matter was intimately connected with the investigation being made under the joint resolution of Congress regarding the utilization of the water of the Colorado river, and that until the data relating to the various phases of the matter could be collected it would be impossible to reach a definite conclusion as to the merits of the proposition. In his report of October 1, 1904, the Director points out that the questions involved are intricate and touch upon matters now under consideration by the Supreme Court of the United States in what is known as the Kansas-Colorado case, and also by Congress; that under the agreement, land on the Mexican side of the international boundary line will be entitled to use one-half of the water carried by the main canal; that whether or not control over the Mexican portion of the canal be held by the Secretary of the Interior, "the adoption of this agreement will be on the part of the United States a confirmation of the agreement between the Mexican Irrigation Company and the Republic of Mexico providing for an equal division of the waters in the Colorado river between the lands in the United States and those of Mexico;" that this question of the division of the waters is one that will be considered in the report to Congress under the joint resolution. He further says that from present knowledge of the conditions a recommendation to pay three millions of dollars for the property or rights involved is not justified.

Referring to what he considers the most important proposition, he says:

The key of the whole situation is the acquisition of the canal through Mexico. In brief, it is proposed that this shall be purchased by the Water Users' Association, the money being taken by the Secretary of the Interior from the reclamation fund. In return the property acquired in Mexico shall pass, not to the Government, but to the Water Users' Association, to be controlled under the direction of the Secretary of the Interior until the money advanced has been repaid. The legality and propriety of the acquisition by the Secretary of the Interior, even in this manner, of the control of property outside of the United States, which is necessary for the reclamation of lands within its limits, should be the subject of careful consideration, not only upon general principles but also in view of the provisions of the reclamation act.

After noting the provisions of the reclamation act authorizing the Secretary of the Interior to acquire any rights or property necessary to carry out the provisions of said act and authorizing the construction of necessary irrigation works and providing that when the payments required by the act are made for the major portion of the works, the management and operation of such works shall pass to the owners of the lands irrigated thereby, it is said:

From these provisions of the law it is plain that the Secretary is authorized to purchase any water rights or irrigation works necessary for a reclamation project, and that when the conditions described in section six arise he is to transfer the management and operation thereof to the owners of the lands irrigated thereby. The ownership of the rights and works is not to be transferred, only the management and operation. The provisions quoted and the whole tenor of the act indicate that all payments from the reclamation fund for such rights or property shall be for the acquisition of ownership by the United States, to be retained by it until further action of Congress.

In his report of December 22, 1904, under the joint resolution heretofore referred to, the Director states that for nine months of each year the flow of water in said river has usually been below 10,000 cubic feet per second; that in its unregulated condition there is not enough water flowing in the stream during the irrigating season to supply the future demands for irrigation purposes; that to utilize its full value for irrigating purposes the flow of the water must be regulated by storage works; that under a wise control of the entire stream all the interests of irrigation and navigation can be fully protected; that the large amount of sediment brought down by the river clogs the artificial channels constructed for carrying water for irrigation purposes, thus involving enormous expense for keeping the ditches in condition to be useful; and reached the conclusion that the governmental control of the waters of this river is absolutely necessary to attain the best results. He says it is generally conceded that legislation is necessary because the lower part of the river, being navigable, its waters are not subject to appropriation, and notices

filed in conformity with the customs of Arizona and California are not valid, and suggests that the legislation should be along the line of guarding the present navigation interests; of confirming diversions heretofore made to the extent of the actual beneficial use of the water diverted upon land capable of producing remunerative crops; of allowing further appropriations of water only with the approval of the Secretary of the Interior and of making all appropriations heretofore or hereafter allowed appurtenant to specific tracts of land. This report was transmitted to Congress by the Department with letter of January 6, 1905, signifying approval of the recommendations made.

In a further report, dated January 4, 1905, in the matter of the proposed purchase from the California Development Company, the Director of the Geological Survey says that upon the question of the desirability of acquiring the system there is opportunity for differences of opinion, and it is proper to consider whether, if the work were presented free to the government, it would be wise to become involved in the serious questions pending in the Imperial Valley; that the unfavorable reports made by the Department of Agriculture concerning the agricultural possibilities of these lands on account of their conditions and the present desperate situation of many of the inhabitants, render it a matter of grave doubt whether it is advisable for the Department to become involved in the matter. In describing the conditions existing, he says:

The lands for the most part have now passed into the hands of individuals in relatively large tracts—upwards of 320 acres or even more, and many of the owners do not live in the valley, while the reclamation act if applied to this district would limit the holdings to 160 acres and require residence in the vicinity. Much of the land filed upon is unsuitable for cultivation owing to the large amount of alkali and other adverse conditions of the soil. The water supply has been deficient, owing to poor construction and accidents to the canal system, and although during the fall months there has been ample water, it appears that the people are not utilizing it, and, from best information, are not planting crops to any considerable extent. The difficulties of handling the silt are very great, and if the government is to take up the project, it must make enormous expenditures at once to prevent the country lapsing into a desert condition.

The act of June 17, 1902 (32 Stat., 388), in which must be found authority for the Secretary of the Interior to intervene in this matter, if there be any, provides that moneys received from the sale and disposal of public lands in certain States and Territories shall be reserved and set aside as a reclamation fund, "to be used in the examination and survey for, and the construction and maintenance of, irrigation works, for the storage, diversion and development of waters for the reclamation of arid and semiarid lands in the said States and

Territories, and for the payment of all other expenditures provided for in this act."

The Secretary of the Interior is authorized and directed to make examinations and surveys for and to locate and construct "irrigation works for the storage, diversion, and development of waters, including artesian wells." Lands susceptible of irrigation from such works are to be disposed of under the provisions of the homestead laws in tracts of not less than forty or more than one hundred and sixty acres. The Secretary of the Interior is authorized to limit the area per entry, which shall represent the acreage which, in his opinion, may be reasonably required for the support of a family, and to fix the charges which shall be made per acre upon said entries and upon lands in private ownership which may be irrigated by the waters of any irrigation project, and these charges "shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project and shall be apportioned equitably." No rights to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one land owner, who must be an actual *bona fide* resident on such land, or occupant thereof residing in the neighborhood.

Section 6 of the act reads as follows:

That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: *Provided*, That when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

Section 7 provides:

That where in carrying out the provisions of this act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose.

It is admitted that the matter is not presented in such form that it may be acted on and finally disposed of at this time. If, however, there be no insuperable obstacle to prevent the Secretary of the Interior assuming the obligations and doing the things necessary to be assumed and done, if the proposed transaction is to be carried through, matters of detail will probably be satisfactorily arranged hereafter.

The price to be paid the California Development Company for the rights and property proposed to be transferred is a matter of first importance. The Director of the Geological Survey has refused to recommend the purchase at the price named in the propositions submitted, and the California Development Company has declared that no reduction in the price will be made. It is possible, however, that these differences of opinion may be adjusted by further negotiation. Upon this question of price the Department must necessarily be guided in large degree by the advice of the officers of the Geological Survey who have practical knowledge of the value of such properties and of this system.

It is insisted by the California Development Company and the Imperial Valley Water Users' Association that the United States stands in relation to this transaction in the position of a banker advancing the money to carry the thing through. The declaration is made that "the sole purpose of the act of June 17, 1902, is to lend money to communities that are struggling to reclaim the desert." The contention is, that being the position of the government, that the matter of the price to be paid does not concern it particularly. If this contention were well founded the only question would be as to the sufficiency of the security offered. The theory can not, however, be sustained. The authority of the Secretary of the Interior respecting the use of the reclamation fund, as defined and limited by the act of 1902, is to make preliminary investigations to determine the feasibility of any project, to construct reservoirs and irrigation works and operate and maintain those thus constructed, and to acquire "for the United States by purchase or condemnation under judicial process" rights or property necessary for these purposes. The fact that, under certain conditions, the management and operation of irrigation works constructed under said act shall pass to the owners of the lands irrigated thereby, does not enlarge the authority of the Secretary, which is to acquire property "for the United States." Neither does the fact that the money to be expended upon any project by the United States is to be returned to the reclamation fund, release him from the obligation to require that such fund shall be properly expended and that no property shall be purchased at unreasonable prices.

The sum mentioned as the purchase price does not by any means represent the total expenditure involved, nor does it represent the burden which must be assumed and met by the lands in Imperial Valley to be irrigated through this system. The cost of improving and enlarging the system will be large. That fact seems to be recognized by the Water Users' Association, and it is understood that the lands to be benefited must bear this additional expense; but there is another element which has not been mentioned and which perhaps

has not been considered by the Water Users' Association. If this canal, with its distributing ditches, is to become a part of the project which involves the construction of storage works for the control of the waters of the Colorado river, the lands to be irrigated by means of this canal must bear their proportionate share of the total cost of the storage works and other expenses involved in the general project. In other words, the consideration of three millions of dollars to be paid the California Development Company, does not constitute the total cost to the owners of land in the Imperial Valley, to be irrigated from this project. What this additional cost would amount to is a matter of estimate to be made by the Geological Survey. It is possible the amount to be paid for the works already constructed by the Development Company would necessarily be considerably less than the named purchase price, in order to make it feasible to include the irrigation of these lands in the larger project. It is possible also that the Water Users' Association may conclude to recede from the position that the price named in the proposals submitted is reasonable, when attention is called to the additional burden their lands must carry if the transaction is to be carried through.

The basic idea of the legislation in question is the conservation and control of water through storage works. The project of the California Development Company involves no element of conservation of water or of control of the flow thereof by storage works, but contemplates only such diversion and use as may be practicable with the river in its natural and normal condition. It is not necessary to consider whether there is authority under said act to enter upon a project which involves, as does this system at present, merely the diversion of water naturally flowing in a stream and carrying it to a point where arid lands are found and there distributing it; for, as indicated by the papers, especially the reports of the Geological Survey, the intention is, if the government enters upon the enterprise, to make this system a part of or adjunct to the main project involving a conservation and utilization of the waters of the Colorado river by means of an extensive system of dams and storage reservoirs. For such a project the act clearly authorizes the Secretary of the Interior to acquire rights and property pertaining to an irrigation system already in operation, which, like that of the California Development Company, involves only the diversion and carrying of the water. The fact that the system to be acquired is not at present connected with any storage works and does not include any works to regulate or control the flowing of the stream from which the water is to be diverted, offers no objection to the proposed purchase. If this system as now constituted is to be considered as a separate, distinct and complete project, there might be very potent argument produced against its purchase and in support of the proposition that such a purchase

would not come within the purview of the law; but when considered as only a section of the greater system to be constructed under the general project for utilization of the waters of this river, its purchase clearly comes within the purview of the law and may be consummated unless some other prohibitive obstacle is presented.

One element which the California Development Company undoubtedly considers of great importance in estimating the value of the property to be sold by it, is the claimed right to divert 10,000 cubic feet of water from the Colorado river. If the recognition of its claim as a valid right is involved in the approval of this transaction by the Secretary of the Interior, such approval should be withheld. The Congress has control over navigable streams and the waters thereof. No claim based upon appropriation of such waters for irrigation made without the sanction of Congress should be recognized by this Department as valid. Claims to the water of such a stream asserted under the law of a State must be adjudicated in some other forum. This Department not having jurisdiction to decree the validity of such a claim as that presented here should not do that which would necessarily involve the hypothesis of its validity. It seems that claims already made under state and territorial laws cover several times over all the waters of the river. If these claims can be sustained and enforced the navigation of the river would be utterly destroyed and all plans now under consideration by the reclamation service, which involve the use of water from this stream, would necessarily have to be abandoned. The Department of Justice is of opinion, as shown by the report of April 8, 1904, on H. R. 13627, that such claims can not be sustained. In the case of the California Development Company, however, the appropriation has been acquiesced in by the federal government and by reason thereof the claimants have secured a certain standing entitling them to equitable consideration and, possibly, to some compensation for relinquishment of its claim. The matter is now pending before Congress which may confirm this appropriation, and hence it would not be advisable to dismiss the proposed transaction from further consideration on the sole ground of the invalidity of the water right to be conveyed. Possibly, too, the legality of the appropriation should be considered only as affecting its money value and as a factor in determining the fairness and adequacy of the price to be paid for the rights and property to be transferred or relinquished.

The greatest difficulty presented in this matter grows out of the fact that a part of the property involved lies in foreign territory. Without that portion of the canal in Mexico the diversion works are of little or no value and that portion of the main canal and all branches in the Imperial Valley in California are useless. The proposition is that the United States shall pay for and take title to

property which without the connecting link can not be utilized. That the Secretary of the Interior has no authority under the act of 1902 to purchase property in a foreign territory seems to be taken for granted by both parties submitting the proposals, and it is sought to avoid this difficulty by leaving the title to such property in the Mexican corporation, lodging the stock of that corporation in the Imperial Valley Water Users' Association, organized under the laws of California, and whose members are and must be land owners or occupants of public lands within certain described boundaries in California. It is further proposed that full power to control and direct the operation and maintenance of the canal shall be placed in the Secretary of the Interior acting in a supervisory capacity. Possibly such a plan might be satisfactorily worked out if the position of the United States were properly described as that of a banker—a lender of money on approved security. But, as has been pointed out, the law does not put the United States in that position and the Secretary of the Interior has no authority to embark upon, or commit the government to, any irrigation enterprise that makes it simply a lender of money and does not contemplate the absolute transfer of the property involved to the United States.

Treating the transaction as a purchase for the United States, the obstacles seem to be insuperable. The act of June 17, 1902, contains no provision specifically or impliedly authorizing the purchase of stock in any foreign corporation and the articles of concession held by the Mexican corporation declare that said company shall not sell or mortgage the concessions made to any government or foreign state nor admit it in partnership. Any transaction intended to evade this prohibition would probably be considered by the Mexican government as a just cause for declaring the concession forfeited. These concessions involve rights which are evidently considered as valuable in connection with the reservations insisted upon by the Development Company in the proposals submitted. The preservation of those rights is evidently in the view of said company an indispensable element in the transaction.

The property proposed to be transferred includes some fifty thousand acres of land in Mexico, which is not needed in the construction or operation of the canal or the works connected therewith, but which is susceptible of irrigation therefrom. The law does not authorize the use of the reclamation fund for the purchase of any land except such as may be necessary in the construction and operation of irrigation works. If this land were within the United States there would be no authority under existing law to acquire it, and much less is there any authority to go into foreign territory to acquire it. So far as the proposals contemplate the use of the reclamation fund for the purchase of land in Mexico, either directly by the

Secretary of the Interior or indirectly by advancement to others, they are outside the scope of his authority and can not be approved.

The approval of these proposals and the cooperation of the Secretary of the Interior in the scheme presented would commit him to the theory that the act of 1902 authorizes the construction of works to divert water at a point in the United States, to carry it to the boundary line of the country and there deliver it to a foreign corporation. The proposition that the stock of this foreign corporation shall be transferred to and held by citizens of the United States through a corporation organized under the laws of California, does not affect the question. The act can not be construed as sustaining this theory or as giving any such authority. If the plan involved merely carrying all the water through the foreign territory and its redelivery to the reclamation service at some other point on the international boundary, it would present questions of international law and comity over which this Department has no jurisdiction. The fact that one half the water to be delivered to the Mexican corporation is to be retained and used in Mexican territory increases the complications and emphatically demonstrates the proposition that the transaction involves questions outside the jurisdiction of the Secretary of the Interior.

Because of the peculiar conditions obtaining in Imperial Valley and of the unusual surroundings of the inhabitants, I have, with exceeding reluctance, reached the conclusion that relief intended to be afforded by the proposed transaction can not be encompassed in this way. The results accomplished in the way of reclaiming the lands of this district are large and the energy necessarily expended in bringing about these results is worthy of all praise. To the end that the results already accomplished in this reclamation work may be preserved and that the work may be extended to include the unreclaimed portions of the Valley, this Department would be justified in going to the full limit of its power in giving assistance. But there is a limit to its power fixed by law, which interposes to prevent the giving of aid in the manner and through the channels suggested. It is asserted that the plan adopted was recommended to and in fact urged upon the settlers by officers of the reclamation service, and contended that the Government, because thereof, is obligated to carry out its implied promises and afford the settlers relief. It is unnecessary to determine whether this assertion is sustained by the facts, because an implied, or even expressed, promise by an officer or employee of this Department that certain results shall follow a certain line of action, can not bind the head of the Department or control him in determining the scope of his jurisdiction or the extent of his power. The conditions existing in this Valley arising from the character of the soil and "the present desperate situation of many of the inhabi-

tants," mentioned by the Director of the Geological Survey as rendering it "a matter of grave doubt whether it is advisable for the Department to become involved in the matter," have not been discussed herein. Those matters are not important in determining whether the proposed action comes within the purview of the law, but would properly and necessarily be considered in determining whether the project, if authorized by law, is feasible.

Approved:

E. A. HITCHCOCK, *Secretary.*

ROSEBUD AND DEVILS LAKE RESERVATIONS—EXTENSION OF TIME
WITHIN WHICH TO ESTABLISH RESIDENCE—ACT OF FEBRUARY 7,
1905.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 9, 1905.

Register and Receiver,

Chamberlain, South Dakota, and Devils Lake, North Dakota.

GENTLEMEN: The act of February 7, 1905, provides—

That the homestead settlers on the lands which were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County, South Dakota, opened under an act entitled "An act to ratify and amend an agreement with the Sioux tribe of Indians of the Rosebud Reservation, in South Dakota, and making appropriation and provision to carry the same into effect," approved April twenty-third, nineteen hundred and four, and the homestead settlers on the lands which were heretofore a part of the Devils Lake Indian Reservation in the State of North Dakota, opened under an act entitled "An act to modify and amend an agreement with the Indians of the Devils Lake Reservation, in North Dakota, to accept and ratify the same as amended, and making appropriation and provision to carry the same into effect," approved April twenty-seventh, nineteen hundred and four, be, and they are hereby, granted an extension of time in which to establish their residence upon the lands so opened and filed upon until the first day of May, anno Domini nineteen hundred and five: *Provided, however,* That this act shall in no manner affect the regularity or validity of such filings, or any of them, so made by the said settlers on the lands aforesaid; and it is only intended hereby to extend the time for the establishment of such residence as herein provided, and the provisions of said acts are in no other manner to be affected or modified.

You will see that as to lands in the former Rosebud Reservation [or "Devils Lake Reservation," in the instructions to the Devils Lake office], this act is given effect in your office as to all entries made of such lands prior to November 1, 1904. Soldiers and sailors who have filed declaratory statements under section 2309 of the Revised Statutes come within the spirit of the relief granted by the act, and

where such declaratory statement has been filed before November 1, 1904, are entitled to the extension, both as to settlement and entry.

Very respectfully,

W. A. RICHARDS, *Commissioner*.

Approved:

E. A. HITCHCOCK, *Secretary*.

PRIVATE CLAIM—SUCCESSION PROCEEDINGS—ACT OF JUNE 2, 1858.

WIDOW OF EMANUEL PRUE.

In the case of a private land claim in Louisiana confirmed to the legal representatives of the claimant, and held under succession proceedings as property of the claimant's estate, the land department, on application by the purchaser at the succession sale for certificates of location under section 3 of the act of June 2, 1858, is justified in recognizing such purchaser, where the record upon which the sale was ordered and made affirmatively shows the necessary jurisdictional facts, unless it be otherwise shown that the court which ordered the sale was without jurisdiction of the *rem* because of a prior sale or disposal of the claim by the original claimant or otherwise in accordance with law.

Departmental decision herein of December 22, 1887, 6 L. D., 436, vacated and set aside.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 10, 1905.* (F. W. C.)

This case is again before the Department on appeal by the attorney for M. W. Chaney, claiming through transfer from D. J. Wedge, from the decision of your office, dated May 24, 1904, denying his application for certificates of location under the act of June 2, 1858 (11 Stat., 294), in satisfaction of the private land claim of the widow of Emanuel Prue.

Your office rejected said application because of the previous decision of this Department of December 22, 1887 (6 L. D., 436), denying a like application for the issue of certificates, by D. J. Wedge.

The claim in question is entered as No. 24 B, in the report dated April 6, 1815, by the commissioners appointed for the Western District of Louisiana, and the proceedings before said commission are set forth in American State Papers (Green's Ed., Vol. 3, at pp. 84 and 91). Reference to said proceedings show that this claim was originally presented to the board by one Daniel Callaghan, who claimed a tract of 11,943 acres of land on the Bayou Cuckettree (supposed to be Crocodile), which claim was based upon an alleged purchase by him from the widow of Emanuel Prue, who, he alleged, had purchased the tract from the Indians. The evidence of two witnesses was taken by the commissioners with reference to the alleged purchase by Mrs. Prue from the Indians, and her occupation of the land.

The commissioners state in their report that no written evidence was produced of the alleged purchase by Mrs. Prue from the Indians or her alleged sale to Callaghan, but found upon the testimony offered that Mrs. Prue had resided upon the land claimed and had cultivated it for about five years (1793 to the latter part of 1797), and concluded their report as follows:

The commissioners are of opinion that this claim derives no validity from any title the Indians may have had to the land, but from being permitted by the Spanish government to occupy it as above stated, and not having, to the knowledge of the commissioners, abandoned the right thus acquired. They are of opinion that legal representatives of the widow of Emanuel Prue ought to be confirmed in their claim to six hundred and forty acres of land, to be laid out in such form as will embrace the ancient improvements of said widow.

The claim as thus recommended was confirmed by the first section of the act of April 29, 1816 (3 Stat., 328).

It does not appear that any attempt was ever made to locate the claim thus confirmed, but, following the opening of the succession of Mrs. Emanuel Prue in the parish court of Lafayette parish of Louisiana, in 1872, this claim was sold to D. J. Wedge, in whose favor the sheriff of said parish issued the usual act of sale, as provided by the Louisiana laws, and thereafter Wedge made application to the surveyor-general of Louisiana for certificate of location under the act of 1858, *supra*, in satisfaction of the confirmed claim. August 16, 1877, the surveyor-general issued certificates, four in number, for 160 acres each, marked 360 A, B, C, and D, but your office refused to authenticate or deliver these certificates to the attorney for Wedge, and it was his appeal from such action that was considered in departmental decision of December 22, 1887, *supra*, upon which your office decision denying the application under consideration was based.

In the decision of the Department referred to, it was held, in effect, that a confirmation "to the legal representatives" of the original occupant, vested no claim in the estate of such original claimant, and that a purchaser of such claim upon the opening of the succession of such original claimant is not entitled to receive scrip under the act of 1858, on account of and in satisfaction of such claim. In said decision it was said:

The report of the commissioners recommended that the legal representatives of the widow of Emanuel Prue be confirmed in their claim, and the confirmatory act following the recommendation of this report confirmed the claim to the legal representatives of Mrs. Prue.

What class of legal representatives was intended to be benefited by this confirmation it is not easy to determine, whether her heirs at law, or her legal representatives by contract. In either case no estate in this claim vested in Mrs. Prue, for if by legal representatives were meant her heirs at law, then Mrs. Prue must have been dead when the commissioners made their report, for "*Nemo est haeres viventis*;" and if, on the other hand, by legal representatives

was meant her legal representatives by contract, then it must be conceded that Mrs. Prue had already parted with her title to this claim when said report was made. (See Williams on Executors, Vol. 2, 1232.)

If no estate in this claim vested in Mrs. Prue by the confirmation, then none was sold in 1872 at the succession sale aforesaid. The applicant for scrip herein merely purchased the right, title and interest of Mrs. Prue in this claim; and inasmuch as it has not been shown that she had any interest whatever in the claim at the date of confirmation, or afterwards, it must necessarily follow that he can have no interest in it either.

In the case of Narcisse Carriere (17 L. D., 73), which was a like application for certificates of location under the act of June 2, 1858, *supra*, in satisfaction of a private land claim confirmed in favor of the legal representatives of Narcisse Carriere, it was held, after a careful review of the decision of the supreme court of the United States in the case of Simmons *v.* Saul (138 U. S., 439), and certain provisions of the civil code of Louisiana of 1824, in force at the time that claim was reported upon, that—

in the absence of a showing that there ever was in this case an assignee or legal representative of Carriere by contract, the judgment of the parish court that the claim became assets of his estate must be accepted, that under the ruling of the supreme court in the case of Simmons *v.* Saul, *supra*, the parish court of Lafayette parish had jurisdiction over the succession of Carriere, that the informalities in the record are not such as to present grounds upon which the decree of the parish court may be successfully assailed, and that the sale under that decree must be recognized as vesting in the purchaser thereunder all the rights of the estate or of Carriere himself by virtue of the confirmation of his claim.

This, in effect, overruled the broad principle announced in the decision of the Department in the case of Emanuel Prue, but did not, necessarily, affect the conclusion reached in the decision made in the latter case, because of the fact that in that case the claim was originally presented to the board of commissioners by one claiming to be an assignee of the original occupant. It becomes necessary therefore to review the decision heretofore made with regard to the claim of the widow of Emanuel Prue, upon the application of Wedge.

The third section of the act of 1858, under which the application was made, provides:

And be it further enacted, That the locations authorized by the preceding section shall be entered with the register of the proper land office, who shall, on application for that purpose, make out for such claimant, or his legal representatives, (as the case may be,) a certificate of location, which shall be transmitted to the Commissioner of the General Land Office; and if it shall appear to the satisfaction of the said commissioner that said certificate has been fairly obtained, according to the true intent and meaning of this act, then, and in that case, patents shall be issued for the land so located as in other cases; and for each and every certificate as aforesaid, issued by the register of any land-office, he shall receive the sum of one dollar; that in all cases of confirmation by this act, or where any private land claim has been confirmed by Congress, and the same, in whole or in part, has not been located or satisfied, either

for want of a specific location prior to such confirmation, or for any reason whatsoever, other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor-general of the district in which such claim was situated, upon satisfactory proof that such claim has been so confirmed, and that the same, in whole or in part, remains unsatisfied, to issue to the claimant, or his legal representatives, a certificate of location for a quantity of land equal to that so confirmed and unsatisfied; which certificates may be located upon any of the public lands of the United States subject to sale at private entry, at a price not exceeding one dollar and twenty-five cents per acre: *Provided*, That such location shall conform to legal divisions and subdivisions.

It will be seen that this section makes it the duty of the surveyor-general of the district in which the claim is situate, upon satisfactory proof that the claim has been confirmed, but remains unsatisfied in whole or in part, "to issue to the claimant, or his legal representatives, a certificate of location for a quantity of land equal to that so confirmed and unsatisfied."

In the performance of this duty, it is only necessary that the Department be satisfied that the party applying for the scrip is the one rightfully entitled to claim and receive the same, and under the holding in the *Carriere* case the Department would be fully justified in recognizing the purchaser of the claim at the succession sale, where the record upon which the sale was ordered and made affirmatively shows the necessary jurisdictional facts, unless it is otherwise shown that the court which ordered the sale was without jurisdiction of the *rem* because of a prior sale or disposal of the claim by the original claimant or otherwise in accordance with law. The only suggestion of a prior assignment or sale of the claim in question is found in the record of the proceedings before the board of commissioners hereinbefore referred to, no claim ever having been presented to this Department for land in place, or for scrip in satisfaction of the claim on account of any purchaser thereof, other than the purchaser under the succession sale as before stated. While the record before the board of commissioners shows that one Daniel Callaghan claimed to be the purchaser of the claim from the widow of Emanuel Prue, it is stated in the report of the board that no deed from the widow to Callaghan was produced. They further found that her claim derived validity, not from any alleged purchase from the Indians, as claimed by Callaghan, but from being permitted by the Spanish government to occupy certain lands "and not having, to the knowledge of the commissioners, abandoned the right thus acquired." This, in effect, negated the idea that a sufficient showing had been made to satisfy the commissioners that she had ever sold or disposed of her claim acquired through settlement. It would seem, therefore, that the Department, under these circumstances, is warranted in accepting the judgment of the parish court that this claim became an asset of the estate of Emanuel Prue as fully as in the case of Narcisse Car-

riere, before referred to, and for the purpose of disposing of the present application the decision of the Department of December 22, 1887, *supra*, on the application of D. J. Wedge, is hereby set aside and the case remanded to your office for further consideration and disposition under the holding herein made.

In this connection, however, it is deemed advisable to direct that the present applicants be required, if their application is otherwise satisfactory, to furnish your office a certificate from the recorder of deeds of the parish in which the claim of the widow of Emanuel Prue was, at the time of its confirmation, located, and also of any other parish in which it may have since been included, showing that there is no record of any sale by her of this claim, before certificates are issued in satisfaction thereof and delivered to them.

**ABANDONED MILITARY RESERVATION—TIMBER—ACTS OF JULY 5, 1884,
AND MARCH 3, 1891.**

INSTRUCTIONS.

There is nothing in the act of July 5, 1884, providing for the disposition of lands in abandoned military reservations, authorizing the disposition of the timber growing upon any such reservation, separate and apart from the lands. The provisions of the act of March 3, 1891, authorizing the use of timber on non-mineral public lands, have no application to lands in abandoned military reservations subject to disposition under the act of July 5, 1884.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *February 13, 1905.* (A. M.)

I have at hand your letter of the 13th instant, in which you have recommended that the Commissioner of Indian Affairs be permitted to remove from Graham's Island, in Devils Lake, North Dakota, an abandoned wood reservation in connection with the Fort Totten military reservation, three hundred cords of fire wood, or so much thereof as may be necessary, for the use of the Fort Totten Industrial School.

It appears that superintendent Charles L. Davis, of the Devils Lake Agency, has expressed a desire to cut and remove this wood for the purpose mentioned, and that the only available wood supply is on Graham's Island; that the Commissioner of Indian Affairs has informed you that the need therefor is urgent, and that its removal will not have an injurious effect on the water supply or any public interest.

The lands on this island are subject to disposal under the act of July 5, 1884 (23 Stat., 103), which provides for the disposal of abandoned military reservations, but by departmental letter of November 26, 1904, to you, I directed that you take no action looking

to the disposal of the lands under the act mentioned till further ordered by the Department.

You have expressed the opinion that the granting of the permission to cut the timber would not be in violation of the act and would not be detrimental to the public interests.

I do not concur in your conclusions. The only authority the Secretary of the Interior has for disposing of any portion of the realty within an abandoned military reservation turned over to the Interior Department for disposition under the act of July 5, 1884, *supra*, is conferred by the provisions of that act. Growing timber is a part of the realty and there is nothing in that act that authorizes its disposition in the manner requested in the application under consideration.

The Secretary of the Interior has authority to permit the removal of timber from non-mineral lands under the act of March 3, 1891 (26 Stat., 1093), but the lands in this reservation, in my judgment, are not public lands within the purview of the act last mentioned. The purpose of that act, as set forth in paragraph 2 of the regulations of this Department under date of February 10, 1900 (29 L. D., 572), 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.

Even could it be held that the lands in this reservation are public lands within the meaning of the act of March 3, 1891, *supra*, it could not be held that this applicant is either a settler or a resident of the State in which these lands lie. Besides, there are administrative reasons that prevent the granting of this application.

If action were taken as recommended by you it would mean that any settler or resident within any State or Territory to which the act of March 3, 1891, *supra*, applies, and in which there is an abandoned military reservation turned over to this Department for disposition under the act of July 5, 1884, *supra*, could apply for permission to cut any timber that might be growing on said lands.

While the granting of said application would be a matter within the discretion of the Secretary, yet under the regulations of this Department under the act of March 3, 1891, *supra*, any settler or resident is authorized to cut not to exceed fifty dollars' worth of timber annually from the public lands without making application to the Department so to do. The result of such a policy is at once apparent—namely, that the timber growing on lands within abandoned military reservations would be speedily appropriated and the value of the lands depreciated to the extent of the timber removed therefrom.

The application is therefore denied, and you are advised to take the necessary supplemental action.

FOREST RESERVE—WITHDRAWALS UNDER THE ACT OF JUNE 17, 1902.

OPINION.

The authority to withdraw lands for irrigation purposes conferred upon the Secretary of the Interior by the act of June 17, 1902, is a special authority to make withdrawals for a particular purpose, and is limited to the specific uses provided for in the act, or for uses incident to and in furtherance thereof; and he has no authority under said act to withdraw lands for reservoir sites with a view to the use of the waters impounded therein for domestic purposes.

*Assistant Attorney-General Campbell to the Secretary of the Interior,
February 18, 1905. (E. F. B.)*

By letter of October 15, 1904, the Director of the Geological Survey recommended a withdrawal of certain lands in California as reservoir sites which, it is contemplated, will in the future become of great value in connection with operations of the Reclamation Service, "although no immediate project for their utilization is now under consideration." Two of these sites include lands within the limits of the Yosemite National Park created by the act of October 1, 1890 (26 Stat., 650). The letter of the Director was referred to me for opinion as to "whether or not public lands in the National Parks in California can be legally withdrawn for reservoir sites or irrigation works under the act of June 17, 1902 (32 Stat., 388)."

Under date of December 30, 1904, (33 L. D., 389), I submitted an opinion upon this question, advising that such withdrawal can be made under authority of the act of June 17, 1902, and of the act of February 15, 1901 (31 Stat., 790), which empowers the Secretary of the Interior to permit the use of the right of way through the Yosemite, and other National Parks in California named in said act, for certain purposes, including water conduits and reservoirs to promote irrigation, upon his approval and finding that the granting of such permit is not incompatible with the public interest; that he may grant or withhold his approval accordingly, and revoke the permit whenever in his judgment the public interest is jeopardized; that under authority of said act lands within such reservations belonging to the United States may be subjected to use by the government for the purposes contemplated by the act of June 17, 1902, to the same extent that individuals, associations or corporations may be permitted to use them for such purposes.

The papers are again submitted to me with a statement from the Chief of the Patents and Miscellaneous Division, for opinion as to

"whether under the reclamation act of June 17, 1902, water can be furnished from reservoir sites reserved thereunder to cities for domestic purposes."

The authority of the Secretary of the Interior to withdraw lands for irrigation purposes conferred by the act of June 17, 1902, is a special authority to withdraw lands for a particular purpose and is limited to the specific uses provided for in the act, or for uses incident to and in furtherance thereof. He cannot make reservation for reservoir sites under any authority conferred by said act with a view to the use of the waters impounded therein, for domestic purposes.

In the letter of the Director of the Geological Survey recommending the withdrawal of these lands for reservoir purposes, he states that certain cities of California, which he names, are interested in the matter, as "it will undoubtedly become necessary in the near future for these cities to obtain their water supply from the mountains in the section of country under consideration." From this statement the Chief of the Patents and Miscellaneous Division infers that the reservation of the sites in the Yellowstone National Park is suggested in the interest of those cities, looking to the supplying of water for domestic purposes, and that the officials charged with the duty of carrying into effect the reclamation act seem to be of the opinion that water from reservoirs established under that act can be furnished to cities for domestic uses. In view of his opinion to the contrary, and for the further reason that there is no apparent necessity for the withdrawal of these lands, as they are already in reservation, he suggests that the recommendation of the Director of the Geological Survey be disapproved.

Upon the last proposition his view was anticipated in the opinion of December 30, 1904, in which it was said:

It may be well to add further that while a withdrawal or reservation of lands for irrigation purposes can only be made by the Secretary of the Interior by virtue of the authority conferred by the act of June 17, 1902, and for the purposes and in the manner contemplated by that act, the act of February 15, 1901, confers no absolute right to the use of a right of way over public lands within reservations of the United States, but the granting of such permits rests in the sound discretion of the Secretary of the Interior, who may withhold generally from such privilege the lands in any particular reservation, if in his judgment the granting of a permit for use of a right of way for certain purposes would be "incompatible with the public interest," and accomplish by this means all that would be accomplished by a formal withdrawal or reservation.

Two questions were definitely determined in the opinion of December 30, 1904, that lands within the National Parks in California may be formally withdrawn for reservoir site and other irrigation works to be constructed under authority of the act of June 17, 1902, and second, that as the granting of permits for right of way in such parks rests in the sound discretion of the Secretary of the Interior,

the reservation of such lands for future use by the United States for irrigation purposes can practically be accomplished by withholding all permits for rights of way over and through such lands.

The object of the specific withdrawal is to signify to the public the purpose of the United States to reserve such lands for use by the government in the construction of ditches and reservoirs for the utilization of waters in the irrigation and reclamation of arid lands only so far as may be authorized by law. As it does not enlarge the Secretary's authority to use them for any purpose not contemplated by the withdrawal, no possible harm can result in a specific withdrawal, while it may serve an important office in giving notice to the public of a contemplated appropriation of the land by the United States for legitimate uses, and thus avoid any possible conflict between the United States and applicants for right of way under the act of February 15, 1901, and the inadvertent granting of a permit. This, however, is purely a question of administration.

It is not intended by this to indicate that the Secretary of the Interior cannot revoke those withdrawals at any time in order that individuals, associations or corporations may secure the benefits conferred by the act of February 15, 1901, if, in his judgment, permits should be granted for right of way over such lands, in order that the waters may be used for domestic purposes, the primary beneficial use as recognized in all the States, if the necessity of the cities in California require, but it cannot be so used in connection with irrigation under any authority derived from the reclamation act.

Approved:

E. A. HITCHCOCK, *Secretary.*

RESIDENCE—ESTABLISHMENT OF—PERSONAL.

PUETTE *v.* GREER.

Residence under the homestead laws must be established by the personal act of the entryman.

An entrywoman can not establish residence through the acts of her husband.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 21, 1905.* (E. P.)

March 4, 1901, Emma Meek (now Emma Greer) made homestead entry of the SE. $\frac{1}{4}$ of Sec. 30, T. 12 N., R. 26 W., Mangum land district, Oklahoma, against which entry J. M. Puette, on September 24, 1902, filed an affidavit of contest charging, among other things, abandonment. Notice issued February 10, 1903, citing the parties to appear June 10, 1903, and submit testimony, and was served upon defendant February 14, 1903, at Oklahoma City, Oklahoma.

After hearing, the local officers recommended that the entry be canceled. No appeal from this action having been filed by the defendant within the time allowed by the rules of practice, your office considered the case under rule 48, and, on August 30, 1904, reversed such action and dismissed the contest. From the decision of your office the plaintiff has appealed to the Department.

It appears from the testimony that on March 4, 1902, the defendant went upon the land and caused the foundation for a house to be laid, and remained there one day. About August 1, 1902, she, in company with her husband, Hezikiah C. Greer, to whom she was married June 3, 1902, and her youngest son, then a little boy, again went to the land. A box house, ten by fourteen feet, without a floor, and costing between forty and fifty dollars, was, on the occasion of this visit, built by Mr. Greer, after he and the defendant had spent three or four days in "locating" the same. Into this house was placed a cook stove, cooking utensils, a cupboard, a bed, bedding, a mirror and a trunk containing some of the clothes of the defendant and of her husband. The defendant went to the house some time between the fifth and the ninth of August, and there remained, eating and sleeping there, until the morning of the tenth, when she and her son returned to Oklahoma City, where for some years next prior to this visit to the land she had been living with her family, consisting of at least one child and her father and mother, in a house owned by herself, and in which she had been and then was conducting a millinery establishment. She remained in Oklahoma City, cooking, eating, sleeping and conducting her millinery business in her house there, until January or February, 1903, when she again went to the land and stayed there with her husband three or four days, and then returned to Oklahoma City, arriving at the place last-named a short time before the notice of the contest was served upon her. Up to the time the hearing closed the defendant was not again upon the land, but had continued to live with her family and conduct her millinery business in her house in Oklahoma City, as she had done before the house was built upon the land, until some time during the summer of 1903, when she, with her little boy, removed to another house in the same city, and was there living and carrying on her business August 11, 1903, the date upon which her testimony herein was given. In the meantime the defendant's husband had spent nearly all of his time, or at least the greater part thereof, upon the land.

The defendant, when asked why she left the land after her few days' presence thereon in August, 1902, and returned to Oklahoma City, says: "I was too sick to stay on the claim; we intended to stay, but I couldn't; and another thing, the store was locked up, and we were short of our money, and, of course, I had to get back to make more money so that he [her husband] could stay out there;" also, that

she was dependent upon her millinery business as a means of support for herself and family while her husband was on the land; that for the twelve years then last past she had been sick and subject to sinking spells and constantly required the services of a physician; that she was informed that there was no physician within twenty-two miles of the land; that it was necessary for her to return to Oklahoma City in order to be near a physician; she further testifies that at the time the notice of contest was served upon her "I had just returned home," meaning Oklahoma City; "I had been on the farm and had been there three or four days before I came home;" that "I was sick in bed three or four weeks after I got home;" that during the time her husband was on the land she furnished him with means to live and to do work there; that, considering her financial condition and the state of her health, she had, during the period covered by her entry, complied with the requirements of the homestead law to the best of her ability.

It further appears from the testimony that in August, 1902, about five acres of the land were broken, and that in the following spring the broken land was planted to crop and about one hundred fruit trees were set out. These acts, together with the building of the house, constitute all of the improvements made by the defendant on the land.

It is very evident that the defendant has never gone upon the land with the immediate intention of making it her home to the exclusion of one elsewhere. It must therefore be held that she has never established a *bona fide* residence thereon, and, *a fortiori*, that she has never there maintained one.

Your office, in the decision appealed from, without finding that the defendant ever established a residence on the land, does find that her husband established and maintained a residence thereon, and holds that "either the husband's or wife's residence on the land would defeat the charge of abandonment, either being a part of the family of the other." This is equivalent to holding that a married woman having a homestead entry may, by the acts of her husband, establish a residence on the land embraced therein.

The Department cannot give its assent to the application of any such doctrine to a case like the one at bar. Indeed, this ruling of your office is in direct conflict with the uniform departmental rulings to the effect that the establishment of residence upon public lands under the public land laws must be by the personal act of the entryman; that it cannot be done by the act of any other person, even though such other person performing the acts be a member of the entryman's family. The Department is not unmindful of the fact that it has said in a number of cases that "the residence of the husband is the residence of the wife; his acts are her acts," etc.; but in

those cases the husband either appeared as the principal actor or was shown to have been claiming land as an actual settler while at the same time his wife was claiming to be a settler on other land. These cases are therefore in nowise applicable to the case at bar, wherein the wife is the principal actor, and the husband figures merely as a member of her family. For the reasons above stated it is held that the defendant derived no benefit whatever from her husband's presence on the land. This is not to be taken as determining what effect the husband's presence on the land would have had if the defendant had established an actual residence on the land and then absented herself therefrom.

The defendant having failed to establish and maintain, in good faith, a residence on the land, is held by the Department to have abandoned the same, and because of such abandonment her entry will be canceled. The decision appealed from is accordingly reversed.

SOLDIERS' ADDITIONAL RIGHT—SECTION 2296, R. S.

EDWARD J. McLAUGHLIN.

Section 2296 of the Revised Statutes, which provides that no lands acquired under the provisions of the homestead law shall become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor, applies only to lands "acquired" under the homestead law, and does not include rights and privileges; and said section can have no effect to protect a soldiers' additional right under section 2306 of the Revised Statutes from sale under proper judicial proceedings.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) February 21, 1905. (G. B. G.)

This is the appeal of Edward J. McLaughlin from your office decision of September 8, 1904, denying his application to enter under section 2306 of the Revised Statutes the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 30, T. 56 N., R. 15 W., Duluth land district, Minnesota.

It appears that by reason of the provisions of said section 2306 one John C. Loyd, who served not less than ninety days in the army of the United States during the war of the rebellion, was at some time seized of a soldiers' additional right to eighty acres of land. He assigned this right to one Charles W. Gardner, and McLaughlin's claim to forty acres thereof rests upon a judgment, execution and sale under proceedings in the municipal court of the city of Duluth. McLaughlin was the purchaser at such sale, and it is urged that under these proceedings he became the assignee of the right by operation of law.

Your office denied the application because of section 2296 of the

Revised Statutes, which provides that "no lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefore." In the course of the decision it was said:

The chapter of the Revised Statutes thus referred to is "Chapter Five," entitled "Homesteads," of "Title XXXII," entitled "Public Lands," and is subdivided into twenty-nine sections, numbered from 2289 to 2317, inclusive. Since the right involved in this case is conferred by one of these sections, 2306, and must ripen into a patent under the provisions of the chapter named, it is believed that that right, as well as the lands to be hereafter acquired under it, are protected by section 2296, and that, therefore, no title passed by the attempted sale upon which McLaughlin bases his assignment.

The Department must, after most careful consideration, withhold its assent to the construction thus placed upon said section 2296. This section was taken from section 4 of the act of May 20, 1862 (12 Stat., 392, 393), entitled, "An act to secure homesteads to actual settlers on the public domain," which provided that "no lands acquired *under the provisions of this act*" should become liable to the satisfaction of debt contracted prior to the issuing of the patent therefor. The act of May 20, 1862, made no provision for soldiers' additional homestead rights, and when enacted there could therefore have been no thought by Congress of lands acquired in the assertion of such rights. While the revision extends the law to any "lands acquired under the provisions" of the chapter on homesteads, and in that respect broadens it, in both the original act and the revision it in terms applies only to lands "acquired," and does not include rights and privileges, although the same may be in somewise associated with and dependent upon entry made under the homestead law. The manifest purpose of the statute originally was to protect the settler in the home acquired under the homestead law, and there is no reason to believe that it was the intention of the legislature to broaden the law in this respect. The soldiers' additional right was a gratuity, in the nature of a scrip right, which was subject to barter and sale, and when finally located there was no condition requiring residence upon or cultivation of the land. Its primary purpose was not to provide a home, and it is believed that it was only the home contemplated under the homestead law which was intended to be protected against the antecedent debts of the homesteader. This construction it is thought accords with both the letter and spirit of the homestead law.

The decision appealed from is reversed, with directions to allow McLaughlin's application, unless other objection appear.

It is noted, however, in this connection, that the court proceedings under which this right is claimed are somewhat anomalous, and the attention of your office is specially directed to this matter in your further consideration of the case.

FINAL PROOF—EQUITABLE ACTION—CONTEST.

SITZLER *v.* HOLZEMER.

If a satisfactory showing be made by a claimant, within the time limited, in response to a notice to show cause why his entry should not be canceled for failure to submit final proof within the statutory period, equitable confirmation of the entry will not be defeated by the initiation of a contest against the entry subsequently to such notice.

In case an entryman fails to comply with the law prior to the expiration of the time limited in a notice to show cause why his entry should not be canceled for failure to submit final proof within the statutory period, proof of a subsequent compliance with law, in the face of a contest, although such contest was improperly allowed subsequently to the notice to show cause and prior to the expiration of the time therein limited, will not entitle the entryman to have his proof submitted to the board of equitable adjudication with a view to confirmation of the entry.

The Government may avail itself of, acquiesce in, or adopt the proceedings initiated and the proofs furnished by an individual in protest of final proof, or in contest of an entry.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) February 21, 1905. (P. E. W.)

September 13, 1898, Jennie M. Meserve made desert land entry, No. 886, for the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 22, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 21, and NW. $\frac{1}{4}$, Sec. 27, T. 17 N., R. 18 E., Lewiston, Montana.

June 16, 1899, she assigned the entry to Philena R. Holzemer.

November 14, 1899, Holzemer filed her first annual proof, alleging an expenditure of \$320, for fencing, breaking and ditching on the land in question. December 14, 1900, she filed her second annual proof, alleging an expenditure of \$320 additional, in fencing, breaking, and work done on ditches. December 20, 1901, the third annual proof was submitted, alleging the expenditure of \$320 additional, in cultivating, ditching, irrigating, and fencing.

Final proof was not submitted within the statutory period, and October 15, 1902, Holzemer was ordered to show cause, within ninety days, why her entry should not be canceled for such failure.

After the expiration of said ninety-day period, on January 24, 1903, Holzemer filed application to make proof on March 15, 1903, and duly published notice of her intention to make proof on that day.

On March 15, 1903, Martha A. Sitzler appeared for the purpose of protesting Holzemer's announced final proof, but the latter did not appear or offer such proof.

On March 18, 1903, Sitzler filed her affidavit of contest against said entry, alleging that Holzemer has failed to comply with the desert land law; that she has failed to conduct sufficient water thereupon for its irrigation; that, in fact, no water whatever has been brought thereon; that she has no water right; that she has failed to cultivate

or improve the land and has not made proof thereon within four years as required by law; that the annual proofs submitted by her are fraudulent, and that there are no improvements on the land.

On this affidavit, contest notice was issued on March 19, 1903, and served personally upon the defendant March 20, 1903, fixing April 27, 1903, for a hearing, which was afterwards changed by stipulation to May 4, 1903. March 26, 1903, Holzemer again applied to make final proof, and made republication of notice of intention, fixing May 12, 1903, as the day for hearing.

Contest testimony was submitted by both parties on May 4, 1903, as stipulated. May 12, 1903, Holzemer appeared with her final proof witnesses, according to her last published notice, but in view of the contest proceedings she did not submit her final proof.

June 20, 1903, the local officers rendered their joint decision, recommending the cancellation of the entry.

July 5, 1904, your office affirmed their decision and held the entry for cancellation.

Holzemer has appealed to the Department.

It is contended in the appeal that said contest by Sitzler was erroneously allowed and considered in view of the fact that Holzemer had been notified to appear and show cause why her said entry should not be canceled for failure to submit proof within the statutory period.

In the case of *United States v. Scott Rhea* (8 L. D., 578), it was held that:

An application to contest an entry filed pending proceedings against the same by the government, should be received and held subject to the final determination of such proceedings.

In the case of *Dean v. Peterson* (11 L. D., 102), it was held that:

During the pendency of a rule to show cause why an entry should not be canceled for failure to submit proof within the statutory period, an application to contest said entry shall not be allowed.

In the case of *Fette v. Christiansen* (29 L. D., 710), it was held that:

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.

It follows that a claimant's response and showing upon such notice to show cause is to be considered and adjudicated upon its merits and regardless of any contest initiated subsequently thereto, and if appellant had made such response and showing herein, and if the same had been found satisfactory, equitable confirmation of her entry would not be defeated by the present contest.

But, as shown by the record, the appellant did not, within ninety

days, as required by the notice, or at any time, submit a response to said notice or a showing of cause why her entry should not be canceled for failure to submit her final proof within the statutory period. Ignoring the notice, and allowing ninety days to elapse without any action whatever, she, ten days subsequently to their expiration, and without any reference to said notice, which she received at least five weeks previously, published notice of her intention to make final proof on March 15, 1903. In entire disregard of her own published notice, and still ignoring the notice served on her to show cause why her entry should not be canceled, she did not appear and did not submit any proof on the day advertised. Sitzler, who appeared on that day, with witnesses, to protest against Holzemer's final proof, thereupon filed her contest on March 18, 1903, charging, *inter alia*, that which the government had charged in its notice, the failure to submit final proof within the statutory period.

On the same day Holzemer filed her appointment of counsel, who entered her appearance in the contest case and stipulated as to the time of hearing, all without objection to the allowance of the contest. Subsequently she again published notice of intention to submit final proof, but when the day fixed therein arrived she did not submit her proof because of the pending contest. At the contest hearing, on May 4, 1903, she appeared and submitted testimony, among other matters, on the cause of her failure to make final proof within the statutory period. This was the first and only response ever made herein to the notice of October 15, 1902, from the local office, more than seven months before.

Can it be seriously contended that there was error, prejudicial to the claimant, in allowing and considering this contest, which resulted in placing before the local officers the only response ever made by claimant to the proceedings instituted by them and to the notice to show cause within ninety days from October 15, 1902, why her said entry should not be canceled?

It seems entirely clear that the claimant first elected to rely upon the showing she could make by way of final proof in the spring of 1903, rather than the showing of cause she could make in explanation of her failure to submit final proof prior to October 15, 1902, or within ninety days thereafter, and that when Sitzler appeared to protest, she withheld her final proof. When, thereupon, Sitzler filed contest, Holzemer, without objecting to the allowance of the same, submitted testimony on all points, including the said charge and proceedings of the government against her entry. This included all the testimony which, in case the contest had been rejected, would have been submitted by her eight days later, on May 12, 1903, in accordance with her last republication of notices of final proof. She is therefore in the position of a party who, without objection, goes

to trial in an action, accepting and appropriating the chance of a result favorable to himself, and when such trial results adversely, for the first time objects to such trial of the issue involved. A careful consideration of the testimony submitted, shows that the claimant was allowed full opportunity to present her case, the testimony most favorable to her, relating to work done in the spring of 1903, and subsequently to the expiration of the ninety days within which she was required to show cause, and subsequently to service of notice of contest. Moreover, it appears from the decision of the local officers that this hearing was entered into by all parties, and was regarded by all as a merger of the adverse proceedings initiated by the government against said entry, with the final proof proceedings initiated by Holzemer, in protest against which Sitzler made her first appearance in the case, on March 15, 1903, and prior to the initiation of contest.

It is said in their said decision:

Upon the 15th of March, 1903, the first date set for final proof, Martha A. Sitzler appeared, intending to protest final proof if offered. Final proof not being submitted, affidavit of contest was filed by her, part of the allegation of which was that claimant had not made final proof therein or reclaimed the land within four years from date of entry, as required by law. The only reason shown for the non-submittal of final proof within four years, or as to why the land had not been reclaimed within that time, is given by the witness Lindsey (claimant's agent). * * * He states that it was impossible to complete the work required by law in the specified time, but that since the 18th day of March, 1903 (subsequent to the date set by claimant for her final proof, and after contest affidavit was filed), he constructed two reservoirs, completed the ditches and broke some more land. The proceedings in this case show that the land in controversy had not been reclaimed from its desert condition within a period of four years from the date of entry, and we are of the opinion that in the presence of a protest or adverse claim, claimant has not shown cause why the entry should not be canceled, for failure to make final proof therein within the statutory period of four years from date of entry, and that, therefore, the entry should be canceled.

It is now contended that claimant's proceedings in making final proof were interrupted by this contest, improperly allowed, and that, therefore, all proceedings had herein should be dismissed and that claimant should thereupon be permitted to make final proof, and that—

if that proof shows sufficient compliance with law, the same may be submitted to the Board of Equitable Adjudication for confirmation on account of the failure to submit the proof within the statutory period.

The effect of this would be that the proceedings initiated by the Government with said notice to show cause would be operative only for the warding off of contests, until the claimant, by reason of work done since the expiration of the ninety days allowed to show cause, would be able to submit final proof which might be found satisfac-

tory, but that otherwise said proceedings by the Government should have no effect and might be ignored.

It is not shown or claimed that prior to said notice or within the ninety days allowed thereafter, there was a compliance with the law. It is not intimated that appellant will or can meet the requirement and show sufficient cause existing at the time of said notice and prior thereto, or within ninety days thereafter. It is asked that claimant be now permitted to make final proof on the facts as they now exist, to the entire exclusion from consideration of the proceedings initiated by the Government and the proceedings initiated by the contestant, and of the facts as they existed up to the spring of 1903, six months after the issuance of notice to show cause. And this is asked, not upon the basis of a meritorious defense, existing when her default was complete and still existing, when the ninety days allowed to show such cause or defense had expired, but upon the basis of work done since the contest affidavit was filed.

It is proper to add that while an individual may not come in and usurp the place of the Government in adverse proceedings against the entry, there can be no question of the right of the Government to avail itself of, acquiesce in, or adopt the proceedings initiated and the proofs furnished by an individual in protest of final proof, or in contest of an entry.

The entry will be canceled, your said decision being hereby affirmed.

**RAILROAD GRANT—PURCHASE UNDER TIMBER AND STONE ACT—
ADJUSTMENT.**

EATON ET AL. v. NORTHERN PACIFIC RY. CO.

- A claim resting solely upon the tender of a mere application to enter or purchase which had not been finally disposed of on January 1, 1898, and not based upon a preceding settlement, is not within the class of claims subject to adjustment under the act of July 1, 1898.
- Lands embraced in a railroad indemnity selection are not subject to entry or purchase under the timber and stone act, and no right or claim can be initiated to such lands by an application to enter or purchase the same.
- An appeal from the action of the local officers rejecting an application to purchase under the timber and stone act entitles the applicant only to a judgment as to the correctness of such action at the time it was taken.
- No such right is acquired by a purchase of land under the timber and stone act made in violation of an order suspending such lands from entry as entitles the purchaser to be heard upon the question as to the validity of a prior railroad selection, or other claim asserted to the land, before carrying into effect an order for the cancellation of the purchase thus erroneously allowed.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 24, 1905.* (F. W. C.)

The Department has considered the appeals by F. W. Eaton and A. F. Huntoon from your office decision of October 31, 1902, wherein

it was held that the conflicting claims to the NW. $\frac{1}{4}$ of Sec. 9, T. 54 N., R. 12 W., Duluth land district, Minnesota, are not subject to adjustment under the provisions of the act of July 1, 1896 (30 Stat., 597, 620), and wherein the purchase made of this land by Eaton under the provisions of the act of June 3, 1878 (20 Stat., 89), was held for cancellation for conflict with indemnity selection made thereof by the Northern Pacific Railroad Company, and the action of the local officers, in rejecting Huntoon's homestead application covering this land, was affirmed.

The tract involved is within the second indemnity belt of the grant made in aid of the construction of the Northern Pacific railroad, provision for which is found in the joint resolution of May 31, 1870 (16 Stat., 378), which reads—

and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that 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,—

and selection was made thereof October 17, 1883. The order of May 28, 1883 (12 L. D., 196), in force at the time said selection was made, permitted this company to make its indemnity selections, without specification of losses, from the lands within the primary limits of its grant, as a basis therefor, leaving the ascertainment of the losses to your office. The company did, however, accompany its list of October 17, 1883, with a designation of losses in bulk equalling in amount the selected lands, and on April 11, 1893, filed a supplemental list rearranging the losses with the selected lands, and in this list the SW. $\frac{1}{4}$ of Sec. 9, T. 133 N., R. 34 W., was specified as a basis for the selection in question. With regard to said basis your office decision finds that the tract designated is within the primary limits of the grant; was disposed of subsequently to the passage of the act of July 2, 1864, making the grant to the Northern Pacific Railroad Company, and prior to the definite location of the line of road opposite the same, and that said tract has not been used by the railroad company in the selection of any other land.

October 26, 1895, Frank W. Eaton presented at the local land office an application to purchase this land under the timber and stone act of June 3, 1878, under the provisions of which an applicant is required

to publish notice of his application for a period of sixty days, and thereafter, if no adverse claim shall have been filed, is required to furnish to the register of the land office satisfactory evidence that notice of his application has been published as required, that the land is of the character contemplated by the act, is unoccupied and without improvement, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper or coal, and thereupon he is permitted to make entry of the land upon payment of the purchase price together with the fees allowable by law to registers and receivers.

No notice was issued for publication upon Eaton's application because the same was, at the time of its presentation, rejected for conflict with the railroad indemnity selection then of record.

In his appeal from the action of the local officers rejecting his application Eaton alleged that "the said lands are not within the limits of said lands granted by the United States to said Northern Pacific Railroad Company and for this reason are part of the public domain and subject to entry under the laws."

July 17, 1896, Alonzo T. Huntoon tendered a homestead application at the local land office embracing this land, which application was also rejected for conflict with the indemnity selection thereof made by the Northern Pacific Railroad Company, and he also appealed to your office.

By departmental decision of November 13, 1895 (21 L. D., 412), in considering the question as to the location of the eastern terminus of the Northern Pacific land-grant, you were directed to suspend action upon all cases involving the question of the company's right to a grant between Thomson's Junction in the State of Minnesota, and Superior City in the State of Wisconsin; and by departmental decision of August 27, 1896 (23 L. D., 204), Duluth, in the State of Minnesota, was fixed as the eastern terminus of the Northern Pacific land-grant and directions were given for the restoration of all lands within the limits of the grant as formerly recognized to the east of the terminal so established.

The land in question being to the east of the terminal limit so established at Duluth, your office letter of March 2, 1897, addressed to the local officers, directed the cancellation of the selection of this land made by the Northern Pacific Railroad Company, as before described.

February 21, 1898, your office took up and considered the appeals by Eaton and Huntoon from the action of the local officers rejecting their applications, and, as the selection by the railroad company, which had barred the allowance of said applications, had in the meantime been canceled, held that, as between Eaton and Huntoon, the former had the prior and better right of entry. No appeal was taken by Huntoon, and his application was therefore finally rejected.

Because of pending test suits in the courts, it was directed by departmental letter of February 28, 1898 (26 L. D., 265), that the odd-numbered sections available to the Northern Pacific grant within the primary limits, and those selected within the indemnity limits formerly recognized to the east of the terminus established at Duluth, be suspended from entry pending the judicial determination in the courts of the question as to the proper location of the eastern terminus of the Northern Pacific land-grant. It was further provided in said order that where entries had been theretofore allowed the parties would be permitted to complete the same by making proof thereon, but the issue of patent on such entries was suspended until such judicial determination.

Notice of this order was mailed to the local officers at Duluth March 1, 1898, and was received at that office 9 A. M., March 4, 1898.

At the time of the receipt at the local office of the order of suspension, the entry sought by Eaton, the way for which had been apparently cleared by your office decision of February 21, 1898, had not been made or allowed. But it appears that, March 2, 1898, a notice of his application was issued by the local officers, which notice was published by Eaton, the first publication being on March 11, 1898, that after the period of publication, to wit, on May 19, 1898, he was permitted to make proof and payment under the timber and stone law, the entry sought by him was allowed, and a certificate of purchase was issued to him, upon which was endorsed the statement that the same was issued under departmental order of February 28, 1898, before referred to.

September 28, 1898, Huntoon again applied to enter the land under the homestead law, his application being rejected for conflict with the purchase made by Eaton under the timber and stone act. From such action Huntoon appealed to your office.

May 26, 1900, following the decision of the supreme court in case of United States *v.* Northern Pacific Railroad Company (177 U. S., 435), which fixed the eastern terminus of the Northern Pacific land-grant at Ashland, in the State of Wisconsin, your office, apparently without notice to Eaton, rescinded the order canceling the railroad indemnity selection and ordered its reinstatement.

November 3, 1900, a brief was filed in your office in support of Eaton's right to this land under his purchase, in which the validity of the railroad company's selection is attacked upon the ground that it was not made of the nearest available lands to those specified as a basis for the selection, and in demonstration of this claim lists, numbered, respectively, A and B, were filed, designating lands within the first and second indemnity belts, claimed to be available for selection and to be nearer to those lost. Presumably because of this showing, your office, in its decision of October 31, 1902, before

referred to, considered the conflicting claims to this land, from which decision Eaton and Huntoon have appealed to this Department, as before stated.

In the disposition of this case it is first necessary to inquire whether the conflicting claims to this land are subject to adjustment under the provisions of the act of July 1, 1898, *supra*, for if they should be so found to be it would be unnecessary to consider the respective rights of the parties under their asserted claims of record. For this reason, and upon the request of counsel for the interested parties, action upon the case has been suspended pending the decision of the supreme court in the case of *Humbird et al. v. Avery et al.*, it having been suggested that the decision in that case might affect the disposition of this case.

December 12, 1904, the supreme court handed down its opinion in the above referred to case, and after a most careful review thereof I am of opinion that it furnishes no rule of construction affecting the case here under consideration, but leaves this case for consideration as though that suit had never been instituted.

With regard to the applicability of the act of 1898, counsel for Eaton urges that as the legislation is remedial it should be liberally construed and if so construed a claim under any of the land laws pending on January 1, 1898, is subject to adjustment under that act, if the land claimed is also included in a claim under the Northern Pacific land-grant, without regard to whether the individual claim had been accepted and had become of record or was predicated upon a prior settlement. In other words, that a claim resting alone upon a tender of a mere application to enter or purchase which had not been finally disposed of on January 1, 1898, is within the class of individual claims subject to adjustment under the act.

While the act of July 1, 1898, is remedial in its nature and should be liberally construed so as to embrace the remedy, a careful analysis of the act will not support counsel's contention.

The act defining the class of claims subject to adjustment, provides—

That where, prior to January first, eighteen hundred and ninety-eight, the whole or any part of an odd-numbered section, in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection, has been purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department, * * *

But two classes of individual claims are here described: First, those resting on a purchase directly from the United States, and second, where the land had been "settled upon or claimed in good faith by any qualified settler under color of title or claim of right

under any law of the United States or any ruling of the Interior Department." Where the individual claimant had been permitted to make entry or purchase from the United States, the government, retaining his money, was under an obligation to him, or where he had settled the land, this was sufficient to invite congressional recognition, as Congress and the courts have always dealt tenderly with settlers upon the public lands. Where, however, the individual claimant was a mere applicant to purchase or enter, not having made a preceding settlement, he had no such claim as merited particular consideration, and in this connection it must be remembered that the act first affords to the individual claimant the option of transferring his claim from railroad lands to other public lands, with credit for the period of *bona fide* residence and amount of improvements made upon the railroad lands. In the case of a mere applicant, he had nothing to transfer, and he was in no better or different position whether he was permitted to transfer or his application was rejected, as, in either case, he might and would be forced to proceed in the same way in entering other public lands. While this is in nowise conclusive of the question, as a further right is given the individual claimant to retain the tract claimed, which right would undoubtedly be asserted if the act were held applicable to the claims here under consideration, the tract being particularly valuable for its timber, yet it is worthy of notice in consideration of the question as to the class of claims intended to be embraced within the scope of the adjustment provided for in the act.

It is further insisted that the instructions or regulations heretofore prescribed by the Department in the administration of this act include individual claims having a status like that of Eaton. In the instructions of February 14, 1899 (28 L. D., 103, 105), issued under said act, in defining who are beneficiaries thereunder, it was said, in paragraph 1, that—

The act designates a class of beneficiaries whose status is that of claimants adverse to the Northern Pacific Railroad Company, or its successor in interest, and in doing so, different words and terms of description are used in different portions of the act, but considering the act in its entirety, and giving due recognition to each provision therein, this class embraces any qualified person who, prior to January 1, 1898, by settlement, entry, or purchase, initiated in good faith a claim to lands of the description given "under color of title or claim of right under any law of the United States or any ruling of the Interior Department," and who is still maintaining such claim conformably to such law or ruling.

What was the status of Eaton's claim to this land on January 1, 1898? He had not at that time initiated a claim by settlement, entry, or purchase. He had, as before shown, on October 26, 1895, applied to purchase the land under the timber and stone act, which application had been rejected for conflict with the pending indemnity selec-

tion by the railroad company, and he had appealed to your office, where the matter was, January 1, 1898, pending. So long as the railroad indemnity selection remained intact, the land embraced therein was not subject to entry or purchase under the timber and stone act, and no right or claim could be initiated by an application for such entry or purchase. There had been no ruling of the Interior Department, at the time of the tender of his application, in anywise questioning the validity of the railroad selection. His claim was therefore not initiated under any ruling of the Interior Department. His application was properly rejected, and his appeal from the action of the local officers entitled him only to a judgment as to the correctness of their action when taken. *Hanson v. Roneson* (27 L. D., 382); *Northern Pacific R. R. Co. v. Wolfe* (28 L. D., 298); *Falje v. Moe* (28 L. D., 371); *Olson v. Welch* (28 L. D., 431); *Olson et al. v. Hagemann* (29 L. D., 125); *Oregon and California R. R. Co. v. Johnston* (29 L. D., 442).

It is true that during the pendency of his appeal the railroad selection was canceled under a decision of this Department since held by the supreme court to have been erroneous, but this cancellation was not in any way attributable to his appeal, and it has been repeatedly held that an appeal from the action of the local officers properly rejecting an application because the land described therein is not at the time subject to entry, confers no right upon the applicant, even though the land becomes subject to entry during the pendency of the appeal. *Maggie Laird* (13 L. D., 502); *Swanson v. Simmons* (16 L. D., 44); *Katharine Davis* (30 L. D., 220); *Hall v. State of Oregon* (32 L. D., 565). Therefore, no right or claim was initiated by Eaton's appeal.

For somewhat similar reasons, Huntoon did not, prior to January 1, 1898, initiate any right or claim to the land under color of any ruling of this Department. The decision of November 13, 1895, before mentioned, was prior to Huntoon's homestead application, and questioned but did not determine the validity of the company's indemnity selection of lands like that here in controversy situate between Thomson's Junction and Superior City; but that decision, instead of inviting application to make entry or purchase of the land here in controversy, expressly directed that for the time being action should be suspended "upon all cases involving the question of the company's right to a grant between Thomson's Junction and Superior City." It was while this order of suspension was operative that Huntoon's application was tendered and rejected. The action of the local officers in rejecting his application was subsequently affirmed by your office, and no further appeal was taken by Huntoon.

This was the status of the claims of Eaton and Huntoon on January 1, 1898, and your office therefore very properly held that there

were no such conflicting claims to this land January 1, 1898, as were subject to adjustment under the provisions of the act of July 1, 1898. See *Lamb v. Northern Pacific Ry. Co.* (28 L. D., 124); *Northern Pacific Ry. Co. v. Sherwood* (28 L. D., 126); and *Northern Pacific Ry. Co. v. Rooney* (29 L. D., 242).

Subsequently, and prior to the passage of the act of July 1, 1898, to wit, on May 19, 1898, the local officers accepted the money tendered by Eaton and permitted him to make purchase of this land, but their action in permitting such purchase was in direct violation of the order of suspension of February 28, 1898 (of which they had full notice), for Eaton had not made the entry or purchase or even given notice of his application to make the purchase, prior to the receipt of notice of the order of suspension.

Had the entry been regularly allowed after January 1, 1898, the claim would not, under the plain terms of the statute, have been subject to adjustment under the act of July 1, 1898.

It is insisted, however, that your office erred in holding Eaton's purchase for cancellation without first affording him an opportunity to be heard in the matter of the validity of the railroad selection, and many reasons are assigned in his appeal and arguments filed herein why such selection should not be recognized, and exhibits are submitted in support of the contentions made.

From the previous recitation it is apparent that Eaton's purchase was allowed in plain violation of the order of suspension, and it can not be held, therefore, that any such right was acquired by this purchase as entitled Eaton to be heard upon the question as to the validity of the railroad selection or any other claim asserted to the land prior to an order for the cancellation of the purchase thus erroneously allowed, and the fact that the government might, on the removal of all adverse claims to the land, permit a purchase thus erroneously allowed, to stand, does not in anywise affect the question here under consideration.

Your action holding Eaton's purchase for cancellation is therefore affirmed. This action is without prejudice to his right, upon a proper application, to question the validity of the selection of record, but, in such a proceeding, the record made, if it reaches this Department, will presumably be in such condition as will enable it to intelligently pass upon the questions presented, which it could not do upon the record now before it.

It is equally clear that Huntoon's first application was properly rejected, and was probably subsequently abandoned. His second application, tendered September 28, 1898, was also properly rejected under the terms of the suspending order of February 28, 1898.

The decision appealed from is accordingly affirmed.

SOLDIERS' ADDITIONAL—ASSIGNMENT—PERSONAL REPRESENTATIVE.

FREDERICK ROTH.

The assignment of a soldiers' additional right of entry under section 2306 of the Revised Statutes, by the personal representative of the deceased soldier, will not be recognized by the land department unless it be shown that there is neither widow nor minor orphan child of the soldier capable of exercising such right under section 2307 of the Revised Statutes.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) February 25, 1905. (E. P.)

September 1, 1902, Frederick Roth, as assignee of William Stout, administrator of the estate of William Yarberry, deceased, applied to make soldiers' additional entry of the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 8, and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 17, T. 25 N., R. 28 E., Clayton land district, New Mexico, basing his application upon the service of said Yarberry for a period of more than ninety days in the army of the United States during the war of the rebellion, and upon a homestead entry made by him July 11, 1870, for the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ (40.38 acres) of Sec. 31, T. 31 N., R. 32 W., Harrison land district, Arkansas.

Your office, by decision of October 8, 1904, rejected Roth's application because it appeared from the records of your office that Mary F. Yarberry, the widow of the said William Yarberry, has assigned the additional right, in forty-acre lots, to B. N. Borman, John S. Maginnis, and Noah Hudson.

From this decision Roth has appealed, contending that there is nothing to show that Mary F. Yarberry was the sole heir of the deceased soldier; that according to appellant's information Yarberry left surviving him other heirs, to wit, a number of children; that under the laws of Arkansas, in which State the soldier was domiciled at the time of his death, the widow, if any, of a deceased person takes, and only after administration, but a one-third interest in the estate of such deceased person, the remaining two-thirds going to his children, if any; that Yarberry's soldiers' additional right passed under the laws of said State to his personal representative, by whom alone it was assignable; that the alleged attempted assignment of this right by Yarberry's widow was therefore absolutely void and should not be permitted to have any effect upon an assignment thereof by the administrator of Yarberry's estate, or to defeat an application to enter based thereon.

The rights of appellant in the premises must be determined not, as contended by him, in accordance with the laws of Arkansas, but in accordance with the laws of the United States, and in the disposition of this case the Department does not deem it necessary to consider the assignment of Mary F. Yarberry. It need be held only that before an assignment by the personal representative of a deceased

soldier of such soldiers' right under section 2306 of the Revised Statutes can be recognized by the Department, it must be shown that there is neither widow nor minor orphan child of the soldier capable of exercising such right under section 2307 of the Revised Statutes. Roth has failed to make any such showing, and for this reason the action of your office in rejecting his application is hereby affirmed.

EMPLOYEE OF GENERAL LAND OFFICE—FOREST RANGER—SECTION
452, REVISED STATUTES.

ROBERT J. WATSON.

A forest ranger is an employe of the General Land Office within the meaning of section 452 of the Revised Statutes, and as such prohibited from "purchasing or becoming interested in the purchase of any of the public land," regardless of whether actually employed or on furlough at the time of presenting his application.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 25, 1905.* (A. W. P.)

On November 5, 1902, Robert J. Watson filed his sworn timber land application No. 3911, for the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 4, T. 27 S., R. 2 W., Roseburg, Oregon, land district, on which proof was submitted and cash certificate No. 11155 issued, May 26, 1903.

By decision of July 30, 1904, you held said entry for cancellation on the ground that the proof "disclosed the fact that entryman at the time of making application for the purchase of said land was a forest ranger of the General Land Office and therefore disqualified from making such entry by Sec. 452 of the Revised Statutes," and therefore directed that claimant be given notice that he would be allowed sixty days within which to show cause why said entry should not be canceled.

In response thereto the local officers, by letter of August 25, 1904, transmitted Watson's sworn statement, wherein he alleged, substantially, that at the time of initiating said entry he was on a furlough and working for his brother, and therefore was not an employe of the General Land Office; and that he had examined the land in question and had determined to enter the same long before he became such an employe, although he did nothing toward initiating entry until after receiving appointment from your office as a forest ranger.

This statement you construed as a motion for review of your said former decision, and upon consideration thereof, by decision of September 23, 1904, denied the same.

The case is now before the Department upon the appeal of Watson, wherein he alleges, in substance, that you erred in holding that a

forest ranger is such an employe as to be included in the enumeration mentioned in section 452 of the Revised Statutes; and in holding that he could not make the filing and receive patent for the land when at the time of making application therefor he was on furlough and not receiving salary as an employe of your office.

Section 452 of the Revised Statutes provides that:

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 any person who violates this section shall forthwith be removed from his office.

The Department in construing this section in *Herbert McMicken et al.* (10 L. D., 97), held that it extends to officers, clerks, and employes in any of the branches of the public service under the control and supervision of the Commissioner of the General Land Office, in the discharge of his duties relating to the survey and sale of the public lands, and that an entry made by such an employe is illegal and must be canceled.

In affirming this decision on review (11 L. D., 96), the Department directed the formulation of a circular in accordance with the construction placed upon the law therein. Such circular, which was issued September 15, 1890 (11 L. D., 348), after setting out section 452 of the Revised Statutes, and referring to the decisions above cited, 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.

The appointment of Watson was made in conformity with an act of Congress passed July 1, 1898 (30 Stat., 597, 618), making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1899, and for other purposes. Similar provision has been contained in all subsequent acts making appropriations for sundry civil expenses. Under this authority said Watson was commissioned by the Secretary of the Interior as a "Forest Ranger of the General Land Office," by way of reinstatement, July 8, 1901, to take effect July 1, 1901, or as soon thereafter as he should file the oath of office and enter on duty. It appears that he duly entered upon the discharge of his duties under said appointment; that on October 23, 1902, he was given notice of furlough, owing to weather conditions, until further notice; and that shortly thereafter, to wit, November 5, 1902, he filed the sworn timber land application in question.

Considering the plain purpose of the statute, the language of the

circular and of the cases above referred to, and also this act of Congress authorizing such appointment, the Department reaches the conclusion that a forest ranger is an employe in the General Land Office, in contemplation of law, and therefore within the inhibition of section 452 of the Revised Statutes.

While Watson was on furlough at the time of filing the said timber land application, he was being carried on the rolls as an employe of your office. Such relation could be severed only by death, by tender and acceptance of his resignation, or by notice from your office that his services had been dispensed with. The period of furlough would terminate upon his return to duty in response to such a notice from your office. No commission would issue or oath be administered as in the case of an original appointment or a reappointment.

In this connection, it further appears from an examination of the records of your office that prior to the submission of proof in support of his said application on May 26, 1903, Watson had been directed by your office letter of April 22, 1903, to resume duty as forest ranger on May 15, 1903; that he entered on active duty on that date, and subsequently requested and was granted leave of absence without pay to attend to private business, from May 26, to May 31, both inclusive, presumably for the purpose of submitting such proof in support of his timber land application.

Upon the facts thus disclosed it clearly appears that claimant was an employe of your office, and hence disqualified by statute from making the entry in question. Accordingly your said decision holding the same for cancellation is hereby affirmed.

At the conclusion of the brief on appeal, it is urged, in the event the Department should affirm the judgment of your office, that claimant be allowed to resign his position as forest ranger and perfect his entry. While said employe is at liberty at any time to tender his resignation as such, the Department declines at this time to pass on the question of the acceptance of such a conditional application.

REPAYMENT—DESERT LAND ENTRY—COMPACTNESS.

PARIS GIBSON.

Upon application for repayment, in the absence of evidence that an entry was erroneously allowed and could not be confirmed, any doubt on the subject must be resolved in favor of the Government as against the applicant.

If an entry is of unreasonable shape on its face, or flagrantly violates the regulations as to intersecting streams, and the records disclose that it might have been made in better form, so far as the character and topography of adjacent lands and prior appropriation are concerned, a case for repayment is made out.

Where the entry is of unreasonable shape on its face, and the records fail to show that it could have been made in other form, the applicant for repayment must furnish proof that the entry could have been made in different and more compact form.

If an entry on its face shows no gross or absolute departure from any reasonable degree or requirement of compactness, it is not a case for repayment, regardless of the facts disclosed by the records.

Whether the land embraced in an entry is "in compact form" within the meaning of the law must be determined from the facts of each case, consideration being given to the area of the entry as well as to the regulations and departmental decisions and practice, as far as practicable.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 25, 1905.* (C. J. G.)

An appeal has been filed by Paris Gibson, heir of Valeria Gibson, deceased, from the decision of your office of March 12, 1904, denying his application for repayment of the purchase money paid by said Valeria Gibson on desert land entry No. 569 for the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 1, E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 12, T. 20 N., R. 3 E., SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, and lot 10, Sec. 6, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$, and lots 1, 2 and 3, Sec. 7, T. 20 N., R. 4 E., containing six hundred and forty acres, Helena, Montana.

The entry was made January 22, 1883, the initial payment, which is now involved, being at the rate of twenty-five cents per acre, and was canceled on relinquishment July 2, 1883. The claim for repayment is made under section 2362 of the Revised Statutes, and also the act of June 16, 1880 (21 Stat., 287), on the allegation that the entry was erroneously allowed and could not have been confirmed within the purview of the said act, because for a tract of land not in compact form as contemplated by the desert land act of March 3, 1877 (19 Stat., 377). The claim was denied by your office for the reason that—

A diagram of the petitioner's claim shows that it was in the form of a parallelogram, with the exception of one subdivision of 40 acres, and that it was sufficiently compact to meet the requirements of the law (5 L. D., 429; 31 L. D., 441).

The case is one coming clearly within that portion of the decision in the case of Chester Call (32 L. D., 471), and allied cases, which held that repayment of the purchase money paid on a desert land entry is not authorized where the entry upon its face does not show such a departure from any reasonable requirement of compactness as would necessarily preclude its confirmation. But in view of the strong presentation of the case and the apparent misunderstanding that seems to prevail in these matters, the controlling reasons for the conclusion reached in the Call and other repayment cases will be more fully stated.

The desert land act of March 3, 1877, provided:

That no person shall be permitted to enter more than one tract of land, and not to exceed six hundred and forty acres, which shall be in compact form.

By the amendatory act of March 3, 1891 (26 Stat., 1095), the amount of land that could be acquired by one person was restricted to not exceeding three hundred and twenty acres. The act of 1877 does not prescribe what shall constitute compactness as applied to desert land entries. The regulations issued under said act, prior to the circular of September 3, 1880 (2 C. L. L., 1378), contained no directions or intimations as to the form of the entry, and no attempt has ever been made to formulate a rule exactly and strictly defining the term "compact." In the above circular it was said:

The requirement of compactness of form will be held to be complied with on surveyed lands when a section, or part thereof, is described by legal subdivisions compact with each other, as nearly in the form of a technical section as the situation of the land and its relation to other lands will admit of, although parts of two or more sections are taken to make up the quantity or equivalent of one section. But entries which show upon their face an absolute departure from all reasonable requirements of compactness, and being merely contiguous by the joining of ends to each other, will not be admitted. . . . In no case will the side lines be permitted to exceed one mile and a quarter, when the full quantity of six hundred and forty acres is entered. Where the entry embraces a less quantity than a whole section, or its equivalent, the limit to the side lines will be proportionately decreased. . . . Entries heretofore made, whether by legal subdivisions on surveyed lands, or of an irregular form on unsurveyed lands, running along the margins or including both sides of streams, and not being compact in any true sense, will be suspended by this office, and the parties will be called upon to amend their entries so as to conform to the law; failing to do which after proper notice, such entries will be held for cancellation.

Appellant's contention is that the desert land act, which provides that an entry thereunder "shall be in compact form," is peremptory; that it is "an exact, inelastic and uncompromising statute of prohibition"; that under the regulations and the long settled practice, an entry embracing six hundred and forty acres, in order to be compact under the law, must be for a tract of land in the exact form of a technical section or square, and an entry for a tract of less than six hundred and forty acres as nearly in such form as is possible with the area of land taken, unless in each case the situation of the land and its relation to other lands forbids such an arrangement. From these premises it is argued that an entry showing on its face the least departure from such requirement is *prima facie* non-compact and therefore invalid, unless the records disclose that it could not have been made in other form. In other words, appellant's theory is that "compact" under the law means square, and the argument assumes that such is the meaning of the regulations of 1880 and the settled rule and practice in cases of this kind. Upon this theory there is no discretion whatever in the premises; if an entry embracing six hundred and

forty acres is not perfectly square in form, on its face, a conclusive case for repayment is presented, unless the records show that it is as nearly in such form as the situation of the land and its relation to other lands will admit; if the records are silent, the fact that the entry on its face does not conform to a technical section is sufficient proof of its invalidity to demand repayment. Appellant's contention recognizes no distinction between an entry grossly irregular on its face and one which shows no departure from any reasonable requirement of compactness. It likewise recognizes no distinction between the proof required to sustain an entry under the desert land law and that required to sustain a claim under the repayment law. A strictness of interpretation is thus argued for that is not supported by the desert land act, the regulations thereunder, or by departmental decisions. The act does not in terms, nor do the regulations, prescribe that an entry shall be in perfectly square form, and that regardless of surrounding conditions. So far as the act itself is concerned, an entry may be compact without being in square form. It becomes then a question of what is to be regarded as compact in form. If the regulations of 1880 contain words of limitation upon rights under the act beyond what the act requires, then they should to that extent be abrogated. Francis M. Bishop (5 L. D., 429). The cases cited by appellant, where the entries were required to be adjusted, or where repayment was allowed, are cases, as will be shown, where the entries showed upon their face a gross departure from any reasonable requirement of compactness. This being true, said cases clearly fail to support the strict interpretation contended for by appellant.

The regulations of September 3, 1880, prescribe that—

In no case will the side lines be permitted to exceed one mile and a quarter, when the full quantity of six hundred and forty acres is entered. Where the entry embraces a less quantity than a whole section, or its equivalent, the limit to the side lines will be proportionately decreased.

A tract of six hundred and forty acres whose side lines are one mile and a quarter could not possibly be in more compact form than that in which the entry in question was made. There must necessarily be some point in such an entry where its width is one mile, thus making an exception of one subdivision of forty acres from a complete parallelogram one mile and a quarter in length. Under the above paragraph this was the extreme limit allowable in case of a tract containing six hundred and forty acres. If the entry embraced a less area the limit to the side lines had to be proportionately less. But in the case of Francis M. Bishop, *supra*, this paragraph was eliminated from the regulations, for the following reason:

The residue of the regulation is in my judgment ample for the protection of the government and for the proper administration of the law by your office and the Department; and it properly leaves to the land department some discretion in determining what is and what is not a compliance with the law.

With respect to the entry in that case it was said:

The tract in question, which as already indicated embraces six hundred acres, is in the form of a rectangular parallelogram, a mile and a quarter long, and three quarters of a mile wide. Its width is equal to three-fifths of its length. The sole question presented is as to the compactness of the tract. Is it compact; or are its shape and contour such as to call for a readjustment of boundaries before patent can issue? The only provision of the law on the subject is that already quoted, that tracts entered under the desert land act "shall be in compact form." That the tract herein described is in compact form within any reasonable definition of the term "compact," can not be gainsaid. It is therefore compact within the meaning of the law and must be so regarded.

There was no reference in Bishop's case as to what may have been the conditions surrounding the entry, either as to the character and topography of the land or prior entries. On its face the entry was found to be compact, notwithstanding the fact that it was not in the form of a square, and it may have been possible to readjust it accordingly. This case alone effectively refutes the applicant's contention. Its obvious purpose was to liberalize the regulation theretofore in vogue and recognize some discretion in the Department in these matters.

The general circular of March 1, 1884 (p. 35), after employing the language of the regulations of September 3, 1880, continued:

But entries running along the margin or including both sides of streams, or being continuous merely in the sense of lying in a line so as to form a narrow strip, or in any other way showing a gross departure from all reasonable requirements of compactness, will not be admitted.

The necessary implication here is that if there is not a gross departure from reasonable requirements the entry may be permitted to stand.

Prior to the Bishop case it was held in the case of Kenneth McK. Ham (4 L. D., 291), involving a repayment claim, that a desert land entry covering the technical three-quarters of one section comes clearly within the law as regards compactness.

The desert land entry in the case of Lizzie Devoe (5 L. D., 4) contained four hundred and forty acres and the tract was a mile and a quarter long. It was said:

The rule prescribed in the circular of March 1, 1884, *supra*, is by its own terms not a rigid and inflexible one There being in the case of Devoe's entry no departure from reasonable requirements of compactness—

it being further stated, however—

but it being as nearly square "as its relation to other lands will admit," I think said entry should be allowed to stand.

Referring to the Devoe case it was said in the Bishop case:

In that case the regulation was treated as sufficiently flexible to authorize the entry, the facts in which clearly met the requirement of the law with regard to compactness. In this, upon further consideration of the regulation,

it is regarded as in part in conflict with the law, because its words of limitation are deemed to go beyond what the statute will authorize, and it is to that extent abrogated. Such modification of the regulation in no way impugns the correctness of the conclusion arrived at in the Devoe case, but that case, in so far as the reasons therefor differ from this, is modified, and this decision will furnish the authority for action in all desert land cases not yet finally adjudicated in so far as the question of compactness is concerned.

In the cases of Maren Christensen (4 L. D., 317), James S. Love (5 L. D., 642), William Thompson (8 L. D., 104), Frederick A. Bacon (9 L. D., 248), Thomas Hunton (11 L. D., 27), William H. Wheeler (22 L. D., 412), Abram M. Reid (24 L. D., 306), and Charles G. Johnson (27 L. D., 123), the desert land entries were allowed to stand as made, although departing in form from a reasonable degree of compactness, because it appeared that the boundaries thereof could not be re-adjusted owing to the prior appropriation or character of the adjacent lands. It was stated in the course of the decisions in said cases that the desert land act does not specifically prescribe what shall be considered "compact;" that it is impracticable to establish inflexible rules to govern the shape or form of an entry; and that each case must be considered in the light of the facts presented. In the case of Bacon it was said: "The entry in question in this case would appear at first glance to be far from compact." But it was held that the existence of prior adjacent entries, and the topography of the country, must be taken into consideration in determining the question of compactness. In the case of Hunton it was said:

Each case must depend upon the circumstances surrounding it and whether an entry should be regarded as sufficiently compact to answer the requirements of the law must depend largely upon the nature and location of the land, its means and facilities for irrigation and the rights of adjacent and surrounding entrymen.

* * * * *

While the decisions of this Department have not been uniform upon the question of what should be considered a compact entry, within the meaning of the statute, yet they have invariably been liberal in the construction of the law, where the entryman has acted in good faith in making his entry and in reclaiming the land.

In the cases of *Stanton v. Durbin* (4 L. D., 445), John Durbize (6 L. D., 536), Joseph Himmelsbach (7 L. D., 247), J. H. Christensen (9 L. D., 202), Thomas Swan (9 L. D., 307), and Joseph Shineberger (on review, 9 L. D., 379), the entries were either canceled or the entrymen were required to reform their entries. But in every case there was a gross departure from reasonable requirements of compactness, the lands being narrow strips and intersected by streams, which the regulations specifically prohibited. In the case of *Stanton v. Durbin* it was said:

It will be observed that the entry is of three hundred and sixty acres, and the tracts embraced in it extend for a distance of two miles along and on both sides

of a considerable stream of water called Bear Creek. An entry of that character is not *compact* in any sense of the word.

Durbize's case:

A plat filed with the application shows that the land applied for lies along and upon both sides of a small stream marked as Kirby Creek, making an irregularly shaped tract one and a quarter miles in length and at no place more than half a mile in width.

Himmelsbach's case:

The tract, after said relinquishment, was, as appears from the plat thereof, nearly two and a half miles in length and from a quarter to a half mile in width, running in a northwesterly direction through parts of four sections of land, and lying in a zigzag line so as to form a narrow strip. This, in the language of the general circular of March 1, 1884 (p. 35), is a "gross departure from all reasonable requirements of compactness."

Christensen's case:

The entry runs along on both sides of a stream, the forties composing it forming a narrow strip over a mile and a half in one direction, while the greatest width, at right angles to the first-named line, is less than three-eighths of a mile.

Swan's case:

In view of the character of the entry and the situation of this land with reference to a running stream, I do not feel justified in disturbing the order as made.

Shineberger's case:

By a straight line from the northwest to the southeast corner of the land, the distance between said points, i. e., the extreme length of the entry is shown to be two and five-eighths miles. A very considerable part of the tract in question is only a quarter of a mile wide while the greatest width at right angles to the line mentioned is about three quarters of a mile. That the entry is in *obvious* violation of the statutory requirement with regard to compactness (19 Stat., 377), is in my opinion too plain for discussion. Moreover, the land embraced therein is intersected by a stream.

Nearly all of the above-cited cases are referred to in the appeal under consideration as authority for the contention for a strict construction of the desert land act; that the Department has uniformly interpreted the requirement in the regulations, namely, "as nearly in the form of a technical section as the situation of the land and its relation to other lands will admit of," to mean that the entry must be in square form if possible; and that the Department possesses no discretion, in determining whether an entry is sufficiently compact to meet the requirement of the statute, recourse always being had to evidence respecting the particular conditions surrounding the entry. Comparatively few repayment claims in this class of cases came before the Department until in recent years, so that precedents in this respect are very few.

Reference is had in the appeal to the repayment cases of Julia B.

Keeler (31 L. D., 354), Manuel Amado (32 L. D., 420), and allied cases, wherein repayment was allowed, the claim being made that the decisions therein state the rule properly applicable to all cases of this character and at the same time follow and affirm the uniform and settled interpretation, rules and practice of the Department. Whereas the cases of Chester Call (32 L. D., 471), Peter J. Bacca (32 L. D., 660), and allied cases, to which reference is also made, and in which repayment was denied, depart from and set aside such interpretation, rules and practice, and establish a new rule for the adjudication of repayment claims arising in this class of cases.

In the Keeler case it was determined that the entry on its face showed a gross departure from any reasonable requirement of compactness. A recourse to the records disclosed that there was no apparent reason why the entry could not have been made in more compact form. It was therefore held that it was a case in which repayment was authorized because of erroneous allowance. The entry in the Amado case likewise evidenced upon its face a violation of a reasonable requirement of compactness, and being for unsurveyed land there were no records to show whether it could have been made in better form. But the proof offered by the entryman did disclose that the entry covered land on both sides of a river. It was held that a case for repayment had been made out.

As to the Call case it was determined that the entry on its face did not show a departure from reasonable requirements of compactness, which of itself was a sufficient reason for denying repayment therein. But it was further found and so stated that the records failed to show that the entry could have been made in other form, nor was the fact otherwise shown, on the theory that even if it were conceded that the entry did violate the statutory requirement on its face, a case had not been made out for repayment, because of the absence of other necessary elements of proof. On each proposition the case was essentially different from the Keeler case, and it was so stated.

In the Keeler case, referring to the regulations of September 3, 1880, it was said:

Their necessary corollary is that where an entry by legal subdivisions is not in the form of a technical section, or *prima facie* non-compact, in order to stand at all it must appear that it is as nearly in such form "as the situation of the land and its relation to other lands will admit of."

This was practically a restatement of the general rule issued for the guidance of local officers in this class of entries, but as shown by the decisions cited herein it was not intended to be a rigid and inflexible rule, and the practice thereunder fully bears this out. The rule was applied to the case in hand and the above statement bore the same significance precisely as the rule itself, which, as shown herein,

has never been construed to require a desert land entry to be in absolutely square form. Its significance becomes apparent when it is remembered that the entry in the case was grossly irregular on its face. The Department did not intend thereby to hold and has never held that an applicant for repayment is relieved of the burden of otherwise bringing his case within the terms of the repayment statute by simply inviting attention to the face of the entry even though it be grossly irregular in shape. Other elements necessarily enter into the equation. The case turned upon the fact of the gross irregularity of the entry, it also appearing from the records that it might have been made in better form, consideration being given to departmental decisions as well as to that other part of the regulations which says: "But entries which show upon their face an absolute departure from all reasonable requirements of compactness, etc." As stated in said case:

The plats and field notes fail to disclose any valid reason why the entry might not have been made more nearly in the form of a technical section, nor is any reason otherwise shown. The irresistible conclusion therefore is that, upon the face of the entry which shows a gross departure from any reasonable requirement of compactness, the entry was in fact non-compact in form and therefore allowed in violation of the statutory requirement.

In the Call case the Department exercised the discretion and latitude given by the desert land act, which failed to define the term "compact," and by the regulations which were never intended nor construed to be rigid and inflexible.

In a supplemental brief filed with the appeal here numerous illustrations are given and contrasts made of the forms of entries involved in repayment claims, in some of which repayment was allowed and in the others denied. The illustrations as given are manifestly unfair and misleading as they are not accompanied by any showing as to the conditions under which the entries may have been made. It is obvious that of two entries of precisely like form one may be consistently permissible under the law and regulations and the other not, owing to different surrounding conditions. Yet these illustrations are submitted in face of the admissions by appellant that an entry, although non-compact on its face, may nevertheless be allowable by reason of particular conditions; in face of the repeated holdings of the Department that it is impracticable to establish inflexible rules which shall govern the shape or form of an entry, and that each case must be controlled by the facts presented. Besides, if any error has been committed in these cases, it is not chargeable to the rule itself that has been established in this class of cases, but to the possible wrongful application of the rule and the improper interpretation of the regulations and controlling decisions.

A presumption, however strong, does not satisfy the specific

requirements of the repayment statute. If this were not so it might with equal propriety be presumed that local officers were in possession of knowledge that an entry could not be made in other form than that appearing. Upon application for repayment, in the absence of evidence that an entry was erroneously allowed and could not be confirmed, any doubt on the subject must be resolved in favor of the government as against the applicant. This principle is recognized in the case of *United States v. Edmondston* (181 U. S., 500). Especially is this true as the entry in the first instance was of the selection of the entryman himself who had the sole opportunity of judging surrounding conditions as to the character and topography of the land; and that in most, if not all, cases of this kind the entries were canceled not because of their form but on voluntary relinquishment or for failure to comply with the law as to reclamation. The missing elements of proof must be supplied. If the records are silent in the matter of essential evidence, the applicant for repayment is peculiarly in a position to supply the defect. The case must be satisfactorily made out, and in this connection it may be said that the repayment claim, to authorize favorable action, must be brought ultimately within the terms of the repayment statute as distinguished from any requirements of the desert land act; a distinction that is practically overlooked in the presentation of this claim.

While it is not practicable to establish an inflexible rule with respect to repayment claims arising in this class of cases, yet it may be suggested generally in addition to and along the line of the matters set forth herein, that where an entry is of unreasonable shape on its face, or flagrantly violates the regulations as to intersecting streams, and the records disclose that it might have been made in better form, so far as the character and topography of adjacent lands and prior appropriation are concerned, then a case for repayment is made out. Where the entry is of unreasonable shape on its face and the records fail to show that it could have been made in other form, the applicant is required to furnish evidence showing that the surrounding conditions were such that the entry could have been made in different and more compact form. Where the face of the entry shows no gross or absolute departure from any reasonable degree or requirement of compactness it is not a case for repayment, and this regardless of the facts disclosed by the records. Whether the land embraced in an entry is "in compact form" within the meaning of the law must be determined from the facts of each case, consideration being given to the area of the entry as well as to the regulations, departmental decisions and practice, so far as practicable.

The action of your office herein denying repayment is hereby affirmed.

CHEYENNE AND ARAPAHOE INDIAN LANDS—ISOLATED TRACT.

JAMES M. McCOMAS.

Congress having specifically limited the disposal of the lands formerly embraced within the Cheyenne and Arapahoe Indian Reservation and opened to settlement under the provisions of the act of March 3, 1891, to actual settlers only, under the provisions of the homestead and townsite laws, with the exception of section 2301, Revised Statutes, said lands are not subject to disposal under section 2455, Revised Statutes, as amended by the act of February 26, 1895, providing for the sale of isolated tracts.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) February 25, 1905. (A. W. P.)

An appeal has been filed on behalf of James M. McComas from your office decision of October 13, 1904, rejecting his application to have 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), the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 31, T. 11 N., R. 20 W., Elreno, Oklahoma, land district.

In said decision you found as follows:

The land applied for was opened to settlement and entry by the act of June 6, 1900 (31 Stat., 676), under the general provisions of the homestead and townsite laws. These lands are, therefore, not subject to sale under section 2455 R. S., and the application is accordingly denied, of which you will advise him.

In support of this appeal it is urged in substance that you erred in finding and holding that the tract in question was a part of the lands opened to settlement and entry by the act of June 6, 1900, *supra*, and that, in fact, the same has been subject to settlement since April 19, 1892.

From an examination of the records of your office, the Department finds that the tract in question is not a part of the lands opened to settlement and entry by the act of June 6, 1900, *supra*, but is within the limits of the former Cheyenne and Arapahoe Indian reservation, which was opened to settlement April 19, 1892, as contended by appellant. (Proclamation, April 12, 1892, 27 Stat., 1018.)

Such opening was the result of agreement ratified and confirmed by the act of Congress of March 3, 1891 (26 Stat., 989-1044), section 16 of which (page 1026) provides for the disposal thereof, as follows:

That whenever any of the lands acquired by either of the three foregoing agreements respecting lands in the Indian or Oklahoma Territory shall by operation of law or proclamation of the President of the United States be open to settlement they shall be disposed of to actual settlers only, under the provisions of the homestead and town site laws (except section twenty-three hundred and one of the Revised Statutes of the United States, which shall not apply): *Provided, however,* That each settler on said lands shall before making a final proof and receiving a certificate of entry, pay to the United States for the land so taken by him, in addition to the fees provided

by law, and within five years from the date of the first original entry, the sum of one dollar and fifty cents per acre, one-half of which shall be paid within two years: 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, and all the lands in Oklahoma are hereby declared to be agricultural lands, and proof of their non-mineral character shall not be required as a condition precedent to final entry.

Considering the above section, it is apparent that Congress has specifically provided for disposal of the lands thus opened to entry to actual settlers only under the provisions of the homestead and townsite laws, with the exception that section 2301 of the Revised Statutes shall not apply. As the method of disposal is thus limited, said lands are not subject to the provisions of the law relating to the sale of isolated or disconnected tracts. See the cases of H. R. Saunders (27 L. D., 45); W. D. Harrigan (29 L. D., 153); and William C. Quinlan (30 L. D., 268).

For the reasons stated herein, the judgment of your office rejecting the application of McComas is affirmed.

ADDITIONAL HOMESTEAD ENTRY—COMMUTATION—ACT OF APRIL 28,
1904.

STEPHEN TEICHNER.

The provisions of the act of April 28, 1904, relating to additional homestead entries, do not apply to or for the benefit of any person who does not own and occupy the lands covered by the original entry.

An additional homestead entry made under the provisions of the act of April 28, 1904, is not subject to commutation.

An entry made or commuted in violation of statutory provisions may not properly be submitted to or allowed by the board of equitable adjudication.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *February 28, 1905.* (J. L. McC.)

Stephen Teichner, on March 5, 1900, made homestead entry for the NE. $\frac{1}{4}$ of Sec. 30, T. 152 N., R. 76 W., 5th P. M., Devils Lake land district, North Dakota. Subsequently he relinquished this entry and it was canceled.

On November 15, 1900, he made homestead entry (under the act of June 5, 1900—31 Stat., 267) for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 26, T. 152 N., R. 75 W., same land district. He commuted the same to cash, May 1, 1901; and patent therefor issued March 29, 1902.

On April 12, 1901 (a few days before proof was submitted on the last-named entry), Teichner was allowed to make homestead entry,

“under Sec. 6 of the act of March 2, 1889” (25 Stat., 854), for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 35, T. 152 N., R. 75 W., same land district. He submitted commutation proof therefor on August 19, 1902. In said proof he stated (*inter alia*):

I have built no house on this land, but have continued to reside on the adjoining eighty acres on which I have made commuted proof. The improvements consist of eighty acres of breaking, worth about three hundred dollars, and crop, worth about one thousand dollars.

Upon receipt of the final proof papers, your office, by letter of February 26, 1904, instructed the local officers that, because of the entryman's failure to reside upon said land (last entered), his entry thereof was illegal, and directed them to notify Teichner, and any other known party in interest, that he would be allowed sixty days within which to show cause why his cash certificate for said additional entry should not be canceled for illegality.

Upon being notified as above directed, Teichner filed, and the local officers transmitted to your office, his corroborated affidavit, setting forth that he had been informed by a certain attorney and land locator named, that it would not be necessary for him to reside on the “second eighty” (the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 35, *supra*), because his residence on his “first eighty” (the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 26, *supra*) was sufficient; that if he had known it was necessary to live on the additional eighty he could have done so, as his house was only across the highway, some thirty rods from the additional entry; that after submitting proof on his additional entry he sold the entire one hundred and sixty acres; and he asked that the requirement relative to residence be waived, all other requirements of law having been complied with.

Your office, on September 23, 1904, advised the applicant that it was not within its power to modify in any manner the requirements of section 6 of the act of March 2, 1889; therefore it rejected his commutation proof, and held said additional entry and cash certificate issued thereon for cancellation.

The entryman filed a motion for review, contending that the act of April 28, 1904 (33 Stat., 527), should be invoked for his relief, and that it affords ample ground for an equitable adjudication of said entry. The motion was overruled by your office December 19, 1904.

Counsel for the entryman has filed an appeal to the Department, contending that “said additional homestead entry was validated” by said act of April 28, 1904, and that it was error on the part of your office not to have held that:

Although the said additional entry may have been made without authority of law, yet, inasmuch as he would now be entitled to make such entry under

said act of 1904, under the same conditions that existed when said entry was made, it should be allowed to stand, subject to all the rights and privileges to which the entryman would be entitled had his entry been made under the provisions of said act.

In his argument in support of his appeal he invites attention to the fact that the attorney who advised him that residence on his additional entry was not necessary, "is regularly admitted to practice as an agent or attorney in land cases," and the entryman "was therefore warranted in the belief that he was well informed as to the requirements of the homestead laws;" and contends that, "when the commutation proof on the additional entry was offered, showing, as it did, that the entryman had not resided on the additional land, and therefore was not entitled to certificate of final entry, the district land officers should have rejected the proof;" in brief, that "the painful predicament he is now in is due primarily to the incapacity or inadvertence of the agents of the United States employed in the district land office," and therefore it is no more than right that the Department should afford the entryman, whose good faith is unquestioned, relief from the condition of affairs here presented. He therefore reiterates his application to have said entry submitted to the Board of Equitable Adjudication for confirmation; but suggests by way of alternative:

May not the Secretary of the Interior, under the supervisory authority vested in him, accept Teichner's additional entry as though made under the act of April 28, 1904, cancel the cash certificate as unnecessary and contrary to the provisions of that statute, and authorize the issuance of patent as provided therein? The Department has frequently permitted entries, unlawfully made under laws existing at the time, to stand and be considered as if made under subsequent statutes authorizing such class of entry.

It will not be necessary to discuss all the allegations of the appeal, inasmuch as there is one fact, not referred to therein, that is a controlling factor in the determination of the question in issue.

In the entryman's affidavit executed June 16, 1904, he makes a statement relative to his entry for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 26, and his subsequent or additional entry for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 35, to the effect that the entryman continued to reside on the former, "until finally, in the fall of 1902, after making proof for the second eighty he sold the entire 160 acres." Elsewhere in the record the statement is repeated that he sold said land "in the fall of 1902." He claims the same—at least, the eighty acres last entered—by virtue of his entry made April 12, 1901. It will be observed that entry (April 12, 1901), commutation proof (August 19, 1902), and sale (in fall of 1902), were all made prior to the passage of the act of April 28, 1904, which contained a proviso, as follows:

That this section shall not apply to or for the benefit of any person who does not own and occupy the lands covered by the original entry.

Therefore said act can not be considered as being in any manner applicable thereto, in addition to the fact that it expressly provides that entries made thereunder shall not be commuted; nor could an entry so made be properly submitted to or allowed by the Board of Equitable Adjudication. Chauncey Carpenter (7 L. D., 236); Francis A. Lockwood (20 L. D., 361).

The action of your office in holding said additional entry for cancellation was correct, and is hereby affirmed, inasmuch as the reinstatement of said entry as requested would be in effect for the Department to allow an entry to be made avowedly for the benefit of another person than the entryman.

RIGHTS OF WAY WITHIN FOREST RESERVES FOR DAMS, RESERVOIRS, WATER PLANTS, DITCHES, FLUMES, PIPES, TUNNELS, AND CANALS—ACT OF FEBRUARY 1, 1905.

REGULATIONS.

The following regulations are promulgated under section 4 of the act of Congress approved February 1, 1905 [Public—No. 34], which reads as follows:

SEC. 4. That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated.

1. This act grants rights of way through forest reserves to citizens and corporations of the United States for the objects therein specified, during the period of their beneficial use, under rules and regulations to be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated.

All applications for the right of way for the purposes set forth in said act, must be submitted thereunder in accordance herewith, but where the right of way is desired for the main purpose of irrigation and for public or other purposes as subsidiary thereto, as contemplated by sections 18 to 21 of the act of March 3, 1891 (26 Stat., 1095), and section 2 of the act of May 11, 1898 (30 Stat., 404), the application must be submitted in accordance with the regulations issued under said acts (for present regulations see circular approved June 26, 1902, 31 L. D., 503). Or where application is made for *permission* to use rights of way for the purposes set forth in the act of February 15, 1901 (31 Stat., 790), the same must be submitted under said act (for present regulations see circular approved July 8, 1901, 31 L. D., 13).

2. The right granted is not in the nature of a grant of lands, but is a base or qualified fee, giving the possession and right of use of the land for the purposes contemplated by the act, during the period of the beneficial use. When the use ceases, the right terminates, and thereupon proper steps will be taken to revoke the grant.

No right whatever is given to take from any part of the reservation any material, earth, or stone for construction or other purposes, nor does it give any right to use any land outside of what is actually necessary for the construction and maintenance of the works.

3. Applications for right of way under this act should be made in the form of a map and field notes, in duplicate, and must be filed in the local land office for the district in which the land traversed by the right of way is situate; if in more than one district, duplicate maps and field notes need be filed in only one district and single sets in the others. The maps, field notes, evidence of water rights, etc., and, when the applicant is a corporation, the articles of incorporation and proofs of organization, must be prepared and filed in accordance with the then existing regulations, under the general right of way act (for present regulations see paragraphs 4 to 23, inclusive, circular of June 26, 1902), appropriate changes being made in the prescribed forms so as to specify and relate to the act under which the application is made.

4. An affidavit that the applicant is a citizen of the United States must accompany the application, and if the applicant is an association of citizens, each must make affidavit of citizenship, and a complete list of the members thereof must be given in an affidavit of one of them. A copy of their articles of association must also be furnished, or if there be none, the fact must be stated over the signature of each member of the association.

If the applicant is not a native-born citizen, he must file the usual proof of naturalization. The applicant must set forth in the affidavit the purposes for which the right of way is desired.

5. When application is made for right of way for water plants, the location and extent of ground proposed to be occupied by buildings, or other structures necessary to be used in connection therewith, must be clearly designated on the map and described in the field notes and forms by reference to course and distance from a corner of the public survey. In addition to being shown in connection with the main drawing, the buildings or other structures must be platted on the map in a separate drawing on a scale sufficiently large to show clearly their dimensions and relative positions. When two or more of such structures are to be located near each other, it will be sufficient to give the reference to a corner of the public survey for one of them, provided all others are connected therewith by course and distance shown on the map.

The applicant must also file an affidavit setting forth the dimensions

and proposed use of each of the structures and must show definitely that each is necessary to a proper enjoyment of the right of way granted by the act.

6. The applicant must file with each application under this act a stipulation, under seal, incorporating the conditions set forth in paragraph 3 of the circular of June 26, 1902 (subdivisions 1, 2, 3, and 4).

The applicant will also be required to give bond to the Government of the United States, to be approved by the Commissioner of the General Land Office, such bond stipulating that the makers thereof will pay to the United States "for any and all damage to the public lands, timber, natural curiosities, or other public property on such reservation, or upon the lands of the United States, by reason of such use and occupation of the reserve, regardless of the cause or circumstances under which such damage may occur." A bond furnished by any surety company that has complied with the provisions of the act of August 13, 1894 (23 Stat., 279), will be accepted, and must run in the terms of the stipulation above quoted. The amount of the bond can not be fixed until the application has been submitted to the General Land Office, when a form of the bond will be furnished and the amount fixed.

No construction can be allowed on the reservation until an application for right of way has been regularly filed in accordance herewith and has been approved by the Department, or has been considered and permission specifically given by the Secretary of the Interior.

7. Upon the filing of an application under this act, the register will note the same in pencil on the tract books, opposite the tracts traversed, giving date of filing and name of applicant, and also indorse on each map the name of the land office and the date of the filing over his written signature.

If it does not appear that some portion of the public lands in reserve would be affected by the approval of such maps, they will be returned to the applicant with notice of that fact. If unpatented lands are affected by the proposed right of way, the register will so certify on the map and duplicate, over his signature, and will promptly transmit the same to the General Land Office; with report that the required notations have been made.

8. Upon the approval of a map of location by the Secretary of the Interior, the duplicate copy will be sent to the local officers, who will mark upon the township plats the lines of the right of way as laid down on the map. They will also note the approval in ink on the tract books, opposite each legal subdivision affected, with a reference to the act mentioned on the map.

W. A. RICHARDS, *Commissioner*.

Approved, March 1, 1905:

E. A. HITCHCOCK, *Secretary*.

JOHN S. MAGINNIS.

Motion for review of departmental decision of November 10, 1904, 33 L. D., 306, denied by Secretary Hitchcock, March 3, 1905.

SCHOOL LAND—INDIAN OCCUPANT—SEC. 4, ACT OF FEBRUARY 8, 1887,
AND SEC. 10, ACT OF FEBRUARY 22, 1889.

SCHUMACHER *v.* STATE OF WASHINGTON.

Lands in a section sixteen or thirty-six in the State of Washington which at the date of survey were in the possession and occupation of an Indian living apart from his tribe, and improved by him, and for which application for allotment has been made by the Indian occupant under the provisions of section four of the act of February 8, 1887, are "otherwise disposed of by or under the authority of an act of Congress," within the meaning of that term as employed in section ten of the act of February 22, 1889, making a grant to the State of sections sixteen and thirty-six in each township in support of common schools, and are therefore excepted from the grant.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 7, 1905.* (F. W. C.)

With letter of October 9, 1903, the register at Seattle, Washington, forwarded an application, filed in his office on August 26, 1903, by George A. Keepers, special Indian allotting agent, in behalf of James Schumacher, as the head of a family, for an allotment of lot 2, Sec. 16, T. 35 N., R. 6 E., W. M., under the provisions of section 4 of the act of February 8, 1887 (24 Stat., 388), which section provides:

That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land-office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land-office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

As the tract applied for is a portion of section 16 granted to the State for the support of common schools under and by virtue of the act of Congress approved February 22, 1889 (25 Stat., 676), the State

was advised thereof, and in response to said notice objected to the allowance of the application for the reasons: first, that the grant of February 22, 1889, being *in presenti*, and as the land in question was a part of section numbered sixteen, it having been previously identified by the lines of the public survey, it became, upon the passage of said act, segregated from the public domain and was not thereafter open to settlement, preemption, homestead, Indian allotment, or any other entry, under the land laws of the United States; second, that on January 5, 1892, upon application duly presented therefor, the State, after due and legal notice of publication, sold the lot in question to one B. D. Minkler, and upon said day a contract of sale was entered into which is still in force and effect and binds the State of Washington to make to said Minkler the title to said property; and third, that James Schumacher, the applicant for allotment, never made a *bona fide* residence upon said land prior to the survey thereof in the field or prior to the filing of the plat of survey of said township, and never has complied with the laws of the United States as to settlement, cultivation or improvement of public lands, and has never complied with the laws of the United States relating to the allotment of lands to Indians.

Following the filing of said protest, your office, by decision of March 31, 1904, rejected the application for allotment, upon the ground that the title to the land had become vested in the State of Washington prior to the filing of said application; from which decision an appeal has been taken to this Department.

It might first be noted that it does not appear from the record now before the Department that any notice was given the Indian office of the protest by the State or of your office decision denying the application for allotment.

The plat of survey of the township in question was filed in the local office April 15, 1880. In his application for allotment Schumacher alleged that he was the head of a family, over sixty years of age, and that he had made his home upon this land all his lifetime, and that his father and mother both resided upon this land until their death; that he is an Indian of the Skagit tribe and that no reservation has been provided for said tribe by treaty, act of Congress, or executive order, and that his application was made for actual *bona fide* settlement of the lands described for the exclusive use and benefit of himself and family.

In support of his appeal affidavits are filed to the effect that Schumacher has resided upon this land many years and made improvements thereon of a reasonable value of \$500; that he was in ignorance of the methods of acquiring title thereto but believed that he was fully protected by his occupancy and improvement thereof, which

had never been questioned until the year prior to the filing of his application, when persons claiming to represent the owners of the land took possession of his orchard and gathered and used the fruit grown upon the land.

This Department has uniformly respected the occupancy of Indians upon the public lands living apart from their tribes and has, by circular, directed the register and receiver of the several land offices to peremptorily refuse all entries or filings attempted to be made by others than the Indian occupants upon lands in the possession of Indians who have made improvements of any value whatever thereon (see circular of May 31, 1884, 3 L. D., 371; reissued October 26, 1887, 6 L. D., 341), and has held that such lands are not unappropriated lands within the meaning of section 2289 of the Revised Statutes and are therefore not subject to homestead entry. See *Ma-gee-see v. Johnson* (30 L. D., 125).

This continued practice would seem to amount to an appropriation or dedication of such lands, and when considered in connection with the provisions of section 4 of the act of February 8, 1887, hereinbefore quoted, and under which the application for allotment in question is made, lands so occupied and applied for would seem to have been "otherwise disposed of by or under the authority of an act of Congress," within the meaning of those terms as employed in section 10 of the act of February 22, 1889, *supra*, making the grant to the State of Washington in support of common schools.

If it can be shown, therefore, at a hearing, that the land in question has been occupied and improved, as alleged by Schumacher, it would seem to have been excepted from the operation of the grant to the State. It is true that the Indian did not give notice of his intention to apply for an allotment of this land until after the State had made disposal thereof, but the purchaser at such sale was bound to take notice of the actual possession of the land by the Indian if, as alleged, he was openly and notoriously in possession thereof at and prior to the alleged sale, and that the act did not limit the time within which application for an allotment should be made.

Assuming that the land was not within the exception contained in section 10 of the granting act above quoted, it is nevertheless a fact worthy of consideration that by the act of February 28, 1891 (26 Stat., 796), amending sections 2275 and 2276 of the Revised Statutes, it is provided that—

Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of lands in the field, which are found to have been made on sections sixteen and 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

That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands within the State or Territory where such losses or deficiencies of school sections occur.

By the eleventh section of the act of February 22, 1889, *supra*, it was provided:

All lands herein granted 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 has been decided by the Department that the provisions of sections 10 and 11 of the act of February 22, 1889, and those of sections 2275 and 2276 of the Revised Statutes, being in apparent conflict, the act of 1889 is superseded by the act of February 28, 1891, and that the grants in support of common schools to the States named in the act of 1889, are now to be found in and governed by this later act. The Department, in the instructions to your office dated April 22, 1891 (12 L. D., 400), held--

that the provisions of the prior act of February 22, 1889, in so far as they are in conflict with those of said sections 2275 and 2276 of the Revised Statutes as amended by the later act of February 28, 1891, are superseded by the provisions of said sections as amended, and that the grants of school lands to those States mentioned in said act of February 22, 1889, are to be administered and adjusted under the provisions of this later general law.

See *State of Washington v. Kuhn* (24 L. D., 12).

As the State had made no sale or disposal of this land until after the passage of the act of February 28, 1891, it may be that a purchaser under a sale subsequently made secured no right as against a settler then in possession whose possession had been begun long prior to the survey of the lands. In other words, that the occupancy of such settler, if without recognition prior thereto, was clearly recognized and validated by the act of 1891, and that the State's claim under its grant of school lands was thereby limited to a right to select other lands in lieu of those so occupied and applied for.

I have therefore to remand the case to your office with directions that a hearing be ordered, after due notice to the State and its transferee, at which hearing Schumacher will be afforded an opportunity to submit testimony in support of his claimed occupancy and improvement of this land; and I have also to direct that the Indian office be duly advised of such hearing in order that it may by special agent, or otherwise, aid the Indian in the presentation of his case. For this purpose your office decision appealed from is hereby set aside.

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

HEIRS OF GEORGE LIEBES.

The right to make selection in lieu of lands in a forest reserve relinquished to the United States under the exchange provisions of the act of June 4, 1897, is not assignable, but must be exercised by or for the person who owned and relinquished the land upon which the selection is based.

In case of the death of a person who made relinquishment under the exchange provisions of the act of June 4, 1897, prior to acceptance thereof by the government, only those upon whom is cast the equitable title remaining in such person at his death can be recognized to make selection and thus complete the transaction initiated by him.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 10, 1905.* (W. C. P.)

Charles F. Gardner, attorney in fact for George Liebes, deceased, appealed from your office decisions of September 20, and November 11, 1904, rejecting application, number 8145, your office series, under the act of June 4, 1897 (30 Stat., 36), to select the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, E. $\frac{1}{4}$ SW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 28, T. 17 N., R. 3 E., M. D. M., Eureka, California, in lieu of the NE. $\frac{1}{4}$ of Sec. 14, T. 6 S., R. 23 E., M. D. M., in the Sierra forest reserve, California.

November 10, 1899, George Liebes recorded his deed relinquishing to the United States the NE. $\frac{1}{4}$ of Sec. 14, the NW. $\frac{1}{4}$, Sec. 13, T. 6 S., R. 23 E., and the SE. $\frac{1}{4}$, Sec. 17, T. 6 S., R. 24 E., M. D. M., Sierra forest reserve, and applied, December 30, 1899, No. 1803, for land in lieu of said NE. $\frac{1}{4}$ of Sec. 14; January 2, 1900, No. 1742, for land in lieu of said NW. $\frac{1}{4}$ of Sec. 13; and No. 1744 for land in lieu of said SE. $\frac{1}{4}$ of Sec. 17. January 3, 1903, selections 1742 and 1744 being pending, your office ruled Liebes within ninety days to make a new selection for the NE. $\frac{1}{4}$, Sec. 14, and to extend the abstracts of title to such date. July 13, 1903, the attorney representing the two then pending selections refused to comply, and requested that they be canceled, and July 22, 1903, they were canceled, and your office returned the deed of relinquishment and abstracts of title.

April 14, 1903, after rejection of selection 1803, with rule to make new selection, and before rejection of numbers 1742 and 1744, the present application was filed in the name of and signed by George Liebes.

February 20, 1904, Julien and Sidney Liebes, in their own right, and Sidney as trustee for Herman Liebes, filed at Boise, Idaho, application No. 10188, for lands in lieu of said NW. $\frac{1}{4}$, Sec. 13, also now before the Department and to be separately decided. The abstract filed with No. 10188 showed that George Liebes died April 6, 1900, testate, and by his will, probated April 27, 1900, after sundry dispositions, devised his residuary estate to his brothers Julien and

Sidney and his nephew, son of Sidney; that the estate was closed April 26, 1901, after notice to creditors and final report of the executors, and was distributed to the legatees, the shares of Julien and Sidney being charged with a life annuity to Aaron Michael, his grandfather.

September 20, 1904, in the selection here in question your office found that George Liebes's signature to the application—

appears to be the true signature of George Liebes, as shown by comparison with other papers unquestionably signed by him in his lifetime, and under such signature is written in a different hand, and obviously at a later date: "Care Chas. F. Gardner, 228 Crocker Bld., San Francisco, Cal.," apparently written by the same hand that filled out the blanks in the form. . . .

The only possible inference is that an application signed in blank by George Liebes during his lifetime, but not then used, was sought to be utilized more than three years after his death, involving, of course, an attempted concealment from the knowledge of the government officers of the facts and the true condition of the title. If such attempt had succeeded, patent for the selected land would have issued in name of George Liebes, and it is difficult to see how the title could have inured to the benefit of any person other than his devisees. . . . Without further considering the character of the transaction, it is clear that on April 14, 1903, George Liebes, then deceased, had no right of selection; that if any such right existed it was in his devisees, and the application to select in his name must be and hereby is rejected.

October 22, 1904, counsel for Charles F. Gardner filed a motion for review, supported by proofs tending to show that December 20, 1899, George Liebes sold to Charles F. Gardner, for \$1680 paid, his right under the act of June 4, 1897, *supra*, to select other land in lieu of the tracts relinquished and covenanted, in substance, that he (Liebes) had neither made nor authorized any selection in lieu of said tracts, nor had hypothecated or in anywise encumbered his right, and that in furtherance of such sale Liebes executed two powers of attorney to Gardner, authorizing him by one to select lands in lieu of the tracts relinquished, and by the other to grant, bargain, sell, and convey any and all right or title he (Liebes) might thereafter have in the lands so selected for such sum as he (Gardner) might deem proper; that Liebes also signed several blank applications to be used by Gardner, one of which was used in making this selection; that Gardner had no knowledge of Liebes's death until December 22, 1903.

Your office held the powers ineffective to vest an interest in the attorney in fact, that they were revoked by Liebes's death, and that selection 8145 in question did not comply with regulations of July 7, 1902 (31 L. D., 372), paragraph 19, that selections "when made by an agent or attorney in fact, proof of authority must be furnished." The motion was therefore denied. These decisions are claimed to be erroneous.

The appeal and argument in support thereof are based upon the

proposition that the right of selection under the act of 1897 may be transferred by way of assignment and may be exercised by and for one other than the owner of the land relinquished; in other words, that these rights are floating rights properly subject to barter and sale. The question presented is in all essentials the same as was presented in *John K. McCornack* (32 L. D., 578). There the proposition that these rights are assignable was earnestly and ably advocated by counsel and fully considered by the Department. The conclusion was that under the wording and spirit of the law these rights are not assignable but must be exercised by or for the person who owned and relinquished the land upon which such lieu selection is based. This ruling was adhered to in *Albert L. Bishop et al.* (33 L. D., 139). The argument presented here has been carefully considered but has not led the Department to a different conclusion and the rule laid down in those cases will be adhered to.

The conveyance tendered by George H. Liebes had not been accepted by the government at the time of his death, and, in fact, the transaction had not proceeded to the point where land had been designated by him or by any one for him to be taken by him in lieu of that proposed to be relinquished. At that time he still held an equitable title to the land tendered the government by his unaccepted deed of relinquishment. *Cosmos Exploration Co. v. Gray Eagle Oil Co.* (190 U. S., 301, 312); *C. W. Clarke* (32 L. D., 233). Inasmuch as only the owner of land relinquished can be recognized to make selection of land in exchange therefor, it follows that only those upon whom this equitable title was cast upon George H. Liebes's death, can be recognized to make selection and thus to complete the transaction initiated by him. It is not contended that the power of attorney alleged to have been executed by Liebes purported to or was effective to convey and transfer this title.

It is unnecessary to notice the informalities of the present attempted selection, because it must, for the reasons given herein, be rejected. The rejection thereof by your office decision is affirmed.

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

HEIRS OF GEORGE LIEBES.

The act of June 4, 1897, contemplates an exchange of lands only with the owner, and where a person joins in the execution and tender of a deed to the United States for a tract of land in a forest reserve, representing that he and those joining with him in such deed are the sole and complete owners of the land, he is thereby estopped, if the title tendered be accepted by the government, from ever asserting any interest in the land relinquished.

An application to make lieu selection under the exchange provisions of the act of June 4, 1897, should not be received during the pendency of a prior similar application for the same land; but where a second application is so received, and the first is canceled prior to action thereon, it may be regarded as attaching immediately upon the cancellation of the first, if no adverse rights exist.

If the owner of lands within a forest reserve, after relinquishing the same to the United States with a view to the selection of other lands in lieu thereof under the exchange provisions of the act of June 4, 1897, die, all subsequent proceedings, by his heirs or legal representatives, looking to a completion of the transaction should be carried on in the name of such deceased owner, and if the exchange be consummated patent for the lieu lands will issue in his name.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 10, 1905.* (J. R. W.)

R. M. Cobban, attorney in fact for Julien and Sidney Liebes and Sidney Liebes trustee for Herman Liebes, appealed from your office decision of September 20, 1904, rejecting application, number 10188, your office series, under the act of June 4, 1897 (30 Stat., 36), to select the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 22, and W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 15, T. 11 N., R. 3 E., B. M., Boise, Idaho, in lieu of the NW. $\frac{1}{4}$, Sec. 13, T. 6 S., R. 23 E., M. D. M., in the Sierra forest reserve, California.

November 10, 1899, George Liebes recorded his deed, under the act of June 4, 1897, *supra*, relinquishing to the United States the NW. $\frac{1}{4}$ of Sec. 13, NE. $\frac{1}{4}$, Sec. 14, T. 6 S., R. 23 E., and SE. $\frac{1}{4}$, Sec. 17, T. 6 S., R. 24 E., M. D. M., Sierra forest reserve, and applied, December 30, 1899, No. 1803, for land in lieu of said NE. $\frac{1}{4}$, Sec. 14; January 2, 1900, No. 1742, for land in lieu of said NW. $\frac{1}{4}$, Sec. 13, and, No. 1744, for land in lieu of said SE. $\frac{1}{4}$, Sec. 17. January 3, 1903, selection No. 1803 was rejected, and June 3, 1903, selections 1742 and 1744 being pending, your office ruled Liebes within ninety days to make a new selection for the NE. $\frac{1}{4}$, Sec. 14, and to extend the abstracts of title to such date. July 13, 1903, the attorney representing the two then pending selections refused to comply, and requested that they be canceled. July 22, 1903, they were canceled, and your office returned the deed of relinquishment and abstracts of title.

April 14, 1903, after rejection of selection 1803, with rule to make new selection, and before rejection of numbers 1742 and 1744, at Eureka, California, local office, application 8145 was filed, in the name of and signed by George Liebes, to select lands in lieu of said NE. $\frac{1}{4}$, Sec. 14, which is also now before the Department, and will be separately decided.

February 20, 1904, Julien and Sidney Liebes, in their own right, and Sidney as trustee for Herman Liebes, filed the present application, 10188, which the local office accepted and certified, but, as your

office states, erroneously, as a former similar selection, No. 4518, of F. A. Hyde and company, for the same land, was then intact upon the local office record. The abstract of title filed with No. 10188, certified January 12, 1904, showed that George Liebes died April 6, 1900, testate; that his will, duly probated April 27, 1900, after sundry legacies, devised his residuary estate to Julien and Sidney Liebes, his brothers, and Herman Liebes, his nephew, son of Sidney; that the brothers' interests were charged with payment of \$25 monthly to his grandfather, Aaron Michael, for life; that Julien and Sidney were executors, rendered a final account, which was approved, and, April 26, 1901, at the executors' request, the estate was closed and distributed, after due notice to creditors and full payment of all legacies and debts, except that there was a balance of \$4,353.16 due the executors as commissions and excess of their disbursements over receipts and the annuity to Michael. The decree provided that such sum "is hereby made a charge against the residue of said estate hereby distributed," and that the shares of Julien and Sidney were "subject to the further charge of \$25 per month, payable to said Aaron Michael during his life."

With the application was filed a deed executed by Julien and Sidney Liebes, and Sidney Liebes trustee for Herman Liebes, confirmatory of George Liebes's former deed to the United States as to said NW. $\frac{1}{4}$, Sec. 13. They described themselves as " devisees under the will of George Liebes, deceased," and, referring to the former deed and its record, recited that "George Liebes did not during his lifetime select or exercise his right to select any public land in lieu" of the NW. $\frac{1}{4}$, Sec. 13, wherefore grantors, "desiring to more fully relinquish the said lands above described to the Government and to select in lieu thereof a tract of vacant land open to settlement, do hereby release, remise, grant, relinquish, and quitclaim," etc.

Your office held that the assigned base tract (NW. $\frac{1}{4}$, Sec. 13) — is encumbered by the annuity charge created by the will of George Liebes in favor of Aaron Michael, and by the charge in favor of the executors placed upon the residue of the estate by the decree of distribution.

The title tendered was therefore held defective and the selection rejected for that reason and the further one that the selected land was not subject to selection at the time of the application, because of the then uncanceled prior application No. 4518, above mentioned. The appeal assigns error in holding the title of the base tract defective because of the charge in favor of the executors, or of the annuity charge in favor of Michael; (2) in rejecting the selection because of the then former uncanceled selection 4518 of F. A. Hyde and company.

The first part of the first assignment of error is well taken. The executors might have insisted upon conversion of sufficient assets of

the estate into money to pay their charges and disbursements; but if they elected to take the title, they waived liens for reimbursement. One can not be his own creditor or debtor. Lord Coke said: "Of one thing I am assured. A man can not be both lord and tenant of the same manor at the same time." As to their two-thirds personal interest in the residuary assets, the two-thirds at least of their excess of disbursements and charges were by operation of the decree satisfied. Had there been a liquidation of their claim before distribution, they would have received so much less, and electing to take the assets, their claims, at least to that extent, were satisfied.

As to the other one-third of their dues chargeable in equity upon the interest of Herman Liebes, admitting for argument that they could in equity assert such charges upon this third interest, they could not assert it against property to the disposal of which they assented, and co-operated. One may not stand by and see property upon which he has a lien disposed of with representation of good title, and afterward assert his lien. Still less may he join in a deed making disposal of it and afterward assert a lien upon it. The act of June 4, 1897, proposes exchange of lands only with the owner, and if one joins in execution and tender of a deed of lands to the United States for purposes of exchange under the act, he represents that he and those joining with him in such deed are sole and complete owners of the land described. By the exchange, if such title be accepted, all grantors in the deed are estopped ever to assert any interest in the land relinquished.

The transaction proposed by the act of June 4, 1897, which George Liebes by his deed accepted, and which his devisees by their confirmatory deed elected to complete, was one of equal exchange. Exchange of lands, as part of the contract, implies at common law a warranty of title. Rawle's Covenants of Title, 4th Ed., 471; Washburn Real Property, Vol. 5, 4th Ed., 484. The implied warranty at common law estopped the parties to assert a lien upon the land conveyed in the exchange. The lands conveyed were in California and the deed of confirmation used the word "grant," as also did the original deed of George Liebes, which his devisees confirmed. By the law of California (Sec. 1113 Civil Code, Deering's Annotated Codes and Statutes), it is provided:

Sec. 1113. From the use of the word "grant" in any conveyance by which an estate of inheritance or fee-simple is to be passed, the following covenants, and none other, on the part of the grantor for himself and his heirs to the grantee, his heirs, and assigns, are implied, unless restrained by express terms contained in such conveyance:

1. That previous to the time of the execution of such conveyance the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee.
2. That such estate is at the time of the execution of such conveyance free

from incumbrances done, made, or suffered by the grantor, or any person claiming under him.

Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance.

Thus, by the statute, the grantors covenanted against and were estopped to assert a lien, thereby releasing every interest they had. *Touchard v. Crow* (20 Cal., 150); *Muller v. Boggs* (25 Cal., 175).

In the deed filed with selection 10188, in question here, the granting parties were confirmors of the earlier deed of the devisor. Whatever interest they had was cast on them as volunteers by the decease and devise of the former owner, who accepted the invitation of the government, relinquished the land, and made a selection, which after his death failed of approval. In rejecting the selection the United States ruled him to make a further one. The confirmors had simply his right, complied with the rule imposed, made this selection, and extended the abstract of title. They were called upon to elect whether, on failure of the first selection, they would reclaim the title, or would effectuate the testator's original purpose to vest title in the government and select other land. They made election and indicated it in a formal appropriate manner by execution of the confirmatory deed. The proceedings after death of George H. Liebes were for the purpose of completing the transaction begun by him and for effectuating his plans. They should be carried to completion in his name.

The annuity to Michael was, however, a charge upon the two-thirds interest in the lands. The terms of the will were that:

Out of the portions of my estate herein allotted, and given to my said brothers, Julian and Sidney Liebes, I direct them and the survivor of them, to pay regularly on the first day of each and every month, during his lifetime, unto my grandfather, Aaron Michael of San Francisco, the sum of \$25, for his support and maintenance, hereby appointing them trustees without bonds for that purpose.

As this was payable out of their portions of the estate and they received such portions as trustees to make such payment, it was a charge upon the entire two-thirds of the estate, which a court of equity would enforce upon any part of the assets received by said legatees, pursuing them and impressing the trust upon them wherever found and however changed in form.

There are, however, two affidavits furnished that this incumbrance expired by death of the beneficiary, October 4, 1902. These proofs were not before your office at the time of said decision, which therefore properly held that said base land was incumbered.

The fact that the land at time of selection was segregated by F. A. Hyde's uncanceled prior one ought to have caused the rejection of the

present selection by the local officers. If, however, the Hyde selection was canceled prior to action by your office on the present one, the objection could have been and may now be waived, and the second selection be regarded as attaching immediately upon cancellation of the first, if no adverse right exists. Arden L. Smith (31 L. D., 184, 186); *Barbour v. Wilson et al.* (28 L. D., 61, 70). This case seems to be one in which the rule laid down in the Arden L. Smith case may be properly applied, and it is so directed.

Your office having erred in respect to the existence of a lien in favor of Julien and Sidney Liebes, and proof being offered as to termination of the annuity charge to Michael, the decision is vacated, and the case remanded to your office, with direction that the application and proceedings be amended to be in the name of George Liebes, and to be then readjudicated, and if finally approved that patent issue in his name.

CONTESTANT—PREFERENCE RIGHT—HEIRS—ACT OF JULY 26, 1892.

BIGGS *v.* FISHER.

Upon the successful termination of a contest commenced by a person who dies prior to such termination, the person or persons who seek, under the provisions of the act of July 26, 1892, to exercise the preference right resulting therefrom, are required to show merely that they are the heirs of the deceased contestant and citizens of the United States, and that the contestant was a qualified entryman at the time of his death.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 14, 1905.* (E. P.)

June 15, 1901, your office, upon a contest initiated by James A. Fisher, canceled the homestead entry of Joseph W. Lawson, made April 11, 1898, for the NW. $\frac{1}{4}$ of Sec. 22, T. 23 N., R. 16 W., Alva land district, Oklahoma.

July 5, 1901, Christopher P. Fisher made homestead entry of said land, alleging in a duly corroborated affidavit accompanying his application that he is the sole heir of the said James A. Fisher, who died, unmarried and without issue, December 21, 1900.

July 11, 1901, Samuel V. Biggs filed an affidavit of contest against the homestead entry last mentioned, charging that the said Christopher P. Fisher—

was not a qualified entryman at the time he made said entry, for the reason that he had made H. E. No. 3278 for the NW. $\frac{1}{4}$ of Sec. 26, Township 20 N., R. 12 W., on Nov. 23, 1893, at said Alva, O. T., land office, which last named entry is now and has been ever since the making of the same in full force and effect, and still is at this date.

August 5, 1901, Fisher filed a motion praying that Biggs's contest be dismissed on the ground that the affidavit of contest did not state facts sufficient to constitute a cause of action, and alleging in an affidavit filed in support of said motion that he is a citizen of the United States and that he made the entry herein involved under the provisions of the act of July 26, 1892 (27 Stat., 270), as the sole heir of the said James A. Fisher, deceased. This motion was denied by the local officers.

After hearing duly had, the local officers held that the defendant, having previously made a homestead entry, and being at the time the entry involved herein was made the owner and holder of one hundred and sixty acres of land, was disqualified from making the entry in question, although a citizen of the United States and the sole heir of a deceased successful contestant; that because of such disqualification the defendant did not come within the purview of the second proviso to the said act of July 26, 1892; they therefore recommended said entry be canceled for illegality.

On appeal by the defendant, your office, by decision of August 11, 1903, reversed the action of the local officers and held that the defendant, being a citizen of the United States and the heir of a deceased successful contestant who was at the time of his death qualified to make a homestead entry, was, as such heir, qualified, under the provisions of the said act of July 26, 1892, to make the entry in question, notwithstanding the fact that at the date thereof the defendant had already had the benefit of the homestead law and was then the owner of one hundred and sixty acres of land. It was further held, however, that the entry should be amended so as to make it appear on its face that it was made for the benefit of the heirs of the said James A. Fisher, deceased.

From this decision of your office the plaintiff has appealed, alleging error as follows:

1. In holding that the only qualification necessary to entitle the heirs of a deceased contestant is that they are citizens of the United States.
2. In not sustaining the holding of the local office that the act of May 2 [July 26], 1892, was only intended to revive the action of a deceased contestant.
3. In not holding that the act of May 2 [July 26], 1892, only gave to the heirs of a deceased contestant, if citizens of the United States such rights as the contestant would have had should he have lived, and that the language of the act so states, and that if the contestant, if the owner in fee simple of 160 acres of land in any state or territory of the United States, would have been disqualified to enter the contested tract, the heirs, if the owner of a like quantity of land, would likewise be disqualified from entering the contested tract.
4. Error in holding the entry valid and dismissing the contest.
5. Error in not holding that the contest affidavit stated a good cause of action and that the record sustains the same, and that no amendment can be made that would defeat the same.

There is no controversy concerning the facts in this case. It is conceded that the defendant is a citizen of the United States and the sole heir of the said James A. Fisher, as the result of whose contest a former entry covering the land involved herein was canceled, and who died prior to the cancellation thereof; that the defendant made the entry now under consideration within thirty days after receipt of notice of the cancellation of said former entry; that prior to the making of the entry herein involved the defendant made a homestead entry upon which he submitted final proof and received final certificate, and that at the date of the entry in question he was the owner of one hundred and sixty acres of land. The only question presented therefore is whether the defendant was entitled, under the provisions of section 2 of the act of May 14, 1880 (21 Stat., 140), as amended by the act of July 26, 1892 (27 Stat., 270), to make the said entry.

Said act of July 26, 1892, reads as follows:

In all cases where any person has contested, paid the land office fees, and procured the cancellation of any preemption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands: *Provided*, That said register shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant and not to be reported: *Provided further*, That should any such person who has initiated a contest die before the final termination of the same, said contest shall not abate by reason thereof, but his heirs who are citizens of the United States may continue the prosecution under such rules and regulations as the Secretary of the Interior may prescribe, and said heirs shall be entitled to the same rights under this act that contestant would have been if his death had not occurred.

The act of May 14, 1880 (21 Stat., 140), provided, in substance, that one who had successfully contested an entry, should be entitled, for a period of thirty days after notice of the cancellation thereof, to a preference right to enter the land. In construing this act the Department held that all rights, present as well as prospective, that might have been acquired by a contestant by virtue of his contest, were purely personal, and that upon the death of a contestant pending final action on his contest, the proceeding, so far as he was concerned, abated, thus determining his rights thereunder. This ruling, while clearly correct, operated harshly upon the heirs of deceased contestants, many of whom had spent large amounts of money in the prosecution of their respective contests with a view to entering the land, and, when final decision was about to be rendered in their favor, died without having had an opportunity to reap the benefits of their endeavors. Their estates were therefore despoiled of the money that they had so expended. It was this evil that was sought to be remedied by the act of July 26, 1892, the purpose of said act being to provide a means whereby the citizen heirs of a deceased contestant might

derive the same benefits from a contest commenced by their ancestor in his lifetime that such ancestor himself might have been entitled to had he lived. In the effectuation of this purpose it was the intention of Congress, as clearly appears from the language used in the act and from the proceedings had in Congress with reference thereto, to place the heirs in the same position upon the successful termination of the contest that the contestant himself would have occupied if the contest had so terminated in his lifetime, the only qualification required of the heirs being, as expressly stated in the act, that they be citizens of the United States. The Department therefore holds that upon the successful termination of a contest commenced by a person who dies prior to such termination it is necessary that the person or persons who seek to exercise the preference right resulting therefrom show merely that they are the heirs of the deceased contestant and citizens of the United States, and that the contestant was a qualified entryman at the time of his death.

The late contestant, James A. Fisher, is shown to have been a qualified entryman under the homestead laws at the time of his death, and Christopher P. Fisher, the defendant herein, is shown to be the sole heir of the deceased contestant and a citizen of the United States. The defendant was, therefore, under the above ruling of the Department, entitled to exercise a preference right of entry as such heir. He should, however, have made entry in his representative capacity as heir, rather than in his own name, but no good reason appears why he may not now be permitted to amend the entry so as to make it appear that it was made for the benefit of the heirs or the sole heir of James A. Fisher, deceased.

For the reasons above stated, Biggs's contest will stand dismissed, and the entry, upon being amended in the respect herein suggested, will remain intact. The decision of your office is accordingly affirmed.

Subsequently to the rendition of your said office decision the defendant filed a motion praying that the contest be dismissed for reasons other than those stated in the decision, but the disposition herein made of the case renders it unnecessary to pass upon said motion.

The question of the authority of the land department to declare a forfeiture of a right of way which has attached by virtue of the approval of the Secretary of the Interior, under the provisions of said act of March 3, 1891, does not seem to have ever been specifically decided, either by this Department or the courts. It is not believed that such authority exists. That the courts have jurisdiction of the question there is no doubt, but in instances like the present one, where the government has no interest to subserve, and is under no special obligation to the parties interested in having forfeiture declared, the Department hesitates to ask the Department of Justice to institute the necessary suit. But there would seem to be no good reason why the interested parties may not themselves institute and maintain such suit in the name of the United States. Your office is therefore directed to advise the parties in interest that upon their proper application to this Department, and upon the execution of a good and sufficient bond to indemnify the United States against liability for costs, this Department will request the Department of Justice to permit the use of the name of the United States in a suit to declare a forfeiture of said rights of way.

RAILROAD GRANT—RIGHT OF WAY—ACT OF JULY 26, 1866.

MISSOURI, KANSAS AND TEXAS RY. CO.

The grant of a right of way to the Missouri, Kansas and Texas Railway Company made by the act of July 26, 1866, is subject not only to the conditions expressed in the grant, but to the necessarily implied condition that it be used for the purpose of maintaining a railroad; and the grantee has no authority under the grant to lease any portion of its right of way for the purpose of sinking wells thereon for extracting, piping and removing oil and natural gas therefrom.

Assistant Attorney-General Campbell to the Secretary of the Interior,
March 14, 1905. (F. W. C.)

I am in receipt through reference from the Acting Secretary, under date of the 10th instant, with request for my opinion upon its legality, of a contract entered into between the Missouri, Kansas and Texas Railway Company and B. P. McDonald & Company, granting to the latter the privilege to use and occupy the surface of its right of way and terminal grounds in the State of Kansas and in the Indian and Oklahoma Territories to such extent as it may be necessary to carry on the work of prospecting and sinking wells for extracting, piping, and removing oil and natural gas from said right of way and terminal grounds.

Among the papers accompanying the request for an opinion is a letter dated February 18, last, from Clifford L. Jackson, general

attorney for the Missouri, Kansas and Texas Railway Company, addressed to Hon. J. George Wright, United States Indian inspector, in which he encloses a copy of the contract above referred to and states that "the Supreme Court of the United States has held that the Missouri, Kansas and Texas Railway Company has the fee to its right of way."

The grant of the right of way to the Missouri, Kansas and Texas Railway Company is found in the act of July 26, 1866 (14 Stat., 289), and is similar to the grant of right of way made to the Northern Pacific Railroad Company by act of July 2, 1864. The question as to the power of disposal of any portion of the right of way granted by the United States to a railroad company was considered in the case of the Northern Pacific Railway Co. *v.* Townsend (190 U. S., 267, 271), in which it was said:

Following decisions of this court construing grants of rights of way similar in tenor to the grant now being considered, *New Mexico v. United States Trust Co.*, 172 U. S., 171, 181; *St. Joseph & Denver City R. R. Co. v. Baldwin*, 103 U. S., 426, it must be held that the fee passed by the grant made in section 2 of the act of July 2, 1864. But, although there was a present grant, it was yet subject to conditions expressly stated in the act, and also (to quote the language of the Baldwin case) "to those necessarily implied, such as that the road shall be . . . used for the purposes designed." Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. This being the nature of the title to the land granted for the special purpose named, it is evident that to give such efficacy to a statute of limitations of a State as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use, would be to allow that to be done by indirection which could not be done directly, for, as said in *Grand Trunk Railroad v. Richardson*, 91 U. S., 454, 468, "a railroad company is not at liberty to alienate any part of its roadway so as to interfere with the full exercise of the franchises granted." Nor can it be rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the powers conferred by Congress, for, as said in *Northern Pacific Railroad Co. v. Smith*, 171 U. S., 261, 275, speaking of the very grant under consideration: "By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance."

It will thus be seen that the fee granted the company for its right of way is subject to the conditions expressed in the act and also to those necessarily implied, namely, that it should be used for the

purposes designated—that is, for the purpose of maintaining the railroad—and I am clear that under this grant the company is not invested with the right to lease any portion of its right of way for the purposes named in the contract submitted for my consideration. I have therefore to advise that said contract is invalid.

Approved:

E. A. HITCHCOCK, *Secretary.*

INDIAN LANDS—UMATILLA RESERVATION—ACTS OF MARCH 3, 1885,
AND JULY 1, 1902.

HOOVER *v.* JONES.

The acts of March 3, 1885, and July 1, 1902, relating to the disposal of lands in the Umatilla Indian Reservation, must be construed *in pari materia* and as though the later act were merely another section of the first; and where a person failed to secure all the land to which he was entitled at public sale under the first act he may be permitted to complete his purchase at private sale under the second.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 15, 1905.* (C. J. G.)

The Department has received your office letter of February 11, 1905, asking to be further advised in the case of Charles E. Hoover *v.* George W. Jones (33 L. D., 353), which involved lands within the former Umatilla Indian reservation in the State of Oregon.

The records in said case show that April 14, 1891, George W. Jones purchased one hundred and sixty acres of untimbered lands, being the SE. $\frac{1}{4}$ of Sec. 34, T. 2 N., R. 32 E., La Grande, Oregon, under the act of March 3, 1885 (23 Stat., 340), entitled, "An act providing for allotment of lands in severalty to the Indians residing upon the Umatilla reservation, in the State of Oregon, and granting patents therefor, and for other purposes," section 2 of which is as follows:

The said lands, when surveyed and appraised, shall be sold at the proper land office of the United States, by the register thereof, at public sale, to the highest bidder, at a price not less than the appraised value thereof, such sale to be advertised in such manner as the Secretary of the Interior shall direct. Each purchaser of any of said lands at such sale shall be entitled to purchase one hundred and sixty acres of untimbered lands and an additional tract of forty acres of timbered lands, and no more.

A patent for the land described was in due time issued to the purchaser.

By the act of July 1, 1902 (32 Stat., 730), it was provided:

That all the lands of the Umatilla Indian reservation not included within the new boundaries of the reservation and not allotted or required for allotment to

the Indians, and which were not sold at the public sale of said lands heretofore held at the price for which they had been appraised, and upon the conditions provided in an act entitled, "An act providing for allotment of lands in severalty to the Indians residing upon the Umatilla reservation, in the State of Oregon, and granting patents therefor, and for other purposes," shall be sold at private sale by the register of the land office in the district within which they are situated, at not less than the appraised value thereof, and in conformity with the provisions of said act.

August 22, 1903, Jones applied to purchase the NE. $\frac{1}{4}$ of Sec. 34, T. 2 N., R. 32 E., as untimbered land, and the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 11, T. 1 S., R. 34 E., as timbered land, and gave notice of an intention to offer final proof thereon. October 16, 1902, Charles E. Hoover filed affidavit of contest against Jones, describing only the untimbered land, alleging that he was disqualified to purchase said land by reason of his prior cash entry for the SE. $\frac{1}{4}$ of said Sec. 34 under the act of March 3, 1885. The local officers decided that Jones was a qualified purchaser under the act of July 1, 1902, notwithstanding his said prior purchase. On appeal your office rendered decision finding that Jones had already exhausted his right, and held his application for cancellation. But in said decision the case was treated as if he were only applying to purchase the one hundred and sixty acres of untimbered land, no mention being made of the forty acres of timbered land included in his application. On further appeal the Department made a formal affirmance, based on the case of *Davis v. Nelson* (33 L. D., 119), of the decision of your office, and subsequently denied a motion for review without in either instance referring to the forty acres of timbered land, although it appears that in said motion Jones raised for the first time this question: Whether he is not entitled to hold the forty acres of timbered land included in his application under the act of July 1, 1902, in view of the fact that he did not purchase land of that character under the act of March 3, 1885, notwithstanding he may not be entitled to purchase any more untimbered land. It is upon this question that your office seeks information, it being stated that the application of Jones as to the forty acres of timbered land is still intact.

The only change made in the act of March 3, 1885, by the act of July 1, 1902, is as to the manner of disposal of the lands. The facts in the case of *Davis v. Nelson*, *supra*, are that Nelson purchased one hundred and sixty acres of untimbered lands under the first act and made application to purchase the same number of acres of untimbered lands under the second act. In denying said application it was said:

The two acts of Congress relate to the same subject and are to be construed *in pari materia*. The first act provides for the disposal of the lands in question at public sale, the quantity not to exceed 200 acres to one individual. The second act, which is clearly supplementary and complementary to the first,

simply provides that the lands which have not been disposed of at public sale may be disposed of at private sale upon the same terms and conditions as provided for the first sale. Reading the two acts together, and looking to the purpose of Congress, it is obvious that the acts should be read as if the second were merely another section of the first and provided that the remaining lands, which were not disposed of at public sale, should be subject to private cash entry.

The question presented herein was also raised by the motion for review filed in the case of *Davis v. Nelson*, but as it did not appear to have been involved in said case it was not necessary to pass upon the same.

There is the same limitation in the act of 1902, as to the quantity of land each purchaser is entitled to purchase as in the act of 1885, the act of 1902 providing that the lands not sold at public sale under the act of 1885 should be sold at private sale in conformity with the provisions of the earlier act. In the instruction of July 29, 1902 (31 L. D., 392), under the act of July 1, 1902, it is said:

The amount that any qualified applicant may purchase is still limited to one hundred and sixty acres of untimbered lands and an additional forty acres of timbered lands; and no person will be permitted to purchase timbered lands unless he is also the purchaser of untimbered lands.

And again:

As the right to purchase timber lands is dependent upon the purchase of untimbered lands, no certificate will be issued to the purchaser of timbered lands until full payment and proof have been made on the untimbered land purchased by the party, when, if the proof of compliance with the requirements of the law is satisfactory, the register will issue his certificate for the entire area purchased, numbering such certificates consecutively.

These instructions were apparently intended to have exclusive reference to the act of 1902. They undoubtedly contemplate not only that there must be a purchase of untimbered lands in order to entitle the purchaser to the additional forty acres of timbered land, but that the lands of each character must be taken under the act of 1902, else it would be impossible to issue one certificate for the entire area purchased. The question is, the acts of 1885 and 1902 being *in pari materia*, whether this is not too narrow a construction. A purchaser of one hundred and sixty acres of untimbered lands under the act of 1885 was also entitled to an additional forty acres of timbered lands, or a total of two hundred acres, and this held true up to the passage of the act of 1902, provided any lands remained unsold. If, therefore, Jones was entitled to an additional forty acres of timbered land under the act of 1885, there does not seem to be anything in the act of 1902 which inhibits his acquiring such land thereunder. The two acts are to be read together "as if the second were merely another section of the first," the only question in this case being whether a person who failed to secure all the land to which he was entitled at

public sale under the first act may be permitted to complete his purchase at private sale under the second. As stated, there is nothing in the act of 1902 that forbids this, and the purchaser thereby merely secures the quantity and character of lands, and "no more," which Congress intended he should have. Nor is there anything in either act indicating that a person who purchases one hundred and sixty acres of untimbered lands thereby exhausts his right to purchase subsequently an additional tract of forty acres of timbered land, thus making it incumbent upon the purchaser who desires the full two hundred acres allowable to complete his purchase therefor at one time. To the extent that the instructions under the act of 1902 contain words of limitation upon rights beyond what the act seems to require, they should be abrogated.

No good reason is seen why the entry of Jones under the act of 1902 as to the forty-acre tract of timbered land embraced therein should not remain intact as additional to his entry under the act of 1885, and your office is so advised.

SWAMP LAND—FIELD NOTES OF SURVEY.

WALLACE *v.* STATE OF MINNESOTA.

Where swamp is disclosed only upon one of the surveyed lines of a section, thus rendering the application of the rule of adjustment laid down in First Letter, page 543, impossible, the State's claim under its swamp land grant should be adjudged by the portions of the surveyed line shown to be swamp and dry—if the greater part be swamp the tract will pass to the State, and if the greater part be dry it will remain the property of the government.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 20, 1905.* (F. W. C.)

The Department has considered the appeal of the State of Minnesota from your office decisions of October 1 and December 12, last, holding that the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 35, T. 55 N., R. 10 W., 4th P. M., Duluth land district, Minnesota, is not shown by the field notes of the survey to be of the character of lands which passed to the State under its swamp land grant.

Wallace's contest against the State of Minnesota, as originally brought, involved other lands in addition to those here in question, this contest being the subject of departmental decision of June 13, 1904 (not reported), wherein it was said:

It is clear from what has been said that your office has not passed upon the question as to whether the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of section 35 was of such character as passed under the swamp land grant, and in view thereof the case is remanded for your consideration of the contest as to said tract.

Upon further consideration of Wallace's contest your office found, as above stated, that the tract here in question was not of the character of lands which passed to the State under its swamp land grant. From this decision the State appealed to this Department.

According to the statement in the decisions appealed from, the field notes of survey of this township disclose that 10.30 chains of the east line of the tract in question were returned as dry land while 9.80 chains are within a swamp. There being no other defined lines of swamp along the surveyed lines of the section in question, the application of the rule found in First Lester, 543, seems impossible, and therefore the State's claim must be judged by the portions of the surveyed line shown to be swamp and dry. The greater part of the only surveyed line of the tract in question being dry it follows, under this rule, that the tract must be adjudged non-swamp. The rule thus applied is purely arbitrary but the necessity for some rule is apparent. The plat of survey shows an extension of the lines of the swamp within the section for a considerable distance and, it may be, that viewed by the sketch shown upon the plats, the greater part of the tract in question would be swamp. Such sketch, however, can not be accepted as controlling.

In the appeal it is stated that—

If a rule were announced in that case, or in the case at bar, providing that where swamp is given only upon one side of the section, or where the swamp areas were meager, as the Commissioner says they are in the case at bar, whereby the margins of the swamp should be connected by the circumference of a circle, the radius of which shall be one-half the length of the section line, shown to traverse swamp, we would then have a rule which would operate fairly, and which in its application would be entirely consistent with the instructions under which the deputy works in the field.

Without in anywise committing the Department to the recognition of such a rule in the matter of the adjustment of the swamp land grant, if, as the Department understands the rule contended for, namely, that the exterior lines of the swamp defined in the field notes of survey should be connected by the circumference of a circle the radius of which shall be one-half of the section line included within the swamp, it would not in anywise affect the conclusion heretofore reached adverse to the State's claim. It is believed, however, that the rule hereinbefore announced is preferable to that here suggested.

After a most careful consideration of the matter, therefore, the Department affirms your office decision and rejects the State's claim to this tract under its swamp land grant.

SOLDIERS' HOMESTEAD—WIDOW AND MINOR CHILDREN—SECTION 2307,
REVISED STATUTES.SNOW *v.* DICKEN.

Upon the death of a soldier entitled to make homestead entry under section 2304 of the Revised Statutes, without having exercised such right, leaving surviving him a widow and minor orphan children, no rights can be acquired by such minor children, under the provisions of section 2307 of the Revised Statutes, prior to the death or remarriage of the widow without having exercised her right under said section.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 22, 1905.* (E. P.)

June 6, 1902, Sarah J. Dicken, as guardian of Amos C. Dicken, made homestead entry of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and lot 1 and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 5, T. 18 N., R. 16 W., Kingfisher land district, Oklahoma, alleging that said Amos C. Dicken was the only minor "heir" (meaning child) of Charles Dicken, deceased, who had served for a period of more than ninety days during the war of the rebellion in the army of the United States.

October 22, 1902, William L. Snow filed an affidavit of contest against said entry, charging, among other things, that Amos C. Dicken—

is not now and never was the head of a family, and has no rights under the homestead laws as a minor or in any other way.

After hearing duly had April 30, 1903, the local officers, on August 15, 1903, found and held as follows:

From the records and evidence offered in this case it appears that Sarah J. Dicken, widow of Charles Dicken, who died December 26, 1882 or 1883, married one James Shepherd about the 19th of December, 1888, and that her marriage with said Shepherd was annulled by the district court in and for Blaine county, Territory of Oklahoma, on the 11th day of October, 1899. Said decree of annulment of the marriage was by reason of the fact that said James Shepherd already had a lawful wife living in the State of Kansas, and from whom he was not divorced until December, 1899 [1889], being more than a year subsequent to his marriage with Sarah J. Dicken, widow of Charles Dicken, deceased.

* * * * *

The question in this case is whether or not the soldier's right of Charles Dicken, deceased, could be legally exercised under section 2307, by Sarah J. Dicken, as guardian of Amos C. Dicken, minor, orphan child of said Charles Dicken, deceased.

Section 2307 of the Revised Statutes of the United States provides, that the rights given to honorably discharged soldiers in sections 2304 and 2305 of the Revised Statutes, shall, in case of the death of the soldier or sailor, go to the widow, or in case of her death or marriage, to the minor, orphan children. The marriage of Sarah J. Dicken to James Shepherd, never having been a legal marriage, . . . the minor, orphan children of Charles Dicken could never acquire any benefits mentioned in section 2307 of the Revised Statutes, for the reason

that the minor, orphan children mentioned in said section can only attach in cases of the death or marriage of the widow. It is plain to be seen that in this case Sarah J. Dicken has always been and still is the widow of Charles Dicken, deceased, and the benefits enumerated in section 2307 of the Revised Statutes, can be exercised by no person other than Sarah J. Dicken, so long as she shall live and remain unmarried.

The local officers therefore recommended that the entry be canceled for illegality.

On appeal by the defendant, your office, by decision of August 26, 1904, after setting forth the opinion of the local officers and stating that their findings were sustained by the testimony, held that Mrs. Dicken did not remain unmarried; that, on the contrary, "to all intents and purposes she was married to James Shepherd, and to be free from such marriage she procured a divorce." For this reason, as well as for other reasons not deemed necessary by the Department to be herein referred to, your office held said entry to be legal, and dismissed the plaintiff's contest against the same.

From this decision of your office the plaintiff has appealed to the Department.

It is claimed on behalf of the defendant that Amos C. Dicken, as the minor child of a deceased soldier, was entitled, under the provisions of sections 2304, 2305 and 2307 of the Revised Statutes of the United States, to make a homestead entry, by guardian, of one hundred and sixty acres of land.

Said sections 2304 and 2305 confer certain rights upon a soldier who served in the army of the United States during the war of the rebellion for a period of ninety days and was honorably discharged and remained loyal to the government. Section 2307 provides as follows:

In case of the death of any person who would be entitled to a homestead under the provisions of section two thousand three hundred and four, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, by guardian duly appointed and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumerated in this chapter [section one of which chapter is embodied in Sections 2304 and 2305 of the Revised Statutes].

It is clear from the language used in said section 2307 that there-under no rights pass to the minor children of a deceased soldier except upon the happening of one of the conditions stated therein, namely, the death or remarriage of the soldier's widow, if there be one; in other words, that no rights can be acquired by such minor children, under the provisions of this section, during the widow's lifetime and widowhood.

It appears from the record herein that the soldier, because of whose services it is claimed that Amos C. Dicken was entitled by

guardian to make the entry here in question, died about 1883, leaving a widow, Sarah J. Dicken, and that Mrs. Dicken was living in January, 1903, at the time Amos C. Dicken attained his majority, and is still living. In view of these circumstances the legality of said entry must depend, primarily, at least, upon the validity of the marriage, hereinbefore referred to, between Mrs. Dicken and James Shepherd. Your office holds that "to all intents and purposes" this was a valid marriage, and that "to be free from such marriage she procured a divorce." In this holding the Department cannot concur. It is shown by the record herein that in June, 1898, Mrs. Dicken, then styling herself "Sarah J. Shepherd," filed in the district court in and for Blaine county, Territory of Oklahoma, a petition, praying that "her said marriage with the said James Shepherd be declared null and void," said petition being based upon the ground that at the date of such marriage Shepherd had an undivorced lawful wife then living. A copy of the decree rendered in said cause is not with the record herein, but from Mrs. Dicken's testimony it appears that a certified copy of the decree was filed by her in the Bureau of Pensions in support of her application for a widow's pension. A certified copy of said decree is found on file in the Pension Bureau with Mrs. Dicken's application for a pension, and therefrom it appears that on October 11, 1899, it was in said cause—

ordered, adjudged and decreed by the court that the said marriage contract between the plaintiff Sarah J. Shepherd and the defendant James Shepherd be set aside and held broken, null and void from the beginning, and of no force and effect whatsoever.

This decree was not, in a legal sense, a decree of divorce. It was merely a declaration by the court, upon Mrs. Dicken's petition of an existing fact, namely, the invalidity from the beginning of the so-called marriage between herself and Shepherd.

It thus appears that at the time Mrs. Dicken applied as guardian of Amos C. Dicken to make the entry in question she occupied the status of widow of the deceased soldier, her so-called marriage with Shepherd having been, some time previously to the date of the entry, judicially declared to have been void *ab initio*; and it also appears that she continued to occupy this status until the date of the hearing had herein, which was some months after said Dicken had ceased to be a minor.

It is clear from the foregoing that Amos C. Dicken was not entitled, under the provisions of said section 2307, to make a homestead entry by guardian, and for the reasons stated the entry as made is held by the Department to be illegal. The decision of your office appealed from is accordingly reversed.

OATHS, AFFIDAVITS, FINAL PROOFS, ETC.—OFFICERS.

CIRCULAR.

Suggestions to United States Commissioners, United States Court Commissioners, and Judges and Clerks of Courts of Record.

First. No oath in support of any application, entry, proof or claim to public lands should be administered to any stranger until he has first been reliably made known and identified to the officer administering it as the identical person he pretends to be.

Second. No jurat or certificate should be attached to any oath, affidavit, application, proof or other written statement affecting public lands until such oath, affidavit, application, proof or statement has been fully written out and completed, and until all blank spaces in any blank form prescribed or used therefor shall have been fully filled out or erased, and not then until after the same has been sworn to and signed by the affiant before and in the presence of the attesting officer and fully read by or made known to the affiant.

Third. Final proofs should in every case be made at the time and place advertised, and before the officer named in the notice, at his regularly established office or place of business, and not elsewhere. Between the hours of 8 A. M. and 6 P. M. on the day advertised, the officer named in the notice should call the case for hearing, and should the claimant fail to appear with his witnesses between those hours, or the taking of the proof fail to be completed on that day, the officer should continue the case until the next day, and on that day, or any succeeding day, should the plaintiff or his witnesses fail to so appear, he should proceed in like manner to continue the case from day to day until the expiration of ten days from the date advertised, but proof can not be taken after the expiration of the tenth day. Upon continuing any case in the manner indicated, the officer continuing the same should in the most effective way available give notice to all interested parties of such continuance.

Fourth. Protestants, adverse claimants, or other persons desiring to be present at the taking of any proof for the purpose of cross-examining the claimant and his witnesses, or to submit testimony in rebuttal, should be allowed to appear for that purpose on the day advertised, or upon any succeeding day to which the case may be continued. If any person appears for the purpose of filing a formal protest against the acceptance or approval of the proofs, or contest against the entry, and does nothing more than file same, such protest or contest should be received and forwarded to the register and receiver for their consideration and action.

Fifth. All final proofs should be reduced to writing by or in the

presence of and under the supervision of the officer taking them, and in all cases where no special agent or other representative of the government appears for the purpose of making cross-examinations, the officer taking the proof should use his utmost endeavor and diligence to so examine the entryman and his witnesses as to obtain full, specific, and unevasive answers to all questions propounded on the blank forms prescribed for the taking of such proofs, and in addition to so doing, he should make and reduce to writing and forward to the register and receiver with the proof such other and further rigid cross-examination as may be necessary to clearly develop all pertinent and material facts affecting or showing the validity of the entry, the entryman's compliance with the law, and the credibility of the claimant and his witnesses. And, in addition to this, he should inform the register and receiver of any facts, not set out in the testimony, which, in his judgment, cast suspicion upon the good faith of the applicant or the validity of the entry.

Sixth. The testimony of each claimant should be taken separate and apart from and not within the hearing of either of his witnesses, and the testimony of each witness should be taken separate and apart from and not within the hearing of either the applicant or of any other witness, and both the applicant and each of the witnesses should be required to state in and as a part of the final proof testimony given by them that they have given such testimony without any actual knowledge of any statement made in the testimony of either of the others.

Seventh. Officers taking affidavits and testimony should call the attention of parties and witnesses to the laws respecting false swearing and the penalties therefor, and inform them of the purpose of the government to hold all persons to a strict accountability for any statements made by them.

Eighth. After proofs have been taken in the manner indicated, they should be duly authenticated and properly transmitted to the register and receiver with the necessary fees and commissions.

Ninth. No fee in excess of twenty-five cents can be lawfully charged or received for administering the oath to and preparing any affidavit, application, proof or any other written statement affecting public lands, except that where the officer prepares and writes the final proof testimony of any claimant or witness, he will be entitled to charge and receive the sum of one dollar for writing and preparing such testimony and for administering the oath thereto. Any officer demanding or receiving a greater sum than is here specified for such services will be subject to indictment and punishment under amended section 2294 of the United States Revised Statutes.

Tenth. No person will, while holding an office which authorizes him to take final proofs, be recognized or permitted to appear as an agent or attorney for others in any matter affecting in any way the title to public lands which may be pending before the Department of the Interior, or any of its subordinate offices or officers, nor will such persons while holding such offices be permitted to enroll themselves in that Department, or before any of its offices, as agent or attorney.

Eleventh. No officer authorized to take final proofs shall, directly or indirectly, either as agent, attorney, or otherwise, in any manner or by any means, cause, aid, encourage, induce or assist any person to in any manner wrongfully or illegally acquire or attempt to acquire any title to, interest in, use of, or control over, any public lands belonging to the United States.

Twelfth. No officer authorized to take final proofs should, either for himself or as agent, attorney, or representative of another, induce or attempt to induce any owner, entryman, or other person, to purchase, sell, mortgage, exchange, lease or relinquish any lands which are involved, may be involved, or have been involved, in any affidavit, application, or proof, executed before him, and he should not, either for himself or as agent for any other person, in any manner, solicit or make to any entryman, owner, or claimant, any loan or attempted loan, the payment of which is to be secured by a lien or mortgage upon such lands, and he should not be or remain a member or stockholder of any copartnership or company which shall, either directly or indirectly, be interested in or benefitted by any such sale, mortgage, exchange, lease, relinquishment, or loan, nor accept nor receive in any manner any fee, commission, compensation, emolument or benefit arising therefrom, except for the lawful discharge of his official duties.

Thirteenth. Any officer violating any of these rules suggested for the government of their actions may, after such violation, be deprived of the right of further taking final proofs, and when any commissioner has so offended, his action may be called to the attention of the court by which he was appointed, with appropriate recommendations. All registers and receivers and special agents have been charged to use their utmost diligence in seeing that the rules here suggested are fully and in good faith complied with, and directed to investigate and fully report any apparent violations thereof which may come to their notice.

W. A. RICHARDS, *Commissioner.*

Approved, March 24, 1905:

E. A. HITCHCOCK, *Secretary.*

SCHOOL LANDS—INDEMNITY SELECTION—TEMPORARY RESERVATION.

STATE OF CALIFORNIA.

By the action of the Department in its decision of February 13, 1904, permitting certain indemnity school land selections filed by the State, previously accepted and placed of record, and based upon lands alleged to be lost to the State because included within a temporary withdrawal with a view to their examination preliminary to the creation of a forest reserve, to stand, pending final determination of the boundaries of the proposed reserve, which would fix the status and determine the question of availability of the base lands, it was not the intention to include mere applications previously presented by the State, but which had not been formally accepted.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 27, 1905.* (F. W. C.)

The Department has considered the appeal by the State of California from your office decision of June 13, 1904, rejecting certain indemnity school land selections, filed by the State of California upon the dates named and for descriptions specifically set forth in said decision, aggregating more than fifty thousand acres within the Eureka land district.

These selections were presented between June 5 and September 21, 1903, and were all based upon lands alleged to be lost to the State because included within a temporary withdrawal with a view to their examination preliminary to the creation of a forest reserve.

It appears that at the time said lists were filed in the local land office no action was taken thereon, there being some question raised as to the payment of fees upon a portion of the selections. Following the departmental decision of December 10, 1903 (32 L. D., 346), wherein it was held that the mere inclusion of portions of sections 16 and 36 within a withdrawal made for the purpose of permitting investigation and examination of lands withdrawn with a view to their possible inclusion within a forest reserve, does not afford a sufficient base for the selection of school indemnity lands under the provisions of the act of February 28, 1891 (26 Stat., 796), the local officers took up and rejected all of the selections here involved; from which action the State appealed to your office.

Upon consideration of said appeal, the decision appealed from was rendered, wherein it is said that "the lands selected, with a few exceptions, have since the filing of the State's applications been temporarily withdrawn for a like purpose;" that is, for the purpose of determining the advisability of including them within a forest reserve, and upon inquiry at your office it is now learned that a reservation has been finally determined upon which will include all of the lands previously withdrawn.

Since forwarding the record on appeal, there has been transmitted a relinquishment by the State of a portion of the selections. It is

unnecessary to specifically describe the lands relinquished, in view of the action herein taken.

The real basis of the State's appeal seems to be the action taken in departmental decision of February 13, 1904 (32 L. D., 454), on review of the decision of December 10, 1903 (32 L. D., 346), before referred to, wherein the State's request was granted in the following terms:

The Department sees no objection to granting the same upon the condition that the lands selected are not desired in the creation of other reserves, and wherever any such selections have been included within the limits of a withdrawal made prior to the time when the validity of the bases for such selections are fixed by the final establishment of a forest reserve including such base lands such selections will be canceled.

And it is now urged that the effect of said departmental decision was to allow all pending applications to select lands where the base lands were of the character before described.

The decision appealed from holds that in permitting certain selections previously accepted and placed of record to stand, pending the final determination of the boundaries of the proposed reserve, which would fix the status and determine the question of availability of the base lands, it was not the intention to include mere applications previously presented by the State but which had not been formally accepted, and with this the Department agrees; and after careful consideration of the entire matter the decision appealed from is affirmed and the proffered applications by the State will stand rejected. You will direct the local officers to make proper notation upon their records.

HOMESTEAD—DECEASED ENTRYMAN—HEIRS—PATENT.

HEIRS OF WILLIAM B. CRENSHAW.

In the case of a homestead entryman who dies within six months after making entry, without having established residence, leaving surviving him as his only known heirs a widow and also a minor child which soon thereafter dies, and his widow subsequently complies with the law and earns title to the land, but dies prior to submitting final proof, her estate will not be divested of the inchoate right of property acquired by her compliance with law, merely because the law does not in terms provide for the completion of title in such cases, but upon the submission of final proof by persons claiming to be her heirs, showing her compliance with law, patent will issue in the name of the heirs of the deceased entryman, leaving it to the courts to determine who under the law is entitled to the property.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 31, 1905.* (G. B. G.)

This is the appeal of Alexander Walters, transferee, from your office decision of August 4, 1904, which rejected the final proof sub-

mitted by Wallace E. Fightmaster upon the homestead entry of William B. Crenshaw for the SE. $\frac{1}{4}$ of Sec. 6, T. 9 N., R. 14 W., Elreno land district, Oklahoma.

It appears that William B. Crenshaw made homestead entry of this land April 20, 1893, but died the following September, leaving surviving him a widow, Mary C. Crenshaw, and an infant son, who died about six months later. In September, 1897, his widow married Wallace E. Fightmaster, but died in February, 1899, leaving as her surviving heirs her husband, the said Wallace E. Fightmaster, and a child, Edward Fightmaster, the issue of her second marriage.

In 1901 the entry was contested upon the ground that the widow of Crenshaw had died without submitting final proof upon said entry, and that there were no known heirs of Crenshaw, or, if there were such, that they had wholly failed to cultivate the land as required by law. Upon the testimony taken at a hearing ordered upon this contest your office found that Crenshaw's widow had complied with the law as to cultivation, and that "she earned a patent for the land." The contest was thereupon dismissed, but your office, May 6, 1903, directed the local officers to issue the usual expiration notice calling upon the heirs of W. B. Crenshaw to show cause why the entry should not be canceled for failure to make proof during the seven year period. This notice appears to have been given, and no heir of Crenshaw has appeared to claim any interest in the entry. July 21, 1903, however, the said Wallace E. Fightmaster submitted final proof thereon as "one of the heirs of Mary Catherine Fightmaster, formerly Mary Catherine Crenshaw," showing that she, as the widow of the entryman, took possession and control of said land and continued to cultivate and improve it up to the time of her death. Specifically, the final proof shows that Crenshaw died before he established residence upon the land, that his widow lived on the claim a part of the time each year after his death, that she cultivated and improved it until her death, that at the time proof was submitted the whole tract was under fence, one hundred and twenty acres thereof had been broken, and that the improvements were valued at \$400.

Upon this proof final certificate issued July 24, 1903, stating that "Wallace Fightmaster, one of the heirs of Mary Catherine Fightmaster, deceased, formerly Mary Catherine Crenshaw, widow of William B. Crenshaw, deceased, has made payment in full" for said land, and that upon presentation of said certificate "the said heirs of William B. Crenshaw, deceased, shall be entitled to a patent for the land."

December 22, 1903, the said Wallace E. Fightmaster and his then wife, Ella O. Fightmaster, for themselves, and the said Wallace E.

Fightmaster as the duly appointed and authorized guardian of Edward Fightmaster, sold and conveyed the land in controversy to the appellant, Alexander W. Walters, for the sum of \$2,250 cash in hand paid, and Walters swears that he has since spent \$1,000 in improving the land.

Under all the circumstances, it is believed that the ends of justice can be best served by the issuance of patent upon said final certificate. This conclusion has been reached without reference to the general regulations of your office governing the submission of final proof under section 2291 of the Revised Statutes. This case is not within the statute, and the regulation in question is without application. Crenshaw had done nothing towards earning title to this land, and so far as appears from this record he has no heirs. His widow complied with the law and earned the title. She might have submitted final proof under section 2291 of the Revised Statutes and received the patent. She might have relinquished the land to the government and thereby defeated the claim of the Crenshaw heirs, if he had had such heirs. *Steberg v. Hanelt* (26 L. D., 436). This being so, it would seem absurd to say that after she had earned the title, her estate may be divested of this inchoate right of property because the law does not in terms provide for the completion of title in such cases. It is believed that upon the issuance of patent the title to this property will inure to her estate. But however this may be, the patent will follow the final certificate, and this runs to the "heirs of William B. Crenshaw." These heirs are designated also as the "heirs of Mary Catherine Fightmaster," but whether this be true is a question for the courts of Oklahoma to decide, if such question should arise. All the parties in interest, so far as appears from this record, are satisfied to have the patent issue in accordance with the recitals of the final certificate, and if their claim to the land should be disputed, it will be competent for the court to say who under the law is the owner or owners of the property, and declare a trust for his or their benefit, if found necessary.

The decision appealed from is reversed, with directions to issue the patent, unless further objection appear.

ABANDONED MILITARY RESERVATION—SELECTION UNDER ACT OF
JUNE 22, 1874.

UNION PACIFIC LAND COMPANY.

Lands in the Fort Wallace abandoned military reservation which by the act of October 19, 1888, were opened to disposition under the homestead law (with the exception of section 2301 of the Revised Statutes), are not unappropriated public lands within the meaning of the act of June 22, 1874, providing for the relief of settlers on railroad lands, and are therefore not subject to selection in lieu of lands relinquished under the provisions of said act for the benefit of settlers.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *March 31, 1905.* (E. J. H.)

Lots 5 and 6 of Sec. 25, T. 13 S., R. 39 W., Wakeeney, Kansas, land district, are within the limits of the grant to the Union Pacific Railway Company, and also within the boundary of the Fort Wallace military reservation, which was established prior to the attachment of the company's rights by definite location of the road.

Subsequently, said military reservation was abandoned, and Congress, by the act of October 19, 1888 (25 Stat., 612), provided for the disposition of the land within said reservation. Said act provided for right of way and station grounds for the railway company, the Wallace townsite and water-works, and a cemetery, and—

that the remainder of said reservation shall be disposed of under the homestead laws, except the privileges granted by section twenty-three hundred and one of said homestead laws.

February 23, 1904, the Union Pacific Land Company, successor to the Union Pacific Railway Company, applied to select the above described lots, under the act of June 22, 1874 (18 Stat., 194). This application was rejected by the local officers for the reason that said lots were included in an application of one George R. Allaman, then pending in your office, for the sale thereof, under section 2455 of the Revised Statutes, as isolated tracts.

The land company appealed from said action of the local officers, and while the case was pending in your office the Department, on August 2, 1904, rejected the application of Allaman for the sale of said lots, one ground therefor being—

that the tract, being within the Fort Wallace abandoned military reservation, and subject to disposal under section 6 of the act of October 19, 1888 (25 Stat., 612), could not be offered under Sec. 2455 of the Revised Statutes as amended.

December 14, 1904, your office affirmed the decision of the local officers in rejecting the company's application to select the lots in dispute, from which an appeal has been taken to the Department.

The sole question presented in this case is, whether the limitation as to disposition of the lands in the Fort Wallace abandoned military reservation, contained in the act providing for their disposition "under the homestead laws," renders the provisions of the act of June 22, 1874, inapplicable thereto.

Said act of 1874 provides that for lands relinquished for the benefit of settlers, the company—

shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant, not otherwise appropriated at the date of the selection.

It is contended on behalf of the land company that under the act of October 19, 1888, *supra*, providing for the disposition of the lands in said abandoned military reservation "under the homestead laws," they became "public lands" and subject to selection under said act of 1874.

Practically the same question involved in this case was before the Department in the case of State of Utah (30 L. D., 301). In that case, under a grant of lands in quantity, made to the State for the establishment and maintenance of an institution for the blind, said lands to be selected "from the unappropriated public lands," the State had made selection of lands in part satisfaction of its grant in an abandoned military reservation, which at the time of such selection were subject to disposition under the acts of July 5, 1884 (23 Stat., 103), and August 23, 1894 (28 Stat., 491), which provided an exclusive method for the disposition of lands in abandoned military reservations.

It was said in the opinion that—

because of the enhanced value of lands in abandoned military reservations, or because of other reasons growing out of their former use and surroundings, it was deemed more conducive to the public interests to set them apart for disposition in certain designated modes, to the exclusion of all others, than to unconditionally restore them to the public domain. (See case of R. M. Snyder, 27 L. D., 82.) In this sense they are appropriated—not disposed of in the sense of sold or its equivalent, but set apart for disposition in a particular manner in pursuance of a defined policy. This appropriation does not place the lands beyond the power of other disposition by Congress, but so long as it stands unaltered, controls the Secretary of the Interior under whose direction the State selections in question must be made.

The State's selections were rejected.

The above case was very carefully considered and very clearly covers the case at bar. The act under which the State of Utah attempted to make its selection provided that they should be made from "the unappropriated public lands," and that under which the land company has applied to make selection of the tracts in controversy, provides that such selections shall be made from any of

the public lands, not mineral, within the limits of the grant, "not otherwise appropriated at the date of the selection." The lands involved in this case were, at the time of the attempted selection thereof by the company, "appropriated" in the same sense as were those which the State of Utah applied to select in the above mentioned case. They were set apart for exclusive disposition "under the homestead laws." Other departmental decisions are practically to the same effect as in the Utah case.

Your office decision is affirmed.

HOMESTEAD SETTLERS WITHIN THE LIMITS OF THE MOBILE AND GIRARD RAILROAD GRANT, ALABAMA—ACT OF FEBRUARY 24, 1905.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., March 24, 1905.

The act of February 24, 1905 [33 Stat., 813], is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where any homestead entry heretofore allowed under ruling of the Land Department, for lands within the limits of the grant made by act of Congress approved June third, eighteen hundred and fifty-six (Eleventh Statutes, page eighteen), to the State of Alabama in aid of the construction of the railroad known as the Mobile and Girard Railroad has been canceled because of a superior claim to the land through purchase from the railroad company, which claim has been held to have been confirmed and a confirmatory patent issued for the land under the provisions of section four of the act of March third, eighteen hundred and eighty-seven (Twenty-fourth Statutes, page five hundred and fifty-six), such homesteader is hereby accorded the privilege of transferring his claim thus initiated under the homestead laws to any other nonmineral unappropriated public land subject to homestead entry, with full credit for the period of residence and for the improvements made upon his homestead hereinbefore first described prior to the order of its cancellation, provided he has not forfeited or voluntarily abandoned his homestead claim and that his application for transfer is presented within one year from the date of the passage of this act. Should he elect, however, to retain the tract embraced in his homestead entry heretofore canceled, the holder of the patented title through the railroad grant shall thereupon be invited to relinquish or reconvey the land included in such former homestead entry, and upon filing such relinquishment or reconveyance such holder of the patented title shall be entitled to select and receive patent for an equal quantity of nontimbered, nonmineral, and unappropriated public lands subject to homestead entry, and upon the filing of such relinquishment or reconveyance all right, title, and interest under and through the railroad grant and the confirmatory patent hereinbefore referred to shall revert to the United States, and the tract thus relinquished or recon-

veyed shall be treated and disposed of as other public lands of the United States: *Provided, however,* That such previous homesteader shall be reinstated in his rights and permitted to complete title to the land previously entered, as though no cancellation of his homestead entry had been made.

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

Approved, February 24, 1905.

WHO ARE THE BENEFICIARIES UNDER THIS ACT?

The act clearly describes the beneficiaries as those who had, prior to the passage of said act, been allowed under the rules of the land department to make homestead entry for lands within the limits of the grant made by act of Congress approved June 3, 1856 (11 Stat., 17, 18), to the State of Alabama in aid of the construction of the railroad known as the Mobile and Girard Railroad, whose entries have been canceled because of superior claims to the land through purchase from the railroad company and the land patented to such purchasers under the confirmatory provisions of section 4 of the act of March 3, 1887 (24 Stat., 556). To such homesteader the act accords the privilege of transferring the claim under the homestead law to any other nonmineral unappropriated public lands subject to homestead entry with full credit for the period of residence and for the improvements made upon his homestead prior to the order of its cancellation, provided he has not forfeited or voluntarily abandoned his homestead claim, and that his application for transfer is presented within one year from the passage of the act of February 24, 1905.

Where any such homestead had passed to final entry and certificate or to the submission of final proof entitling the claimant to final entry and certificate, and the homesteader has since died or transferred and assigned his rights under such entry, and has not made a subsequent homestead entry, the heirs of such deceased homesteader or his assigns will be entitled to all the benefits of this act, the evident purpose of the act being to place the homesteader and those claiming under or through him in the same position as though his entry when originally made had been of public lands of the United States.

A further class of beneficiaries is named in the act, namely, "the holder of the patented title through the railroad grant," who, in the event the homesteader elects to retain the tract formerly entered, is to be invited to relinquish or reconvey said tract to the United States, whereupon he is granted a right to select and receive patent for an equal quantity of nontimbered and nonmineral and unappropriated public lands subject to homestead entry. The person thus designated is the lawful holder of the title to the land at the time the relinquishment and reconveyance is requested and made.

PROCEDURE IN OBTAINING RELINQUISHMENTS.

Wherever, upon examination of the records, it appears that a homestead of the character described has been canceled, the Commissioner of the General Land Office will notify the homestead claimant of the option accorded him by law, either to transfer his claim to other lands or to retain the land formerly entered, and request that he file notice of his election at the earliest opportunity. If he elects to relinquish the land formerly entered and take other lands in lieu thereof he must execute a proper relinquishment, as hereafter required, and transmit the same to the Commissioner of the General Land Office, together with his notice of election so to do. If he elects to retain the land formerly entered, the notice of his election should be accompanied by proof that he has not forfeited or voluntarily abandoned his homestead claim; but the fact that he left the land after the adjudication in favor of the purchaser under the railroad grant will not be construed as an abandonment.

Where any such homesteader had, prior to the passage of this act, made a homestead entry for other lands, he will, upon filing an election with the Commissioner of the General Land Office, be entitled to full credit for the period of residence and for the improvements made upon his former canceled homestead entry as though said second homestead entry had been made under the provisions of this act.

An individual may, without formal notice or request, make the required proof and file notice of his election with the Commissioner of the General Land Office.

Where the claimant under the homestead elects to retain the land formerly entered and makes satisfactory proof in support of such election, the Commissioner of the General Land Office will thereupon notify the holder of the patented title, through the railroad grant, to the land entered, inviting such holder to relinquish or reconvey the land included in the former homestead entry.

WHAT IS A PROPER RELINQUISHMENT?

The relinquishment must be an instrument in writing describing the land relinquished and making appropriate reference to the claim intended to be surrendered and in terms releasing, quitclaiming, and relinquishing unto the United States of America all the right, title, and interest and claim of the homesteader or holder of the patented title through the railroad grant, as the case may be, to such lands, and when relinquishing the patented title must be executed, witnessed, and acknowledged conformably to the laws respecting the conveyance of real property in the State of Alabama.

Relinquishments by those claiming under the homestead entry, where the same have passed to final entry and certificate or to the submission of proof entitling the claimant to final entry and certificate, 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.

Relinquishments by those claiming under the homestead entry, where the same have passed to final entry and certificate or to the submission of final proof entitling the claimant to final entry and certificate, and also all relinquishments by the holder of the patented title through the railroad grant, must be accompanied by proof satisfactorily showing whether the land relinquished has been sold, contracted to be sold, or encumbered.

EFFECT OF RELINQUISHMENT—WHEN RIGHT TO SELECT OTHER LAND IS COMPLETED.

Upon the filing with, and acceptance by, the Commissioner of the General Land Office of a relinquishment under the homestead claim the claimant, upon receiving notice of acceptance of his relinquishment, will be entitled, upon proper application, to select other lands according to the conditions and limitations of the act of February 24, 1905.

Upon filing with, and acceptance by, the Commissioner of the General Land Office of a relinquishment by the holder of the patented title through the railroad grant all right, title, and interest under and through the railroad grant and the confirmatory patent shall revert to the United States, and the lands so relinquished will be treated and disposed of as other public lands of the United States, and the former homesteader will be reinstated in his rights and permitted to complete title to the land previously entered, as though no order for the cancellation of his homestead entry had been made. In the event that any such homestead is not thereafter perfected, any title to the lands embraced in such entry will not revert to the holder of the patented title through the railroad grant, but will be subject to disposal as other public lands.

The holder of the patented title under the railroad grant upon receiving notice of the acceptance of his relinquishment will be entitled, upon proper application, to select other lands according to the limitations and conditions of the act of February 24, 1905.

PROCEDURE IN SELECTING LIEU LANDS AND PERFECTING TITLE THERETO.

Applications to select lieu lands hereunder, and to transfer the homestead claim, must be presented to the local land office in the dis-

tract within which the lands selected or to which the transfer is made are situate. The application must particularly state the description and acreage of the lands relinquished, the acceptance by the Commissioner of the General Land Office of the relinquishment, and the description and acreage of the lands applied for, and since corresponding legal subdivisions generally approximate but do not always embrace the same area, a slight difference in the acreage of the tracts relinquished and applied for will not be deemed an inequality in quantity.

The application must also be accompanied by proof that the land sought is of the character subject to the claim. If the records of the local office do not show to the contrary the character of the land will be deemed to be *prima facie* established, where the application is supported by an affidavit based upon a personal examination of the land. If the application is in proper form and upon examination of the records in the local office the lands applied for appear to be subject to such application, the local officers will accept the same, giving it an appropriate number, make due notation upon the records of their office, and transmit the papers to the Commissioner of the General Land Office for his consideration.

Where the homestead claim sought to be transferred has not been carried to final entry and certificate or to the submission of final proof entitling him to final entry and certificate, the claimant will be required to perfect his right to the land in the new entry by compliance with the homestead law and the submission of proof thereof in the usual way, but credit will be given for the period of residence and for the improvements made upon his canceled homestead entry prior to the order of its cancellation and for any payment of fees or purchase money upon the land relinquished, it being the purpose of the act to give the homestead claimants the same status with respect to the transferred lands which they occupy with respect to the lands relinquished.

TIME OF ISSUING PATENTS TO SELECTED LANDS.

Patents to lands taken under this act, either by those claiming under a former homestead entry or by the holders of the patented title under the railroad grant, will be issued after due examination and approval of the claims made hereunder, conformably to the general rules of practice governing like matters in the General Land Office.

W. A. RICHARDS, *Commissioner*.

Approved, March 24, 1905:

E. A. HITCHCOCK, *Secretary of the Interior*.

SETTLEMENT—HOMESTEAD APPLICATION.

BARTON *v.* JOHNSON.

As between one who has a subsisting settlement upon a tract of land embraced in an invalid Indian allotment at the date of the cancellation of the allotment, and one who immediately upon such cancellation files application to make homestead entry of the land, without having made settlement thereon, the right of the settler is superior to that of the applicant.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 10, 1905.* (P. E. W.)

October 31, 1902, Thomas D. Barton made homestead application for lots 22, 23 and 24, Sec. 14, and lot 17, Sec. 15, T. 34 N., R. 1 W., Lewiston, Idaho.

His application was rejected by the local officers for conflict with Nez Perce Indian allotment No. 856, and his appeal from that action was transmitted to your office on November 19, 1902. Pending said appeal, your office, by letter dated November 28, 1902, advised the local office that the said allotment had been canceled under the direction of the Department, and such cancellation was noted on the records of the local office at nine o'clock A. M., December 3, 1902. At ten o'clock A. M. on the same day Miles S. Johnson filed his homestead application for the same land, which was rejected for conflict with the pending application of Barton. Johnson appealed to your office.

December 20, 1902, Barton filed his second homestead application for the land, alleging:

That Oct. 28, 1902, I went upon this tract and staked out for a house, made arrangements for lumber to construct a house. About Dec. 3, 1902, said lumber was delivered on the ground and I commenced the erection of a house at the identical place which I had selected on Oct. 28, 1902. . . . That on 17 day of Nov., 1902, I hired one William Palmer to erect said house on the ground. That said house is now nearly completed, is 12 x 14.

December 23, 1902, Barton filed his application for a hearing to determine whether he or Johnson had the superior right to the land, and by your office letter of July 24, 1903, a hearing was ordered upon the following questions:

1. Was Thomas D. Barton a *bona fide* settler upon the land in controversy at the time Johnson offered his homestead application for the same?
2. Is it the intention of Miles S. Johnson to take this tract for the purpose of securing a home?
3. Was Miles S. Johnson possessed of the proper knowledge to make a legal application for the land on December 3, 1902, the day he offered his homestead application for the same?

Such hearing was had on October 15, 1903, and thereupon the local officers recommended that Johnson be permitted to file homestead application for the land.

March 14, 1904, your office affirmed their decision.

Barton has appealed to the Department.

The questions presented by the appeal are, whether Barton's acts of settlement were sufficient to reserve the land for him as against Johnson's application; and whether Johnson's intentions and qualifications were such as the law requires.

On behalf of Johnson it is contended that no act of settlement performed by him prior to the cancellation of said allotment at 9 o'clock A. M. on December 3, 1902, can avail said Barton herein and that since Barton was absent from November 28 until December 28, 1902, and no one else could perform an act of settlement for him, Johnson's prior application must prevail.

In the case of *Geer v. Farrington* (4 L. D., 410) it was held:

Conceding that while an entry stands uncanceled upon the record, settlers upon the land covered thereby acquire no rights as against the record entryman or the United States, yet as between such settlers priority of settlement may be properly considered.

In the case of *Tarr v. Burnham* (6 L. D., 709) the Department, citing the foregoing case, said:

Conceding that prior to the act of Congress declaring the forfeiture of the lands granted to said Texas Pacific Railroad Company, and restoring them to the public domain, neither of the parties could acquire any right by virtue of settlement as against the said railroad company, or the United States, yet it does not follow that as between the parties themselves the question of prior settlement cannot properly be considered in determining their respective rights touching the tract of land in contest.

In the case of *Rothwell v. Crockett* (9 L. D., 89) the Department, citing both the foregoing cases, held that:

Lands within the Santee Sioux reservation, remaining unallotted to and unselected by the Indians on April 15, 1885, were on that day restored to the public domain by virtue of the previous executive order.

* * * * *

Conceding that such land was not subject to settlement prior to May 15, 1885, as between claimants therefor, priority of settlement, alleged previous to that date, may be considered.

In the case of *Giles v. Troop* (25 L. D., 448) it is said:

While the land was covered by Kee's entry, Troop could gain no right thereto by his application, nor Giles by his settlement, but when Kee's entry was canceled, then, as between themselves, the date of settlement by them respectively becomes a proper subject for inquiry.

Johnson does not show or claim that he performed any act of settlement, and admits that he has not been on the land since 1899. There is, therefore, no claim that he was misled, or that he was without notice and knowledge of Barton's claim, by reason of insufficient acts of settlement on the part of Barton.

It follows from the cases cited, that, if his stated acts and proceedings prior to the date of Johnson's application, when taken together, constitute a sufficient and legal prior settlement, Barton's right to the land must be held superior to that of Johnson, which depends entirely upon the priority of his said application after the cancellation of the allotment on the records of the local office.

The undisputed testimony of Barton, in which he is corroborated by the several witnesses named therein, shows that as early as the spring of 1902 he employed C. T. Stranahan to procure the cancellation of said allotment; that the latter incurred an expense of thirty dollars, which Barton repaid, in obtaining the admission of the holder of said allotment, who signed a relinquishment thereof, that it was a duplicate allotment and that she held another allotment of her own selection; that Barton went on the land in question on October 27 and 28, 1902, and staked off a place for a house, with the purpose of taking it for a homestead, and in pursuance of that purpose went to the local land office on October 31, 1902, and offered his said homestead application; that about the middle of November, 1902, Barton contracted with William P. Palmer to build a house on this land, and the lumber for the same was delivered on the land between the 3rd and 5th of December, 1902, but for want of time Palmer did not build the house until the latter part of that month; and that it was then built on the identical ground "staked off" by Barton on October 28, 1902.

Barton testified further that on November 17th or 18th, 1902, he contracted with one Alex. Ranes to "get out posts, etc.," for fencing the land (which were delivered at that time and have been on the land ever since) and to break out twenty acres; and that on November 28, 1902, he went to the local office for the purpose of again offering filing upon this land. In response to the question why he did not file at this time, Barton testified further:

I came into the land office and asked Mr. Mallory if it [the allotment] had been canceled and he said that it had, he thought, and he looked at the records and found that it had not been canceled, and I was going to make application anyway and he said I had better wait until Mr. West [register] came down and see him and see whether he would allow application or not—allow me to file on it— and Mr. West said another application would do me no good and I had just as well let the first application stand.

It appears from the foregoing that Barton has persistently and diligently followed up his purpose of acquiring the land in question as a homestead, from his said employment of Stranahan in the spring of 1902, to the completion of his house on the land in December of the same year. Going on the land in October, 1902, for the purpose of preliminary examination, and selecting and "staking off" the site for his dwelling, he immediately thereupon offered his home-

stead application, from the rejection of which he duly prosecuted an appeal, and early in November contracted for the "getting out of posts" to fence the land and for the breaking of twenty acres; also for the delivery on the land of the necessary lumber, and for the building of his house, and later went to the land office to again offer his homestead application.

The delivery of said posts for fencing had begun at that time under said contract, and the lumber for the house was delivered on the land early in December, commencing, as it appears, on the same day on which Johnson filed his application.

It is true the house was not completed until the latter part of December, but it was built on the site selected and staked off by Barton in person on October 28, and where Stranahan testifies he saw the stakes and the lumber on December 10, thus combining with Barton's manifested intent and purpose to appropriate this tract, the prompt inauguration and consummation of acts illustrating that intent and purpose.

It is believed that the stated proceedings and acts of settlement were sufficient to give Barton the status and preference of a settler, at the time of the cancellation of the allotment, as against one subsequently making entry without settlement.

In the case of *Moss v. Dowman* (176 U. S., 413, 417), the Supreme Court of the United States said:

Preemption and homestead laws were enacted for the benefit of the actual settler and to that end they should be construed and administered. . . . again and again has this court affirmed the proposition that the actual settler is the beneficiary of the preemption and homestead laws of the United States. . . . in *Bohall v. Dilla* (114 U. S., 47, 51), "Those laws are intended for the benefit of persons making a settlement upon the public lands, followed by residence and improvement and the erection of a dwelling thereon." . . . the question is as to the relative rights, at the moment the land becomes open to entry, of one a settler in actual occupation and one making a formal entry in the land office. For reasons heretofore stated we have no doubt that the settler is entitled to preference. . . . We endorse what was said by the learned judge of the Circuit Court:

"That Dowman had acquired no rights by his settlement prior to Doran's relinquishment, and might, as respects Doran, have been regarded as a trespasser, makes no difference. When Doran relinquished, Dowman ceased to be a trespasser, and was not only an actual but a lawful settler. There was no evidence of *mala fides* about Dowman's settlement which should affect its legality when the time came for a right to attach to it under the land laws. . . . and if Dowman knew all the antecedent facts he might well expect that an actual settler would acquire the right to the land lawfully, upon the next relinquishment, and make his settlement . . . in good faith.

So in the case before us, Barton knew the antecedent facts of the duplicate allotment and expected that upon relinquishment or cancellation thereof, an actual settler would acquire the right to the land

lawfully. In that expectation he employed and paid counsel to procure the cancellation of said allotment as duplicate, and in the meantime performed the acts of settlement stated. While these acts had not ripened into actual living on the land at the moment the cancellation of the allotment was noted on the local office record, they were unmistakable and ample to indicate his appropriation of the land, and they were followed in due time by the completion of his residence on the land before any act of settlement had been performed by Johnson, who admitted at the hearing that he had not been near the land since 1899. Had the latter, as required by law, personally examined this tract before executing his homestead application, he would have found the stakes which outlined the site of Barton's house on the land for more than thirty days prior to the cancellation of the allotment. Said allotment in its segregating effect on the land does not differ from a formal entry. Barton, though a trespasser as against the allottee and the government, was, by his stated acts, acquiring a prior right as a settler as against one making a prior application to enter who had not performed any acts of settlement.

In the opinion of the Department the case before us comes fully within the scope and rule of the cases cited, and the acts and proceedings of Barton were sufficient acts of prior settlement to reserve the land for him as against Johnson's application.

This conclusion renders it unnecessary to consider the intentions and qualifications of Johnson.

If no other valid objection appears, Barton's application to enter the land will be allowed, your said decision being hereby reversed.

CONFIRMATION—PROCEEDING BY GOVERNMENT—PROVISO TO SECTION 7, ACT OF MARCH 3, 1891.

JOHN N. DICKERSON.

A proceeding by the government to determine the validity of an entry is commenced when the investigation is ordered, and if so commenced before the lapse of two years from the date of the final certificate, it will defeat confirmation of the entry under the proviso to section seven of the act of March 3, 1891, whether notice of such action is given to the entryman or claimant within that period or not.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 10, 1905.* (E. F. B.)

This petition is filed by John N. Dickerson, complaining of the action of your office refusing to transmit his appeal from your decision of December 8, 1904, suspending his homestead entry for the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 11, T. 9 N., R. 2 E.,

H. M., Eureka, California, subject to his right to apply for a hearing in the manner provided by the practice of your office.

Petitioner contends that this entry was confirmed by the 7th section of the act of March 3, 1891 (26 Stat., 1095), there being no pending contest or protest against the validity of the entry at the expiration of two years from the date thereof, and hence your office had no authority to take such proceedings against it.

The final entry was made February 11, 1902. Within two years from the date of the entry a special agent advised your office that, from a partial investigation of said entry, he found a great deal of fraud had been and was being perpetrated, and requested that no patent be issued on that or any other described entries until after further investigation. Thereupon your office suspended the entry and referred it to the special agent for investigation. This action was also taken before two years had expired from the date of entry.

November 22, 1904, the special agent reported adversely as to this claim, and on December 8, 1904, your office, acting upon this report, formally suspended the entry and directed that notice be given in accordance with instructions contained in the circular of August 18, 1899 (29 L. D., 141), which allows the entryman to apply for a hearing and upon failure to do so the entry will be subject to cancellation without further investigation.

It is contended by petitioner that there was no pending contest or protest against the validity of the entry at the expiration of two years from its date, and that no proceedings had been commenced against the validity of the entry that would take this case out of the class of entries confirmed by said act.

This case is controlled by the principle announced in the case of John S. Maginnis (33 L. D., 306), in which a motion for review was denied March 3, 1905 (33 L. D., 454), and the principle was again in the latter decision fully discussed.

The literal interpretation of the act contended for by petitioner, that only a "pending contest or protest against the validity of the entry" will defeat confirmation and that a charge by a special agent upon which no hearing was ordered within the statutory period is not a proceeding of the character contemplated by the statute, has not received the sanction of the Department.

In the instructions of July 9, 1902 (31 L. D., 368), it was said that it was not contemplated that the running of the statute might be suspended by the intervention of individual contests or protests, while the government would be barred from defeating the confirmation of a fraudulent entry by similar proceedings instituted on its own motion within the time fixed by the statute; that to so construe the statute would be to restrict the operation of the land department in

the exercise of that just supervision over the disposal of the public lands conferred upon it by the organic act.

After the issuance of a final certificate no individual contest or protest can be entertained except by express permission of your office, which you may grant or refuse as in your judgment may seem proper. This is by virtue of the supervisory power and control over the disposal of the public lands to see that no part of it is wasted or disposed of to a party not entitled to it (*Knight v. Land Association*, 142 U. S., 161), and may be exercised through the agency of individual contests or protests or through the agencies provided by law for the investigation of entries of public lands, either of which would be effective to avoid the bar of the statute and defeat confirmation if initiated within the statutory period.

Prior to the act of March 3, 1891, the land department had full power and authority to investigate and determine as to the validity of an entry up to the issuance of the patent. Its power and duty is just as effective and imperative now as it was before the passage of that act. As the agent of the government it is still required to investigate every entry and to protect the rights of the people as well as to do justice to all claimants. The act of March 3 in no wise limited this power except as to the time in which it shall be exercised. That act is founded upon the same principle as other statutes of limitation in which the general rule prevails that a proceeding to enforce the claim or right initiated within the statutory period is sufficient to suspend the running of the statute and does not depend upon a perfected service.

If it be once established that the act does not take from your office the supervisory power to proceed against a fraudulent entry or to suspend it for investigation, it must then follow that the manner of proceeding is immaterial, whether by the allowance of contests or protests, or through its accredited agents, by investigations conducted in the usual manner so as to secure accurate information as to the true status of the entryman. The proceedings are commenced from the time the investigation is ordered, and if commenced within the statutory period, it will suspend the running of the statute and defeat confirmation whether notice of such action is given to the entryman or claimant within that period or not. It is evident that notice to the claimant of such action would in many cases defeat the purpose for which the investigation was ordered. It is sufficient that the proceedings were commenced within the period fixed by statute and that the entryman has had full opportunity to defend the validity of his entry before a final determination has been made.

The motion is denied.

FOREST RESERVE—ACT OF JUNE 4, 1897—ATTORNEY.

MAYBURY *v.* HAZLETINE.

A party to a proceeding before the land department will not be heard to say that the attorney who represented him throughout and solely conducted such proceeding was not his authorized attorney to receive service of notice of the result thereof.

Lands within a forest reserve relinquished to the United States with a view to the selection of other lands in lieu thereof, under the exchange provisions of the act of June 4, 1897, and afterwards excluded from such reserve, are not subject to appropriation, entry, or selection under the public land laws until the relinquishment is approved and the title tendered to the United States is accepted.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 15, 1905.* (J. R. W.)

A. J. Hazletine appealed from your office decision of September 9, 1904, denying his motion for review of your office decision of July 5, 1904, dismissing his appeal from the action of the local office of April 22, 1904, awarding to William J. Maybury, settler claimant, right to make homestead entry for the W. $\frac{1}{2}$ SW. $\frac{1}{4}$ of Sec. 5, lot 10, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ of Sec. 6, and lot 2, Sec. 7, T. 28 N., R. 13 W., Seattle, Washington, and recommending rejection of Hazletine's application, number 5388, your office series, under the act of June 4, 1897 (30 Stat., 36), to select the same land.

The case was formerly before the Department and is reported in 32 L. D., 41, to which reference is here made as to facts therein recited. February 14, 1903, Maybury filed an affidavit that he was a settler on the land, and from August 8, 1901, he maintained actual residence thereon, without absence therefrom for ten days at any one time. This affidavit was not referred to in briefs of counsel and was not in the files of the selection, so that it did not come to the notice of the Department and was not considered in said decision. October 31, 1903, said decision, so far as it adjudicated between Maybury and Hazletine, was recalled and a hearing ordered to determine the rights between Maybury and Hazletine, October 29, 1901, when Ayers's reconveyance of the land to the United States was accepted.

A hearing was had before the local office, at which both parties appeared and fully participated, and April 22, 1904, the local office found that—

on said 29th day of October, 1901, Maybury was in the actual occupancy of the land in question sufficient to bring the same within the purview of said last named decision [*Litchfield et al. v. Anderson*, 32 L. D., 299]. . . . the evidence shows that the homestead claimant had settled upon the land on the 8th day of August, prior to the date of the opening of the same for entry, and that he had maintained residence thereon up to and including the 28th day of October, 1901, being the day preceding the opening of the land for entry; that

on the evening of said 28th day of October he left the place and went to the city of Port Angeles, being the county seat, for the purpose of paying his taxes, and did not return to the place until some time after the 29th day of October, 1901. . . . He was in possession of the land and had made some improvements thereon, and we are satisfied that the "signs of settlement and improvement" which he had placed thereon were not only "sufficient to charge the settler with notice thereof," but were fully sufficient to entitle him to a preference right of entry as against the lieu selector.

We, therefore, find and decide that the homestead applicant, William J. Maybury, is entitled to a preference right of entry as against the lieu selector, A. J. Hazletine, and that the lieu selection of the said Hazletine should not be approved, and we so recommend.

April 27, 1904, Hazletine's attorney personally accepted service of a copy of the above, and May 31, 1904, served upon Maybury and filed in the local office Hazletine's appeal. Maybury filed in your office a motion to dismiss such appeal as not taken in time. July 5, 1904, your office sustained such motion and dismissed the appeal and closed the case.

August 4, 1904, Hazletine filed a motion for review of said decision, which, September 9, 1904, was denied. Hazletine appealed to the Department. Counsel for Maybury have filed in the Department a motion to dismiss the appeal.

The questions presented by the appeal and motion are: Whether Hazletine was properly served by the local office; and, if so, the questions of law arising upon the facts so found.

The notice of the hearing was accepted January 15, 1904, by George F. Stone, as attorney for Hazletine. The service of the copy of the local office findings was accepted April 27, 1904, by F. F. Randolph, attorney [in fact] for A. J. Hazletine, the words in brackets being typewritten and erased. The record of proceedings before the local office at the hearing recites that Maybury appeared—

in person and by his attorney, Joseph W. Gregory, Esq., the contestee appearing by his attorneys, Messrs. George F. Stone and F. F. Randolph, and a general appearance was entered by both parties hereto, and thereupon a trial was had.

The record of testimony taken contains the same appearances in its caption and all through the record of testimony the cross-examination of Maybury's witnesses, the examination of Hazletine's witnesses, and the announcement of the rest, or closing of testimony on Hazletine's behalf, was made by Mr. Randolph. Frank F. Randolph filed Hazletine's appeal from the local office. He was thus the sole active attorney throughout the whole proceeding, and George F. Stone, who accepted notice of the hearing, took no part therein, so far as the record shows.

One can not be heard to say that the attorney who represented him throughout the whole proceedings before a tribunal and solely conducted them was not his authorized attorney to receive service of the

notice of result of the proceedings he conducted. *Walker v. Gwin* (25 L. D., 34); *Staples v. St. Paul and Northern Pacific R. R. Co.* (25 L. D., 294). It must therefore be held that the service upon Randolph was sufficient, and that by default of appeal within the time limited, the finding so made became final.

The only other questions sought to be raised relate to the time when Ayers's prior relinquishment of the land became effective so as to render it subject to selection. The Department in this case held (32 L. D., 41, 42) that such lands are not subject to appropriation, entry, or selection under the public land laws until the relinquishment of the former entry is approved and the title tendered to the United States is accepted. *C. W. Clarke* (32 L. D., 233). That is the necessary deduction of the decision in *Cosmos Exploration Company v. Gray Eagle Oil Company* (190 U. S., 301, 312, 313), that equitable title does not vest by the mere filing of papers, but when a decision is rendered upon the title tendered.

Your office decision is affirmed.

FOREST RESERVE—UNSURVEYED LAND—ACT OF MARCH 2, 1899.

SANTA FE PACIFIC RY. CO. *v.* McCALL.

In case of the selection of unsurveyed lands by the Northern Pacific Railway Company under the provisions of the act of March 2, 1899, a new selection list must, in view of the provisions of section four of said act, be filed within three months after the plat of survey is filed in the local office, describing the lands according to such survey; and in case of failure to file such new list within the time limited, the lands at the expiration of such period become at once subject to appropriation by the first legal applicant.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 15, 1905.* (J. R. W.)

The Santa Fe Pacific Railway Company (hereinafter styled the Santa Fe Company) and Dougall H. McCall each appealed from your office decision of September 30, 1904, rejecting their respective applications for the SW. $\frac{1}{4}$ of Sec. 20, T. 15 N., R. 6 W., W. M., Olympia, Washington, for conflict with the Northern Pacific Railway Company's lieu list No. 44, under the act of March 2, 1899 (30 Stat., 993).

July 8, 1899, the Northern Pacific Railway Company (hereinafter styled the Company) filed in the local office its lieu list No. 44 for this and other land, then unsurveyed, and, deeming that list invalid, July 31, 1899, filed substitute list 44, including this tract.

Section 4 of the act of March 2, 1899, provides:

In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by [in] said local land office, a new selection list shall be filed by said company, describing such tract according to such survey.

The plat of survey of the township was filed in the local office July 2, 1903, and the company did not within three months thereafter file a new selection list describing the tract selected, when unsurveyed, according to such survey. October 3, 1903, at nine o'clock, before noon, the Santa Fe Company, by C. E. Moulton, its attorney in fact, applied under the act of June 4, 1897, to select the tract in lieu of the NE. $\frac{1}{4}$ of Sec. 33, T. 29 N., R. 3 E., G. & S. R. M., in the Grand Canyon forest reserve, Arizona, and therewith filed its duly recorded deed relinquishing the base tract to the United States, and a duly authenticated abstract of title showing perfect title to the tract relinquished, with a properly executed power of attorney authorizing C. E. Moulton to act in its behalf in making selection of land in lieu thereof. There was not filed therewith any affidavit or other proof that the land so selected was at that time "not in any manner occupied adversely to the selector," as required by paragraph 21 of the regulations of July 7, 1902 (31 L. D., 372, 375). Paragraph 18 of said regulations also provides that:

All papers and proofs necessary to complete a selection must be filed at one and the same time, and until they are all presented, no right will vest under the selection.

There was tendered with the other papers a duplicate, uncertified copy of the form of such required affidavit of non-occupation, unsigned by either officer or affiant. The local office examined the papers and called Mr. Moulton's attention to the lack of the required affidavit, whereupon he withdrew the carbon copy blank, saying that the affidavit "was at his room at the hotel, and that he had substituted this carbon copy by mistake," and that he would furnish it later.

At 10.26 before noon, and before the papers in the Santa Fe Pacific Railway Company's application were completed, Dougall H. McCall presented his application, in due form, under the acts of June 3, 1878, and August 4, 1892 (20 Stat., 89, and 27 Stat., 348), to purchase the tract as chiefly valuable for its timber.

At eleven o'clock, before noon, of the same day, Mr. Moulton filed in the application of the Santa Fe Company, *supra*, the proof required as to the non-occupancy of the land.

October 7, 1903, the local office transmitted all the papers in the

applications of both McCall and the Santa Fe Company for consideration and action of your office. September 30, 1904, your office rejected both applications "for being in conflict with substitute list No. 44 of the Northern Pacific Railway Company to select the said land under the act of March 2, 1899." Such decision was based upon a supposed analogy between the present case, involving the Northern Pacific lieu list No. 44 under the act of March 2, 1899, *supra*, and the case of the same company's indemnity selection list No. 15, decided by the Department June 30, and on review August 31, 1904, both unreported. The acts under which the lists in question were presented being dissimilar, the decision cited and relied upon by your office was not a precedent and was inapplicable. The present case is governed by the decision in Northern Pacific Railway Company *v.* Pyle (31 L. D., 396, 398), wherein, setting out the provision above quoted from the act of March 2, 1899, it was held that:

It will thus be seen that where selection is made of unsurveyed land, the company is required to file a new selection list, conformable to the lines of the official survey, within three months after the plat of survey of the township is filed in the local land office, and the fact that the list filed before survey described the lands according to the description of the official survey subsequently approved, does not relieve the company from the duty of filing a second list as required by the statute. It is not until the filing of this new or second list that a selection originally made of unsurveyed land becomes a completed selection, and a failure on the part of the company to file such new or second list within the required time subjects the land to an intervening claim.

The act of March 2, 1899, granting the right of location on unsurveyed land, conditioned such preliminary location upon the filing of "a new selection list" describing the land according to the surveys when made and approved. Selection of land unsurveyed gives only an inchoate or preference right, in the nature of a pre-emption declaratory statement, for three months, as against other claimants, to make selection of the land. Whether the requirement of the filing of a new list be construed as a condition to the vesting of right, or as a limitation upon the preference right obtained by selection of unsurveyed land, the effect of failure to comply leaves the land open to other appropriation. The company having failed to file its new list within three months limited by the act of March 2, 1899, its proposed, or pre-emptive, selection was no longer an obstacle to other appropriation of the land, which became at once subject to appropriation by the first legal applicant complying with the land laws and regulations governing his application.

The decision appealed from is reversed.

The conclusion reached by your office precluded consideration of the claims of the Santa Fe Pacific Company and McCall, and hence no decision was made as between them. The case is therefore returned for further consideration and proper disposition.

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

SIOUX BEET SYRUP CO. ET AL. *v.* SCOTT.

A person claiming the right to make purchase under section 5 of the act of March 3, 1887, and having knowledge of an adverse claim asserted to the land under the homestead law, should make prompt assertion of his right; and where he fails to do so he is barred from asserting any claim to the land as against the adverse claimant in possession.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 15, 1905.* (F. W. C.)

The Department has considered the appeal by Charles E. Scott from your office decision of December 22, 1903, holding for cancellation his additional homestead entry covering lot 5, Sec. 21, T. 29 N., R. 9 E., O'Neill land district, Nebraska.

The tract in question is within the limits of the grant made by acts of July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 356), in aid of the construction of the Sioux City and Pacific railroad, the rights under which attached in the vicinity of the land in question January 4, 1868. This tract was listed on account of the grant December 13, 1883, but the listing was held for cancellation February 20, 1901, under the authority of departmental decision of January 18, 1897 (*Phillips v. Sioux City and Pacific Railroad Co.*, on review, 24 L. D., 29), and the order of cancellation was ordered carried into effect October 3, 1901.

October 25, 1898, Scott tendered his homestead application for this and adjoining land, and following the cancellation of the railroad listing, to wit, on November 25, 1901, he was allowed to complete his entry of the lot here in question. November 25, 1902, he caused to be posted notice of his intention to submit commutation proof in support of said entry on January 10, 1903, and on that date he appeared and submitted his formal final homestead proof, against the acceptance of which the Sioux Beet Syrup Company and John C. Blenkiron, claimants through purchase under the railroad grant, protested, urging that they were entitled to the land under the provisions of the act of March 3, 1887 (4th section, 24 Stat., 556). Hearing was ordered and held upon their protest, at which copies of certain deeds of conveyance and oral testimony were introduced. Each of the protestants claims a half interest in the lot in question, both tracing title through purchase from the Missouri Valley Land Company, the successor in interest to the Sioux City and Pacific Railroad Company, to the land grant made by the acts before referred to.

The deeds offered evidence a sale by the Missouri Valley Land Company of the lot in question and other lands, made September 30, 1890, to E. C. Palmer. Palmer and wife, November 6, 1890, sold an

undivided half interest in lots 5 and 6 of this section to one J. M. Moan; that R. E. Evans, as administrator of the estate of J. M. Moan, on November 1, 1900, sold an undivided half interest in lots 5 and 6 and other lands to John C. Blenkiron, one of the protestants herein; that Kate C. Palmer and Charles E. Palmer, administrators of the estate of E. C. Palmer, October 12, 1901, sold the remaining undivided half interest in lots 5 and 6 of this section to A. J. Kramper, and on December 11, 1901, Kramper and wife sold said interest in said lots to the Sioux Beet Syrup Company, the other protestant.

The local officers, without considering the question as to whether the land in question ever became subject to purchase under the fifth section of the act of 1887, which section seems to be the one on which protestants now rely, held that if any such right ever existed it was barred in the protestants by reason of their laches in not asserting the same or giving notice of their intention to make such claim at an earlier date. They therefore overruled the protest, referring to departmental decision in the case of *Howell v. Hannon et al.* (31 L. D., 433), and recommended that the commutation proof offered by Scott be approved on a showing of fourteen months' residence since the date of entry.

Upon appeal your office reversed the decision of the local officers December 22, 1903, giving as authority therefor the decision of this Department in *Miller v. Tacoma Land Company* (29 L. D., 633), and held Scott's homestead entry for cancellation; from which he has appealed to this Department.

It is deemed advisable to here state that this land was formerly in the bed of the Missouri river, but by a sudden avulsion the river changed its channel in this locality so that the lot in question and the surrounding lands became dry. Thereafter the government surveyed the old river bottom and has since disposed of the land as public lands of the United States. Whether the change occurred before or after the admission of the State of Nebraska the Department is without information other than certain affidavits furnished by the Governor tending to show that the change was after the admission of the State into the Union. These affidavits were furnished upon notice being given the State of the pending controversy and in partial response to an inquiry as to whether the State claimed, or intended to lay claim to, the land. The Governor has also responded that so far as he knows the State of Nebraska lays no claim to this lot, but states that this is not to be construed as a waiver of any right or title which the State may have in the land. Due and full opportunity has been afforded the State to present any claim it might desire to make in the premises and it is assumed that it intends to make no claim and

the controversy is therefore proceeded with upon the assumption that the tract in question is public land of the United States.

The question as to whether the grant in question attached to lands having the status of the lot here in question, namely, lands which had been a part of the bed of the Missouri river at the date of the original grant, was considered in the case of *Phillips v. Sioux City and Pacific Railroad Company*, before referred to, and decided adversely to the claim under the grant January 18, 1897, and under the authority of the decision in that case the listing here in question was canceled. With the view hereinafter taken, it is unnecessary to determine whether the Missouri Valley Land Company succeeded to any interest in the land in question, and it does not appear that those claiming through purchase from said company had entitled themselves to special notice at the time of the rendition of the decision cancelling the listing here in question.

One thing is clear: The purchasers were bound to take notice of the cancellation of the claim asserted to this land under the railroad grant and to take appropriate steps to protect their interests under the act of 1887, if they had any, within a reasonable time.

The case relied upon by your office, namely, *Miller v. Tacoma Land Company*, *supra*, was carried to the Supreme Court of the United States, it being there known as the case of *Susan A. Ramsey v. The Tacoma Land Company*, in which decision was rendered by that court on January 30, last. In the decision of that court the following appears:

The other question arises on the contention of the plaintiff, that the statute of 1887 is not curative but simply permissive; that it does not attempt to confirm the title of the purchaser from the railroad company, but simply gives him the privilege of purchasing from the government at the ordinary price. It is urged that it cannot be presumed that Congress intended that the land should be held indefinitely waiting for the election of the purchaser, and that the privilege must be exercised at once or considered as abandoned. It is said that the land company did not attempt to exercise the privilege immediately after the passage of the act, but waited for more than ten years. Obviously the statute is not a curative one, confirms no title, but simply grants a privilege. We shall assume that that privilege is not one continuing indefinitely, that the land is not held free from entry until the purchaser from the railroad company has formally refused to purchase, and that he must act within a reasonable time. Nevertheless, we are of opinion that the action of the land department must be sustained. It is true that the land company did not proceed immediately after the passage of the act of 1887, but until 1896 both the railroad company and the land department assumed that the land was already the property of the land company by its purchase from the railroad company. While all parties considered the full equitable title as vested in the land company, there was no duty cast upon it of securing a further title by purchase from the government. Only after the decision in the *Corlis* case in 1896, and on October 13 of that year, was the land stricken from the railroad company's list. Within ten months thereafter the land company made its application. Now, whether it acted with reasonable

promptness was a question primarily for the consideration of the land department. That department had before it the application of the plaintiff to enter the land under the general land laws, and that of the land company to purchase it under the act of 1887; and after a full consideration it decided in favor of the land company, a decision which, in effect, determined that the company had acted with all necessary promptness and was entitled to the benefit of the statute. Of course, the privilege granted by the statute would be of little or no avail if it had to be exercised on the very day. Some time must be allowed for acquiring knowledge of the situation and determining the course of action. The plaintiff was as fully charged with knowledge of this act of 1887 as the land company. Upon the records of the county were the deeds from the railroad to the land company and from the latter to its grantees. So she acted with knowledge both of the law and the facts, and is not in a position now to complain of the action of the land department. We are not justified in setting aside the decision of the land department and holding that it erred in awarding to the land company the privilege which the statute, without any express limitation of time, gives to it.

As the land in question had never been patented under the railroad grant, the protestants are in no wise protected by the provisions of section 4 of the act of March 3, 1887. If they have any interest in the premises at all, it must be under the fifth section of that act, and that section does not confirm a title, but simply grants a privilege. With regard to this privilege, it is said by the court that it "is not one continuing indefinitely, that the land is not held free from entry until the purchaser from the railroad company has formally refused to purchase, and that he must act within a reasonable time."

The facts in this case are widely different from those in the case relied upon by your office and before the court. Long prior to Blenkinson's purchase, to wit, in January, 1897, the Department had finally determined that lands of this character were excepted from the railroad grant, and at the time of his purchase Scott had pending in the land office an application to make homestead entry of this land, attacking the railroad company's claim under its grant. And at the time of purchase by the Sioux Beet Syrup Company the order of cancellation of the listing of this tract by the railroad company had actually been carried into effect. With a knowledge that Scott had been permitted to make homestead entry of this land, of which the protestants were obliged to take notice, as well as of the cancellation of the listing under the railroad grant, no action was taken toward asserting a claim under the act of 1887 until the offer of proof by Scott under his homestead entry in January, 1903, nearly fifteen months after the cancellation of the listing of the land under the railroad grant, and then no formal claim was presented, only a protest filed against permitting Scott to complete final entry of the land, and during all this time Scott was in the open and notorious possession of the land in question.

After a most careful consideration of the matter, the Department affirms the decision of the local officers and holds that these protestants are by their own laches barred from asserting any claim to the lot in question as against Scott. Your office decision is therefore reversed, and the case is remanded for your consideration and decision on Scott's proof and supplemental showing made by him evidencing his continuous residence upon the land.

STATE SELECTION—FOREST RESERVE—PROCLAMATION.

STATE OF UTAH.

The proclamation of the President of May 29, 1903, creating the Logan forest reserve, took effect from the first moment of that day, and selections made by the State on the same date, within the boundaries prescribed, are therefore subsequent to the proclamation and can have no effect to except the lands from the reservation.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 18, 1905.* (F. W. C.)

The Department has considered the appeal by the State of Utah from your office decision of January 13, 1905, holding for cancellation list No. 47, Salt Lake City, Utah, series, filed by the State on account of the grant in aid of the establishment of a school of mines, which list was filed in the local land office on May 29, 1903.

Your office decision is based upon the fact that the lands in question are within the Logan forest reserve and that this list was filed after the creation of said forest reserve.

The list in question, with others made by the State at different dates, in part satisfaction of the several grants made to the State, was under consideration in departmental decision of December 16, 1904 (33 L. D., 358). In that case it was held (syllabus):

Where, after application by the State of Utah for the survey of lands under the act of August 18, 1894, but prior to the filing of the plat of survey, a temporary withdrawal embracing the land was made with a view to the establishment of a forest reserve, and the State was thereafter, within due time after the filing of the plat of survey, permitted to make selection of the lands, subject to final determination of the boundaries of the proposed reserve, such selections, being still of record at the date of the executive proclamation creating the reserve, although not approved by the land department, are lawful filings within the meaning of the excepting clause of the proclamation, and the lands embraced therein are therefore excepted from the reservation, but selections of lands so situated made subsequently to the date of the proclamation can have no effect to except the lands from the reservation.

The Logan forest reserve was created by proclamation of the President dated May 29, 1903 (33 Stat., —), being the same date that the list under consideration was filed in the local land office. In the appeal it is urged that the selections contained in list No. 47 were in fact made on the 28th of that month although not filed until the following day and it is therefore urged that they were made prior to the creation of the forest reserve. This contention is without merit. The selections can in no sense be held to be made until the list is filed in the local office, and the only question for consideration in this case is whether the entire day on which the proclamation was signed should be included in reckoning the point of time when the reservation was created, for, if it should, the selections were necessarily made after the creation of the reserve.

The point of time when a proclamation takes effect has been twice the subject of consideration by the Supreme Court. In the case of *Lapeyre v. United States* (17 Wall., 191), it was held that a proclamation by the President takes effect from its date without regard to the time when it was actually published and promulgated. In that case it was said:

There is no statute fixing the time when acts of Congress shall take effect, but it is settled that where no other time is prescribed, they take effect from their date. Where the language employed is "from and after the passing of this act," the same result follows. The act becomes effectual upon the day of its date. In such cases it is operative from the first moment of that day. Fractions of the day are not recognized. An inquiry involving that subject is inadmissible. See *Welman's Case*, where the subject is examined with learning and ability.

* * * * *

Why should not the same rule apply to proclamations? We see no solid reason for making a distinction. If it be objected that the proclamation may not then be known to many of those to be affected by it, the remark applies with equal force to statutes. The latter taking effect by relation from the beginning of the day of their date, may thus become operative from a period earlier than that of their approval by the President, and indeed earlier than that at which they received the requisite sanction. The legislative action may all occur in the latter part of the day of their approval. The approval must necessarily be still later.

In the case of *Burgess v. Salmon* (97 U. S., 381) it was said:

In *Lapeyre v. United States* (17 Wall., 191) it was said *obiter*, "The act became effectual upon the day of its date. In some cases it is operative from the first moment of that day. Fractions of the day are not recognized. An inquiry involving that subject is inadmissible." The question involved in that case was whether a proclamation issued by President Johnson, bearing date of June 24, 1865, removing certain restrictions upon commercial intercourse, took effect on that day, or whether it took effect on the day it was published and promulgated, which was on the 27th of the same month. It was held by a majority of this court that it took effect from its date. The question was upon

the 24th or the 27th of June, and the point of the portion of a day was not involved. While the general proposition may be true, that where no special circumstances exist, the entire day on which the act was passed may be included, there is nothing in that case to make it an authority on the point before us.

* * * * * * *

In the present case, the acts and admissions of the government establish the position that the duties exacted by law had been fully paid, and the goods had been surrendered and transported before the President had approved the act of Congress imposing an increased duty upon them.

To impose upon the owner of the goods a criminal punishment or a penalty of \$377 for not paying an additional tax of four cents a pound, would subject him to the operation of an *ex post facto* law.

An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed, or a punishment in addition to that then prescribed. *Carpenter et al. v. Commonwealth of Pennsylvania*, 17 How., 456.

Had the proceeding against Salmon & Hancock been taken by indictment instead of suit for the excess of the tax, and the one was equally authorized with the other, the proceeding would certainly have fallen within the description of an *ex post facto* law.

In *Fletcher v. Peck* (6 Cranch, 87) it was decided that an act of the legislature by which a man's estate shall be seized for a crime which was not declared to be an offence by a previous law, was void.

In *Cummings v. Missouri* (4 Wall., 277) it was held that the passage of an act imposing a penalty on a priest for the performance of an act innocent at the time it was committed, was void.

To the same purport is *Pierce v. Carskadon*, 16 id., 234.

The cases cited hold that the *ex post facto* effect of a law can not be evaded by giving a civil form to that which is essentially criminal. *Cummings v. Missouri*, *supra*, *Potter's Dwarris*, 162, 163, note 9.

In this latter case it is plainly announced that the general proposition is that where no special circumstances exist the entire date on which an act is passed is to be considered as within the effect of the act, and under the authority first cited the same rule should be followed when considering the effect of a proclamation. As to the point of time the President signed the proclamation in question on May 29, 1903, or the point of time when the list in question was filed in the local land office at Salt Lake City, the record is silent and it is extremely doubtful whether these actual points of time could be satisfactorily established. It is sufficient in this case to say that in the opinion of this Department no special circumstances exist for departing from the general rule, and it is therefore held that the proclamation of May 29, 1903, took effect from the first moment of that day, and that, as a consequence, the selections in question were filed after the creation of the forest reserve.

Your office decision is therefore affirmed and the selections in question will be canceled.

RAILROAD LANDS—SETTLEMENT—SELECTIONS UNDER ACTS OF
AUGUST 5, 1892, AND JUNE 4, 1897.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. ET AL. v. BERGMAN.

Rights acquired by settlement and improvement upon unsurveyed land, and duly and timely asserted upon the filing of the plat of survey, will, as against an intervening indemnity railroad selection made under the act of August 5, 1892, or a lieu selection under the provisions of the act of June 4, 1897, made long prior to the filing of the township plat of survey and with full knowledge of the settlement claim, be protected in its entirety, even though the lands claimed may be in different sections and the improvements of the settler be confined to the lands in one section.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 18, 1905.* (F. W. C.)

The Department has considered the joint appeal by the St. Paul, Minneapolis and Manitoba Railway Company and Frank M. Sylvester, from your office decision of April 5, 1904, affirming the action of the local officers in rejecting their applications to select the SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 18 and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 19, T. 36 N., R. 7 E., Seattle land district, Washington, on account of the prior homestead claim of Oscar A. Bergman.

Sylvester's claim rests upon an application, filed on April 23, 1900, while the land was yet unsurveyed, to make forest lieu selection embracing, with other lands, the NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of said Sec. 19. The railway company's claim rests upon an application to select, July 21, 1902, also prior to survey, the SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 18, the selection being proffered under the act of August 5, 1892 (27 Stat., 390).

The plat of survey of this township was filed August 13, 1902, and on that day Bergman tendered his homestead application for the above-described tracts, together with lots 3 and 4 and the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 18, alleging, in support thereof, settlement upon the land applied for on June 8, 1899, with continuous residence thereon ever since. Following the filing of the township plat on October 6, 1902, the railway company filed supplemental list of selections conforming its previous selections with the lines of the public survey. It does not appear that Sylvester has filed an application or in anywise changed his application as originally filed prior to the survey.

Hearing was held upon Bergman's allegation of settlement antedating both selections, which resulted in the decision of the local officers in favor of Bergman, they recommending the rejection of the Sylvester application and the application by the railway company, so far as in conflict with Bergman's settlement claim.

Upon appeal, your office affirmed the decision of the local officers,

and the claims have been further prosecuted by appeal to this Department.

The appeal urges, in effect, that Bergman never made a valid settlement and has never maintained a claim to this land. It is further urged in support of Sylvester's application that it should prevail because Bergman's improvements are all upon section 18, there being nothing to indicate that his claim extended without that section.

A most careful examination of the case discloses no sufficient reason for reversing the concurring decisions of your office and the local officers and it is but necessary to say with regard to the claim, made on behalf of the Sylvester application, of lack of notice, that the settler's claim extended without section 18. In the case of *Hickey v. St. Paul, Minneapolis and Manitoba Ry. Co.* (32 L. D., 8) it was said:

That in the adjustment of conflicting settlement claims the notice given by improvements made upon a tract of land prior to the survey thereof is limited to the technical quarter-section in which the same is shown to be, upon survey, is held in a long line of departmental decisions; but the railway company is not in the position of a conflicting settlement claimant, and when making its selection it was bound to take notice of Hickey's improvements and to ascertain the land claimed by him.

It is the opinion of this Department that the same responsibility rests upon a selector of lands under the act of 1897, where the selection is made, as in this case, long in advance of the filing of the township plat of survey. Sylvester was fully apprised that Bergman had a settlement claim in the locality and his selection of land was made at his peril.

The decision appealed from is affirmed, and the applications to select, so far as in conflict with Bergman's homestead application, will stand rejected upon the completion of that application within a reasonable time to be fixed by your office.

RAILROAD GRANT—CONFLICTS BETWEEN SOUTHERN PACIFIC AND ATLANTIC AND PACIFIC RAILROAD COMPANIES.

SOUTHERN PACIFIC R. R. Co.

All questions affecting any claimed right of the Southern Pacific Railroad Company under its grant of March 3, 1871, to lands within the forfeited Atlantic and Pacific grant, have been fully determined by the supreme court in favor of the United States.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 19, 1905.* (F. W. C.)

The Department has considered the appeal by the Southern Pacific Railroad Company from your office decision of October 17, 1903,

affirming the action of the local officers at Los Angeles, California, in rejecting a certain list of selections, No. 95, proffered at that office March 9, 1903, to select certain lands, aggregating 13,556.28 acres, as indemnity on account of its branch line grant of March 3, 1871 (16 Stat., 573, 579).

Your office decision holds said list for cancellation because it is found upon examination that the lands selected are all within the twenty and thirty mile limits of the prior grant made by the act of July 27, 1866 (14 Stat., 292), in aid of the construction of the Atlantic and Pacific railroad, which latter grant was forfeited in the State of California by the act of July 6, 1886 (24 Stat., 123).

It is the opinion of this Department that all questions affecting any claimed right of the Southern Pacific Railroad Company under its grant of 1871, to any of the lands within the forfeited Atlantic and Pacific grant, have been fully determined in favor of the United States. (See 146 U. S., 570, 619; 168 U. S., 1; 189 U. S., 447.)

In the case reported in 168 United States, which was a suit brought by the United States to quiet its title to a large tract of lands claimed by the Southern Pacific Railroad Company on account of its grant of 1871, it was said by the court, on page 47:

It may be said that the lands here in dispute belong to one or the other of the following classes: Lands within the common granted limits of both the Atlantic and Pacific grant of 1866 and the Southern Pacific grant of 1871; lands within the granted limits of the Southern Pacific grant and the indemnity limits of the Atlantic and Pacific grant; lands within the Southern Pacific indemnity limits and the Atlantic and Pacific granted limits; lands within the common indemnity limits of both grants. Of those in dispute, 219,012.93 acres have not been surveyed by the United States.

From this it will be seen that the court had before it and understood that the case was determinative of any question of claimed rights of the Southern Pacific Railroad Company on account of its grant of 1871, within the limits referred to, which embraced all the conflicts possible between the two grants. The decision of your office holding for cancellation the list in question is accordingly affirmed.

UMATILLA INDIAN LANDS—ACT OF MARCH 3, 1905.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., April 19, 1905.

Register and Receiver, Lagrande, Oregon.

GENTLEMEN: Your attention is called to the following provisions contained in the act of March 3, 1905 (33 Stat., 1048, 1072-3), entitled, "An act making appropriation for the current and contingent expenses of the Indian Department and for fulfilling treaty stipu-

lations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and six, and for other purposes: ”

That all persons who have heretofore purchased any of the lands of the Umatilla Indian reservation and have made full and final payment thereof in conformity with the acts of Congress of March third, eighteen hundred and eighty-five, and of July first, nineteen hundred and two, respecting the sale of such lands, shall be entitled to receive patent therefor, upon submitting satisfactory proof to the Secretary of the Interior that the untimbered lands so purchased are not susceptible of cultivation or residence and are exclusively grazing lands, incapable of any profitable use other than for grazing purposes.

In accordance therewith, any person, who prior to March 3, 1905, purchased any of the land within said reservation and had made full and final payment therefor in conformity with said act of Congress prior to said date and who now desires to make proof in accordance with the provisions of said law, will be required to file with the register a written notice within a reasonable time, which is hereby fixed at six months from notice given as hereinafter provided, of his intention to do so in the manner prescribed under the homestead laws, and the register will thereupon cause such notice to be duly posted and published. The proof, which must consist of the testimony of two witnesses and the claimant, accompanied by his final affidavit, must be made before the register and receiver, and the homestead proof forms will be used, modified to suit the provisions of said law.

Such purchasers will be required to show specifically in what respect the untimbered lands so purchased are not susceptible of cultivation, what efforts, if any, have been made to cultivate the same, and for what reasons residence could not be maintained thereon, and that the lands embraced in said entries are exclusively grazing lands, incapable of any profitable use other than for grazing purposes, and to what extent they have been so used for grazing purposes since they were purchased. The proper cross-examination of such claimants and their witnesses will be made by the register and receiver to bring out all the facts relative to the adaptability of such lands for cultivation or residence, and such cross-examination will be reduced to writing and forwarded with the proof in each case.

In cases of the purchase of lands within said reservation subsequent to March 3, 1905, or of the purchases made prior thereto in which full and final payment therefor had not been made prior to said date, the purchaser will be required to furnish satisfactory evidence that he has resided on the land purchased at least one year and reduced at least twenty-five acres thereof to cultivation, in accordance with the requirements of said acts of March 3, 1885 (23 Stat., 340), and July 1, 1902 (32 Stat., 730), and the instructions thereunder, as the provisions of said act of March 3, 1905, do not apply thereto.

You will notify all purchasers of the lands within said reservation who come within the provisions of said law, of their right to submit

proof thereunder and of the foregoing requirements relative thereto, in accordance with circular of March 1, 1900 (29 L. D., 649).

Very respectfully,

J. H. FIMPLE, *Acting Commissioner.*

Approved:

E. A. HITCHCOCK, *Secretary.*

PRACTICE—APPEAL—REHEARING.

FRENCH *v.* SOBER.

Where an application to withdraw an appeal is made to the local officers, in view of the provisions of Rule 80 of Practice, for the purpose of removing the obstacles thereby imposed to a consideration of an application for rehearing, and, owing to the fact that the appeal was transmitted to the General Land Office prior to receipt of the application to withdraw at the local office, both the application to withdraw the appeal and the application for rehearing come before the General Land Office for consideration, the appeal should not be dismissed on the application to withdraw, but, if the application for rehearing be denied, the case should then be considered and decision rendered on the merits.

In case the record transmitted with an appeal is so contradictory and conflicting that a satisfactory conclusion as to the real facts in the case can not be reached, the Department may, upon its own motion, order a rehearing.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 21, 1905.* (E. O. P.)

This case is before the Department upon appeal by Hugh W. Sober from your office decision of October 13, 1904, affirming that of the local officers denying his application for rehearing and cancelling his homestead entry for the SE. $\frac{1}{4}$, Sec. 9, T. 11 N., R. 25 W., Mangum land district, Oklahoma.

The record presented is confusing and the testimony submitted is in many material respects contradictory and conflicting, and, on the whole, unsatisfactory.

Entry was made by Sober May 11, 1901, contest affidavit filed September 7, 1903, and personal service of contest notice had September 26, 1903. October 31, 1903, was fixed as the date for submission of testimony before the local officers, at which time the parties appeared in person and by attorney, and contestant submitted his testimony. Motion for continuance, filed on behalf of claimant, in order that the testimony of his witnesses might be taken by deposition, was allowed, and the case continued for that purpose to December 6, 1903. Upon the coming in of all the evidence the local officers rendered joint decision holding the entry for cancellation. From this action the claimant, on December 19, 1903, appealed to your office, which appeal was regularly transmitted on January 7, 1904. On the following day claimant filed application with the local officers to withdraw the same and

asked that a rehearing be granted. The appeal having been transmitted, the matter had passed beyond their jurisdiction and they properly declined to consider said application.

Thereupon the claimant filed what purports to be a supplemental appeal from the action of the local officers in refusing to consider his application, and in conclusion requests:

In the event the Honorable Commissioner be of opinion that the register and receiver of the local land office had no power to entertain said application, after an appeal is taken, that the Hon. Commissioner consider said application as one made to himself, and that he act thereon, as though it had been originally filed in his office, and in the exercise of sound discretion he may, if the findings of the register and receiver, as to the facts in evidence, be sustained, grant to the contestee a new hearing in this cause, to the end that he may be permitted to show his cause fully to the land department.

In passing upon said request your office held:

In accordance with defendant's request, as expressed in his appeal from your refusal to consider his application, the case will be considered in the same manner as though his application to withdraw his appeal, and for a new trial, had been originally made to this office (*Hill v. Patzer*, 18 L. D., 434). The appeal is therefore dismissed and the motion for a new trial will be disposed of in accordance with the rules applicable thereto.

In this holding the Department can not wholly concur. The application to the local officers to withdraw the appeal was undoubtedly made because of the provisions of rule 80 of practice, that—

No officer shall consider a motion in a case after an appeal from his decision has been taken,—

and for the purpose of removing the obstacles thereby imposed to the consideration of the application for rehearing by them; an appeal having been filed prior thereto. It was not the intention of claimant to withdraw his appeal unless his application for rehearing was to be considered by the local officers. By affirming the action of the local officers in refusing to consider the petition for rehearing, because an appeal was pending, and at the same time holding that claimant had voluntarily withdrawn his appeal, thereby bringing the consideration of his case by your office within the operation of rule 48, claimant might be deprived of a substantial right or suffer a material injury. If the withdrawal of claimant's appeal is recognized, then the restrictions imposed by rule 80 are removed and the rule announced in *Withee v. Martin* (3 L. D., 539, 540), should control, and it was—

the duty of the register and receiver to act upon said motion promptly, and, in case of refusal, an appeal from the original decision would bring the whole case before your office. * * * The filing of the motion did not cut off his right of appeal, and it is quite reasonable that he should wish to strengthen his proof by such additional evidence as had been subsequently discovered.

Where a motion for a new trial is made, it is not collateral but directly connected with the judgment and when entertained there is *no final* disposition of the case, and *no final* judgment rendered from

which an appeal can be taken until it is disposed of. *Brockett v. Brockett* (2 How., 238); *Slaughter House Cases* (10 Wall., 273, 289); *Colchen v. Ninde* (120 Ind., 88).

To re-vest jurisdiction in and secure further action by the local officers was undoubtedly the reason which prompted claimant to withdraw his appeal; but such withdrawal was not in any way essential to the consideration by *your* office of his application for rehearing, as an appeal pending therein is no bar to a consideration by you of a motion for a new trial. (*Bridges v. Bridges*, 27 L. D., 654.) Claimant's object was to follow the usual procedure by making his application for a rehearing to the trial court, viz., the local officers, and in the event their action was adverse, to bring the whole matter before your office by an appeal from their decision on the merits. (*Witter v. Ostroski*, 11 L. D., 260.) While the discretion of the trial court will not be controlled by an appellate tribunal, and, in the absence of statute, no appeal lies from their decision in such matters, yet in departmental procedure the whole is so closely associated with the judgment on the merits, that it is usually considered on an appeal from the local officers or from your office, taken from a decision rendered thereon.

Proceeding with an examination of the record, it is clear from all the testimony that claimant had established and maintained a residence on the land up to January, 1903; the only question in dispute being as to his abandonment thereof subsequently thereto and for six months prior to initiation of contest. On this point the testimony is hopelessly conflicting and from it the Department is unable to reach a satisfactory conclusion.

The affidavits submitted are either merely cumulative or impeaching, and therefore not the proper basis for a new trial, and the Department can not, upon the showing made, order a rehearing. Neither can they be considered touching the merits of the case.

The testimony submitted at the hearing on behalf of contestant is general in its nature, and is flatly contradicted by much of that submitted on the part of claimant by depositions. In addition to all this there is on file with the record the affidavit of one of contestant's material witnesses discrediting his former testimony. It also appears from the affidavits of J. H. C. Finney and Elizabeth D. Finney that they were properly notified to appear before the commissioner appointed to take depositions, but were unable to attend on the day set. Their said affidavits further show that the facts to which they will testify are material.

The same desire to do complete and substantial justice is as strongly prevailing in the Department as in the courts, and while—it is desirable that there should be an end of litigation with as little delay as possible, consistent with the great end of litigation and a correct decision of

causes according to the real merits, it should always be sought in subordination of the great end to be obtained. *Mitchell v. Boss* (26 Tex., 297).

And where the record transmitted on appeal is so contradictory and conflicting that the Department, after careful consideration thereof, is unable to reach a satisfactory conclusion as to the real facts in the case, it may, upon its own motion, order a rehearing in order that substantial justice may be done. *French v. Noonan* (16 L. D., 481); *Robert Hall et al.* (5 L. D., 174).

Therefore, while your action in denying the application for rehearing upon the showing made is correct, yet in view of the present unsatisfactory condition of the record, the Department is of opinion that it should, upon its own motion, order a rehearing in order that all the facts involved may be more clearly presented for determination.

It further appears that your office erroneously ordered the cancellation of said entry, pending a decision on claimant's appeal, and that there is now of record in the local office the homestead entry of Samuel A. Elliott for the tract in question. This entry being imprudently allowed will be held to await the final determination of the pending contest.

The case is hereby remanded to your office with direction that a rehearing be ordered upon the issue involved, at a time to be determined by you, after proper notice to the parties, after which the case will be readjudicated upon the whole record in the regular way.

LANDS WITHDRAWN UNDER ACT OF JUNE 17, 1902—SOLDIERS'
ADDITIONAL ENTRY.

CORNELIUS J. MACNAMARA.

Upon the cancellation of a homestead entry covering lands embraced within a subsequent withdrawal made under the provisions of the act of June 17, 1902, the withdrawal becomes effective as to such lands without further order.

By the provision in the act of June 17, 1902, that lands susceptible of irrigation under a project contemplated under said act shall be withdrawn "from entry, except under the homestead laws," Congress intended to inhibit any mode of private appropriation of such lands except by such entry under the homestead laws as requires settlement, actual residence, improvement, and cultivation; hence such lands are not subject to soldiers' additional entry under section 2306 of the Revised Statutes.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) . April 20, 1905. (J. R. W.)

Cornelius J. MacNamara appealed from your office decision of February 2, 1904, rejecting his application, under section 2306 of the Revised Statutes, as assignee of John T. Lake, to enter the SW. $\frac{1}{4}$ SE.

$\frac{1}{4}$, Sec. 29, and the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 32, T. 28 N., R. 13 E., M. M., Greatfalls, Montana, additional to Lake's original homestead entry at Traverse City, Michigan, August 25, 1871, for the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 24, T. 23 N., R. 9 W., canceled March 22, 1874, for abandonment. An oral hearing was granted and counsel have been heard.

April 5, and October 21, 1902, in connection with the St. Marys canal project, under the act of June 17, 1902 (32 Stat., 388), all the public lands in this township were withdrawn from entry, "except under the homestead laws." December 10, 1902, MacNamara presented his application, which was transmitted to your office and was, February 2, 1904, rejected under circular of September 9, 1902 (31 L. D., 420). At the time of the withdrawal the land here involved was embraced in one Mrs. Becker's homestead entry, which MacNamara induced her to relinquish that he might make the entry applied for. The order of withdrawal was worded to be of all *public lands* within the township, and it is claimed that it was not effective as to these lands, which were then segregated from the public domain.

Two questions are presented: Whether the order of withdrawal so worded became effective on the land in question when the former entry was relinquished, and whether an additional entry under section 2306 of the Revised Statutes is, within the meaning and intent of the act of June 17, 1902, *supra*, an entry under the homestead laws.

The first question was decided in Emma H. Pike (32 L. D., 395, 396). The argument upon this head is purely technical, based on the words "public lands." It is argued that "public lands" mean only lands owned by the United States, subject to entry and private appropriation. In a sense this is true. After an entry, lands once public become private and are segregated from the public domain. *Witherspoon v. Duncan* (4 Wall., 210, 218); *Opinion, Attorney-General* (1 L. D., 30, 32). In the decision cited (4 Wall., *supra*), the court was speaking of the right of taxation of lands before patent, but after payment and final entry. The opinion of the Attorney-General, *supra*, was rendered upon the question whether, after—

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

It was held:

That, in contemplation of the homestead law, the settler acquires, by his entry, an immediate interest in the land, which (for the time being, at least) thereby becomes severed from the public domain, appears from the language of section 2297, Revised Statutes, wherein it is provided that, in certain contingencies, "the land so entered shall revert to the government."

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

Neither of these authorities go to the extent to hold that land held under a homestead entry not consummate, which ultimately falls back into the public domain, is unaffected by such order. This point is expressly reserved and excepted by the Attorney-General by the reservations "for the time being, at least" and "so long as the claim or entry of the settler subsists." The question here is, not whether Catherine Becker's right was affected by the order, but whether the order was operative to prevent another entry after hers was relinquished.

An order of the Secretary in administration of the land laws, like a statute or a contract, is subject to construction, and must have such construction as will effectuate its object. When so viewed, the proper effect to be given to it is clear. The purpose was to prevent any private appropriation of lands of the United States in this township, except under the act of June 17, 1902. Nothing in the argument of counsel presents a reason to overturn the decision in *Emma H. Pike, supra*. When a body of lands is withdrawn to be included in a project of this character, further orders are not necessary to make the withdrawal effective upon lands then included in an existing entry after such entry is canceled.

As to the second question, the first source of inquiry as to the legislative intent is the act itself. That provides (section 3) that "the commutation provisions of the homestead law shall not apply to entries under this act;" (section 4) the Secretary of the Interior shall "fix and give notice" of the limit of area per entry to the acreage that in his opinion "may be reasonably required for the support of a family upon the lands;" (section 5) the entryman "shall in addition to compliance with the homestead laws reclaim at least one half of the total irrigable area of his entry for agricultural purposes;" and as lands already in private ownership might be included within an irrigation project, the sale of water for use on such lands was limited to one hundred and sixty acres to one owner, and was prohibited to any owner "unless he be an actual *bona fide* resident on such land or occupant thereof residing in the neighborhood."

These provisions show that the intent was to distribute these lands to residents upon them in as small holdings as are reasonably necessary "for the support of a family upon the lands;" and to assure actual cultivation of the reclaimed land, the entryman is required to effect actual reclamation of at least half of all his irrigable land. While one object of the law was to insure repayment to the government of the cost of the reclamation work by imposing the cost upon the land by an assessment per acre, this important object was subordinated to the primary purpose of assuring a productive resident agricultural population of small land owners by prohibiting sale of water to one owner for more than one hundred and sixty acres, or any

sale to a private owner who is not an occupant of his land and resident in its immediate vicinity or "neighborhood." The private land owner, though willing to reimburse the whole cost of the project, can not obtain water for more than one hundred and sixty acres nor for any area that he does not occupy and does not reside on or near. Such requirements are not incident to what is generally called the "soldiers' additional homestead," wherein no residence, occupancy, or cultivation is required, nor, as one person may purchase and enter under the rights of others, is there any limit upon the area that may be acquired by one person by such entries short of the total of such existing rights outstanding.

While the right generally called the soldiers' additional homestead is embodied in the Revised Statutes as section 2306, in the chapter entitled "Homesteads," the act by which this right was conferred was no part of the body of the homestead laws, as is seen by examination into its character and history. It was merely a bounty, having no more reference to the body of the homestead laws than had any other of the many acts granting military land bounties, except that it made reference to the homestead acts to point out and identify the beneficiaries.

By the act of May 20, 1862 (12 Stat., 392), homestead entries were authorized for one hundred and sixty acres or a quarter section of minimum land or half that quantity of the double minimum class, and no special right was granted in consideration of military service. By the act of April 4, 1872 (17 Stat., 49), the right was granted to honorably discharged soldiers and sailors who rendered not less than ninety days' service in the war of the rebellion, and to their widows and orphans, to take homesteads under the act of 1862 without restriction to the half quantity of double minimum land, and a privilege to those who had theretofore entered less than one hundred and sixty acres to enter an additional quantity to make that amount. This was amended, June 8, 1872 (17 Stat., 333), by limiting the additional entry to land contiguous to that in the original entry. This was again amended, March 3, 1873 (17 Stat., 605), by taking away the requirement of contiguity, leaving the section in effect as it stood originally in the act of April 4, 1872, *supra*. The section as it stands (Sec. 2306 of the Revised Statutes) is:

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

It is thus seen that Congress in 1872 granted to honorably discharged soldiers the privilege to enter under the homestead act of 1862 twice as much of double minimum land as other settlers. Dur-

ing the elapsed ten years many of them had taken homesteads of less quantity, in consideration of which they were granted right to enter the quantity deficient: It was a pure gratuity, a mere grant of a right of entry without payment. The character of this entry right was considered by the court in *Webster v. Luther* (163 U. S., 331, 340), wherein, adopting the language of the supreme court of Minnesota (50 Minn., 83), the court held that:

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.

The court also (*ib.*, 341) adopted the view of Judge Sanborn (57 Fed., 956) that:

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.

It was therefore held that this right is vendible and transferable, a mere grant to appropriate so much public land, free of any restriction save that it must be non-mineral, unappropriated, surveyed land subject to disposal by the land department under the general land laws.

In all decisions since this decision, commencing with *Welch v. Petre* (22 L. D., 651, 653), the Department has followed this doctrine, and held it to be merely a right to appropriate lands and to be assignable. In *William C. Carrington* (32 L. D., 203, 205), referring to the decision of the supreme court, *supra*, it was held that:

This additional right of entry has been held to be a gift, a "mere gratuity," an "unfettered gift." None of the things required by law of an ordinary homestead entryman are required of an entryman under this act, except to prove his qualifications; he is not required to reside upon, cultivate, or improve the land embraced in his additional entry; he may sell his right before making the additional entry, or may sell the land as soon as his entry is recorded.

While this gift, bounty, or right of entry is given by a section of one of the homestead laws, it is obvious that allowance of such entries of lands embraced in an irrigation project, withdrawn under the act of June 17, 1902, *supra*, could not but tend to defeat the purposes of the act. The act bears conclusive internal evidence that its purpose is to assure the distribution of these lands in small holdings, to actual settlers and agricultural resident occupants. One making a soldiers' additional entry is under no obligation to improve, to cultivate, or to occupy, nor is the area one person may so acquire limited. One person, if able to purchase rights enough, may acquire all the public land included in an irrigation project, if such entries are within the intent of the act, yet he can obtain water service for but

one hundred and sixty acres, though the cost of the project is to be ratably imposed on all the land included. It was certainly not intended to permit entries of more land by one person than is permitted to be served with water. This would be to impose a burden where all benefit is prohibited. In view of the Department it is therefore clear that by directing withdrawal of such lands "from entry, except under the homestead laws," Congress intended to inhibit any mode of private appropriation of such lands except by such entry under the homestead laws as requires settlement, actual residence, improvement, and cultivation.

Your office decision is affirmed.

LANDS WITHDRAWN UNDER ACT OF JUNE 17, 1902—SOLDIERS'
ADDITIONAL ENTRY.

WILLIAM M. WOOLDRIDGE.

Lands withdrawn from entry, except under the homestead laws, as susceptible of irrigation under a project contemplated under the act of June 17, 1902, are not subject to soldiers' additional entry under section 2306 of the Revised Statutes.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 20, 1905.* (W. C. P.)

William M. Wooldridge has appealed from your office decision of December 15, 1903, rejecting his application, as assignee of John M. Cartwright, to make soldiers' additional entry for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 6, T. 80 N., R. 36 E., Greatfalls, Montana, land district.

In the decision appealed from it was said:

The township in which the land applied for lies was withdrawn from entry, except under the homestead laws, by the Secretary of the Interior, Aug. 8, 1902, under act of Congress of June 17, 1902 (32 Stat., 388), and under the provisions, limitations, charges, terms, and conditions of said act, soldiers' additional entries under Sec. 2306, R. S., may not be allowed for land while so withdrawn. See Office Circular (C) of Sept. 9, 1902.

The act of June 17, 1902 (32 Stat., 388), authorizes and directs the Secretary of the Interior to make examinations and surveys for and to locate and construct irrigation works. Section 3 provides that he shall withdraw from public entry lands required for irrigation works and authorizes him before beginning the survey for any contemplated irrigation works "to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works," and provides as follows:

Provided, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all

the provisions, limitations, charges, terms, and conditions of this act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: *Provided*, That the commutation provisions of the homestead laws shall not apply to entries made under this act.

Sections 4 and 5 of said act read as follows:

That upon the determination of the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided*, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section four. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual *bona fide* resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this act.

The clear intent and purpose of this act is to secure for lands to be irrigated actual settlers, those who will establish and maintain homes there. The limit of area per entry is to be measured by the acreage required for the support of a family upon the lands. The

idea of personal connection with the land is even carried to those who hold in private ownership. None such can secure a right to water for land in excess of one hundred and sixty acres and to secure any right the landowner must be an actual resident on the land or an occupant thereof residing in the neighborhood. This idea of residence upon the land is a characteristic of the ordinary homestead entry but it is not an attribute of an entry under section 2306, Revised Statutes.

The act of June 17, 1902, provides that the entryman "shall in addition to compliance with the homestead laws" reclaim one-half the irrigable area of his entry. That this has been done must be shown as a part of his final proof. The exercise of the soldiers' additional right does not require or contemplate compliance with the homestead laws in the matters of residence, cultivation or improvements either by the original beneficiary or by his assignee. It will hardly be contended that the phrase "shall in addition to compliance with the homestead laws," makes it necessary that an applicant, to exercise the right conferred by section 2306, Revised Statutes, upon lands withdrawn under said act of 1902, shall establish his residence upon the land and shall, before entitling himself to a patent, make proofs required of homestead entrymen by section 2291, Revised Statutes. It is clearly indicated, however, that all entrymen upon such land shall do those things. An entry under section 2306 is not the character of entry contemplated by the law of 1902. The quality of assignability alone differentiates it from and takes it out of the class of entries contemplated under the general theory of the homestead laws. In discussing this quality in *Webster v. Luther* (163 U. S., 331), the court quotes an excerpt from the decision of the supreme court of Minnesota, pointing out the radical differences between homestead entries and those made under the additional rights conferred upon soldiers.

In *William E. Moses* (31 L. D., 320) it was held that a personal presentation of an application to make entry under section 2306 is not required, that proof as to the character of the land may be made by any person having knowledge of the premises, and that affidavits in such cases may be made outside the land district within which the land is located. None of these things could be allowed under a homestead entry. In *William C. Carrington* (32 L. D., 203, 205), speaking of the right given by said section 2306, it was said:

This additional right of entry has been held to be a gift, a "mere gratuity," an "unfettered gift." None of the things required by law of an ordinary homestead entryman are required of an entryman under this act except to prove his qualifications; he is not required to reside upon, cultivate or improve the land embraced in his additional entry; he may sell his right before making the additional entry, or he may sell the land as soon as his entry is recorded.

Without discussing the matter further it is sufficient to say that it was clearly not intended to leave lands withdrawn under the act of 1902, as susceptible of irrigation, subject to be taken by one holding a right under section 2306 of the Revised Statutes.

Your office decision so holding is affirmed.

RAILROAD GRANT—SETTLEMENT CLAIMS—ACTS OF JULY 1, 1862, AND
JUNE 22, 1874.

UNION PACIFIC RAILROAD COMPANY.

The mere occupancy of lands with a view to their possible entry under the public land laws, prior to the time when those laws were extended to the territory so occupied, can not be considered as attaching a homestead or pre-emption claim to the lands so as to defeat the operation of the grant made in aid of the construction of the Union Pacific railroad by the act of July 1, 1862.

In accepting the general relinquishment executed by the company under the act of June 22, 1874, it was intended by the Department to include within its scope claims resting upon occupancy begun prior to, but without the protection of law until after, the filing of the map of general route.

Departmental decision of July 12, 1904 (33 L. D., 89), recalled and set aside.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) April 25, 1905. (F. W. C.)

July 12, last (33 L. D., 89), this Department affirmed your office decision of March 18, 1904, rejecting the application of the Union Pacific Railroad Company to select 1,235.12 acres within the North Platte land district, Nebraska, under the provisions of the act of June 22, 1874 (18 Stat., 194), upon the basis of an equal quantity of land forming parts of the odd numbered sections within the limits of its grant within the State of Utah, to which it relinquished all claims under its grant, for the reason that the lands relinquished and sought to be made the base for the selections were held to have been excepted from its grant of July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 356), and therefore did not afford a sufficient base for the selection of other lands under the act of June 22, 1874, *supra*.

A motion was filed for the review of said decision, which was entertained. Oral argument has been heard in support thereof and the brief and papers filed have been referred to your office and are made the subject of a special report dated February 13, 1905.

In view of the importance of the case and the fact that the questions raised on review were not considered at the time the former decision was rendered, it is deemed advisable to state the entire case anew.

It may be here stated that the grant made by the acts of 1862 and

1864 was one with place limits alone, there being no indemnity limits provided for, and if the lands made the base for the selections are held to have been excepted from the original grant, there is no other provision for indemnifying the company for such loss unless indemnity can be taken under the special provisions of the adjustment act of 1874.

The original grant will be found in the third section of the act of July 1, 1862, *supra*, whereby there is granted in aid of the construction of the Union Pacific railroad—

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 the act of 1864 the grant was increased from five alternate sections per mile on each side of the railroad to ten alternate sections per mile. The effect of the excepting clause found in this grant was first considered by the United States Supreme Court in the case of *Kansas Pacific Railroad Company v. Dunmeyer* (113 U. S., 629). On page 634 of the opinion it is said, referring to the definite location of the line of road: "After this no such rights can attach, because the right of the company becomes by that act vested." Again, on page 644, it is said:

Of all the words in the English language, this word *attached* was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land it was excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds.

In the later case of *Tarpey v. Madsen* (178 U. S., 215), after referring to the *Dunmeyer* case and a number of other cases, the following recapitulation is found on page 228:

Recapitulating, we are of opinion that a proper interpretation of the acts of Congress making railroad grants like the one in question requires that the relative rights of the company and an individual entryman, must be determined, not by the act of the company in itself fixing definitely the line of its road, or by the mere occupancy of the individual, but by record evidence, on the one part the filing of the map in the office of the Secretary of the Interior, and, on the other, the declaration or entry in the local land office. In this way matters resting on oral testimony are eliminated, a certainty and definiteness is given to the rights of each, the grant becomes fixed and definite; and while, as repeatedly held, the railroad company may not question the validity or propriety of the

entryman's claim of record, its rights ought not to be defeated long years after its title had apparently fixed, by fugitive and uncertain testimony of occupation; for if that be the rule, as admitted by counsel for defendant in error on the argument, the time will never come at which it can be certain that the railroad company has acquired an indefeasible title to any tract.

The company's line of road was definitely located opposite the lands relinquished and made the basis for the selections in question on April 28, 1869. At that date those lands were free from any claim of record.

By the seventh section of the act of 1862 provision was made for the filing of a map of general route, whereupon it became the duty of the Secretary of the Interior to cause the lands within fifteen miles of said designated route to be withdrawn from preemption, private entry, and sale, and by the act of 1864 the withdrawal was enlarged to twenty-five miles. Acting upon these provisions the Union Pacific company, on June 28, 1865, filed a map of general route of this portion of its line of road, whereupon a withdrawal was made which included the lands made the base for the selections in question. At the time of the filing of the map of general route in 1865 the preemption laws had not been extended to the Territory of Utah and they were not extended until July 16, 1868 (15 Stat., 91). A land office was not established including the lands made the base for the selections in question until March 9, 1869, and while the lands had been surveyed in 1855, no claim could have been filed in the local land office until after March 9, 1869, and within three months thereafter preemption filings were made upon all of the lands made the base for the selections in question and final proof and payment were shortly thereafter made in perfection of such preemption claims, certificates issued, and the patent of the United States has long since issued to the preemptors so asserting claim to those lands.

In the proof offered by these preemptors it was shown in each case that the preemptor had occupied the land from a time prior to the filing by the railway company of its maps of general route and definite location; in fact, prior to the passage of the acts making the grant, and it was because of the occupancy so shown that your office held that the lands so claimed and occupied were excepted from the operation of the grants of 1862 and 1864 and therefore did not offer a sufficient base for relinquishment and the selection of other lands in lieu thereof under the act of June 22, 1874. By said act it was provided:

That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the preemption or homestead laws of the United States subsequent to the time at which, by the decision of the land-office, the

right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete titles as if such lands had not been granted: *Provided*, That nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to any such railroad or to extend to lands reserved in any land grant made for railroad purposes: *And provided further*, That this act shall not be construed so as in any manner to confirm or legalize any decision or ruling of the Interior Department under which lands have been certified to any railroad company when such lands have been entered by a preemption or homestead settler after the location of the line of the road and prior to the notice to the local land office of the withdrawal of such lands from market.

Just prior to the passage of this act there was pending before this Department a case known as the Union Pacific Railroad Company *v.* George Gailey, Lucy Hall, *et al.*, involving title to sundry tracts of land in the Salt Lake land district, Utah, based on certain claimed settlement rights, and upon consideration of this case your office, in its decision of November 18, 1873, held that the lands involved were excepted from the railroad grant. On appeal, this Department on April 5, 1874, affirmed your said office decision "after much hesitation and grave doubts as to the law," it being stated in said decision that the conclusion was reached in view of the great equities of the settlers.

Following the passage of the act of June 22, 1874, which it is claimed was largely the result of the case just referred to, the Union Pacific Railroad Company executed and filed a relinquishment under that act in favor of Gailey, Hall, *et al.*, which relinquishment was forwarded to your office with departmental communication of December 26, 1874, wherein it was held that the company would be allowed to make indemnity selections for these tracts under the act of June 22, 1874, notwithstanding the prior departmental decision in favor of the settlers.

Thereafter the railroad company filed a general relinquishment of all tracts within the limits of the withdrawal made upon its map of general route which had been proved up and entered by *bona fide* settlers under the preemption and homestead law, whose claims are based on settlement and entry made subsequently to the filing of said map of general route. In view of said relinquishment it was stated in departmental communication of February 27, 1875, forwarding the same to your office—

I perceive no objection to allowing said date [the date of filing the map of general route] to be considered as that on which the withdrawal for their

benefit should take effect; and if none occurs to your mind, other than that presented in your letter of the 3rd instant, you will govern your action accordingly.

It is now urged on behalf of the railroad company:

1. That the lands made the base for the selections in question were not excepted from its grant, (a) because at the date of the filing of its map of definite location whereby its rights under its grant became vested, no claim had been initiated to any of the lands by reason of any proceeding in the land department and as a consequence no right of preemption had attached thereto, (b) because the lands were not subject to preemption at the time of the filing of its map of general route, and any occupation of the lands at and prior to that time was without recognition, and so continued until, by the act of 1868, three years after the filing of the map of general route, the preemption laws were extended to the Territory of Utah, (c) that if such occupancy were recognized as sufficient to initiate a right under the settlement laws the occupants were in default in not filing notice of their claims with the surveyor-general within six months after the survey had been made in the field, as required by the act of June 2, 1862 (12 Stat., 413), and (d) that as the plat of survey was filed in the local land office at Salt Lake City on February 3, 1869, they were again in default in not filing notice of their claims until on and after May 10, 1869, more than three months after the filing of such plat.

2. That the action of the Department upon the general relinquishment executed under the act of 1874, hereinbefore referred to, was in effect an adjudication by the land department that the rights of the company attached on the filing of the map of general route for the purpose of adjustment of conflicting claims under the act of June 22, 1874.

With the view now entertained by the Department it will not be necessary to consider and pass upon many of the questions sought to be raised in this case by the railroad company.

The evident purpose of the act of June 22, 1874, was to avoid strife and contention before the land department and in the courts and the act should be given such construction as would protect, as far as possible, the interests of all concerned. The act provides:

If any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the preemption or homestead laws of the United States *subsequent to the time at which, by the decision of the land department, the right of said road was declared to have attached to such lands, etc.*

At and prior to the passage of this act the withdrawals made upon maps of general route were strictly enforced, the rights of the company being respected within the limits of the withdrawals made

thereunder to the same extent as under later withdrawals made upon maps of definite location. The action of the Department hereinbefore set out with regard to the general relinquishment executed and filed in 1875, recognizing the rights of this company upon its map of general route, is in line with the general practice then existing and hereinbefore referred to, and amounted, in effect, to a decision by the land department that the right of the road had actually attached to the lands falling within such withdrawals. There can be but little doubt that the action of this Department in recognizing certain meritorious settlement claims in violation of this principle was among the reasons which called forth the passage of the act of 1874 with the view to the protection of such claims by relinquishment of the railroad claims, thus avoiding harassing suits in the courts.

An extended argument would seem to be unnecessary in support of the proposition that a mere occupancy of lands with a view to their possible entry under the public land laws, prior to the time when those laws were extended to the territory so occupied, can not be considered as attaching a homestead or preemption claim to lands so as to defeat the operation of the grant.

That the Department meant to respect the rights of the Union Pacific company from the date of the filing of its map of general route has already been shown, and as the occupancy of the lands made the base for the selections in question was without the protection of law until nearly three years after the filing of such map, it must be held that the claims were based upon settlements made subsequently to the filing of the map of general route, and, as a consequence, the entries or filings of these preemptors were made subsequently to the time at which, by the decision of the land office, the right of the road was, in effect, declared to have attached to the lands so occupied. It might be here stated that the filings by these preemptors were, in fact, allowed after the filing of the map of definite location.

There is no question in this case affecting the rights of any settlement claim. All claims asserted to the base lands have long since been patented, and those considerations influencing this Department and the courts in the construction of statutes where such a claim is involved have no application here.

The entire matter considered, it is the opinion of this Department that in accepting the general relinquishment filed in 1875, it was intended to include within its scope claims of the character herein described, and you will be guided thereby in the adjustment of this grant. Departmental decision of July 12, last, denying the claim of the company, is hereby recalled and set aside, and your office decision appealed from is reversed.

TIMBER LAND APPLICATION—HOMESTEAD APPLICATION—CHARACTER OF LAND—HEARING.

KATHERINE I. POWELL.

An application to make homestead entry of land embraced in a prior application to purchase under the act of June 3, 1878, does not constitute a protest against the timber land application, and is not a sufficient ground for requiring a hearing to determine the character of the land.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *April 25, 1905.* (G. J. H.)

December 1, 1900, Katherine I. Powell tendered her application to purchase, as timber land, under the act of June 3, 1878 (20 Stat., 89), as amended by the act of August 4, 1892 (27 Stat., 348), the fractional S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the fractional W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 22, T. 12 N., R. 1 E., H. M., Eureka, California (stated in the application to contain approximately 174.48 acres); which was rejected by the local officers, for the reason that it appeared from the connected diagram or plat of surveys on file in their office to conflict with the Pioneer group of patented mining claims; from which action applicant appealed to your office.

June 9, 1903, Dimmon Martin tendered his application to make homestead entry for the NW. $\frac{1}{4}$ of said section 22; and on July 13, 1903, Byron Miller tendered a like application for the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of the same section, together with other lands in a different section; both of which applications were rejected because they appeared to be in conflict with mineral surveys; from which action the applicants appealed.

It is apparent from the foregoing that there is a conflict between the application of Powell and the respective applications of Martin and Miller as to portions of the lands embraced in their several applications.

In her appeal to your office it was contended by Powell, in substance and effect, that the conflict shown upon the connected plat or diagram on file in the local office, between her application and the group of patented mining claims, as above stated, did not exist in fact; that the true location of said group of mining claims is a half mile south of their location as designated upon the plat in the local office; and that as a matter of fact there was no conflict between her application and said mining claims.

A later survey of said township 12 north, range 1 east (completed in May, 1903), plat of which is now on file in your office, shows that only a small portion of section 22—a narrow strip along the west boundary line thereof—is embraced in the Pioneer group of mining claims. The lands embraced in Powell's application are designated

upon the plat of this later survey as lots 2, 3 and 4 and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section 22 (containing 163.26 acres).

In view of this later corrected survey, your office, considering the case on Powell's appeal, in its decision of June 9, 1904, directed that her application be so amended as to describe the tracts applied for according to the designation thereof upon the plat of the later survey. It is then held in said decision that—

The homestead applications of Martin and Miller raise an issue as to the character of the land covered by said SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and lots 2 and 4 of said section 22. If, as a matter of fact, said land "is fit for cultivation by ordinary agricultural process, when the timber is removed, it is not subject to entry under the act of June 3, 1878." (Syllabus in case of *United States v. Montgomery et al.*, 11 L. D., 484.)

It appearing that said SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and lots 2 and 4 were subject to homestead or other entry at the date of Martin and Miller's applications, the pending application by Powell under act of June 3, 1878, not effecting a segregation thereof (see instructions of August 22, 1889, 9 L. D., 335), said Powell may elect to relinquish said tracts from her application and amend the same by including adjoining vacant timber land not to exceed a total area of 160 acres, or she will be allowed sixty days from notice within which to apply for summons for a hearing to determine the true character of the land covered by said SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and lots 2 and 4, whether or not it is of the class subject to entry under the act of June 3, 1878, notice of the time and place of hearing to be by her served on said Martin and Miller, advising her that in case of default and failure to appeal herefrom her said application will be rejected to the extent of said SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and lots 2 and 4 thereof without further notice from this office.

Powell has appealed to the Department.

From an examination of the plat of the later survey it appears that Powell's application for the fractional subdivisions described is not in conflict with the patented Pioneer group of placer mining claims as actually located on the ground. If the true situation had been disclosed by the records of the local office at the time said application was tendered, and no other reason appeared for rejecting it, it would probably have been accepted, and if diligently prosecuted might have been carried to patent long prior to the time Martin and Miller's homestead applications were tendered. Whatever right Powell had to have her application received at the time tendered, she has preserved, as against the subsequent homestead applicants, by her appeal from its rejection. Her application being first in time, and the reason given for its rejection being now shown not to exist, it would seem to be first in order for consideration and action.

The question raised by the appeal is whether the homestead applications of Martin and Miller, tendered subsequently to Powell's application under the timber and stone act, as above shown, may be regarded as in the nature of protests against the latter and as suffi-

cient to warrant the action of your office in requiring the timber and stone applicant to apply for a hearing to determine the character of the land.

The proviso to section three of the act of June 3, 1878, *supra*, is as follows:

That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto: and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases.

In the case of *Hughes v. Tipton* (2 L. D., 334, 336) it was held that—

The proviso to the third section contemplates a protest after entry against the issue of patent, and is similar in terms and purpose to the proviso to section 2325, Revised Statutes. The protestant, to be heard, must allege a "valid claim," under which the lands are "held by him," and the issue at the hearing is on the question of priority of right.

Whilst the statute thus provides for a contest by a party in interest, it does not prohibit the appearance at any time of a party not in interest as *amicus curiae*, who alleges illegality in respect of the qualifications or proceedings of the applicant, the *bona fides* of his application, or the character of the land. Of such character must the claim of Hughes, in the case at bar, be regarded; for, since his entry was made subsequently to Tipton's timber application, it gave him no standing as an adverse claimant.

In that case the protestant denied that the land was of the character subject to entry as timber land, alleged its agricultural character, and objected to the issuance of patent to the timber applicant. In the present case no protest against the timber and stone application has been filed by either of the homestead applicants, nor has either of them in any wise questioned the *bona fides* of the timber applicant. Your office appears to have regarded the mere tendering of the homestead applications as the equivalent of a protest, and as a sufficient basis for requiring a hearing to determine the character of the land. There would seem to be nothing in the act, the regulations issued thereunder, or in the decisions of the Department, to warrant such action. While it is well settled that a timber land application does not reserve the land from settlement or homestead entry (*Smith v. Martin*, 2 L. D., 333; *Capprise v. White*, 4 L. D., 176; *Houghton v. Junett*, 4 L. D., 238, 239; *Henry A. Frederick*, 8 L. D., 412, 414; *Instructions*, 9 L. D., 335, 337; *State of California v. Nickerson*, 20 L. D., 391, 392), it is equally well settled that "a person who initiates his claim subsequently to the timber application gains no right against the applicant or the United States, though he has a preferred right to the land against all the world besides; the position he occupies is simply this—that if the United States does not pass its title to the applicant, he has the next best claim to the land." (*Hughes v. Tipton*, and the other cases cited above.)

The proviso to section 3 of the act of June 3, 1878, above quoted, specifically provides that objections to the issuance of patent on a timber land application, by a person having a valid claim to any portion of the land, shall be "in writing;" and paragraph 14 of the regulations issued under said act (Gen. Cir., G. L. O., 1904, p. 42) provides for the ordering of hearings on any contests or protests that may be "filed;" from which it would seem that objections to an application under said act must be made by a contest or protest in writing filed for the purpose. This view is supported by the decision of the Department in the case of F. E. Habersham (4 L. D., 282, 283), which arose upon the filing of a pre-emption declaratory statement by one Charles Ladd subsequently to Habersham's application under the timber and stone act. In that case the Department said:

No protest was filed to Habersham's application, nor was any contest ordered or initiated, when Ladd filed his declaratory statement. On June 3, 1884, Ladd transmuted his pre-emption entry to homestead entry. Your predecessor held that the application of Habersham should be held for cancellation, it being in conflict with the homestead entry of Ladd, from which decision Habersham appealed. . . .

When there is no adverse claim of file at the date of the application, a simple protest will make an issue, and the sole question then involved is the *bona fides* of the application and the character of the land, and *this issue must be made by protest filed for that purpose* [italics borrowed] . . . you are directed to remand the case to the local office, with instructions to require Habersham to submit the proof *de novo*. Notice shall be given to Ladd of the time and place of receiving such proof and he should be allowed the opportunity of filing protest.

The only limitation placed upon the character of lands subject to homestead entry by section 2289 of the Revised Statutes, under which section the applications of Martin and Miller were made, is that they shall be "unappropriated public lands" (Barbour *v.* Wilson *et al.*, on review, 28 L. D., 61, 65), and the affidavits filed by them with their applications (Form 4-063, Gen. Cir., G. L. O., 1904, p. 275) contain no allegations with respect to the character of the land. It is not seen, therefore, how the homestead applications, even if they had been accepted by the local officers and held subject to the disposition of the timber land application, could be regarded as putting in issue the character of the land in conflict.

The Department is of opinion that the homestead applications tendered by Martin and Miller may not properly be regarded as protests against Powell's application and as sufficient to justify the action of your office in requiring the timber land applicant to apply for a hearing to determine the character of the land in controversy.

Your office decision is therefore reversed, and unless other sufficient reason appear for requiring a hearing between the rival applicants, Powell's application will be returned to the local office, with direction that she be given opportunity to amend the same so as to

make the description of the land applied for conform to the designation thereof upon the plat of the later survey, and when so amended that it be considered and acted upon in the regular way, regardless of the applications of Martin and Miller. If no other objection appear, and the application be accepted, Martin and Miller should be given proper notice thereof, in order that they may have opportunity to file protest, should they desire to do so.

HOMESTEAD—SECOND ENTRY—SECTION 2298, REVISED STATUTES.

INSTRUCTIONS.

The right to make homestead entry has not been exercised, within the meaning of the law, where the entry can not be perfected and the cause therefor is not due to fault on the part of the entryman; but the question whether a person has exercised the right by his first attempt, so as to inhibit him from making a second entry, will not be considered or determined until an application to make such entry is filed.

Secretary Hitchcock to the Director of the Geological Survey, April
(F. L. C.) *29, 1905.* (E. F. B.)

The Department is in receipt of your letter of March 29, 1905, requesting to be advised as to whether persons who have made entries of lands which are afterwards needed for use in the construction and operation of irrigation works constructed under the act of June 17, 1902 (32 Stat., 388), and are taken by the government for such purpose, will be entitled to make another entry of lands under the homestead law.

You refer to entries where the final certificate has not issued and where the legal and equitable title is in the United States.

The uniform construction given to section 2298, Revised Statutes, which declares that "no person shall be permitted to acquire title to more than one quarter section under the provisions of this chapter," is that the right conferred by the homestead law is exercised when the initial entry is made, and under said section a person is restricted to one entry. It is the one homestead privilege that is allowed by that section which "is in general exercised when a qualified claimant makes entry under the homestead law. . . . In such case, although he has acquired no land, his rights under the homestead law are exhausted and he can not again make entry of that or any other land." (*Stephens v. Ray*, 5 L. D., 133.)

But in the administration of the law it has been held that the homestead right is not exhausted by an entry made in good faith, which is afterwards cancelled because the land entered was found to be not subject to entry (*Patrick O'Neal*, 8 L. D., 137), or where the can-

cellation of the entry was due to circumstances beyond the control of the entryman. (Charles A. Garrison, 22 L. D., 179.)

The rule is clearly stated in Thurlow Weed (8 L. D., 100, 101):

If exceptions are to be allowed to the rule of but one homestead entry—and the exception appears to be well established doctrine, and quite as supportable as the rule itself—they should be admitted whenever justice clearly requires, and no bad faith or fraud is shown, and the failure to discover the obstacle to the first entry is fairly excusable. A mistake which involves no wrong, and is attributable to causes reasonably likely to produce it, ought rarely to forfeit the privilege of gaining one homestead, when honestly sought in good faith by a genuine settler with a family.

In theory the right of entry has not been exercised within the meaning of the act where it can not be perfected and the cause therefor is not due to fault on the part of the entryman. Hence the Department does not confer the right to make a second entry, having no authority to extend the provisions beyond what is conferred by the act. Whether a person has exercised the right within the meaning of the act by his first attempt to acquire title to land under the homestead law so as to inhibit him from making entry will not be considered or determined until an application to make entry is filed, when all the facts will be considered. This rule applies to all cases, irrespective of the conditions under which the entry is cancelled.

It may, however, be stated that a case can hardly be conceived that would come more clearly within the rule as stated in Thurlow Weed than where the failure to perfect the entry is due to the fact that the land was taken for government purposes and where the entryman is without fault. Such act on the part of the government will not however condone acts of bad faith on the part of the entryman or restore rights that had been forfeited.

PUBLIC LAND—LIMITATION OF ACREAGE—ACT OF AUGUST 30, 1890.

INSTRUCTIONS.

The provision in the act of August 30, 1890, limiting the amount of land to which title may be acquired under the land laws by any one person to three hundred and twenty acres in the aggregate, as construed by the act of March 3, 1891, applies to all lands acquired under any of the land laws except those relating to mineral lands.

Departmental decision of October 12, 1894, in the case of W. R. Harrison (19 L. D., 299), overruled.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 4, 1905.* (V. B.)

The Department is in receipt of your letter of March 18, 1905, asking for a reconsideration and "express confirmation or disap-

proval" of the departmental decision in the case of *W. R. Harrison* (19 L. D., 299), wherein it was held (syllabus) that—

An entry of land, valuable only for the timber and stone thereon, should not be included in the maximum amount of lands that may be acquired under the limitation imposed by the act of August 30, 1890, as construed by the subsequent act of March 3, 1891.

In the sundry civil act of August 30, 1890 (26 Stat., 371, 391), is the following provision:

No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws.

By departmental instructions of December 29, 1890 (12 L. D., 81), it was held that the limitation of acreage prescribed in said provision extends equally to all the land laws which provide for the disposition of the public domain and restricts the applicant thereunder to three hundred and twenty acres in the aggregate.

On March 3, 1891 (26 Stat., 1095), was approved "An act to repeal the timber-culture laws and for other purposes," and in section 17 thereof, page 1101, it is declared that the cited provision of the sundry civil act—

shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands and not to include lands entered or sought to be entered under mineral land laws.

In the case of *W. R. Harrison* (19 L. D., 299), which you ask be reconsidered, *Harrison* had made a desert land entry for three hundred and twenty acres and thereafter made cash entry for eighty acres, under the timber and stone act, of land stated to "be unfit for cultivation when the timber is removed;" and your office canceled said cash entry. On appeal here, your decision was reversed on the ground that the lands in the cash entry can not "be treated as agricultural lands and so is not included in the maximum amount of lands that may be acquired by one person."

Prior to the passage of the act of August 30, 1890, a person could acquire under the different land laws, other than those relating to the disposal of mineral lands, 1,440 acres of the public lands. But in view of our rapidly increasing population, Congress thought it would be best that the opportunity to acquire portions of the public domain should be more generally distributed among the many small holders rather than monopolized by the few larger ones, and to this end the act of August 30, 1890, was passed. In December following its passage, this Department, in the cited instructions, declared that the act limited the right of acquisition under *all* of the land laws. It is obvi-

ous from the prompt action of Congress, within three months thereafter, the construction given by the Department was not that intended by Congress, and it so said.

It will be understood that Congress did not undertake to amend the act of 1890, but declared what should be the construction of that act.

It should be recalled that under the laws for the disposal of the public lands in existence at the time of said legislation, whilst there was a limitation as to the size of mineral claims, there was no limitation as to the number of said claims, and consequently of the amount of land which might be acquired under the mineral laws by an individual, but there was a limitation as to the quantity which could be acquired under each of the other laws. It might well have been questioned whether Congress intended, under the general language used in the act of 1890, to reverse its well-settled policy, so long in existence, in relation to mineral lands, and limit that which had never been limited before. It is true the mineral laws are a part of the land laws, but they provide a separate and distinct method of acquisition in no way connected with or cognate to what, in land office terminology, is known as the "General Land Laws," the mineral laws even recognizing rights acquired without resort to the provisions of the statute.

That Congress had no such purpose in view is made clear by the act of 1891, wherein it declared that the former act should not be so construed as "to include lands entered or sought to be entered under the mineral land laws."

Whilst the language used in the later act is somewhat involved and not as clear as perhaps it might be to the casual reader, yet, upon consideration of the whole subject, the history of the legislation, the evil sought to be remedied and the remedy applied, and studying the matter in the light of well-defined rules of construction, the Department is now of the opinion that the purpose of Congress in the cited legislation was to apply the rule of limitation to lands disposed of under any of the land laws, other than those acquired under the mineral land laws; and in expressing this conclusion used the words "agricultural lands" only in contradistinction to mineral lands.

These views are somewhat strengthened by an examination of the proceedings of Congress on the passage of the act of 1891, *supra*. The bill had been sent to a conference committee of the two houses and in the written report of the Chairman of the House Committee, it is stated: "Section 17 allows mineral entries in addition to the maximum allowance of 320 acres allowed under existing laws."

Entertaining these views, the decision of the Harrison case (19 L. D., 299) is overruled and will no longer be followed.

TOWNSITE ENTRY—MINERAL LAND—SECTION 2389, REVISED STATUTES.

TELLURIDE ADDITIONAL TOWNSITE.

Under the provisions of section 16 of the act of March 3, 1891, a townsite entry by an incorporated town may be made upon mineral lands of the United States, subject to the limitations and conditions prescribed, and therefore such an entry, upon surveyed lands, even though the lands be mineral, should, in its exterior limits, be made in conformity to legal subdivisions, as required by section 2389 of the Revised Statutes.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 6, 1905.* (G. N. B.)

December 29, 1899, W. A. Taylor, mayor of the town of Telluride, Colorado, made additional townsite entry, under the provisions of the act of March 3, 1877 (19 Stat., 392), for a ten-acre tract of ground embracing portions of lots 7 and 8 in the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 36, T. 43 N., R. 9 W., N. M. P. M., Montrose, Colorado, land district.

April 22, 1903, your office held the entry for cancellation, for the reason, among others, that the ground claimed as an additional townsite, in its exterior limits, does not conform to the legal subdivisions of the public-land surveys.

June 22, 1903, the claimant asked leave to submit additional proof to show, among other things, that the portions of said lots 7 and 8 not embraced in the entry are mineral lands. Leave was accordingly granted, and an additional showing was made by means of affidavits, in which it is alleged, in substance and effect, that the ten-acre tract selected is non-mineral in character; that on the west the same is bounded by the Mill placer claim; that on the north it is bounded by high and perpendicular cliffs of solid rock, above which the ground embraced in said lots 7 and 8 is mineral in character; that on the east the adjoining lands contain valuable placer deposits; that on the south the land not included in the original patented townsite is covered by the Yosemite placer mining claim; and that the townsite can not be made to conform to said lots 7 and 8 without embracing lands chiefly valuable for mineral.

February 26, 1904, your office held the showing insufficient to sustain the townsite entry, and held the same for cancellation. Subsequently the claimant asked for additional time in which to make explorations and furnish evidence with respect to the mineral character of the land surrounding the tract entered. April 28, 1904, your office directed the local officers to advise the claimant—

that no extension of time in which to perfect an appeal under the decision heretofore rendered will be granted, but that in default thereof, in view of the statements now made by claimant, final action looking to the cancellation of the entry involved will be deferred sixty days within which further showing may be

made on the merits as contemplated, but that in default thereof the entry will be finally canceled on the record in pursuance of the judgment already rendered.

The claimant has appealed to the Department.

The contention on appeal is, that the lands immediately surrounding the tract are mineral in character, and therefore entry to include such lands can not be made under the townsite law.

Section 2389 of the Revised Statutes, treating of townsite entries, provides that:

If upon surveyed lands, the entry shall in its exterior limit be made in conformity to the legal subdivisions of the public lands authorized by law.

See regulations of the land department regarding townsites (5 L. D., 265, 267; 32 L. D., 156).

The township and section, embracing said lots 7 and 8, were surveyed in 1882, and the plat thereof was filed in the local office January 25, 1883. The ten-acre tract in question embraces eighty-eight one-hundredths of an acre of lot 7, which contains twenty-eight acres, and the remainder consists of a portion of the west side of lot 8, which contains thirty-five acres. No attempt has been made to conform the limits of the townsite to the lines of these lots, or either of them.

Section 16 of the act of March 3, 1891 (26 Stat., 1095, 1101), provides:

That townsite 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.

The entry in question can not be sustained in its present form. The statutory requirement as to conformity to the legal subdivisions of the public lands is clear and explicit. The land department can not disregard it. Where, as in this case, the entry is upon surveyed lands, the mandate of the statute is that, in its exterior limits, it shall be made in conformity to the legal subdivisions of the public lands authorized by law.

If it be true, as claimed, that the portions of said lots 7 and 8, not included in the townsite entry, are mineral in character, that fact can furnish no excuse for not conforming the entry, in its exterior limits, to legal subdivisions, as required by law. Telluride is an incorporated town, and under section 16 of the act of March 3, 1891, is authorized to make townsite entry on mineral lands of the United States, the title, when acquired, to be subject to the conditions and limitations prescribed in that act. There is therefore no reason why the townsite application in this case may not be made to embrace either of said lots 7 and 8, or both of them, as should be determined

by the claimant. They are legal subdivisions of the public lands, notwithstanding the fact they are designated as lots.

It is not intended to hold, however, that the townsite claimant may not exclude from his application any vein of gold, silver, cinnabar, copper, or lead, or any valid mining claim or possession held under existing law, which may as a matter of fact be embraced within said lots, or either of them, as the case may be, and as to which no title would pass under the townsite patent when issued. Should any such exclusion be made, satisfactory proof in support thereof should be furnished. If a mineral vein be excluded, its existence must be shown. If the exclusion be of a mining claim or possession, it must be shown to be a *valid mining claim or possession held under existing law*.

Unless the townsite claimant shall, within a reasonable time, so amend his application that entry may be allowed thereon to conform to the legal subdivisions of the public lands, in accordance with the principles herein announced, the existing entry must be canceled. The decision of your office is modified accordingly.

VALENTINE SCRIP—ASSIGNMENT—INNOCENT PURCHASER.

MARVIN HUGHITT.

Land warrants are not commercial or negotiable paper, and the doctrine applying to innocent holders of commercial paper acquired before maturity has no application thereto; and an assignee of such warrants can acquire no greater interest as against the government than belonged to the warrantee.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 8, 1905.* (E. F. B.)

With your letter of March 8, 1905, you transmit the appeal of Marvin Hughitt from the decision of your office of January 4, 1904, refusing his application for a recertification, in his name, of what is alleged to be the unused portion of Valentine Scrip E, No. 23, amounting to 19 acres, which was assigned to him by Lucy J. Simmons, executrix of Charles E. Simmons.

It appears from the papers transmitted with your letter that "Valentine Scrip E, No. 23," for forty acres, was located July 31, 1874, by Wm. L. Webber, trustee, at the Ionia land office, Michigan, upon unsurveyed lands, who at the same time tendered to the local officers said scrip, which was received by them to be applied in payment for said land after the survey thereof and after the location had been made to conform to the legal subdivisions as required by law. In due time (August 13, 1874), the register reported to your office the filing by Webber of his application and the deposit of the scrip.

After said location had been made, and while the scrip, which had been assigned in blank by the scrippee, Valentine, was in the custody of the local officers, it was abstracted by a clerk in that office, and sold to one D. H. Talbot. It subsequently came into possession of Charles E. Simmons by assignment, who, on May 26, 1880, located it at Sioux Falls, Dakota Territory, on a tract of land containing 21 acres, upon which patent issued.

The land upon which Webber had located this scrip was not surveyed until 1883. On March 4, 1884, Webber applied to adjust his entry in conformity with the township surveys, which was found to embrace lots 5 and 6, section 26, T. 18 N., R. 18 W., which at that time was subject to sale at the Reed City, Michigan, land office, containing 40.57 acres. The local officers certified upon that application that "Valentine Scrip E No. 23 as shown by the records of this office was filed at the Ionia land office July 31, 1874, upon a tract of unsurveyed land which when officially surveyed embraced lots 5 and 6 of Sec. 26, T. 18 N., R. 18 W., containing 40.57 acres."

It being found upon inquiry that the scrip was not in the local land office, the register reported all the facts to the Commissioner of the General Land Office, who, by letter of May 23, 1884, stated that it having been established that Webber deposited the scrip in the land office at Ionia for the location of said land, which was abstracted by a clerk in that office while in the custody of the local officers, the United States is responsible for the loss of the scrip, and that so far as concerns Mr. Webber's right to receive a certificate of location he stands in the same relation to the government as if the scrip had not been abstracted and otherwise used. The local officers were directed to adjust the location according to the regulations and to issue the usual certificate, which was done June 24, 1884, cash payment being made for the excess fifty-seven hundredths of an acre. Upon this certificate a patent issued September 3, 1884, which recited that "the said special certificate after having been thus located by the said William L. Webber, trustee, was stolen from the files of the local land office and assigned to another party and was by said party relocated at Mitchell, Dakota Territory, and a patent issued therefor."

The case now before the Department arose upon the application of appellant for recertification to him of the unused portion of the scrip located by Charles E. Simmons, amounting to 19 acres, claiming the right to such portion by purchase and assignment from Lucy J. Simmons, executrix, under the last will and testament of the said Charles E. Simmons. Your office rejected the application for the reason that the scrip had been fully satisfied by the location made by Webber.

The appellant rests his claim upon the validity of the location of

Simmons. His contention may be substantially embodied in two grounds, (1) that if he, Simmons, was entitled to any portion of or interest in the scrip he was entitled to it all, and (2) that the question as to the validity of his location and of his ownership of the scrip was adjudicated by the Commissioner of the General Land Office in his decision of May 23, 1884, the effect of which was to hold that Simmons was an innocent purchaser, and to justify an innocent purchaser from him in assuming that Simmons had a good title to the unused portion of the scrip.

The first proposition may not be questioned, but it is very evident from the facts recited above that Simmons was never entitled to any part of the scrip and did not acquire any right, title or interest in it either as against the United States or the true owner, whether he was an innocent purchaser or not.

The consummation of an entry under a location of the stolen scrip confirmed no right in the locator to the scrip, either as to the part located or the unused portion. While the title to the land located is now protected by lapse of time, it is certain the entry would not have been allowed if the conditions under which Simmons acquired the scrip had been known at the time of the entry or before it passed to patent, even though he acquired it without notice of want of title in his vendor.

The clerk who stole the scrip could assign no valid right or interest in it to Talbot, nor could Simmons acquire any such right under his assignment from Talbot, however innocent he may have been of any knowledge of the source from which Talbot acquired it. These warrants are not commercial or negotiable instruments, and the doctrine applying to innocent holders of commercial paper acquired before maturity does not apply to them. The assignee of these warrants can acquire no greater interest as against the government than the warrantee. *Bronson v. Kukuk* (3 Dillon, 490.)

Appellant's second position is equally untenable. The decision of May 23, 1884, which he contends was an adjudication of the right of Simmons to the scrip as an innocent purchaser, and his consequent right to locate it, was rendered upon the application of Webber to complete his location of the scrip initiated in 1874, when the scrip was surrendered to the government. No right of Simmons was involved, nor did the Commissioner pretend to pass upon the validity of the assignment or of the location by Simmons thereunder. He was considering the right of Webber, the true owner, who had surrendered it into the custody of the government in due course of proper proceedings in the location, after which it was stolen from the government. Under such circumstances the Commissioner held that Webber's right to complete his entry was not affected, as the

United States was responsible for its loss, so far as his rights were concerned. The gratuitous statement by the Commissioner that he had no reason to doubt Simmons was an innocent purchaser could not validate his location, nor confirm in him any title to the scrip. He was merely determining that Webber was entitled to complete his location, notwithstanding the invalidity of the location by Simmons.

But whatever protection Simmons, or the purchaser under him of the land located, might claim by reason of his ignorance of any fraud or want of title in his assignors, the same can not be invoked by appellant, who purchased more than twenty years after the completion of the original and only valid location of the scrip, and after all the facts as to the felonious abstracting of the scrip by which Simmons was enabled to make his location had been made known. The records of your office show that this scrip was fully satisfied upon the location made by Webber in 1874, and that it is a part of the records of your office as the basis of that location. There is no scrip upon which the validity of Simmons's location can be based. Even a purchaser of the land located must look to every part of the title which is essential to its validity. An essential part of a title acquired under a location by an assignee of a land warrant is the validity of the assignment. *Brush v. Ware* (15 Peters, 93); *Bouldin and wife v. Massie's Heirs* (7 Wheat., 121); *Galt v. Galloway* (4 Peters, 332.)

Your decision is affirmed.

DESERT LAND ENTRY—IMPROVEMENTS—PRIOR HOMESTEAD ENTRY.

HOLCOMB *v.* WILLIAMS.

A desert-land entryman is entitled to credit for improvements placed upon the land by him in compliance with the requirements of the homestead law while holding the land under a prior homestead entry, provided they are of a character required by the desert-land law.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 11, 1905.* (J. L. M'C.)

On May 6, 1895, Nelson Williams made homestead entry for the S. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of Sec. 8, T. 8 N., R. 30 E., Walla Walla land district, Washington.

On September 3, 1895, he relinquished his right, title, and interest to a portion of said land; but he retained possession of the remainder until, on June 9, 1898, he relinquished his right to the remainder under the homestead law, and made desert-land entry of the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section 8.

On March 25, 1899, he offered proof setting forth that he had,

during the first, second, and third years, made the improvements required by the desert-land law, specifying in each case a house which he had built upon the land during the time he held the same under the homestead law. Said yearly proof was approved by your office March 30, 1899; and endorsement was made upon the entry papers as follows: "First proof sufficient for 3 years." The decision of your office, however, appears to have overlooked the fact that such proof was among the records.

On January 22, 1902, Oscar R. Holcomb filed affidavit of contest, alleging:

That said Nelson Williams has failed, during each and every year since the date of said entry, to expend the sum of one dollar per acre upon said land in the necessary irrigation, reclamation, and cultivation of said land by means of main canals and branch ditches, and in permanent improvements upon the land; and that none of said land is in cultivation or reclaimed.

A hearing was had in the case, on March 11, 1902. At said hearing the contestee testified that he had built on the land a comfortable frame house, sixteen by twenty feet; had dug a well twenty-six feet deep, to water; and had made certain other improvements. He added that he lived in said house for two years, while holding the land under the homestead law, when he was compelled to leave because of the drying up of the canal that had previously supplied the place with water.

The local officers, on February 23, 1903, rendered joint decision, in which they gave a summary of the evidence—which showed that the entryman had "made improvements on the land to the value of from \$360 to \$400;" and therefore held that the contestant had not proved his allegations.

Prior to said action, however, the entryman, on June 9, 1902, filed in the local land office a document setting forth that, inasmuch as the four years within which he must make final proof expired on that day, and as he had been unable to reclaim the land because of failure on the part of others to operate the irrigating ditch upon which he had depended for a supply of water, he desired to relinquish his claim to said land under the desert-land act, and to enter the same under the homestead law—i. e., a second homestead entry, by virtue of the third section of the act approved June 5, 1900, "For the relief of the Colorado Cooperative Colony."

This application was held by the local officers pending action on the contest. When they decided in favor of the entryman (*supra*), the contestant appealed to your office; which, on April 27, 1904, rendered a decision, finding that the only improvements made upon the land by Williams were put there during the lifetime of his homestead entry; that his relinquishment was manifestly the result of

Holcomb's contest; and therefore held that Williams's entry should be canceled, and that Holcomb should be permitted to enter the land by virtue of his preference right.

From this action the contestee appealed to the Department, which, on November 30, 1904, rendered a decision (unreported) affirming that of your office.

Contestee has filed a motion for review. The motion was entertained, and returned to your office to be served on the contestant. It has now been retransmitted to the Department, with argument in support of the same—contending, in substance, that the finding and ruling of your office (April 27, 1904, *supra*) were incorrect.

Said office decision found, "that from the date of entry to the cancellation of the same, no system of irrigation or water-supply was secured and made available for the reclamation of the land."

This statement is conceded by the entryman to be true. But the language of the contest affidavit should be carefully noted. It alleges that the defendant "has failed, during each and every year since the date of said entry, to expend the sum of one dollar per acre on said land in the necessary irrigation," etc. The local officers found, and the Department now finds, that he had made such expenditure—aside from the dwelling-house (which could not properly be considered as compliance with the desert-land act). The allegation of the contest affidavit has not been proved. Said affidavit was filed January 22, 1902 (*supra*). Any laches on the part of the entryman at any subsequent date is a question solely between him and the government, and can not confer a preference right of entry upon the contestant.

The contestant insists upon the correctness of the ruling of your office that the improvements made upon the land could not be considered as inuring to the defendant's benefit under his desert-land entry, because they were placed thereon during his previous homestead entry. But in the case of *Holcomb v. Scott* your office held, in substance, and the Department affirmed said decision (33 L. D., 287, syllabus) :

A desert-land entryman who becomes the owner of improvements placed upon the land by a prior entryman in compliance with the requirement of the desert-land law, is entitled to credit for such improvements the same as if placed upon the land by himself.

Counsel for the contestant, however, contends, in substance, that this ruling does not apply to the case here under consideration, inasmuch as this defendant's improvements were not placed upon the land "in compliance with the requirements of the desert-land law," but of the homestead law. The Department is of the opinion, however, that the reasons adduced in support of the conclusion reached

in said decision in the case of *Holcomb v. Scott* are equally applicable in case of improvements made by the desert-land entryman upon land while it was held by himself under the homestead law—provided such improvements are of a character required by the desert-land law.

Counsel for the contestant, in his answer to the motion for review, earnestly contends that his contest, and nothing else, induced the defendant to relinquish his desert-land entry.

Contestee's proof for the first three years of his entry had been accepted; and his entry-papers had received the endorsement, "First proof sufficient for three years." So far as those three years are concerned, therefore, it would appear that he had no reason to fear an adverse decision. His acts in connection with the land during the fourth year of the entry could not at the date of initiation of contest, nor yet at the date of the hearing, be called in question; for the fourth year had not expired. Upon the expiration of the fourth year, however, his entry was open to attack, for the reason that he had not, at any time during the period covered by his entry, complied with the law as to irrigation; and under the circumstances could not do so. His only hope of retaining possession of the land lay in his making a second homestead entry thereof, under the act of June 5, 1900 (*supra*). He states, under oath, that this was the reason why he made the relinquishment; and the attendant circumstances corroborate such statement.

The contestant evidently confuses two widely different things: to wit, the contest filed by him January 22, 1902, which has been herein held not to have been sustained by the evidence, and a hypothetical contest that he or some one else might file on or after the date of the expiration of the period of Williams's desert-land entry, June 9, 1902, at which failure to reclaim the land within four years as required by law might be shown. It is very clearly conceivable that Williams might relinquish his entry in view of a possible contest on or after the last-named date, and on the last-named ground, and yet his entry be in no way imperiled by a contest initiated on a prior date, and on a different ground.

For the reasons herein set forth, the departmental decision heretofore rendered, holding Williams's application to make homestead entry of the tract in controversy subject to Holcomb's preference right to make entry thereof, is hereby recalled, revoked, and vacated; Holcomb's contest is dismissed; and Williams's application to make homestead entry thereof will be allowed, unless some other reason to the contrary shall appear.

COMMUTATION OF ENTRIES OF CHIPPEWA LANDS—ACT OF MARCH 3, 1905.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 17, 1905.

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

GENTLEMEN: Your attention is called to the act of March 3, 1905 (33 Stat., 1005), entitled "An act extending the provisions of section twenty-three hundred and one of the Revised Statutes of the United States to homestead settlers on lands in the State of Minnesota ceded under the act of Congress entitled 'An act for the relief and civilization of the Chippewa Indians in the State of Minnesota,' approved January fourteenth, eighteen hundred and eighty-nine."

By the terms of said act the right of commutation under section 2301, Revised Statutes, is extended to all lands which have been, or which may hereafter be, opened to homestead entry under said act of January 14, 1889 (25 Stat., 642).

You will, in allowing entries under this act, give them current numbers in your Chippewa series of cash entries, requiring the entrymen in each case to pay, in addition to the purchase price of the land at \$1.25 per acre, the final homestead commissions. See instructions August 17, 1901 (31 L. D., 72), and September 6, 1901 (31 L. D., 106).

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved:

E. A. HITCHCOCK, *Secretary.*

[33 Stat., 1005.]

AN ACT Extending the provisions of section twenty-three hundred and one of the Revised Statutes of the United States to homestead settlers on lands in the State of Minnesota ceded under the act of Congress entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January fourteenth, eighteen hundred and eighty-nine.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of section twenty-three hundred and one, Revised Statutes of the United States, as amended, be, and the same are hereby, extended to all homestead settlers who have made or shall hereafter make homestead entries under the provisions of the act entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January fourteen, eighteen hundred and eighty-nine:

Approved, March 3, 1905.

CERTAIN LANDS IN MINNESOTA HERETOFORE WITHDRAWN FOR RESERVOIR PURPOSES RESTORED TO ENTRY UNDER ACT OF MARCH 3 1905.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 11, 1905.

*Register and Receiver,
Cass Lake, Minnesota.*

GENTLEMEN: Section 1 of the act of March 3, 1905 (33 Stat., 990), provides for the restoration to the public domain, subject to homestead entry only, of certain lands in your district, described below, which were withdrawn from sale or disposal by proclamation of the President, numbered 872, and dated November 28, 1881. It will be observed that lot 7, Sec. 33, and lot 5, Sec. 34, T. 144 N., R. 28 W. of the fifth principal meridian, are excepted from the restoration, and therefore remain in a state of reservation.

Section 2 reserves to the United States the right to overflow the lands restored, or any thereof, by existing reservoirs, or any which may hereafter be constructed, and all patents for the lands restored shall expressly reserve to the United States such right of overflow. You will, therefore, indorse on all homesteads allowed by you for these lands, "Subject to the right of the United States to overflow. See Sec. 2, act of March 3, 1905 (Public, No. 154)."

No entries have been found covering any of the lands referred to in section 1, and thereby restored to the public domain, so that specific instructions under section 3 are not deemed necessary at this time. Should, however, occasion be found therefor, you will be fully advised.

Section 4 declares that no rights of any kind, except as specified in section 3, shall attach by reason of settlement or squatting on these lands, and after prohibiting entry upon or occupancy of the same prior to the day on which they shall be opened to entry, provides that any person violating this provision shall never be permitted to enter any of said lands or acquire any title thereto.

These lands will become subject to entry Monday, September 4, 1905, on and after 9 o'clock a. m., but settlement may be made at any time after 12 o'clock midnight of September 3, 1905.

Any person applying to enter or file for a homestead on said lands will be required first to make affidavit, in addition to other requirements, that he did not violate the law in entering upon and occupying any portion of said lands after March 3, 1905 (the date of said act), and prior to September 4, 1905, the affidavit to accompany your returns for the entry allowed.

Blank forms for said affidavit will be transmitted to you in due time.

Notice of the restoration of these lands to the public domain will be given by publication for thirty days prior to the opening in some newspaper to be designated by the Secretary of the Interior.

You will post a copy of this circular in a conspicuous place in your office, and furnish copies thereof to the various postmasters in your district and to the newspapers for insertion by them as a matter of news.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved:

E. A. HITCHCOCK, *Secretary.*

[Schedule omitted.]

MINING CLAIM—ADVERSE—OATH.

MATTES *v.* TREASURY TUNNEL, MINING AND REDUCTION CO.

To constitute a valid oath under the mining laws there must be, in some form, in the presence of an officer authorized to administer the oath, an unequivocal act by which the affiant consciously takes upon himself the obligation of an oath. There must be some present act to distinguish the oath from the bare assertion of the affiant, and the act must be clothed in such form as will characterize and evidence it.

The requirement of the statute that an adverse claim under the mining laws shall be upon oath is not complied with by the attempt of an officer to administer the oath over a telephone to a person not in the presence of such officer.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 12, 1905.* (G. N. B.)

July 1, 1902, William F. Mattes filed application for patent to the Iron Side, and seventeen other lode mining claims, survey No. 15,342, Durango, Colorado, land district. During the period of publication the Treasury Tunnel, Mining and Reduction Company (hereinafter called the Treasury Company), asserting ownership of the Vagabond lode claim, in conflict with the Iron Side, filed an adverse claim, and suit was commenced thereon within the time limited by the statute. From the record it appears that seventeen other adverse claims of like tenor were filed by the Treasury Company, in which the remaining seventeen claims applied for are alleged, respectively, to be in conflict with a like number of lode claims owned by the Treasury Company; and that suits upon said adverse claims were severally commenced within the statutory period.

October 18, 1902, the applicant for patent filed a motion to dismiss the Vagabond adverse, and at a later date he filed an amended motion to dismiss, supported by certain affidavits. Among other matters, it was alleged, in effect, that the adverse claim was insufficient under the statute, (1) because it appears to have been sworn to by one W. J. Hammond, Jr., as agent of the Treasury Company, whereas no proof of the asserted agency was furnished, and (2) because Hammond had never sworn to the adverse claim at all, but, by the use of a telephone, had called up a notary public who pretended to administer an oath to him over the telephone. At the same time the parties joined in a stipulation that the seventeen other adverse claims, as to each of which the facts relating to the administration of the oath were the same, should abide the result of the motion to dismiss the Vagabond adverse.

Proof of Hammond's agency was subsequently submitted, and thereupon the local officers held the adverse claim to have been legally verified, and overruled the motion to dismiss.

Upon appeal by the applicant for patent, your office, by decision of February 26, 1904, held that the adverse claim had not been legally verified, but that inasmuch as suit thereon had been commenced, the patent proceedings would be suspended to await the judgment of the court.

The applicant has appealed to the Department.

There is no dispute as to the facts: August 25, 1902, W. J. Hammond, Jr., as agent of the Treasury Company, went to the office of the company's attorneys in the town of Ouray, situated outside the Durango land district, where he examined the adverse claims and signed the same in the presence of W. T. Voorhees, a notary public. He was about to make oath to the several claims when some question arose as to the legality of an oath taken outside the land district, and it was agreed that he should go to his residence, twelve miles distant, within the land district, and there "call up" the notary by telephone and make oath to the claims over the telephone. On the next day Hammond called up the notary by telephone as agreed, and used the following language: "Mr. Voorhees, I swear to each of the affidavits to those adverses." Thereupon the notary asked: "You solemnly swear to them?" Mr. Hammond answered "I do." The date was then inserted in the several affidavits, as previously prepared, and the notary attached his jurat to each, as of the same date. The affidavit and jurat attached to the Vagabond adverse are as follows:

STATE OF COLORADO, *County of Ouray, ss.*

On this 26th day of August, A. D. 1902, before me, the undersigned, a notary public in and for the County of Ouray, State of Colorado, personally appeared the above named W. J. Hammond, Jr., who being first duly sworn on his oath

says that he is the duly authorized agent and attorney in fact of the above Company, and the adverse claimant named in the foregoing protest and adverse claim above subscribed by affiant: that affiant has read the foregoing protest and adverse claim and is cognizant of the facts therein set forth, and that the same is true in substance and fact, and is made in good faith to protect the prior and better title to his said principal, The Treasury Tunnel, Mining and Reduction Company.

W. J. HAMMOND, JR.

Subscribed and sworn to before me this 26th day of August, A. D. 1902.
My Commission expires March 5, 1906.

[SEAL.]

WILLARD T. VOORHEES,
Notary Public.

Section 2326 of the Revised Statutes provides that an adverse claim under the mining laws "shall be upon oath of the person or persons making the same." By the act of April 26, 1882 (22 Stat., 49), it is provided that such oath may be made by a duly authorized agent or attorney-in-fact of the adverse claimant.

The question here presented is whether the conversation which took place between Voorhees, the notary, and Hammond, the agent of the Treasury Company, not in the presence of each other but over a telephone, constituted the administration of an oath by the notary to Hammond.

By section 2335 of the Revised Statutes, it is provided that all affidavits required to be made under the mining laws "may be verified before any officer authorized to administer oaths within the land district where the claim may be situated;" and by the act of April 26, 1882, *supra*, it is provided that in certain specified instances the required oath may be made before an officer outside the land district. It is to be observed that under either statute the oath is to be made *before* the officer authorized to administer it. So also, under the statute denouncing perjury as an offense against the United States, an oath, the falsity of which is alleged, must have been taken *before* a competent tribunal, officer, or person. That a proceeding or act required to be had or done *before* a tribunal or officer authorized by law, must be *in the presence of* such tribunal or officer, there would seem to be no room for question.

An oath is defined, generally, to be an outward pledge, given by the person taking it, that his attestation, statement, or promise is made under an immediate sense of his responsibility to God (Bouv. Law Dic.; *Priest v. State*, 10 Nebr., 393, 399; *Winfield's Adjudged Words and Phrases*, 424, 429; *Proffatt on Notaries*, Sec. 72; *John's American Notaries*, Sec. 190). No particular form is necessary. The requirement of an *oath* may be complied with by making *affirmation* in judicial form. It is specifically so provided with respect to oaths required under the laws of Congress (Revised Statutes, Section 1; *Bram v. United States*, 168 U. S., 532, 567).

To constitute a valid oath, however, for the falsity of which perjury may be assigned, there must be, in some form, in the presence of an officer authorized to administer the oath, an unequivocal and present act by which the affiant consciously takes upon himself the obligation of an oath. While large liberty is given as to the form of the oath, yet some form is essential. There must be some present act to distinguish the oath from the bare assertion of the affiant, and the act must be clothed in such form as will characterize and evidence it (O'Reilly v. People, 86 N. Y., 154, 162; Case v. People, 76 N. Y., 242; State v. Gay, 60 N. W. Rep., 676-677; Stoddard v. Sloan, 65 Iowa, 680, 684; Mathews v. Reid, 94 Ga., 461, 462; Carlisle v. Gunn, 68 Miss., 243, 249; Arnold v. Middletown, 41 Conn., 206, 209-210; 21 A. and E. Ency. Law, 747).

There can be no question that a statute which requires an oath will be complied with if the subject-matter of the oath be reduced to the form of an affidavit and legally affirmed or sworn to (Edwards v. McKay, 73 Ill., 570). This is because an affidavit includes the oath (1 Bouv. Law Dic., Ed. 1897, p. 111; Burns v. Doyle, 28 Wis., 460, 463). An affidavit may be generally defined as a statement or declaration on oath, reduced to writing and affirmed or sworn to before some officer who has authority to administer an oath. It is usually signed by the affiant, although this is not necessary unless specially required by statute (Bouv. Law Dic., *supra*; Harris v. Lester, 80 Ill., 307, 311; State v. Sullivan, 39 S. Car., 400, 408; Gill v. Ward, 23 Ark., 16-17; Shelton v. Berry, 19 Tex., 154-70 Am. Decs., 326; Watts v. Womack, 44 Ala., 605, 607; Winfield's Adjudged Words and Phrases, 24-25; 1 A. and E. Ency. Law, 909-910, and notes; Proffatt on Notaries, Secs. 65, 68; John's American Notaries, Sec. 206).

The foregoing authorities, and many more that might be cited, are all to the effect that an oath or affidavit, to be valid and binding, must be made *before*—that is, *in the presence of*—the officer authorized to administer it. The attention of the Department has not been called to any authority to the contrary, nor has any been found after the most diligent search. The administration of an oath is a solemn function. It is essential, from the very nature of the proceeding, that the affiant be in the presence of the officer when the function is performed. How else could the oath be administered and its obligation assumed? If an oath may be administered to a person twelve miles away from the officer, it may, with equal propriety, be administered to a person a thousand miles away. There is no difference, in principle, in the two propositions.

In the case at bar the notary states in his certificate that Hammond, the agent, "personally appeared" *before* him on the 26th day

of August, 1902, and *before* him, on that day, subscribed and made oath to the adverse claim. Under the admitted facts, however, the certificate in these respects is false. Hammond was not *before* the notary on the day mentioned at all, and never, at any time, "personally appeared" *before him and made oath* to the adverse claim. When the detailed conversation took place over the telephone, Hammond and the notary were twelve miles distant from each other. The affiant was in no sense *before* the officer.

In the case of *Sullivan v. First National Bank*, recently decided by the Court of Civil Appeals of Texas (83 SW. Rep., 421), a similar question was involved. In that case, as in this, there was an attempt to administer an oath over a telephone. The court held the proceedings to be without legal effect for the reason that under the law an oath cannot be administered otherwise than in the personal presence of the affiant, and refused to accept, as an *affidavit*, a paper executed in such manner.

In view of what has been said, the Department is of opinion that the attempt of the notary in this case to administer the required oath to Hammond over the telephone was a vain thing, and without legal effect for any purpose under the mining laws. It follows that the adverse claim in question, not being *upon oath* as required by the statute, is invalid and therefore without force and effect to stay the proceedings upon the application for patent.

While the land department may, in the exercise of its supervisory power over the public lands, suspend proceedings upon an application for patent to a mining claim, pending the determination of a suit in court involving the land applied for, even though such suit be not upon an adverse claim within the meaning of the statute, such suspension should only be made where it appears that a judicial determination of the questions involved in the suit would, in some substantial manner, aid the Department in the disposition of matters properly pending before it. It does not appear from the record in this case that the land department would be aided in any manner in the discharge of its functions, by awaiting the determination of the suit on behalf of the Vagabond claim.

The decision of your office is therefore reversed, and the application for patent, if in all respects regular, will be allowed to proceed in the usual course.

FOREST RESERVES—REPEAL OF LIEU SELECTION ACTS—ACT OF
MARCH 3, 1905.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 16, 1905.

*Registers and Receivers,
United States Land Offices.*

GENTLEMEN: The text of the act of Congress approved March 3, 1905 (33 Stat., 1264), entitled, "An act prohibiting the selection of timber lands in lieu of lands in forest reserves," is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the acts of June fourth, eighteen hundred and ninety-seven, June sixth, nineteen hundred, and March third, nineteen hundred and one, are hereby repealed so far as they provide for the relinquishment, selection, and patenting of lands in lieu of tracts covered by an unperfected *bona fide* claim or patent within a forest reserve, but the validity of contracts entered into by the Secretary of the Interior prior to the passage of this act shall not be impaired: *Provided,* That selections heretofore made in lieu of lands relinquished to the United States may be perfected and patents issue therefor the same as though this act had not been passed, and if for any reason not the fault of the party making the same any pending selection is held invalid another selection for a like quantity of land may be made in lieu thereof.

From and after the date of the approval of said act there was no authority of law for the acceptance of relinquishments of lands within forest reserves, and the selection of other lands in lieu thereof under the acts of June 4, 1897 (30 Stat., 36), June 6, 1900 (31 Stat., 614), and March 3, 1901 (31 Stat., 1037), and no such selections should have been, or will hereafter be allowed, except as hereinafter specified.

In providing that "the validity of contracts entered into by the Secretary of the Interior prior to the passage of this act shall not be impaired," Congress referred to, recognized and authorized the consummation of certain agreements entered into between the Secretary of the Interior and the owners of certain odd numbered sections of land in the San Francisco Mountains and Grand Canyon forest reserves in Arizona, and the owners of certain lands, not theretofore reserved but included by the President's proclamation of December 22, 1903, within the Santa Barbara forest reserve in California. Under this provision selections are still authorized to be made in satisfaction of tracts relinquished, or to be relinquished, as follows: First, of odd numbered sections within the San Francisco Mountains forest reserve, Arizona, relinquished or to be relinquished to the

United States, either by the Santa Fe Pacific Railroad Company, the Aztec Land and Cattle Company, the Saginaw and Manistee Lumber Company, William F. Baker or Edward B. Perrin; second, of odd numbered sections within the Grand Canyon forest reserve, Arizona, relinquished or to be relinquished to the United States by the Santa Fe Pacific Railroad Company; and, third, lands of both even and odd numbered sections, within the Santa Barbara forest reserve, California, as defined by the President's proclamation of December 22, 1903, but which were not included within the former Pine Mountain and Zaca Lake forest reserve nor within the former Santa Ynez forest reserve, and relinquished or to be relinquished to the United States by either the Santa Barbara Water Company, or Jed L. Washburn. Upon the presentation of such relinquishments, with applications to select lands in lieu thereof, in accordance with instructions of July 7, 1902 (31 L. D., 372), you will accept same if otherwise unobjectionable.

Under the proviso to the act all selections under the acts of June 4, 1897, and June 6, 1900, *supra*, made prior to and pending for adjudication on March 3, 1905, may be perfected and patented as though the said act of March 3, 1905, had not been passed; and if in the adjudication of any selection then pending same should be held invalid for any reason not the fault of the party making same, it is provided that another selection for a like quantity of land may be made in lieu thereof. Should application be presented under this provision of the law you will be careful to see that same is in strict compliance with the instructions of July 7, 1902 (31 L. D., 372), except that instead of the showing specified in section 22 of such instructions the selector will be required to file his affidavit setting out the facts as to the prior selection in lieu of the relinquished tract, including the date when and place where such selection was made; the description of the land selected; the General Land Office number of such selection, and the date when finally rejected and canceled, so that it may clearly appear therefrom that the original selection was pending and not finally adjudicated on March 3, 1905.

The repealing act makes no provision for cases where lands within forest reserves may have been reconveyed to the United States, but no selections made in lieu thereof, or where such selections if made were finally rejected and canceled prior to March 3, 1905. Except as to the exceptional cases first above specified there is now no provision of law authorizing selections in lieu of such relinquished tracts.

Very respectfully,

W. A. RICHARDS, *Commissioner*.

Approved:

E. A. HITCHCOCK, *Secretary*.

MINING CLAIM—LOCATION—CORNERING TRACTS.

TOMERA PLACER CLAIM.

A location under the mining laws can legally be made only of a tract or piece of land embraced within one set of boundary lines; and two or more tracts merely cornering with each other can not legally be embraced in a single location.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 17, 1905.* (G. J. H.)

September 29, 1902, Christofer Tomera made mineral entry No. 4200, for the Tomera placer mining claim, embracing the E. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 15; the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the E. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 22; and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 21: all in T. 12 N., R. 9 W., Helena, Montana.

December 11, 1903, your office allowed the entryman sixty days from notice within which to show cause why the entry should not be canceled for noncontiguity of the tracts embraced therein, due to the fact that some of them are connected with the others merely by cornering therewith.

February 6, 1904, the entryman appealed to the Department.

The twelve ten-acre tracts embraced in the claim lie in a long, narrow strip, running in a general northeasterly and southwesterly direction, and their appearance on the plat or diagram may be likened to a series of ascending steps. The northernmost five ten-acre tracts adjoin and form a compact body of land, as do also the southernmost four tracts. The three other ten-acre tracts embraced in the claim, each being square in shape, lie in a diagonal row connecting the two larger bodies, cornering therewith and with each other.

The "location" of a mining claim is the act of appropriating a parcel of public mineral land in accordance with the provisions of the mining laws. The term is also applied to the parcel of land so appropriated. (*Smelting Company v. Kemp*, 104 U. S., 636, 649.) Land so located is also referred to in section 2325 of the Revised Statutes as "a piece of land." Tracts which merely corner on each other do not constitute one body or piece of land. (*Kreslin v. Mau*, 15 Minn., 116, 119; *Linn County Bank v. Hopkins*, 47 Kan., 582; 29 Pac. Rep., 606, 607.) Section 2320 of the Revised Statutes provides, among other things, 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." By section 2329 of the Revised Statutes this provision is made applicable to placer claims. (Union Oil Company, on review, 25 L. D., 351, 358.) The limits of a mining claim are defined by its exterior boundary lines. Tracts which merely corner with each other have entirely separate limits and boundaries. But one discovery of mineral is required to support a placer location (Union Oil Company, *supra*); and since such discovery is confined by the language of the statute to the "limits of the claim"—clearly contemplating what may be embraced within one set of boundary lines—it is evident that a claim may not legally be taken in such form as to make necessary two or more sets of boundary lines, defining separate limits. There is no provision of the mining laws authorizing a locator, by virtue of a discovery of mineral within the limits of one parcel of ground, to embrace in his location another and entirely different parcel, lying wholly without such limits and having separate and distinct boundaries, merely because the two parcels corner with each other. Tracts so situated are in fact, and in the administration of the mining laws must be considered and treated as constituting, separate and distinct parcels of ground.

The entry here in question, having been allowed on a location embracing tracts merely cornering with each other, can not pass to patent in its present form.

As before stated, however, the northernmost five ten-acre tracts embraced in the claim adjoin and form one body of land, as do also the southernmost four tracts, and there would seem to be no reason why the entry may not stand as to either of these groups, or as to any one of the intermediate ten-acre tracts, provided the requisite discovery and expenditure in labor or improvements have been made thereon. You will therefore notify the claimant that he will be allowed a reasonable time, to be fixed by your office, within which to elect which, if any, of the tracts mentioned he desires to retain under the entry. If the election be made within the time limited, and a sufficient showing be filed as to discovery and expenditure upon the tract so designated, the entry may stand as to it, and will be canceled as to the remainder. If no such election and showing be made within the time limited, the entry will be canceled in its entirety.

Your office decision is modified accordingly.

SIOUX HALF-BREED SCRIP—ASSIGNMENT.

ARTHUR L. HINMAN.

Sioux half-breed scrip is not assignable, and a power of attorney to locate the same can not be made irrevocable, nor create any interest in the attorney, but is subject to revocation at any time prior to location of the scrip thereunder.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 17, 1905.* (P. E. W.)

Arthur L. Hinman has appealed to the Department from your office decision of December 17, 1904, allowing him, and also Francis G. Burke, sixty days within which to show cause why Louis Labelle, Jr., should not be declared the true and lawful owner of Sioux half-breed certificate No. 387 D, and the same be returned to him.

Error is assigned in holding that the scrip in question must be returned to the scrippee, in not returning same to appellant by whom it was surrendered to the land department, and in passing upon the right to the control of said scrip further than to restore it to the possession from which it came. The record shows that on July 14, 1900, said Labelle executed a power of attorney to said Burke, and on July 27, 1901, to said Hinman, to locate said scrip; that on November 11, 1901, said Hinman applied to locate the same; and that on September 28, 1904, Hinman filed in your office a relinquishment, dated July 1, 1904, "of any and all claims he might have to the land described in his said application to locate, by virtue of said application." Previously to this, on November 29, 1901, a duly executed revocation of said power of attorney to Hinman had been filed in your office, but it does not appear that he received any notice of such revocation. On May 3, 1904, the local officers transmitted to your office a relinquishment, dated April 27, 1904, duly executed by said Burke, "of any and all claim to the land described in his application to locate said scrip, by virtue of said application." By your said decision both relinquishments were accepted and both applications to locate said scrip were finally rejected and canceled.

Both Hinman and Burke, in thus relinquishing any and all claims to lands which they had applied to locate under their said powers of attorney, requested "that the scrip certificate be delivered to Charles P. Maginnis, Duluth, Minnesota."

October 21, 1904, Labelle executed a revocation of both said powers of attorney to Hinman and Burke, and later filed the same in your office together with a request that said scrip certificate No. 387 D be returned to him.

The question presented by this appeal is whether, in view of the facts stated, it was error to hold that Labelle, and not Maginnis, is

entitled to the possession and control of said scrip certificate No. 387 D.

No right appears on the part of said Maginnis to receive the said scrip certificate, either by substitute power of attorney from Hinman or Burke, or by authorization from Labelle. It is only in said requests of Burke and Hinman that Maginnis is mentioned in connection with the said certificate.

The act of Congress of July 17, 1854 (10 Stat., 304), which authorized the issue of such scrip, provided that "no transfer or conveyance of any of said certificates or scrip issued shall be valid."

In the case of *Midway Company v. Eaton* (183 U. S., 602, 611), the court quoted with approval the following language of the supreme court of Minnesota:

It was the intention of Congress that the right to acquire public lands by means of this scrip should be a personal right, in the one to whom the scrip was issued; and not property in the sense of being assignable. . . . In the scrip itself the half-breed had nothing which he could transfer to another . . . any attempt to transfer the scrip directly or indirectly, would be of no effect as a transfer. . . . It would be simply ineffectual, because the scrip is not transferable. . . . A power of attorney . . . could not be made irrevocable, nor create any interest in the attorney.

It is not alleged or shown herein that Hinman's said power of attorney, or that of Burke, is coupled with an interest in the act to be performed or was conferred upon a valuable consideration, and in view of the relinquishment of said applications to locate, which were the only acts performed under such powers of attorney, there can be no question of Labelle's right to revoke the same.

Your said decision is accordingly hereby affirmed.

**RIGHT OF WAY FOR IRRIGATION PURPOSES—INDIAN RESERVATION—
ACTS OF MARCH 3, 1891, AND JUNE 17, 1902.**

OPINION.

The grant of a right of way through the public lands and reservations of the United States for irrigation purposes, made by section 18 of the act of March 3, 1891, extends to Indian reservations, as reservations of the United States, subject to the condition that the location and construction of the ditch or canal shall not interfere with the proper occupation of the reservation by the government for Indian purposes.

For the purpose of carrying out the provisions of the act of June 17, 1902, the government may avail itself of the privileges conferred by the act of March 3, 1891, granting the right of way through the public lands and reservations of the United States for canals, ditches and reservoirs for irrigation purposes, to the same extent that individuals, corporations, or associations of individuals, may exercise such privileges, and subject to the same conditions and limitations.

Assistant Attorney-General Campbell to the Secretary of the Interior,
May 18, 1905. (E. F. B.)

I am in receipt of a letter from the Director of the Geological Survey relative to the withdrawal of lands in the Coeur d'Alene Indian reservation in Idaho for a reservoir site for use in connection with the Palouse irrigation project to be constructed under the act of June 17, 1902, which has been referred to me for an opinion upon the question presented therein.

The practical question presented by the letter of the Director is whether the right of way for irrigation purposes granted by the act of March 3, 1891 (26 Stat., 1095), extends to said reservation and whether the government is entitled to the privileges conferred by said act in constructing works for irrigation under the act of June 17, 1902 (32 Stat., 388).

The act of March 3, 1891, grants to corporations, individuals or associations of individuals the right of way through the public lands and reservations of the United States for canals, ditches and reservoirs for irrigation purposes, with the proviso that no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation.

Upon the application of the Rio Verde Canal Company (27 L. D., 421) it was held that the grant made by the 18th section of the act of March 3, 1891, extended to Indian reservations, as reservations of the United States, subject to the conditions that the location and construction of the ditch or canal shall not interfere with the proper occupation of the reservation by the government for Indian purposes.

The "proper occupation by the government" of an Indian reservation is the occupancy of it by the Indians for their special use, and any occupancy or use of such reservation otherwise, that would interfere with the free use and enjoyment of the reservation by the Indians would be a diversion from the uses intended, and is expressly prohibited by the proviso, which is as applicable to an Indian reservation as to any other reservation set apart for the uses of the United States.

In opinions heretofore submitted by me as to the right of the government to the benefits of the provisions of the act of February 15, 1901 (31 Stat., 790), authorizing the Secretary of the Interior to permit, under certain conditions, the use of rights of way in forest reservations and national parks in California, I advised that the lands within such reservations may be subjected to use by the government for the purposes contemplated by the act of June 17, 1902, to the same extent that individuals, associations or corporations may be permitted to use them for such purposes. (See Opinion, 33 L. D., 389; *Id.*, 415.)

To the same extent the privileges conferred by the act of March 3, 1891, may be availed of by the government in carrying out the provisions of the act of June 17, 1902. Under both acts the duty devolves upon the Secretary of the Interior to determine whether the use of the land for such purposes will or will not be incompatible with the public interest and to grant or refuse it accordingly. In the opinion above referred to, reported on page 389, it was said:

that while a withdrawal or reservation of lands for irrigation purposes can only be made by the Secretary of the Interior by virtue of the authority conferred by the act of June 17, 1902, and for the purposes and in the manner contemplated by that act, the act of February 15, 1901, confers no absolute right to the use of a right of way over public lands within reservations of the United States, but the granting of such permit rests in the sound discretion of the Secretary of the Interior, who may withhold generally from such privilege the lands in any particular reservation, if in his judgment the granting of a permit for use of a right of way for certain purposes would be "incompatible with the public interest," and accomplish by this means all that would be accomplished by a formal withdrawal or reservation.

To a like extent the grant of a right of way by the act of March 3, 1891, where it passes over or occupies any of the reservations of the United States contemplated by that act, is subject to the proviso "that no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation, and all maps of location shall be subject to the approval of the Department having jurisdiction of such reservation," which will determine whether it can be so located as not to impair or interfere with such use and will withhold or give its approval accordingly.

The decision in the case of the Rio Verde Canal Company, and the opinions above cited, had reference to reservations generally, where no private rights would be infringed upon or impaired by the occupation of the reservation for the uses contemplated. With reference to this particular reservation, the Director calls attention to an opinion submitted by me July 11, 1904, "as to whether under the acts of Congress the reclamation service can obtain title to the use of a reservoir and the diversion of water from a stream within an Indian reservation." Upon that question I advised that no part of this reservation can be disposed of by Executive authority in the manner contemplated by the Director, it having been confirmed to the Coeur d'Alene Indians by an agreement entered into between the United States and the Indians and ratified by Congress, by which the lands were ceded to the Indians to be held forever by them and their posterity as a home, and it was declared that "no part of said reservation shall ever be sold, occupied, open to white settlement or otherwise disposed of without the consent of the Indians residing on said reservation."

It was contemplated by the Director that the site for the reservoir

would be purchased in the same manner as rights or property are acquired from private owners under authority of the seventh section of the act of June 17, 1902, it being stated in his letter that it will "be necessary to flood considerable territory within the reservoir site, for which compensation is contemplated," and the opinion was given with reference to the right of the reclamation service to acquire such right by condemnation under authority of the 7th section of the act of June 17, 1902.

In view of the positive stipulation in the agreement with said Indians that no part of the reservation "shall ever be sold, occupied, . . . or otherwise disposed of without the consent of the Indians," I was of the opinion, and I advised, that no right to any lands in said reservation could be acquired otherwise than by express authority of Congress, and hence cannot be acquired under authority of the 7th section of the act of June 17, 1902.

It is clear that a right of way for the proposed reservoir site within this reservation should not be approved either upon application of the reclamation service or of any party. Since this Department has full control of the matter, it may preserve this site from appropriation by refusing to approve applications therefor, and instructions to the Commissioner of Indian Affairs and the Commissioner of the General Land Office that no such applications will be approved as requested by the Director of the Geological Survey are not absolutely necessary. Such instructions, however, could work no harm, and would have the effect of giving notice to the public that no such right will be given.

Approved:

E. A. HITCHCOCK, *Secretary.*

TIMBER AND STONE ENTRY—PAYMENT OF PURCHASE MONEY.

JAMES T. BALL.

The purchase money under the act of June 3, 1878, must be placed in the hands of the receiver at the time of the submission of final proof, and when so paid is in contemplation of law public money, subject to forfeiture under the provisions of section two of said act.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *May 24, 1905.* (C. J. G.)

The Department is in receipt of the letter of your office of March 27, 1905, asking to be advised and making certain recommendations in connection with the case of James T. Ball here on appeal from the decision of your office of November 19, 1904, rejecting his application

filed at the Boise, Idaho, land office, to make entry under the timber and stone act of June 3, 1878 (20 Stat., 89), which was made applicable to all the public-land States by the act of August 4, 1892 (27 Stat., 348).

The application of Ball was made September 25, 1901, at which time he gave notice of intention to submit final proof December 6, 1901, and filed in support of his application to enter, a sworn statement with respect to the land applied for, in compliance with section 2 of said act of June 3, 1878, which required the applicant to state, 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.

The penalty attached to false swearing in the application is set forth in said section 2 as follows:

and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void.

As set forth in the case of *Hughes v. Tipton* (2 L. D., 334):

Section 2 provides for an oath similar, and with similar penalties for false swearing, to that prescribed in section 2262, Rev. Stat., and in general it may be said that the applicant, having taken said oath, and furnished the proofs required by section 3 to the satisfaction of the local officers, is as fully entitled to enter the land as a preemptor who has taken the oath and furnished the proofs required of him. Hence the timber application initiates a valid claim to the land, in the same manner as does the pre-emption declaratory statement; and the applicant under it, in like manner as the pre-emptor, has a preferred right against everybody but a prior claimant and the United States.

Section 3 of the act reads in part:

That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land-office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act . . . and upon payment to the proper officer of the purchase-money of said land, together with the fees of the register and the receiver . . . the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and

testimony in the case, a patent shall issue thereon. . . . Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

Although advertised for December 6, 1901, the final proof of Ball was not in fact submitted until the tenth of that month, at which time he also placed in the hands of the receiver the purchase money for the land as well as the fee and commissions of the local officers. Before any action was taken on said proof or final certificate issued, an investigation of the case was made by a special agent of your office, and upon his report, which challenged the truth of the matters contained in the preliminary statement filed by Ball with his application to enter, a hearing was ordered and had, the local officers recommended the rejection of said application and proof, their action was sustained by your office, and the case, as stated, has been appealed here. The purchase money, fees and commissions are now held by the receiver pending final action. Your office, in the letter under consideration, states:

the matter is now again before this office on the question as to whether the money tendered by Ball should be held by the receiver pending the final action or returned to Ball to be repaid in case favorable consideration is finally given and the entry allowed.

An answer to this question calls for a consideration of the character of these funds and the manner of treating and disposing of moneys given into the hands of receivers. In making disposition of the funds received by them, receivers treat all moneys as belonging to one of two general classes, one designated as "official moneys," being such moneys as arise from completed transactions in his office, which are deposited by him to the credit of the Treasury of the United States; and, another, "unearned fees and unofficial moneys," or such as are tendered to and received by him on incompleted transactions which are to be deposited to the receiver's credit and held by him subject to final action on the application under which they are tendered, when, if favorable action is taken, these unearned fees and unofficial moneys are transferred to the credit of the Treasurer of the United States and become official moneys.

The money paid by Ball was classed and disposed of as unofficial moneys and unearned fees and is now so held.

Again your office says:

the law declares that the perjured entryman "shall forfeit the money which he may have paid for the lands." It would therefore appear that before the forfeiture can be declared the money in the hands of the receivers must be moneys which the applicant "may have paid for said lands," or, in other words, the question here to be determined is whether or not the moneys which have been tendered, and are being held pending action, are moneys which "have been paid for said lands." Can moneys which Ball tendered be said to come within the denomination of "moneys paid for the land." If they can, then they must be forfeited. Looking to the language of this act for the answer to this question, we find the applicant, after having made the preliminary affidavit, and caused the proper publication of notice must first "furnish to the register of the land office satisfactory evidence" as to certain facts "when upon

the payment to the proper officer of the purchase money of said land" together with the fees, "the applicant may be permitted to enter the tract." If this language requires the payment to be made at or immediately after the offering of the proof and before it is determined to be satisfactory, then it would appear that the money tendered by Ball was "a payment" and that the moneys so paid are subject to forfeiture.

Is the applicant required to make this payment before or after the proof is determined to be satisfactory?

For certain stated reasons your office recommends that this matter be referred to the Department of Justice for opinion in the premises; but such course is not deemed advisable or necessary in the present instance.

The act of June 3, 1878, does not prescribe the exact time at which payment of the purchase money shall be made thereunder, that matter being left for regulations by the land department. But the circulars and instructions issued from time to time are very specific as to when payment of purchase money is to be made. In the instructions of November 18, 1884 (3 L. D., 188), it was said:

Final proof and payment must be made at the same time. Proofs presented without tender of payment must be rejected.

Prior to that date there was no prohibition, either in law or the rules and regulations, against the making of proof and payment at different times; and it was usual to accept such proof, when otherwise satisfactory, if the dilatory action was shown not to have been caused by bad faith or other impropriety on the part of the entryman. *Ida May Taylor* (6 L. D., 107, 108).

Instructions of January 5, 1885 (3 L. D., 298) :

The purchase price of the land sought to be entered should always accompany the proofs and application to purchase, and if not found therewith the papers must be promptly rejected and returned.

Circular of November 2, 1886 (5 L. D., 220) :

Proofs taken by other officers than registers and receivers must be immediately transmitted, with the money, to the register and receiver Proof without payment must in no case be accepted or received by registers and receivers.

Lottie Merwin (5 L. D., 221) :

Payment must be made at the time final proof is submitted.

Circular of May 21, 1887, under the timber and stone act (6 L. D., 114, 116) :

13. The entire proof must be taken at one and the same time, and payment must be made at the time of offering proof. Proofs will in no case be accepted in the absence of a tender of the money, etc.

14. When an adverse claim, or any protest against accepting proof or allowing an entry, is filed before final certificate has been issued, you will at once order a hearing, etc.

This same language is embodied in the general circular of January 1, 1889, pp. 40 and 41, as well as in all subsequent circulars, including that of January 25, 1904, p. 42.

In this connection it may be said that the language, "adverse claim," in section 3 of the act of June 3, 1878, has been held to refer to a claim to the land initiated prior to the date of the timber application. *Hughes v. Tipton, supra*; *F. E. Habersham* (4 L. D., 282). This however does not prevent any one, whether a party in interest, or not, from appearing at any time before proof is offered to contest the *bona fides* of the application and the character of the land (id. 283).

In the case of *S. W. Russell, Adm'r.* (25 L. D., 188), referring to the requirements of the foregoing regulations and instructions, it was said:

that it was equally obligatory upon receiver Lesnet to receive the purchase money in question, as it was upon Mason to pay it, at the time final proof was submitted, and *before examination of said proof and in advance of any action thereon by the local office* In the absence of any evidence to the contrary, however, it will be presumed that the proceedings in all respects were regular and that all was done which was required to be done, the payment of the purchase money as prescribed by regulations, *at the time final proof was submitted and prior to the acceptance thereof.*

In that case final proof and payment of purchase money were made at the same time. The proof was held for supplemental proof and the receiver failed to account to the government for the purchase money. Your office held:

As the money in the case now in question was merely deposited with Frank Lesnet, and has not been accounted for nor covered into the treasury, it is a case between the claimant and Lesnet, and you are instructed to require the entryman to pay the receiver the proper amount of purchase money due on the final entry provided the proof is correct, and make due returns thereof to this office.

But the Department on appeal held (syllabus):

Under departmental regulations governing the submission of final proof, and making payment, the entryman is required to make such payment at the time of submitting proof, and it is the duty of the receiver to accept the money at such time; and the subsequent failure of said officer to account to the government for the purchase price of the land, so paid, will not defeat the right of the entryman to receive patent without further payment.

That case also distinguished the case of *Matthiessen and Ward* (6 L. D., 713), wherein your office had said:

Moneys are not payable to a receiver of public moneys until an entry has been allowed by the register and a certificate given. Any moneys placed in the hands of a receiver, or sent to him, to be afterwards applied to any entry, are not moneys lawfully paid to the receiver for which the United States is responsible, but are simply individual deposits in the nature of a personal trust. Such moneys are not received officially, because not authorized to be received.

In the case of Heirs of William Friend (5 L. D., 38), Friend made application under the act of June 3, 1878. He published the usual notices, furnished all the proofs required by the statutes, and tendered the purchase money for the land, but it was refused because of an adverse claim. By a subsequent departmental decision the adverse claim was rejected for invalidity and the land awarded to Friend, who in the meantime had died. His heirs made payment and the entry was allowed. The Department held that the right of a timber land applicant to a patent becomes vested when he has furnished the proofs required by law and paid the purchase money, citing *Stark v. Starrs* (6 Wall., 402), and *Wirth v. Branson* (98 U. S., 118). It was concluded as follows:

Now, in the case under consideration, the money was not *actually* paid and the entry was not *actually* made prior to the death of the original claimant. But he had done all that he was required to do under the law. He had tendered his money, and the only reason why it was not received and his entry then allowed, was because of the invalid adverse claim of Showers. As before stated, my immediate predecessor rejected this claim of Showers for invalidity, and directed that Friend's application should stand. In other words, his right was held to have attached at the date of his said application. This right, as above shown, was a right to a patent if the money had been paid. That it was tendered is, so far as the applicant's rights are concerned, equivalent to the actual payment of the same. His right was, therefore, not merely a *personal* right, but was, in every sense of the word, *inheritable property*.

The case of *Potter v. United States* (107 U. S., 126), involved an action against a receiver for the recovery of moneys which came into his hands as such receiver, and the contention was made that because of irregularities in the proceeding by which entry of the lands was allowed, "there could be no legal pre-emptions during that time, and that all moneys paid for pre-emptions before the conditions prescribed by law had been complied with were not payments made to the United States but unauthorized and unofficial payments made to the receiver, for which his sureties were not liable." But the court held that recovery could not be defeated, it being stated:

The moneys were received by him as public moneys, for he charged himself with them in his accounts with the government. They were paid as public moneys by pre-emptors as a consideration for title to portions of the public domain. . . . These moneys are, therefore, public moneys. They belong neither to Potter nor the pre-emptors, and must, consequently, be the property of the United States. It was, therefore, his duty as receiver to account for and pay to the United States the moneys so received.

The case of *Meads v. United States*, circuit court of appeals (81 Fed. Rep., 684), was a suit against a receiver for money received by him before the time it was payable under a rule of the land department, and not paid out or otherwise legally accounted for. The money was received from persons proposing to make preemption and home-

stead entries, and consisted of the purchase price of public land and officers' fees. The cases had not proceeded so far as the issuance of final certificate. The court held in effect that the payment by the applicants to the receiver was payment to the government; that the money so paid to the receiver was received by him not only *colore officii*, but in the due course of his employment as the officer and agent of the government. The relation of the receiver to the government and to the applicants was considered at length and the court quoted with approval the language of the judge who presided at the trial in the circuit court, as follows:

Payment of the price by the entryman is part of the transaction whereby he is to acquire title to the land. Rules prescribed by the department to the local land officers are for convenience in the transaction of business. Such is the rule requiring payment before action on proofs by those officers—a rule designed to prevent vain proceedings there resulting from a subsequent failure to pay the purchase price. The money may properly be paid at any time while the proceedings for the purpose are *in fieri*, unless some statute or rule prohibits it, and none such has been shown to me. I have no doubt that if the money were not paid at the time of the application, but, upon notification from the land office that the proofs were held sufficient, it should then be paid, the proceeding would be perfectly valid, and the purchaser would have the right to a title. It is a matter of order only. The receiver is the agent of the government to make the sale. If an intending purchaser of land should, with his proposition to buy, pay the price asked by the owner to the agent of the latter appointed to make the sale, the agent would be accountable to his principal for the money, as between them. If the transaction should fail—as, for instance, on account of defect in the owner's title—the principal would be bound to make restitution. The agent would not be liable to the purchaser. It was known that he was acting as agent. He was not selling his own land, nor dealing with a matter of personal concern to himself. There are very cogent reasons for applying this rule of agency to such circumstances as these. My conclusion, therefore, is that, *at whatever stage of the proceedings the money is paid* by the applicant to the receiver upon his intended purchase, the receiver is bound to render an account thereof to the department. It is not his money. He does not receive it as the agent of the applicant. He has no such dual status. If the money was properly payable at the time of the application, it would make no difference whether the government exacted payment then, or was willing to waive payment until the proceeding should ripen.

It has been held that the failure of a receiver to account to the government for the purchase price of land paid at the time of final proof, in such case as the foregoing, will not defeat the right of the entryman to receive patent without further payment. *Germain v. Luke* (26 L. D., 596).

In the case of *Smith v. United States* (170 U. S., 372, 378–380), it is said:

The General Land Office provided by its general circular with regard to the time when payment for public lands sold should be made, and directed "that proofs without payment must in no case be accepted." This regulation did not refer to "final" acceptance of proof, resulting in a favorable decision upon the

application. The statutes already provided that it was only upon payment that the entry might be made. The regulation referred to the taking of the proofs at all. It could only mean that no proof proffered by an entryman should be received without payment of the purchase price of the land which he desired to purchase. The probable purpose of the rule was to prevent the unnecessary examination of proofs in cases where they might be found to be satisfactory and yet the purchase price should not then be forthcoming. Whatever the reason, the direction was plain and unambiguous, and it absolutely forbade the reception of the proofs of the entryman unless at the same time he paid the purchase price to the receiver for lands which he proposed to buy. Thus the entryman could not make his proofs and leave them with the receiver for him and the register subsequently to act upon them, unless the entryman at the time of making his proofs and leaving them for future examination and decision paid the purchase price for the lands. This regulation is not inconsistent with or in violation of the statutes in regard to payment. As we have observed, the payment must by statute be made before entry is allowed, but the particular time is not stated. The regulation above mentioned then comes in, the effect of which is to prevent the acceptance of proof without payment, and the payment must therefore be made when the proof is offered, and it may be some time before it is favorably acted upon by both register and receiver. Thus under provision of law and pursuant to valid requirements of the Land Office the entryman is compelled to pay his money at the time he proffers his proofs and before final action upon them is taken by the two public officers designated in the statutes. When the entryman goes to the public land office for the purpose of obtaining the land he desires, and is told that his proofs can not be filed or accepted unless and until he pays the purchase price of the land, which he thereupon does, he makes such payment to the receiver as a public officer, acting in the line of his duty, and it is safe to say that the entryman is without any thought or intention of paying the money to such receiver as his own private agent, to be kept by that agent in trust until the proofs are satisfactory, and to be then paid by him to the Government; nor are the circumstances of that nature which would lead to the belief that in making such payment the entryman is in fact trusting to the good faith and integrity of the receiver as his agent and that he does not regard himself as dealing with a public officer of the Government. The law accords with the fact. How can it be said that the money which he pays does not become public money upon such payment, when he pays it pursuant to law as the purchase price of land which he desires to buy and the money is exacted from him by the Government before any final action is taken upon his application? What difference does it make that the Government comes under an obligation to repay the money to the man in case the proofs are not finally accepted? The money is none the less public money when paid to this public official pursuant to law and under the direction and by reason of the regulations of the Land Office. See *King v. United States*, 99 U. S., 229.

As the party taking the money is a public officer, and as he exacts the payment, and such exaction is in pursuance of a regulation of the General Land Office, and is consistent with and authorized by law, it seems to us that the money thus paid is received by the receiver as public money and in his official capacity, and he is neither in law nor in fact the agent of the entryman. If the proofs are unsatisfactory and the money is returned, it is returned by the receiver as a public officer and as the agent of the Government, and the money is returned by the Government through its agent.

The custom of the Land Office at the time in question not to have such money appear in the accounts of the receiver with the Government until after

the proofs had been passed upon by both register and receiver and a final receipt given, does not affect the character of the money so paid. The receiver receives the money as a public officer pursuant to the provisions of law. While in the hands of the receiver it remains public money, received by him by virtue of his office, and the money belongs to the Government as between it and the receiver, although it may be under obligation to return the same to the entryman in case his proofs were rejected.

Your office calls attention to a regulation which it regards as not being in harmony apparently with the above rule of simultaneous proof and payment. This rule is found in circular of May 14, 1895 (23 L. D., 572), having reference to what is known as unearned fees and unofficial moneys, and is as follows:

All such unearned fees and unofficial moneys must be promptly returned to the parties from whom received or their legal representatives. The practice of holding the moneys paid in such cases, subject to the order of the applicant until the papers in the application are perfected or completed, is contrary to existing regulations and must be discontinued.

As early as March 10, 1884, your office issued instructions of similar import to registers and receivers, approved by the Department, as follows:

Moneys received at district land offices as fees or commissions, or in payment for lands, in cases where the applications to file or enter are incomplete or can not be allowed for any reason, must be promptly returned to the applicant. The practice of holding the moneys paid in such cases subject to the order of the applicant, until the papers in the application are perfected or completed, or may be received, must be discontinued. Where money is returned to an applicant or entryman a record of the tender of payment and return of the money should be made.

The circular of May 14, 1895, required that a uniform detailed record be kept by receivers and monthly reports made to your office of unearned fees and unofficial moneys received, returned and on hand, and circular of December 26, 1896 (23 L. D., 573), required them, in addition to the monthly reports, "to render a regular quarterly disbursing account under their bond as special disbursing agent, of all such moneys received." As further showing in what character these moneys are regarded it was said in the latter circular: "These moneys will be held by receivers as other disbursing funds and will be so deposited." See also circulars of June 5, 1897 (24 L. D., 505), and February 27, 1900 (29 L. D., 649).

It appears that under authority of the circular of May 14, 1895, *supra*, your office on November 19, 1903, issued a circular letter to receivers as follows:

The accumulation of large sums of unofficial moneys is contrary to public policy and must be discontinued. You will take immediate steps to return all moneys received with timber and stone proofs in which the final papers can not now be issued. Hereafter, when timber and stone proofs shall have been received, unless the same can be at once considered, you will return the money.

Furthermore, it appears that your office specifically directed the receiver at Boise, Idaho, to return the moneys in his hands received from James T. Ball. The receiver did not comply with the direction of your office, but, on the contrary, asked that the matter be further considered and that he be further advised, in view of the fact that the local officers and your office had found that Ball committed perjury and fraud in connection with his timber land application and proof, and also in view of the advice of the United States district attorney to the receiver that said moneys should not be returned pending final disposition of the case.

As clearly shown by the foregoing, the timber land act provides that payment of the purchase money thereunder must be made before entry is allowed, the language being, "and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and receiver. . . . the applicant may be permitted to enter said tract." Referring to this your office says:

If this language requires the payment to be made at or immediately after the offering of the proof and before it is determined to be satisfactory, then it would appear that the money tendered by Ball was "a payment" and that the moneys so paid are subject to forfeiture.

The regulation under the act prescribes that final proof and payment must be made at the same time. The courts hold that this regulation is not inconsistent with nor in violation of the act in regard to payment. Departmental decisions are to the effect that payment must be made in advance of the examination and acceptance of final proof. The conclusion to be drawn from the references made herein is that the act does in fact require payment to be made before the proof is determined to be satisfactory. Therefore, as suggested by your office, the money tendered by Ball was in fact "a payment" within contemplation of said act. Under the regulations and decisions referred to the Department may prescribe any time prior to entry for payment of the purchase money and the time so prescribed becomes the time such payment is lawfully due and must be made. If placing the purchase money in the hands of the receiver upon submission of final proof constitutes payment for one purpose under the act it is payment for all purposes. That is, if it is subject to appropriation in case of favorable action on the final proof it is also subject to forfeiture in case of unfavorable action thereon due to the discovery of fraud. No distinction in this respect can be made. It was said in the case of *Smith v. United States, supra*, in which the court declined to follow the case of *Matthiessen and Ward, supra*:

These distinctions between the acts of the receiver as an alleged agent of the entryman in receiving the money prior to the decision upon the sufficiency of the proofs, and the same receiver as agent of the Government in the keeping of

public moneys, ought not to be created by any refined reasoning. . . . Public money in the sense of the law . . . is money which legally comes to the receiver by virtue of his office and as a public officer and while carrying out the duties of his office.

In this case all the requirements of law and the regulations thereunder had been complied with; the preliminary affidavit was filed, publication had been made for the requisite period, final proof submitted, and the money tendered therewith and received. It is believed that the purchase money under the timber land act has been paid in contemplation of said act when everything necessary on the part of the purchaser has been done in accordance with the law and regulations, and when, but for the discovery of fraud, final certificate would issue entitling him to a patent. If the money is not paid, but merely deposited when placed in the hands of the receiver, then it is at all times subject to the order of the depositor and can be withdrawn when detected in the attempt to illegally obtain title to the land. Under such a construction, should a party be detected in such an attempt he would simply request the return of his money and thus be subjected to no loss or inconvenience. A construction of the act which would lead to such a practice and to such results, would undoubtedly be contrary to the intendment of said act and against a sound policy. If the entry of Ball had been actually allowed there is no question that the purchase money, if subsequent developments disclose fraud, would be forfeited. And yet the mere allowance of the entry could not affect his status, for the entry being in its inception fraudulent no title could pass by it.

Whether or not the money in question was received in violation of the rules and regulations of the land department is not so important after all, as its receipt was not in violation of the act and was received by the receiver *colore officii*, was therefore public money, the accounting for which he is undoubtedly responsible. Though it was public money in this sense, as between the government and that officer, yet not having been paid into the Treasury it would be competent to return it if the purchase of the land for which it was paid be not consummated; unless that return be prohibited by law, as is undoubtedly the case under section 2 of the timber land act, in view of the proof of fraud.

With respect to the circular letter of your office of November 19, 1903, directing the return of moneys received with timber land proofs on which final papers can not at the time be issued, it appears that said letter was based on general departmental circular of May 14, 1895, *supra*, which does not have occasion to specifically refer to the timber and stone law containing a forfeiture provision. The circular of 1895 only contemplates the return of moneys where the papers of the applicant for entry are not "perfected or completed." In

the case under consideration, as hereinbefore stated, all the requirements of law and the regulations had been complied with. In fact, on the face of the proof offered, an entry was allowable. This in itself would seem to distinguish the case from the class contemplated in the circular of 1895. In other words, here it had not been determined that the proof was incomplete or imperfect. The application to purchase was not rejected because of any irregularity on the face of the final proof; so that a time had not arrived under said circular when the money should have been returned. It may be said that the circular letter of your office of November 19, 1903, is directory only and if inconsistent with law and regulations, either by way of enlargement or restriction, it should not be followed. The payment of purchase money as in this case is not made under authority of a regulation, but by virtue of an act of Congress requiring such payment; nor is the money disposed of or accounted for under a regulation, but by authority of law. Hence, the manner in which the receiver may keep his accounts or make his reports and returns does not control the question under consideration. The only bearing that feature has is that so long as the money remains in the control and custody of the land department it may be for proper reasons returned to the purchaser; while after it has been covered into the Treasury specific statutory authority is required to take it out. The directions given by your office for the return of the money received from Ball were evidently precautionary and as matter of expediency, based upon the circular letter of November 19, 1903, and not due to any requirement of law but to the accumulation of a sum of money in the receiver's hands largely in excess of his bonded liability. This condition suggests the advisability of a different arrangement as to the custody and safety of this class of funds, but it can not alter their character nor prevent the operation of the forfeiture provision of the timber and stone act so long as said funds remain in the category of public moneys. If the receiver had followed the directions of your office and returned the money received from Ball, then of course the same could not be forfeited. But such is not the fact. The money is still in the hands of the receiver or in a designated depository to his credit, and being money which the applicant "may have paid for said lands," the act forfeits the same *proprio vigore* upon a showing that the applicant swore falsely in his preliminary statement. The circular letter of your office of November 19, 1903, will be revoked and you will take such precautionary steps, in line with the suggestions contained herein, as will properly and sufficiently safeguard the keeping and disbursement of moneys of the character now in question.

HEIRS OF GEORGE LIEBES.

Motions for review of departmental decisions of March 10, 1905, 33 L. D., 458 and 460, denied by Secretary Hitchcock, May 26, 1905.

PRACTICE—NOTICE—SERVICE BY PUBLICATION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., May 27, 1905.

*Registers and Receivers,
United States Land Offices.*

SIRS: All affidavits hereafter filed as the basis of an order for the publication of notice in contest cases, except such as specifically allege that the entryman is a nonresident of the State, must contain the averment that the affiant has, within fifteen days next preceding the filing of such affidavit, endeavored to ascertain the whereabouts of the defendant by diligently making the search and inquiries indicated on the blank form of affidavit (Form 4-628) prescribed for that purpose, with the view to obtaining personal service of the notice of contest; and you are directed to at once modify all forms of that character now held by you for future use, by interlining after the word "has" in the second line of the body of the affidavit the words, "with a view to obtaining personal service of notice," and by interlining after the word "defendant" in the third line of the body of the affidavit, "within the last fifteen days as follows:" So that the beginning of the second averment of the affidavit will, when so modified, read as follows:

----- being duly sworn, deposes and says that he is ----- in the above entitled contest; that he has, with a view to obtaining personal service of the notice, made diligent search and inquiry for the defendant within the last fifteen days as follows:

You should exercise the utmost care not to order publication of notice on any affidavit which fails to contain averments of the character indicated, as you will be expected to personally defray the expense of republication of all notices where republication results from a lack of those averments.

Very respectfully,

W. A. RICHARDS, *Commissioner.*

Approved:

E. A. HITCHCOCK, *Secretary.*

YAKIMA INDIAN RESERVATION—ACT OF DECEMBER 21, 1904.

INSTRUCTIONS.

Directions given for the preparation of a circular under the act of December 21, 1904, relating to the sale and disposition of surplus or unallotted lands of the Yakima Indian reservation in the State of Washington.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *May 27, 1905.* (F. W. C.)

By the first section of the act of December 21, 1904 (33 Stat., 595), entitled, "An act to authorize the sale and disposition of surplus or unallotted lands of the Yakima Indian reservation in the State of Washington," it is provided:

That the claim of said Indians to the tract of land adjoining their present reservation on the west, excluded by erroneous boundary survey and containing approximately two hundred and ninety-three thousand eight hundred and thirty-seven acres, according to the findings, after examination, of Mr. E. C. Barnard, topographer of the Geological Survey, approved by the Secretary of the Interior April seventh, nineteen hundred, is hereby recognized, and the said tract shall be regarded as a part of the Yakima Indian reservation for the purposes of this act: *Provided further*, That where valid rights have been acquired prior to March fifth, nineteen hundred and four, to lands within said tract by *bona fide* settlers, or purchasers under the public-land laws, such rights shall not be abridged, and any claim of said Indians to these lands is hereby declared to be fully compensated for by the expenditure of money heretofore made for their benefit and in the construction of irrigation works on the Yakima Indian reservation.

The effect of this legislation is to add to the reservation as established by the land department, a body of land on the west side thereof of about 293,837 acres, which are recognized as a part of the reservation established by treaty with the Yakima nation of Indians, dated June 8, 1855 (12 Stat., 951), at the same time saving valid rights acquired prior to March 5, 1904, in these added lands by *bona fide* settlers or purchasers under the public-land laws. The rights of these two classes of claimants, the act provides, shall not be abridged. In other words, their rights are to be respected in their fulness as though the lands had never been included within the Indian reservation. As the act makes provision for disposition of surplus or unallotted lands within this Indian reservation, it becomes material to know, and at the earliest possible time, which of the lands are excepted out of the reservation by reason of the protection extended in favor of *bona fide* settlers and purchasers under the public-land laws. The claims of purchasers will undoubtedly be shown by the records of your office. With regard to the settlers' claims it will be necessary that a published notice be given requiring all those claiming the protection of the statute to come forward within a given time to be fixed by your

office, and give notice of their claims, under penalty that after the time fixed all lands not so claimed will be proceeded with as otherwise provided for in the statute as a part of the reservation.

With regard to the settlers' claims it is not believed to have been the intention of Congress to avoid any such claim merely upon the ground that the party had not made timely assertion thereof, provided the claim has been maintained by compliance with the law in the matter of settlement and cultivation, and would otherwise be entitled to protection, if upon the public lands generally.

To be a purchaser under the public-land laws, within the protection granted, it is not necessary that certificate should actually have been issued to the purchaser prior to March 5, 1904. If in the orderly prosecution of his claim toward final completion, he had, prior to March 5, 1904, made a lawful tender of the purchase money under his claim, the fact that, due to contest or otherwise, the certificate had not actually issued upon the purchase price to that date, will not deprive the party of the protection hereby extended.

It is noted that no particular recognition is given to mining claims within this added territory further than where the claimant would be included within the term "purchasers" under the public-land laws, which would only be after the making of a mineral entry or the offer of proof with the tender of money in consummation of the mining claim. Whether there are any valid mining claims within this added district, the Department is not at present advised, but it is deemed advisable to direct that in the notice hereinbefore directed to be given settlers upon these lands, a notice also issue to any person in possession of a valid mining claim upon any of these lands, to come forward within the time hereinbefore directed to be fixed and give notice of such claim and make showing as to the nature and character thereof, and the question as to the rights, if any, will be considered and passed upon in each individual case.

The circular letters of instructions addressed to registers and receivers proposed to be issued by your office under this act, are herewith returned, not approved, and you are directed to prepare and submit others in accordance with the directions herein given.

PUBLIC LAND—LIMITATION AS TO ACREAGE—ACT OF AUGUST 30, 1890.

MABELLE L. MESERVE.

A right initiated but not consummated under the desert land act does not, under the limitation as to acreage contained in the act of August 30, 1890, exhaust the right of the entryman under the public land laws; and if such entry be subsequently relinquished, it constitutes no bar to the exercise of the right granted by the homestead law.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *May 29, 1905.* (E. O. P.)

The Department has before it the appeal of Mabelle L. Meserve from the decision of your office rendered December 23, 1904, rejecting her application to make desert land entry for the NE. $\frac{1}{4}$, Sec. 17, T. 13 S., R. 14 E., S. B. M., Los Angeles land district, California, because of conflict with the prior homestead application of James C. McElhaney for the same tract.

The land in controversy was formerly covered by the desert land entry of said McElhaney, for which his relinquishment was filed at the time he made application to enter under the homestead law. At the time he made application last mentioned McElhaney was not seeking to acquire title under the public land laws to more than 320 acres of land, but the local officers rejected his application for the reason that, as he had previously entered 320 acres under the desert land act, he was not qualified to make entry under the homestead law, even though he relinquished his right under the former act to acquire title to the land embraced in his homestead entry. This is also the contention urged by counsel for appellant, but the grounds taken to sustain it are untenable.

In departmental decision in the case of *Bradway v. Dowd* (5 L. D., 451, 453) it was held:

When Dowd's relinquishment of his timber culture entry was presented at the Fargo office on November 1, 1884, it was the duty of the local officers to have received it and forthwith have canceled the entry; and the application of Dowd to make homestead entry presented with the relinquishment should have been received and recorded then and there.

The same rule would apply to a desert land entry. An entry made under one act may be subsequently relinquished, and entry made of the land by the same person under another act. A right initiated but not consummated under the desert land act does not exhaust the right of the entryman under the public land laws, under the act of August 30, 1890 (26 Stat., 391), and, when the right is relinquished, constitutes no bar to the exercise of the right granted by the homestead law. See *Stuart v. Burke* (32 L. D., 646), following departmental circular of January 18, 1904 (32 L. D., 400).

The decision of your office allowing the application of McElhaney to enter the land in question, subject to any valid adverse claim then existing, is correct, and the same is hereby affirmed. The application of Meserve, filed subsequently to that of McElhaney, will stand rejected.

CONTEST—APPLICATIONS FILED BY MAIL—PRIORITY OF RIGHT.

BARNES *v.* SMITH.

Where two or more applications to contest an entry are received at the local office in the same mail, they will not be regarded as simultaneous, but the one first taken up, numbered, and entered on the records, in the regular course of business, is entitled to precedence.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *May 31, 1905.* (C. J. G.)

September 28, 1901, Charles L. Jones made homestead entry for the SW. $\frac{1}{4}$ of Sec. 31, T. 2 N., R. 17 W., Lawton, Oklahoma.

March 24, 1902, Claude S. Barnes filed affidavit of contest against said entry, alleging that the same was made for speculative purposes, which was rejected for insufficiency; from which action no appeal was taken.

March 31, 1902, the local officers received in the same mail two special delivery letters containing affidavits of contest against the entry of Jones from Columbus Smith and Claude S. Barnes, both alleging abandonment. The letter of Smith was opened first and his contest was given serial No. 1552 on the docket. The letter of Barnes was next opened and his contest given serial No. 1553. Notice issued on the contest of Smith, hearing being set for August 26, 1902.

April 8, 1902, Barnes filed an affidavit amendatory of his original contest affidavit of March 24, 1902, in which he made the charge of speculation against Jones but no allusion to Smith. No action was taken thereon.

August 16, 1902, Barnes filed an affidavit entitled, "Protest and contest against the award to C. Smith, the preference right to enter the SW. $\frac{1}{4}$ Sec. 31 — 2 — 17," and describing himself as the "person who on the 31st day of March, 1902, filed contest No. 1553," etc. He alleged—

that at the same time, to wit, the 31st day of March, 1902, at the hour of 9 o'clock A. M., one C. Smith filed contest No. 1552 against said tract of land upon the grounds of abandonment; that both of the said contest affidavits were placed in the Post Office at Lawton, O. T., with a special delivery stamp thereon and were both delivered to the clerk in the Land Office at Lawton, O. T., at the same time and were therefore filed simultaneously, and for some reason unknown to this affiant a preference was given to the contest filed by C. Smith and a hearing was ordered thereon which is set for the 26th day of August, A. D. 1902, at the hour of 10 o'clock A. M.

Affiant further deposes and says that at the time the said contest affidavits were filed by himself and the said C. Smith, he, affiant was an occupant in good faith of said tract, that he has occupied the same ever since; and has cultivated a portion of the same and has valuable improvements thereon and is making his home in good faith on said tract of land; and that he filed said con-

test affidavit for the purpose of securing said tract for a home; that your affiant is credibly informed and verily believes and therefore alleges that the said C. Smith filed his contest for the purpose of speculation and in collusion with the said Charles Jones. Affiant therefore protests and objects to a preference right being awarded to the said C. Smith to enter said land under the homestead laws of the United States; and asks that he, the said Claude S. Barnes, be awarded the preference to enter said tract, and that a hearing be ordered to determine the rights of this affiant and the said C. Smith to enter said tract.

It appears that Barnes was informed that a hearing would take place August 26, 1902, at which time he could take whatever action he saw proper. On the day set for hearing Smith and Barnes appeared, but the entryman Jones made default. Barnes stated that he did not desire to offer any testimony as his protest was simply against the preference right of Smith to enter the land. Thereupon Smith offered testimony on his charge of abandonment against Jones. The relinquishment of the latter was filed September 3, 1902, and Smith was allowed to make homestead entry, the local officers holding that he had shown better faith in securing the cancellation of the entry, Barnes having failed to avail himself of his right to intervene and take part in the proceedings or request to be heard. October 9, 1902, Barnes filed a motion to have his contest of March 31, 1902, reinstated, and upon denial thereof by the local officers he appealed to your office, which ordered a hearing January 23, 1903, it being stated:

The affidavit of Barnes, filed August 16, 1902, alleges that he was a settler on the land when the affidavits of contest were filed in your office and also alleges collusion between Jones and Smith. A hearing should have been ordered on said charges.

A hearing was had and as a result thereof the local officers recommended that Barnes's contest be dismissed and Smith's entry held intact. Upon appeal your office affirmed their action, and a further appeal brings the case here.

No attempt was made at the hearing to sustain the charge against Smith of collusion and speculation which the local officers regarded as the gravamen of Barnes's contest in view of the fact that at the time of the latter's alleged settlement and residence the land was embraced in Jones's entry of record. Your office held:

Barnes has had two opportunities to prove his charge of collusion between Jones and Smith. You notified him at the hearing of the Smith contest that he could take action then and you dismissed his contest for the reason that he failed to avail himself of his right to show collusion between Jones and Smith in that contest. But upon the theory that Barnes might possibly have acquired rights as a settler on the land this office allowed him to prove his charges and from the record now before me he has wholly failed to do so. More than sixty pages of typewritten testimony are taken up in showing what Barnes did on the land, although he admits that he knew that the land was segregated by the entry of Jones. Not one word of testimony was submitted in support of the

charge of collusion or speculation, although Barnes's whole case rested on his ability to prove that charge.

A careful examination of the entire record fails to disclose any good reason for disturbing the conclusion reached by your office and the local officers on those points. But it is claimed by Barnes that the contest affidavits of himself and Smith against the entry of Jones were filed simultaneously in the local land office March 31, 1902, and should have been so treated. As to this the local officers state:

The claim of the contestant Barnes that his contest was simultaneous is not in conformity with the practice of this office which has been to file a contest directly received. The officer opening the mail had no means of learning, nor had he any right to assume, that there were other contests in the mail, nor could he withhold the contest in his hands from the records until such scrutiny was made, because precedence must be given in the order in which received. *Darknell v. Taylor* (13 L. D., 162). And a contest can not be regarded as received and initiated until accepted. *Bolster v. Barlow* (6 L. D., 825). The contest of Barnes when subsequently reached was accepted and made of record and had the first contestant failed to prove or prosecute his charge, the contestant Barnes might proceed to do so, his right dating from the time his contest was accepted.

In the cases of *Nichols v. Darroch* (14 L. D., 506), and *Weimer v. Scoffin* (29 L. D., 25), the rule is recognized that where two applications for the privilege of contesting an entry are filed simultaneously the right should be awarded to the highest bidder. In neither of these cases was the matter accorded any serious discussion and the ruling is apparently based on a similar rule prevailing in the case of simultaneous applications to make entry. It is not believed the same rule is equally and necessarily applicable to the two conditions. Even an application to enter for land embraced in an entry of record, as in this case, does not initiate any right and must be rejected. This would be true of simultaneous applications for such land. If the land is subject to entry an application therefor is regarded as an accrued right the equivalent of an entry, and that can not be defeated. Therefore, in case of simultaneous applications to enter there may be good reason for the rule awarding the right to the highest bidder. But the filing of an affidavit of contest against an entry does not confer upon the applicant a vested right. No right in fact attaches until he has prosecuted his contest, paid the land office fees and procured the cancellation of the entry attacked. When these things have been accomplished he is awarded a preferred right for a limited period to enter the land, and then only as against every one except the United States. The contestant occupying as he does the status of an informer merely, with no inherent rights to the land by reason of his application to contest, and with none that can attach so long as there is an entry of record, it is believed that it is en-

tirely within the authority and sound discretion of the land department, in case of alleged simultaneous applications to contest, to accept either one of said applications, or to reject both, as may seem proper. But aside from the seeming impracticability and uselessness of enforcing the same rule in cases of alleged simultaneous applications to contest and to make entry, it is difficult to imagine a case where there would not be some interval, however short, between the presentation and receipt of applications to contest. It is true in some of the decisions applications have been treated as simultaneously received where there was a marked interval, but it was for reasons that were regarded as properly applicable to the facts of those particular cases. On the other hand, it has been held that where a few seconds intervene between two applications to contest, the right of precedence should be awarded to the first one actually received. *Benschoter v. Williams* (3 L. D., 419); *Jacobs v. Champlin* (4 L. D., 318); and *Jasmer et al. v. Molka* (8 L. D., 241). In the first mentioned case it was said:

A few seconds is, comparatively, a short space of time, but it was sufficient to entitle Robertson to the priority, for it matters not how short may have been the interval between the presentation of the two contests, the one actually received before the other is entitled to precedence.

In the present case the applications to contest were presented by mail, and one of the envelopes containing the same necessarily had to be opened before the other. This one happened to be the envelope of Smith, and his application was properly given the next serial number. It was therefore the first one accepted, which was prior to the time the envelope of Barnes was taken up and opened. No good reason appears under the circumstances why the same rule should not apply to contest applications made through the mails as to those made in person. In the latter instance the applicant takes the chance of there being some one ahead of him when he presents his application to contest. If such application is sent through the mails the applicant takes the chance of some one's else envelope being first reached, opened and accepted. In the absence of any allegation or showing of fraud, collusion or undue advantage on the part of the local officers in this case, it is believed the course pursued by them was proper.

The decision appealed from is hereby affirmed. Barnes's contest will be dismissed and Smith's entry held intact.

RULES AND REGULATIONS FOR SALE OF LANDS IN GRANDE RONDE
INDIAN RESERVATION—ACT OF APRIL 28, 1904.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 31, 1905.

The act of Congress of April 28, 1904 (33 Stat., 567), provides:

SEC. 2. That for the purpose of carrying the provisions of this act into effect, the Secretary of the Interior shall be, and he is hereby, authorized and directed to sell, under such rules and regulations as he may prescribe, and at such times and places as he may designate, and shall, within thirty days after the ratification of this agreement, advertise all that part of the Grande Ronde Reservation remaining unallotted on the date of the said agreement, excepting the four hundred and forty acres of land reserved for Government uses at the time their allotments in severalty were made, said unallotted lands approximating twenty-five thousand seven hundred and ninety-one acres: *Provided*, That said lands shall be advertised for sale in Government sections or parts of sections, and shall be sold only by separate sealed bids, and the Secretary of the Interior shall reserve the right to reject any or all of said bids: *Provided*, That the Secretary of the Interior may also receive bids in bulk for the whole tract of land thus offered for sale or separate bids for that part of said tract lying on the north side of the reservation and consisting, approximately, of thirteen thousand acres, and for that part of said tract lying on the south side of the reservation and also consisting of, approximately, thirteen thousand acres: *And provided further*, That no bids shall be accepted until the sum of all bids received shall equal or exceed twenty-eight thousand five hundred dollars, all of which said amount, when received, shall be paid to the said Indians in cash pro rata, share and share alike, in accordance with the terms of said agreement.

The land ceded by the agreement made with the Willamette tribes and other Indians belonging on the Grande Ronde Reservation in the State of Oregon, which said agreement was, by the said act of Congress, modified, amended, ratified, and confirmed, are described as follows:

All that part of the Grande Ronde Reservation remaining unallotted on the date of the said agreement, excepting the four hundred and forty acres of land reserved for Government uses at the time their allotments in severalty were made, said unallotted lands approximating twenty-five thousand seven hundred and ninety-one acres.

The lands in said reservation were offered for sale under sealed bids, in accordance with the provisions of the above named act, in 160-acre tracts, from Monday, August 1, to Monday, August 8, 1904. There were sold at said sale 16,318.48 acres, leaving still unsold 9,703.06.

By virtue of the authority conferred by the said act, it is hereby ordered and directed that on and after Tuesday, the 3rd day of October, 1905, at 9 a. m., and until Tuesday, the 10th day of October, 1905, at 11 o'clock a. m., sealed bids will be received at the local land

office at Portland, Oregon, for the said unsold lands which are more particularly described in the schedule hereto attached.

The said sealed bids must be prepared, filed, received, opened, and acted on in accordance with the following rules and regulations:

First. Each bid must be made on a form similar to that attached hereto, which shall be furnished upon application to the register and receiver of the Portland, Oregon, land office, or the Commissioner of the General Land Office, and must be signed by the bidder, who shall be a citizen of the United States, and who shall therein give his post-office address.

Second. Each bid must be sealed in a separate envelope, which shall be addressed to the "Register and Receiver, United States Land Office, Portland, Oregon," and such said envelope must bear an indorsement across its face showing that it contains a bid for the ceded lands of the Grande Ronde Indian Reservation, and must not bear any indication of the amount of such bid or the description of the tract bid for.

Third. Each bid must be accompanied by a check, payable to the Secretary of the Interior, certified by the proper official of a national bank, for 20 per cent of the amount of such bid, which check must be, by the bidder, placed in the envelope containing the bid before its sealing and delivery to the register and receiver.

Fourth. No bid will be considered that is received by such register and receiver before 9 a. m. on Tuesday, the 3d day of October, 1905, or after 11 o'clock a. m. on Tuesday, the 10th day of October, 1905.

Fifth. Bids will be received for the lands as they are arranged on the attached schedule, the arrangement showing the lands in tracts of full sections where possible. This arrangement has been varied only where the full section in compact form is not found, and in some cases it will be noted that less than 640 acres may be bid for. No bid will be considered describing the tract bid for otherwise than as it appears on the schedule, or which undertakes to cover and describe parts of several tracts.

Sixth. Each bidder may present bids for any number of tracts, but with each bid must make and transmit the deposit above required.

Seventh. No bid will be accepted for said lands which shall be at a less rate than \$1.25 per acre for the land embraced in such bid.

Eighth. The bids will be opened by the register and receiver at their said office in the presence of such bidders who may care to attend, on Tuesday, the 10th day of October, 1905, at 1 p. m., and the register and receiver will indorse on each bid the name of the bidder, the amount of the bid, and the amount of the deposit, immediately as the bids are opened.

Ninth. The register and receiver will then transmit the several bids with the certified checks to the Commissioner of the General Land

Office, with their recommendations for acceptance or nonacceptance, in each case, and the Commissioner will in turn transmit the said bids to the Secretary of the Interior with his recommendation in the premises.

Tenth. Notice of the award by the Secretary of the Interior upon said sealed bids will be given to each of the bidders by the Commissioner of the General Land Office through the ordinary mail to the address given in his bid. The names of the successful bidders will also be given to the press as a matter of news.

Eleventh. The balance due on all of the accepted bids, after crediting thereon the respective certified checks, will become due and must be paid to the register and receiver of the said local land office within thirty days from the date of the mailing of the notice by the Commissioner of the General Land Office, as aforesaid, and if not so paid, or if a successful bidder shall fail within said thirty days to submit proof of his citizenship to the said register and receiver, the amount deposited with such bid, as hereinbefore provided, will be forfeited to the United States, to be disposed of as other proceeds arising from said sale under said act, and the land will be thereafter reoffered under such rules and regulations as may be prescribed by the Secretary of the Interior.

Twelfth. The right is hereby reserved to reject any or all of said bids for said lands.

Upon the payment of the amount of their bids by the purchasers, as hereinbefore provided for, the register and receiver will issue the ordinary cash certificates and receipts, modified by indorsements across the face thereof showing that same are issued for lands of Grande Ronde Indian Reservation under the act of April 28, 1904 (33 Stat., 567), which will be transmitted to this Office as a basis of patent. A duplicate receipt will be given to the purchaser by the receiver upon the full payment.

Very respectfully,

W. A. RICHARDS,
Commissioner.

Approved:

E. A. HITCHCOCK, *Secretary.*

Bid.

THE SECRETARY OF THE INTERIOR.

SIR: I, _____, of _____, State of _____, a citizen of the United States, do hereby bid and offer to pay ____ per acre for the following-described lands, of the Grande Ronde Indian Reservation, Oregon:

Section _____, T. _____ S., R. _____ W.

I herewith inclose certified check of ----- for ----- dollars, the same being 20 per cent. of the total amount of this bid for the above-described land, the same to be retained and credited as part payment of the purchase price should this bid be accepted, or retained by the United States as a forfeit on my part if this bid is accepted and I should fail within thirty days from the mailing of the notice by the Commissioner of the General Land Office of its acceptance to furnish evidence of my citizenship and to pay the register and receiver at the Oregon City, Oregon, land office the balance due on this bid.

This -- day of -----, 1905.

[Schedule omitted.]

FOREST RESERVE—RELINQUISHMENT—SETTLEMENT—ACT OF JUNE 4,
1897.

GEORGE AUSTIN.

- A deed of relinquishment, executed under the exchange provisions of the act of June 4, 1897, for land within a forest reserve, does not operate to vest title in the United States until the title tendered has been examined and accepted; and, until such time, no action should be taken or permitted by the government looking to the disposal of the relinquished land, or which would in any wise impair or cloud the relinquisher's right or claim of title.
- An application to enter land embraced in a relinquishment executed under the exchange provisions of the act of June 4, 1897, presented prior to examination and final acceptance or rejection of the title tendered, will be rejected, and not merely suspended pending such examination and final action.
- The right of a settler residing upon land excluded from a forest reserve, but embraced in a relinquishment executed under the exchange provisions of the act of June 4, 1897, while the lands were within the reserve, attaches at the instant the land becomes subject to private appropriation, by acceptance of the title tendered and consummation of the exchange under the act, and, if duly asserted, will prevail as against an application to enter not based upon rights acquired by settlement and residence.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *May 31, 1905.* (J. R. W.)

George Austin appealed from your decision of February 14, 1905, rejecting his application for homestead entry for lot 4, Sec. 2, and lots 1, 2, and 3, Sec. 3, T. 30 N., R. 14 W., W. M., Seattle, Washington.

July 26, 1899, patent for this land issued to Isaac C. McMunn. It was then in the Olympic forest reserve, created by executive proclamation of February 22, 1897 (29 Stat., 901), and was excluded therefrom by proclamation of April 7, 1900 (31 Stat., 1962). While so included, November 29, 1899, it was relinquished to the United States by Peavey, and made the basis of a selection of lieu land at Seattle, Washington, under the act of June 4, 1897 (30 Stat., 36). The selec-

tion was yet pending, January 4, 1904, when Austin filed his application for homestead entry. The local office rejected the application because the land was "embraced in the patented and uncanceled entry of Isaac C. McMunn." On Austin's appeal your office affirmed the rejection upon authority of *Maybury v. Hazletine* (32 L. D., 41). It is learned from the records of your office that Peavey's relinquishment of the land was accepted and his selection approved October 21, 1904, and homestead entry of the land by Stella B. Myers was allowed, October 29, 1904.

The appeal contends, (1) that a deed of relinquishment of land under the act of June 4, 1897, *supra*, operates immediately to revest title in the United States, without regard to any selection being made in lieu thereof; that title of the United States thereto nowise depends upon the legality or approval of a selection, and that upon exclusion of the land from the forest reserve April 7, 1900, it became public land subject to private appropriation and entry; (2) that if acceptance was necessary to revest title in the United States, Austin's application should have been suspended, and on acceptance of the selection should have been allowed; (3) that it was error to allow Myers's entry without notice to Austin, who states in his appeal that he was then living on and cultivating the land, and has been so doing continuously since his application.

The first contention can not be sustained. Relinquishment of lands and selection of others in lieu thereof under the act of June 4, 1897, is essentially a contract of exchange. The relinquisher proposes to vest in the United States title and to select an equal area. The court held in *Cosmos Exploration Company v. Gray Eagle Oil Company* (190 U. S., 301, 312, 313), that the relinquisher's acts by filing of papers are but a representation that he has title, and that some decision upon the validity of that title must be made by some authorized officer before equitable title vests. Until such decision is made the title is *sub judice*. It may happen, and frequently has happened, that the title so tendered is upon examination found to be defective, encumbered, or even wholly bad and irremediable. In such case it is rejected, and the United States refuses to approve the selection or to give title to public lands in exchange. Whether or not the title, if accepted, relates to the initiation of the transaction, the record of the relinquishment, it is clear that the doctrine of relation can not operate until it is found that the title tendered is good and ought to be accepted. The doctrine of relation is a fiction of the law for protection of rights and does not come into action until it is found that rights at such prior date did in fact exist, and it operates only to protection of the parties themselves and those in privity of estate. *Gibson v. Chouteau* (13 Wall., 92, 101); *Reynolds v. Plymouth Co.* (55 Ia., 90); *Calder v. Keegan* (30 Wis., 126); *Hussman v. Durham*

(165 U. S., 144, 148) ; Bear Lake Irrigation Project *v.* Garland (164 U. S., 1, 23). The United States refuses, and properly should refuse, to make any disposal of land relinquished under the act of June 4, 1897, pending examination of the title and its acceptance, or to do or authorize any act which can impair or cloud the relinquisher's right or claim of title. *Maybury v. Hazletine* (32 L. D., 41).

This case, cited as basis for your decision, does not sustain it, in that Austin claims he was a settler upon the land at the time that Peavey's selection was approved and Myers's entry was allowed. In that case it was observed that—

He [Maybury] does not allege that at the time of the approval of Ayers's selection he was in actual occupancy of the land, or that he followed up his settlement by establishing residence upon the land or gained or maintained an actual occupancy of it.

At a later stage of the case this was found to be an error of fact arising from the misplacing of Maybury's affidavit alleging actual residence. On discovery of such error the adjudication of rights between Maybury and Hazletine was vacated, October 31, 1903, and a hearing was ordered, and ultimately Maybury prevailed, established the allegation, and was awarded the right to make entry (unreported).

It is a rule long recognized by the land department that though one can not acquire rights by application for entry or settlement upon land segregated under a former entry or in reservation, yet, if he is residing on the land, his right attaches at the instant that the land becomes subject to private appropriation, and will prevail if duly asserted. *Londgren v. Rudellat* (27 L. D., 594) ; *McDade v. Hively* (27 L. D., 186) ; *Dowman v. Moss* (19 L. D., 526 ; 176 U. S., 413, 421).

Nor was it due Austin that his application should have been suspended. It is well settled that an application for lands, withdrawn from entry or segregated under a former application or entry, yet *sub judice*, gives no right. By a withdrawal or a former application or entry the land is segregated from the public lands subject to disposal, and is thereby removed from the class of lands subject to appropriation. An application for entry of such lands therefore gives no right to the applicant. The principle underlying many decisions to this effect applies with equal, if not greater, force to lands patented and afterward relinquished to the United States. By the patent the land passed entirely out of the jurisdiction of the land department. Before the land department can assume jurisdiction over it, the relinquishment must be passed upon. If it was made by one not the owner, by a mere stranger to the title, no right accrued to the United States thereby, and the land department acquires no jurisdiction. It is only an unincumbered and complete title that Congress has authorized to be accepted as basis for an exchange. If the title is incumbered, it must be rejected, and no jurisdiction of the

land department to dispose of the land is vested by relinquishment of such defective title. There must be a finding and order that good title is relinquished, and is accepted before the land becomes subject to disposal by the United States. It can not follow upon the act of the relinquisher alone by record of his deed, which is merely a tender of title that the United States may accept, or, for sufficient cause, may decline to embarrass itself with, and therefore reject. Applications for land in this condition can not be accepted, and the land department can not be required to receive and suspend them to be acted upon after the question of acceptance of the title is determined.

The rights acquired by settlement upon lands in this condition of uncertainty as to title are a distinctly different question.

The entry by Myers was improperly allowed by the local office pending Austin's appeal, yet undecided. The real question therefore is, whether Austin or Myers should be allowed to make entry. There has been no issue between them or notice to present their respective rights with opportunity to the other to controvert it. It was held in *Brown v. Hitchcock* (173 U. S., 473, 478), that "power is vested in the Departments to determine all questions of equitable right or title upon notice to the parties interested." The facts in the record are insufficient to enable the Department to make final disposition of the case. Your office decision is vacated, so far as it rejects Austin's application, and a hearing will be allowed at the local office on Austin's application, at which he will be allowed to submit evidence to prove his contentions, and Myers may defend and adduce evidence as upon a rule to show cause why her entry should not be held subject to Austin's allegation of prior right. After such hearing the local office will adjudicate the case, with right of the party to appeal.

WIND CAVE NATIONAL PARK—ACTS OF JANUARY 9, 1903, JUNE 4,
1897, AND MARCH 3, 1905.

OPINION.

The provision in the act of January 9, 1903, relating to the procedure by which the owner or settler upon lands within the Wind Cave National Park may relinquish the same and select other lands in lieu thereof, is in no wise affected by the repeal of the act of June 4, 1897, and acts amendatory thereof, by the act of March 3, 1905, and the act of 1897 and amendatory acts, although repealed, may be referred to to ascertain the procedure in such cases.

First Assistant Attorney Proudfit to the Secretary of the Interior,
June 3, 1905. (W. C. P.)

The Forest Supervisor in charge of the Wind Cave National Park, South Dakota, having asked whether parties having perfected home-

steads within the park may relinquish them and take lands elsewhere, and as to the proper procedure, his letter, together with a memorandum prepared by the Chief of the Patents and Miscellaneous Division, has been submitted for my opinion.

The act of January 9, 1903 (32 Stat., 765), creating the Wind Cave National Park, has a provision as follows:

That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of this park, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government and secure other land, outside of the park, *in accordance with the provisions of the law relating to the subject of such relinquishment of lands in forest reserves in the State of South Dakota.*

The only laws relating to relinquishment of lands in forest reserves in the State of South Dakota are those of June 4, 1897 (30 Stat., 36), and acts amendatory thereof. This law of 1897 and that of June 6, 1900, and March 3, 1901, were repealed by the act of March 3, 1905 (33 Stat., 1264). The repeal of the act of 1897 does not have any effect upon the provision of the act of 1903 referring to the act of 1897 for the procedure by which homesteads within the Wind Cave National Park may be relinquished and other lands selected in lieu thereof. The law authorizing such relinquishment is still in force and the act of 1897 and amendatory acts, although repealed, may be referred to to ascertain the procedure in such cases.

Approved:

E. A. HITCHCOCK, *Secretary.*

MINING CLAIM—SURVEY—MEANDER.

VICTOR A. JOHNSON.

Claims upon unsurveyed lands and bordering on bodies of water, which under the regulations governing the survey of public lands would be meandered upon extension of the public surveys, should be meandered to conform to what would be the line established by a public survey and upon which the public-survey lines would be closed.

The artificial elevation of the level of a meanderable body of water can not be permitted arbitrarily to substitute a new mean high water mark for the natural mean high water mark which the regulations contemplate as defining the meander course.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *June 5, 1905.* (F. H. B.)

Victor A. Johnson has appealed from that portion of your office decision of April 9, 1904, adhered to on review June 4, 1904, whereby he is required to procure an amended survey of his High Top, Pine

Top, and Way Up lode mining claims, surveys Nos. 1595, 1596, and 1600, respectively, Lewiston, Idaho, land district, embraced in separate entries made April 10, 1904, to be so made as to exclude from the claims those portions thereof which now lie below the line of high water mark of Chrystel Lake, upon and along the borders of which they are laid, upon pain of cancellation of the entries.

The lake is situate upon unsurveyed public lands, and is stated to cover an area of about 43½ acres. Your office finds from the record that the lake is a permanent body of water, possessing the characteristics which, under paragraphs 153 to 172 of the manual of instructions for the survey of the public lands (Manual of 1902), will require the meander thereof when the public surveys are extended to the lands embracing it, special reference being made to paragraph 164 of the manual, which contemplates the meander of bodies of water of areas of 25 acres and upwards. It is stated by your office to have been its practice for a number of years to require the meander of mining claims upon unsurveyed lands, where they border upon such lakes and streams as would under the rules be meandered, to coincide with such meander lines as would be established by a public survey.

Appellant assigns error on the part of your office—

1. In assuming that the claimant had no right to establish the lines of his mining claims below the high water mark of the unsurveyed, unmeandered Chrystel Lake, the height of the water in said lake having been raised by the building of a dam for mining and milling purposes.

2. In holding that the lake or any body of water can be considered as meandered in the absence of a regular survey.

3. In ordering an amendment of the surveys to eliminate encroachment upon an unsurveyed lake, the waters of which are used exclusively for mining and milling purposes, for which purpose it is solely valuable.

4. In not approving the entries upon the present existing surveys.

In harmony with the long-established and well-considered regulations prescribing the meander of such a body of water as this, upon extension of the public surveys, claims upon the borders thereof should be meandered to conform to what would be the line established by a public survey and into which the public-survey lines would be closed. The official meandering of these bodies of water fixes and declares the limits of the public lands subject to sale, thereby excluding the submerged areas, and relegates all questions of right or title in riparian patentees to the soil beneath the water to be determined by the laws of the State in which situate. In view of the existing regulations, in contemplation of which such submerged lands are uniformly to be excluded, the government should not by its patent anticipate or embarrass the adjustment of rights between State and riparian owners. The practice of your office, as it

is stated in the decision appealed from, has the full approval of the Department.

It is, however, alleged by appellant, and this seems to have some corroboration in the record, that the level of the lake here in question has been raised by the building of a dam, which it is the intention of the builders to increase in height. In this behalf it may be said that the elevation by artificial means of the level of navigable watercourses and the consequent flooding of adjacent lands can not diminish the area of the public lands and the title of the Federal government thereto, and equally the artificial elevation of the level of this lake (assuming it to be non-navigable) can not be permitted, if the fact can be ascertained, arbitrarily to substitute a new mean high water mark for the natural mean high water mark which the regulations contemplate as defining the meander course. Appellant will therefore be allowed to apply for a hearing, in the usual manner, within a time to be fixed by your office and with notice to all parties whose interests will be affected, at which opportunity will be afforded for the submission of such evidence touching this question as may be had. If a hearing shall be applied for and had, appellant will be required to have surveyed and established a meander line in accordance with the showing made. In the absence of an application for hearing within the time allowed therefor, meander will be required along the present mean high water mark; or, failing meander survey altogether within such time as your office may fix, under the circumstances in either case, the entries will be canceled.

The decision of your office is modified accordingly.

INDEMNITY SCHOOL SELECTION—SELECTION UNDER ACT OF JUNE 4,
1897.

CALIFORNIA AND OREGON LAND CO. ET AL.

A pending invalid indemnity school land selection is a bar to the allowance of an application to select the same land in lieu of lands in a forest reserve relinquished to the United States under the exchange provisions of the act of June 4, 1897.

No preference right is acquired by the filing of a contest against an indemnity school land selection, where cancellation of the selection is due to proceedings instituted by the government in its own interest prior to initiation of the attempted contest,

Where a relinquishment of all right to a tract of land is tendered, and there is filed therewith and as part of the same transaction an application, by or in the interest of the person relinquishing, to make some other appropriation of the same land, the relinquishment must be regarded, for all purposes of such application, as in force at the moment of its presentation, but not effective as to the public generally, so as to make the land subject to other appropriation, until the application is considered and disposed of.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *June 6, 1905.* (J. R. W.)

The California and Oregon Land Company and the Santa Fe Pacific Railroad Company, by Frank E. Alley, their attorney in fact, appealed from your office decision of June 8, 1904, rejecting the appellant's applications under the act of June 4, 1897 (30 Stat., 36), to select the N. $\frac{1}{2}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Sec. 20; S $\frac{1}{2}$ of Sec. 32; and SW. $\frac{1}{4}$ of Sec. 34, T. 14 S., R. 2 E., W. M., Roseburg, Oregon, in lieu of lands relinquished to the United States in a forest reserve. The Santa Fe Pacific Railroad Company, by John C. Ainsworth, its attorney in fact, also appealed from said decision rejecting its application under said act to select the same lands.

These lands were embraced in State indemnity school selection lists 190 and 191, filed by the State November 25, 1899. May 14, 1903, your office directed the State within sixty days to furnish evidence as to the mineral character of the base land used in list 191 as to township eight south, range thirty-four east, and within the same period to show cause why the other selections in this list should not be canceled because of disposal of the base land by the State prior to such selections. From such order the State appealed, and the same was affirmed January 26, 1904 (32 L. D., 412). May 26, 1903, the State was directed by your office to furnish evidence within sixty days as to the mineral character of the base land used in list 190. From this order the State took no appeal, but no final action had been taken thereon until relinquishment by the State hereinafter referred to.

October 5, 1903, lists 190 and 191 being yet so pending, Frank E. Alley, as attorney in fact, presented six applications of the California and Oregon Land Company under the act of June 4, 1897, *supra*, to select the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 32; SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 20; SE. $\frac{1}{4}$, Sec. 32; N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 20; lots 1, 2, 3, 4, S. $\frac{1}{2}$ of N. $\frac{1}{2}$ (being all the N. $\frac{1}{2}$), Sec. 20; and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 20. Also, December 22, 1903, Alley, as attorney in fact of the Santa Fe Pacific Railroad Company, presented its like applications for the SW. $\frac{1}{4}$, Sec. 34, and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 32.

October 10, 1903, Frank E. Alley filed duly corroborated contest affidavits against the State's lists 190 and 191, describing the lands and alleging the lists to be invalid and fraudulent because the State filed therewith no relinquishment of the land assigned as base therefor nor any certificate that the State had not encumbered, sold, or disposed of the base assigned therefor, or agreed so to do, and that they were not in possession of any person under any law or permission of the State; that your office had required evidence of the mineral character of the base land to be furnished within sixty days and

that after more than seventy days' notice, no action had been taken by the State—all of which contestant was ready to prove, and prayed cancellation of the lists and acceptance of his applications to select the lands under the act of June 4, 1897, *supra*.

January 28, 1904, there were filed in the local office two relinquishments by the State of Oregon, of all its right, title, and interest in and to all the lands included in its lists 190 and 191, and at the same time were filed fourteen applications under the act of June 4, 1897, *supra*, by John C. Ainsworth, as attorney in fact for the Santa Fe Pacific Railroad Company, to select all said lands in lieu of land relinquished to the United States in the San Francisco Mountains forest reserve, Coconino county, Arizona. There is also filed herein the affidavit of said John C. Ainsworth that:

said applications were made for and on behalf of M. B. Rankin . . . equitable owner of certificates of sale issued by the State of Oregon for the lands hereinabove described and which said certificates and assignments thereof were surrendered to said State at the time the relinquishments of the Governor and Land Commissioner of said State of all the right, title and interest of said State of Oregon in and to said lands were delivered to be filed in the local land office at Roseburg, Oregon.

There is also filed the affidavit of M. B. Rankin particularly describing the certificates of sale of these lands by the State of Oregon, for value assigned to him. September 28, 1903, the Governor of the State of Oregon, by letter, represented to the Secretary of the Interior that the State Land Board theretofore had made sales and issued certificates and deeds for lands as soon as selections of lands were accepted by local United States land officers, and asking upon cancellation of indemnity selections sixty days' preference right to the State's vendees to acquire title to such lands under the laws of the United States. This request being referred for report, your office, October 13, 1903, expressed the opinion that there was no authority of law to grant the request of the State, but that:

It [the State] may within the sixty days allowed for appeal amend its selection by the substitution of a valid base, or if unable to furnish such a base it may upon receipt of notice that the selection is held for cancellation make a formal relinquishment of the selection and give same to its grantee. While the selection is of record and uncanceled the land is segregated thereby and no right can be acquired by the presentation of an application therefor (29 L. D., 29), but the purchaser holding the State's relinquishment may present it with his application and thereby secure the right of entry.

This letter was, October 17, 1903, transmitted by the Secretary of the Interior to the Governor of the State of Oregon, with the statement that it was for his information.

The several selections and relinquishments of the State being before your office for consideration, it was held by the decision appealed from that the selections by Alley, attorney in fact for the

California and Oregon Land Company and the Santa Fe Pacific Railroad Company, were invalid and must be canceled because at the time of the selections the land was segregated by the pending State lists and was not subject to selections; also that no preferred right of entry was obtained by Alley under his attempted contest filed pending proceedings by the government on its own motion for cancellation of the lists.

Your office also held that as the State's relinquishments were not accepted by your office until March 7, 1904, and were not noted on the local office record until March 16, 1904, the lands were segregated until that time, and the selections of Ainsworth, attorney in fact for the Santa Fe Pacific Railroad Company, were therefore rejected.

Pending these appeals T. R. Sheridan, attorney in fact for the Santa Fe Railroad Company, petitioned to intervene in the case, and shows that March 16, 1904, upon notation in the local office of cancellation of the State's selections, it again filed applications under the act of June 4, 1897, *supra*, numbers 10849 to 10854, inclusive, to select these lands in lieu of other lands relinquished to the United States in the same forest reserve as was its other base for its other former applications.

The assignments of error upon the appeal from rejection of selections by Alley as attorney in fact are, substantially, reducible to two: That the pending indemnity lists did not segregate the land from other appropriation; that the applications made pending action upon such lists amounted to a contest or attack upon the lists and upon their cancellation should be allowed to stand.

The first contention is not well founded. It was held in *Niven v. State of California* (6 L. D., 439), that a pending invalid school selection bars an application for other entry. Also see *George Schimmelpenny* (15 L. D., 549, 550). Such a selection, defective for want of proper base, may be amended, at the instance of a purchaser from the State in possession, by assignment of a valid base.

That which is amendable is not void and can not be treated as a nullity. Such practice to permit interference with matters pending before the land department for determination of rights in controversy between the United States and persons seeking under the law to appropriate public land would manifestly greatly prejudice public interests in economical administration, and also greatly injure those seeking to appropriate public lands by delays due to vexatious claims of right, founded upon some supposed defect in the proceedings of the first applicant. The evils of such practice would be intolerable. The rule in such cases is the same as in analogous cases of pending railway selections (*Southern Pacific Railroad Company*, 32 L. D., 51), and in case of received pending forest lieu selections (*F. C.*

Finkle, 33 L. D., 233). The rule is general in its application in similar cases, is wholesome, and tends to orderly transaction of public business and to the protection of private rights.

Nor can the second contention be sustained. The United States had of its own motion taken cognizance of the invalidity of the pending lists and initiated steps for their cancellation. No service was rendered to the United States by bringing information to the land department of facts invalidating the selections. On the contrary, Alley's affidavit showed that he knew he was giving no information to the land department. On the contrary, he sets forth the fact that the government more than seventy days prior thereto had called upon the State to furnish evidence as to the same defects in the lists that he alleged as ground of their invalidity. He thus puts himself outside that of one who has rendered a meritorious service, and shows himself to be merely a volunteer intermeddler in public affairs, seeking only his own advantage under pretense of concern for the public interest.

The case is here clearly distinguishable from that of George Schimmelpfenny, *supra*, wherein preference right of entry was accorded because of his meritorious service in disclosing the facts causing cancellation of the invalid selection. It is a general rule in analogous cases, and equally applicable here, that for securing a preference right there must have been a meritorious service rendered. A preference right is not gained, nor is it equitably due, where cancellation of the previous entry is due to proceedings instituted by the government in its own interest prior to initiation of the attempted contest. *Drury v. Shetterly* (9 L. D., 211); *Hill v. Gibson* (25 L. D., 63).

It remains to consider the second applications made at the presentation of the State's relinquishment and before the relinquishment was accepted by your office and its acceptance noted on the local office record. Against these selections no one appears in the record entitled to object, except the government, and no other one is seeking to object except the selector itself.

The record shows that the State of Oregon having complicated the interests of third parties by sale of the selected lands before obtaining title thereto asked advice of the land department, and was informed that such innocent vendees could be protected, (1) by assignment of new and valid base for these invalid selections, or (2), if none was available, it might deliver to its vendee a relinquishment of the lands and the purchaser having such relinquishment could present it at the local office with his application and thereby secure his right of entry.

There is no more favored suppliant, no party to whose prayer a court of equity more readily grants all the relief within its power,

than one who has for value purchased from one believed to have title. The acts of Congress are numerous, framed and enacted to grant relief in such cases, among which may be noticed section 5 of the act of March 3, 1887 (24 Stat., 556), which, because of the inherent equity springing from such cases of mistake; was held by the Attorney-General (Opinion, 6 L. D., 272, 275) to be remedial and entitled to be so construed as most effectively to meet the beneficial end in view, to suppress the mischief and to advance and prevent the failure of the remedy. The act was so construed by the Department in *Americus v. Hall* (30 L. D., 388).

There being such an equity, had the land department power to recognize and protect it? Of this there can be no doubt. It was held in *Brown v. Hitchcock* (173 U. S., 472, 478) that "power is vested in the Departments to determine all questions of equitable right or title." In *Williams v. United States* (138 U. S., 514, 524), the court held that:

the statute requiring approval by the Secretary of the Interior was intended to vest a discretion in him by which wrongs like this could be righted, and equitable considerations, so significant and impressive as this, given full force. It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice.

In the case last cited there was complete legal right in conflict with the equity of a purchaser for value of a supposed title, and the words above were spoken with reference to the powers of the Secretary under such circumstances. The Department may, therefore, in a proper case, aid in protecting the equity that so arises, and the suggestion of your office, October 13, 1903, that such equity might be protected by presenting the State's relinquishment, and "thereby secure the right of entry," was fully within the powers of the land department for protection of such equitable rights, and was eminently proper to be made in view of the existing circumstances.

It appears that these selections, while not made in his name, are made by procurement of Rankin for the protection of his equitable right, and that, except in name, the exact course suggested by the land department to the governor has been pursued. The State's relinquishments were filed at the same time as the applications for selection and were by the local office transmitted therewith, with the statement that "this would seem to make the land under consideration subject to entry."

Counsel for these selections contend that the State's relinquishment took effect upon its filing in the local office, citing the decision in *Keane v. Brygger* (160 U. S., 276, 287), wherein it was held that a

relinquishment delivered in February, 1864, then took effect, though not filed or entered upon the land office record until December 20, 1871, saying:

it would be a strange doctrine to announce that a party did not have a right to relinquish any right that he had to or in any property, and that it was the intention of the government to compel its citizens to go to the expense and delay of a contest to extinguish an interest of another citizen who was willing to make a disclaimer of that interest.

This question is not necessary to be decided, nor is it readily presented by the record, as the relinquishments and the applications were a single transaction and their presentation was pursuant to the suggestion of the land department and for the special purpose indicated by the Department to clear the record. The relinquishments should and will be considered and treated with the applications transmitted therewith as parts of one transaction. *Mary Stanton* (32 L. D., 260). The instructions (29 L. D., 29), referred to by your office, have no reference to such case. Where a relinquishment is tendered with applications for some other appropriation of the same land and by or in the interest of the claimant under the entry so tendered to be relinquished, it must be regarded for all purposes of the new applications as in force at the moment of presentation, but not effective as to the public generally to make the land subject to other appropriation until the applications with which it is tendered are considered and disposed of. This is necessary to good faith with the party making such tender, and is the substance and effect of the decision in *Mary Stanton, supra*, and in *Maud McGregor v. Mary Stanton*, October 14, 1904 (unreported).

As the relinquishments under the facts of the case were clearly tendered as part of the transaction of selections, to remove objection of the pendency of the lists, and pursuant to the suggestion and advice of the land department, they will be regarded as effective from presentation for all purposes of adjudicating the fourteen selections of the same lands presented therewith. Your office decision in so far as it rejected these selections is vacated, and the case is remanded to your office for readjudication of said applications.

MINERAL LAND—CLASSIFICATION—ACT OF FEBRUARY 26, 1895.

NORTHERN PACIFIC RAILWAY Co.

Decision of May 10, 1904 (32 L. D., 611), relating to the classification of certain lands in the Coeur d'Alene land district, Idaho, under the provisions of the act of February 26, 1895, construed, and directions given with respect to further proceedings with a view to determining the character of the lands involved.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 8, 1905.* (G. B. G.)

Pursuant to 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," the commissioners appointed thereunder filed, in accordance with the terms of the act, in the Coeur d'Alene land office, certain reports, in the months of September, 1899, September, October, November, and December, 1900, and January, February, and March, 1901, in which they classified as mineral in character the land therein described, situated in Shoshone county, Idaho.

These lands are within the limits of the grant to the Northern Pacific Railroad Company, and that company, in accordance with a provision of said act, filed its protest against the classification, and asked for a hearing, which was granted. At this hearing the United States was represented by the United States attorney for the State of Idaho. The company presented proof in support of its protest, and its witnesses were cross-examined by the attorney for the government, no objection being made by him to the sufficiency or regularity of the proceedings. The local officers and your office held upon the record made at this hearing that the lands were not mineral in character, and sustained the company's protest. In the meantime, however, a petition was filed in your office on behalf of certain mineral claimants, alleging that the petitioners were the owners of certain lode mining claims within the mining district wherein the lands in controversy are situated, that the great body of these lands is of known mineral character, that the petitioners had no notice of the filing of the company's protest against the classification, and asked that a hearing be ordered upon the petition.

The Department considered this petition, May 10, 1904 (32 L. D., 611), vacated the proceedings as without notice and therefore unauthorized, but directed that upon the application of the company for a new hearing a special agent of your office be detailed to make a thorough examination of the lands with regard to their mineral character, with the view of furnishing evidence at such rehearing, and said that a proper officer of the government would be detailed to represent the government thereat.

June 29, 1904 (33 L. D., 74), the Department considered a motion on behalf of the company asking certain modifications of said decision, and gave the following direction:

(1) That upon the company's application for a rehearing, and the publication of notice of the hearing in accordance with law, all persons seeking to show the mineral character of any of the land involved shall be required to file in the local land office, at least thirty days before the date set for the hearing, which

should not be fixed for a date less than sixty days from the date of the first publication, such an accurate description of the lands claimed by them to be mineral as the circumstances of the case will permit, where record will be made of the same and may be inspected by interested parties, but no other or further notice need be served on the railway company.

(2) That the company be permitted to submit as evidence at such rehearing the record of the testimony taken at the former hearing, the same to be considered as between the company and the government only.

With these modifications, and upon the application of the company for a rehearing, your office will proceed to carry into effect the directions given in said departmental decision of May 10, 1904, with the least possible delay.

Pursuant to these directions the company applied for and obtained a new hearing, which was set for October 20, 1904, and on that day, all parties being represented, the following stipulation was entered into:

UNITED STATES LAND OFFICE,
Coeur d'Alene, Oct. 4th, 1904.

Northern Pacific Ry Co.

v.

United States.

STIPULATION.

It is hereby stipulated between M. T. Sanders, counsel for Northern Pacific Ry. Co., A. G. Kerns, counsel for the mineral claimants, and George B. Gardner, special representative of the United States herein, that this case may proceed, as follows:

1st. Upon the calling of the case for trial by the Register and Receiver there may be introduced by the Ry. Co. the record of the testimony taken at the former hearing herein, the same to be considered upon the trial of this cause in accordance with the Department's modified order of June 29th, 1904, subject to objection by the mineral claimants.

2. The mineral claimants herein may then introduce testimony in support of the mineral classification of lands claimed by them and of all other lands in controversy which are alleged generally in their protest to be mineral in character, subject to objection by R. R. Co.

3. This cause will be then adjourned until October 1st, 1905, or such later time as the Department of the Interior may fix.

4. The Register and Receiver will render a decision upon evidence which shall have been adduced as to the mineral or non-mineral character of the lands specifically claimed by the mineral claimants, but no decision shall be reached or determination had as to the balance of the land in controversy, it being the purpose of this stipulation to continue the case as between the Ry. Co. and the United States without prejudice, and for this purpose the case of the mineral claimant in so far as it rests upon general allegations of the mineral character of lands not claimed by them shall be treated as the case of the United States.

(Signed) A. G. KERNS,
Atty. for mineral claimants.
GEO. B. GARDNER,
Special representative U. S.
ALBERT ALLEN,
M. P. SANDERS,
Attys. N. P. Ry. Co.

The hearing proceeded in accordance with the stipulation, and upon the record made the local officers, on November 15, 1904, and your office on February 27, 1905, rendered decisions sustaining the classification as to the land claimed by certain of the mineral claimants.

The company has appealed, substantially upon the ground that the case should have been closed favorably to the company as to all lands not included in the several claims found to be mineral in character.

This contention can not be admitted. The effect of departmental decision of May 10, 1904, was to vacate all the proceedings theretofore had upon the company's protest because of defective notice, and under that decision the company must have proceeded *de novo*. But upon strong representations on behalf of the company that it was not responsible for the defective notice, that the United States had not been misled or injured thereby, and that the company, as between it and the United States, should not be put to the trouble and expense of reproducing the evidence adduced at the first hearing, the company was accorded the privilege of introducing at the new hearing the record of the testimony theretofore made.

It was not, however, the intention of the Department to hold that the United States was concluded by these proceedings, and a fair reading of that decision does not warrant such inference. Moreover, the aforesaid stipulation shows that this was not so understood, and besides, whatever may have been believed as to this, the stipulation in express terms saves all rights of the United States to a further hearing. As a legal proposition the land department would, without this stipulation, have the right to take such further steps as seem needful to protect the interests of the United States in these lands, but, aside from this, the company has agreed in writing that the proceedings had at the last hearing should not conclude the government, and that the hearing should proceed upon the day fixed.

The decision appealed from is affirmed.

To the end that the government's case may be ready upon the day fixed, your office is directed to detail a special agent to make such examination of these lands as is practicable before the day set for the hearing, and to secure the attendance of such witnesses as may be able to establish the mineral character of any of these lands. The Geological Survey will be asked to detail a man to act with such special agent in this work.

PUBLIC LAND—LIMITATION OF ACREAGE—ACT OF AUGUST 30, 1890.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 27, 1905.

*Registers and Receivers,
United States Land Offices.*

SIRS: You are informed that departmental instructions issued to this office on May 4, 1905, in determining the maximum amount of lands which may be acquired by a single applicant under the limitation fixed by the act of August 30, 1890 (26 Stat., 391), overruled *W. R. Harrison's case* (19 L. D., 299), and said:

Upon consideration of the whole subject, the history of the legislation, the evil sought to be remedied, and the remedy applied, and studying the matter in the light of well-defined rules of construction, the Department is now of the opinion that the purpose of Congress in the cited legislation was to apply the rule of limitation to lands disposed of under any of the land laws, other than those acquired under the mineral land laws; and in expressing this conclusion used the words "agricultural lands" only in contradistinction to mineral lands.

You are therefore instructed:

First. That all persons who hereafter seek title to any of the non-mineral public lands of the United States should be required to file said affidavit (Form 4-102b) with their respective applications to enter, purchase or locate [see instructions of June 29, 1905, 33 L. D., 606], and no application for lands of that character should hereafter be either received or allowed, unless it is supported by such affidavit.

Second. You should at once notify all applicants who now have applications of the character mentioned above pending before your respective offices that their applications will be rejected without further notice to them unless they, within thirty days from their receipt of such notice, file said affidavit in support of their said applications; and, upon the failure of any applicant to comply with that notice, you should, after receipt of proper evidence that such notice was duly received by such applicant, at the proper time reject his application, and close the case without reporting the matter to this office.

Third. This order is not intended to affect or invalidate any entry, purchase or location heretofore made and allowed, and said affidavit will not, therefore, be required in support thereof.

Very respectfully,

W. A. RICHARDS, *Commissioner.*

Approved:

E. A. HITCHCOCK, *Secretary.*

PUBLIC LAND—LIMITATION OF ACREAGE—ACT OF AUGUST 30, 1890.

INSTRUCTIONS.

Instructions of May 27, 1905, 33 L. D., 605, relative to maximum amount of lands which may be acquired by a single applicant under the limitation fixed by the act of August 30, 1890, amended.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 29, 1905.* (V. B.)

On June 2, 1905, the Department received a communication from Mr. John M. Rankin in reference to the circular of instructions of May 27, 1905 (33 L. D., 605), to the registers and receivers of land offices, in relation to the form of affidavit, 4-102b, which should be required of persons seeking to make entry of the public lands.

He states that he is the owner of a number of recertified soldiers' additional homestead rights and desires to know whether said affidavit in the prescribed form will be required of an applicant to make entry through the use of such certificate. The letter of Mr. Rankin was referred to your office for report, which is now before me. Therein you indicate that such applications as described by Mr. Rankin come within the purview of said instructions.

These instructions were approved and issued in consequence of the decision of the Department of May 4, 1905 (33 L. D., 539), wherein the case of W. R. Harrison (19 L. D., 299), was overruled. In the later decision the Department was discussing the provisions of the act of August 30, 1890 (26 Stat., 371, 391), to the effect that no person "who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry or settlement, under any of the land laws, shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all of said laws," as directed to be construed by the act of March 3, 1891 (26 Stat., 1095, 1101). It must be obvious in reading said decision that the Department had reference to the class of entries described in that act—entries with a view to "occupation, entry or settlement" under any of the land laws.

In your letter transmitting the circular of May 27, 1905, you stated:

Special consideration is invited to the fact that the proposed instructions to the register and receiver extend the operations of the act of August 30, 1890 (26 Stats., 391), to all of the methods under which title to non-mineral public lands may be acquired, except to the laws authorizing lieu selections. This specific direction seemed to be made necessary by the fact that, while your decision only in express terms overruled Harrison's case, which involved a timber and stone entry, it did in effect overrule the following cases where it had been held by your Department that the limitations of the act of August

30, 1896) did not apply: Charles H. Boyle's case (20 L. D., 255), and Isham R. Darnell's case (21 L. D., 454), both involving the purchase of isolated tracts under section 2455, Revised Statutes; John W. Clarkson's case (31 L. D., 399), involving a military bounty land warrant location, and Kiehlbauch *v.* Simero (32 L. D., 418), involving a soldiers' additional homestead entry.

In returning to you the circular, with my approval, it was said:

With regard to the matters discussed in your letter of transmittal, as to the effect of that circular and the implied overruling of certain cases mentioned by you, the Department does not deem it opportune at this time to express any opinion either of concurrence or dissent. When questions of exception to the general rule laid down in the circular arise and are formally presented to the Department it will be time enough to decide them, rather than now to prejudge them as tentatively suggested by you.

It is apparent therefore that the Department refused to acquiesce in your suggestion that the said decisions referred to by you were by implication or otherwise to be overruled. On the contrary, it was said in effect that the question of whether the decision in 33 L. D. impinged upon those rulings was not then to be considered by the Department, and under these circumstances you are not justified in holding to the contrary. As long as said decisions remain unreversed they are to be followed by your office.

It is observed now that in the circular of instructions of May 27, 1905, it is said:

First. That all persons who hereafter seek title to any of the non-mineral public lands of the United States should be required to file said affidavit (form 4-102b) with their respective applications to enter, *purchase or locate*, and no application for lands of that character should hereafter be either received or allowed, unless it is supported by such affidavit.

The words "purchase or locate," in view of what the Department had said in the case referred to in 33 L. D., should not have been in that circular, and you are directed to eliminate them therefrom in your instructions to the local officers.

ARID LAND—RECLAMATION—LANDS WITHDRAWN UNDER ACT OF
JUNE 17, 1902.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 6, 1905.

*Registers and Receivers,
United States Land Offices.*

SIR: In order that you may be better enabled to take proper action in matters coming before you and give proper advice and instructions

relative to the effect of withdrawals of lands under the reclamation act of June 17, 1902, you are instructed as follows:

First. That all withdrawals become effective on the date upon which they are ordered by the Secretary of the Interior.

Second. There are two classes of withdrawals authorized by that act: one commonly known as "Withdrawals under the first form," which embraces lands that may possibly be needed in the construction and maintenance of irrigation works, and the other commonly known as "Withdrawals under the second form," which embraces lands not supposed to be needed in the actual construction and maintenance of irrigation works, but which may possibly be irrigated from such works.

Third. After lands have been withdrawn under the first form they can not be entered, selected, or located in any manner so long as they remain so withdrawn, and all applications for such entries, selections, or locations should be rejected and denied, regardless of whether they were presented before or after the date of such withdrawal, and regardless also of the fact that any such application may be based upon a settlement made before such withdrawal.

Fourth. Lands withdrawn under the second form can be entered only under the homestead laws and subject to the provisions, limitations, charges, terms, and conditions of the reclamation act, and all applications to make selections, locations, or entries of any other kind should be rejected, regardless of whether they were presented before or after the lands were withdrawn.

Fifth. Withdrawals made under either of these forms do not defeat or adversely affect any valid entry, location, or selection which segregated and withheld the lands embraced therein from other forms of appropriation at the date of such withdrawal; and all entries, selections, or locations of that character should be permitted to proceed to patent or certification upon due proof of compliance with the law in the same manner and to the same extent to which they would have proceeded had such withdrawal not been made, except as to lands needed for construction purposes. All lands, however, taken up under any of the land laws of the United States subsequent to October 2, 1888, are subject to right of way for ditches or canals constructed by authority of the United States (act of August 30, 1890, 26 Stat., 391; circular approved by Department July 25, 1903).

Sixth. Any entry embracing lands included within any withdrawal, made under either of the forms mentioned, whether such entry was made before or after the date of such withdrawal, may be contested and canceled because of entryman's failure to comply with the law or for any other sufficient reason, and any contestant who secures the cancellation of such entry and pays the land office fees occasioned by his contest will be awarded a preferred right of making entry under

the reclamation act, provided the lands involved are not embraced within a withdrawal of the first form.

Seventh. When any entry for lands embraced within a withdrawal under the first form is canceled by reason of contest, or for any other reason, such lands become subject immediately to such withdrawal and can not, thereafter, so long as they remain so withdrawn, be entered or otherwise appropriated, either by a successful contestant or any other person; but any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry.

Eighth. In the event any lands embraced in any entry under which final proof has not been offered, or in any unapproved or uncertified selection, are needed in the construction and maintenance of any irrigation work (other than for right of way for ditches or canals reserved under act of August 30, 1890) under the reclamation act, the Government may cancel such entry or selection and appropriate the lands embraced therein to such use, after paying the value of the improvements thereon and the enhanced value of such lands caused by such improvements.

Ninth. Where the owners of the improvements mentioned in the preceding section shall fail to agree with the representative of the Government as to the amount to be paid therefor, such amount shall be ascertained by the sworn appraisement of three trustworthy and disinterested freeholders, one of whom shall be selected by the owner of the improvements, one by a representative of the Government, and a third by the two thus chosen, and no entry shall be canceled or the lands embraced therein so appropriated until the amounts thus ascertained or agreed upon have been paid to the owner thereof.

Very respectfully,

W. A. RICHARDS, *Commissioner*.

Approved, June 6, 1905.

E. A. HITCHCOCK, *Secretary*.

RIGHT OF WAY—FOREST RESERVES—JURISDICTION.

The respective jurisdictions of the Department of the Interior and the Department of Agriculture over applications for rights and privileges within forest reserves defined.

Secretary Hitchcock to the Secretary of Agriculture, June 8, 1905.
(F. L. C.) (F. W. C.)

In further reply to your letter of April 28, 1905, and after an informal conference between the law officer of the Forestry Bureau

of your Department and the Assistant Attorney General for this Department, I have to advise you that it is believed the respective jurisdictions of the two departments over applications for rights and privileges within forest reserves may be safely defined as follows, namely, that your Department is invested with jurisdiction to pass upon all applications under any law of the United States providing for the granting of a permission to occupy and use lands in a forest reserve which occupation or use is temporary in character, and which, if granted, will in nowise affect the fee or cloud the title of the United States should the reserve be discontinued, but that this Department retains jurisdiction over all applications affecting lands within a forest reserve the granting of which amounts to an easement running with the land, with the further understanding that any permission or license granted by your Department is subject to any later disposal of the land by this Department. Within the limits of the separate jurisdictions herein defined, it is believed that the actions of the two departments will proceed harmoniously.

This Department would be pleased to be informed as to whether these views coincide with the views of your Department, and whether you have any further suggestions to make in the premises.

[By letter of June 13, 1905, the Secretary of Agriculture expressed his concurrence in the views herein set forth.]

UINTAH INDIAN RESERVATION—UNALLOTTED LANDS—ACTS OF MAY 27, 1902, AND MARCH 3, 1905.

INSTRUCTIONS.

The provision in the act of May 27, 1902, that persons entering, under the homestead laws, any of the unallotted lands in the Uintah Indian reservation, shall pay therefor at the rate of one dollar and twenty-five cents per acre, is not repealed by the provision in the act of March 3, 1905, "that the said unallotted lands [with certain stated exceptions] shall be disposed of under the general provisions of the homestead and townsite laws of the United States."

By reason of the legislation affecting these unallotted lands, which amounts to an appropriation thereof, no claim on the part of the State to any portion thereof will be recognized, either under its grant of specific sections in place in support of common schools, or under the provisions of the act of March 2, 1895.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 13, 1905.* (F. W. C.)

Your office letters of April 21, and June 9, last, present for the consideration of this Department certain questions preliminary to the preparation of a proclamation to be issued by the President

opening to settlement, entry and disposition the unallotted lands within the Uintah Indian reservation in the State of Utah.

The matters suggested are:

First. Is that provision of the act of May 27, 1902 (32 Stat., 245, 263), relating to the opening of the unallotted lands in this reservation, by which persons entering any of said lands under the homestead law are required to pay therefor at the rate of \$1.25 per acre, repealed by the provisions of the act of March 3, 1905 (33 Stat., 1048, 1069), which extends the time for opening of these unallotted lands to a date not later than September 1, next, and provides "that the said unallotted lands, except such tracts as may have been set aside as national park reserve, and such mineral lands as were disposed of by the act of Congress of May 27, 1902, shall be disposed of under the general provisions of the homestead and townsite laws of the United States?"

In answering this question, after careful consideration of the several statutes bearing upon the opening of these lands and the matters presented in your letters before referred to, the Department is of opinion that the provision making a charge upon homesteaders for the purpose of creating a fund for the benefit of the Indians, found in the act of May 27, 1902, has not been repealed. The recommendation of your office in regard to this matter is therefore concurred in. The time when the required payment should be made by those making homestead entry of these lands is not fixed in the legislation, and I have to direct that the payment be not exacted until the offer of proof in final consummation of the entry.

The second question presented affects the rights of the State under its grant in support of common schools. In regard to the grant in place, which grant was made by the act of July 16, 1894 (28 Stat., 107), of sections numbered 2, 16, 32 and 36 in each township in said State, it is the opinion of this Department that not only technical rules of statutory construction but also the general scope of legislation bearing upon the disposal to be made of the unallotted portion of this reservation, and the policy of the United States in respect to public schools and also to Indians, call for the denial of any claim on the part of the State to any portion of its school grant in place within the limits of this reservation. Further, that the reasons controlling the decision just arrived at prevent the recognition of any claimed right on the part of the State to select indemnity from the surplus lands of this reservation in further satisfaction of its school grant, prior to the opening thereof, under the provisions of the act of March 2, 1895 (28 Stat., 876, 899), or at all. See *Minnesota v. Hitchcock* (185 U. S., 373). The Department concurs also in your recommendations covering these matters.

The third and last question submitted is as to whether the mineral

laws have any application to these unallotted lands to be opened under the President's proclamation. Without at this time determining the question suggested, it is sufficient to say that no mention thereof is necessary in the preparation of the proclamation to be issued under the act of March 3, 1905, which is to prescribe "the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof" under the scheme contemplated, which scheme would not permit of the separation of the mineral from the agricultural lands, if such a division were deemed necessary and advisable, nor could it be required of a claimant to any of these lands under the mining laws that he make entry within the sixty-day period in which this scheme is to have operation under the limitation of the statute.

MINING CLAIM—PATENT PROCEEDINGS—AMENDED LOCATION.

THE GILSON ASPHALTUM CO.

Where a mining claim has been officially surveyed and the survey becomes the basis of patent proceedings which are carried to entry, an amended location embracing additional ground, even though preceding the entry, can not be recognized as the subject of further patent proceedings to include the additional tract as part of the original claim.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 15, 1905.* (F. H. B.)

This is an appeal by The Gilson Asphaltum Company from your office decision of February 11, 1904, holding for cancellation its entry (No. 120, Ute series) for what is designated as the Black Diamond No. 2 lode mining claim, survey No. 14,666, Glenwood Springs, Colorado, land district. The final certificate of entry issued December 30, 1901, and, first particularly describing the surveyed claim as "extending 1337.35 feet in length along said Black Diamond No. 2" vein or lode, expressly excepts and excludes that portion thereof in conflict with the Black Prince lode claim "and also that portion in conflict with survey No. 14,151, Black Diamond No. 2 Lode," leaving an entered area of 0.277 acres. The last-mentioned exclusion is of special interest under the facts of the case, which are as follows:

On January 1, 1897, one Belle Luxen made location of a lode mining claim which was given the name of Black Diamond No. 2. By intermediate conveyances title subsequently vested in Francis P. McManus. In the meantime (in June, 1898) there was filed in the above-mentioned local land office an application for patent to a cer-

tain placer claim, embracing within its boundaries the Black Diamond No. 2 location, on behalf of which (among others) an adverse claim and suit thereon in court were respectively seasonably filed and instituted. By judgment, rendered June 30, 1900, the right of possession of the ground in conflict was awarded to McManus, as the then owner and substituted plaintiff in the action on behalf of the Black Diamond No. 2 lode claim, described in the judgment by metes and bounds. The claim thus sustained in the adverse suit was surveyed for patent July 26, 1900, and the survey approved October 9, 1900, as No. 14,151.

Subsequent to the rendition of the judgment and to the survey of his claim, to wit, August 8, 1900, McManus made an amended location, in order to include a small tract of ground lying between one end of his claim and the adjacent Black Prince lode claim, laying his new end line within and upon the latter so as to preserve parallelism with his opposite end line, and recorded copy of notice of the amended location.

Thereafter, McManus filed copy of his judgment roll, together with official plat of survey (No. 14,151), submitted the required proofs, etc., and made entry, December 8, 1900, for the claim as involved in the adverse suit. Patent issued therefor November 16, 1901.

January 21, 1901 (subsequent to making entry under his judgment roll, as aforesaid, and prior to the issuance of patent under that entry), McManus had made an official survey of his so-called Black Diamond No. 2 claim, covering both the tract embraced in the original location, and in the entry, and the additional tract claimed under and by virtue of the amended location, the survey being approved by the surveyor-general March 22, 1901, and designated as No. 14,666.

By the duly certified abstract of title which accompanies the record it appears that all right, title, and interest in and to the "Black Diamond No. 2" was transferred, subsequent to the date of the entry last above mentioned and by successive conveyances, to The Gilson Asphaltum Company, the evident intention, as disclosed by the abstract, being to convey both the tract embraced in the original location (now patented) and the additional tract included in the amended location.

October 1, 1901 (also subsequent to the entry under the judgment roll), the Gilson company, the then claimant, filed application for patent to the "Black Diamond No. 2 Lode Mining Claim," extending "1337.35 linear feet on the" lode or vein thereof, etc., "but expressly excepting and excluding" therefrom "all that portion of the Black Diamond No. 2 lode in conflict with survey No. 14,150,

Black Prince lode, and also that portion in conflict with survey No. 14,151, Black Diamond No. 2 lode." The application was accompanied by the plat of, and based upon, official survey No. 14,666. Patent proceedings were prosecuted under the application in the usual manner and without hindrance, and culminated in the entry first above mentioned.

The papers having been forwarded in regular course by the local officers, your office, by letter of November 17, 1903, called attention to the fact that the improvements relied upon by the company are situated upon and were accredited to the excluded ground embraced in survey No. 14,151; and the local officers were directed to notify the company that it would be allowed sixty days from receipt of notice within which to show cause why its entry (No. 120, Ute series) should not be canceled because of insufficiency of improvements, and that in default of such showing and of appeal such action would be taken without further notice.

December 8, 1903, in response to this requirement, resident counsel for the company submitted the following:

1. That the present entry is based upon an *amended location* made by the grantor of the entry company *prior* to the survey of the ground which has been awarded said grantor by the judgment of a court of competent jurisdiction on adverse proceedings duly initiated.

2. That said grantor of the entry company, being the owner of the ground embraced in the *original location*, and included in said judgment, and said original location being less than the length along the vein allowed by law, Sec. 2320, R. S., said grantor and owner of said original location had a legal right to amend his original location and to take by such amendment additional unappropriated ground to the extent of fifteen hundred feet along the course of the vein, and by such amendment, valid when made, he appropriated such additional surface ground, and incorporated and merged it in his original location, as he had a right to do under the law and the decision of the Supreme Court of the United States (*Del Monte etc. Co. v. Last Chance etc. Co.*, 171 U. S., 55); nor did such grantor waive or lose any right to thus amend his location because he had secured a judgment establishing and securing his possessory rights in and to the originally located premises.

3. That by the amended location the ground awarded by the judgment of the court became part and parcel of the *claim*, and the mere fact that such grantor had secured patent for a portion of the located ground upon his judgment roll, does not militate against the right of his grantee to secure patent for the balance of the legally located premises, by the making of the supplemental or additional entry therefor.

4. That the fact that the present entry is based upon an *amended location* made and perfected prior to any proceedings looking to the acquisition of patent title for the ground awarded by judgment, entitled the entry company, as grantee of the locator and judgment claimant, to make an additional or supplemental entry for so much of the valid amended location ground as was not included in the patent issued upon the judgment roll.

5. The fact that the amended location is an entirety (as was also the original location) entitled the entry company to include in the estimate of improvements

for the *whole claim* the work done and expenditure made upon that portion of the claim which was awarded by judgment, and patented upon the judgment roll.

By decision of February 11, 1904, before mentioned, your office, after considering the foregoing, held that "the entry is not supplemental to the prior entry made upon the judgment, but is a separate, independent entry of ground not included in the location on which the former entry was made," and therefore not entitled to credit for the improvements accredited upon the earlier entry. The entry was accordingly held for cancellation.

The situation thus disclosed by the record is unusual, and the question presented by the appeal, primarily important as one of law, is little less so from considerations of administration. Of a locator's right, as a general rule, to enlarge his location by amendment, within the limits prescribed by the mining law and without prejudice to the rights of others, and to secure entry and patent for his amended location under proper proceedings to that end, there can be no question. The decision here must rest, therefore, upon the effect of the steps taken in the case.

As above stated, the original location, as relied upon and under which the claimant prevailed in the adverse suit, was made the subject of an official mineral survey, conformably to the judgment. Thereafter the limits of the claim were extended by amendment. No prejudice to the right of amendment resulted from the antecedent adverse proceedings and survey of themselves, and the amendment might have become effective for patent purposes but for the further circumstance, that the official survey of the claim as originally located, and in accordance with the judgment whereby the claim was sustained and described, was made the basis of entry and patent under the judgment roll. The fact that the amendment preceded both the approval of the survey and the ensuing entry is immaterial: the controlling consideration is that it was that official survey, of the original and litigated claim, to which the entry conformed and upon which it rested. Had that survey been renounced, the amended location made the subject of a new and substituted official survey (as it was in fact surveyed), and the later survey made the basis of entry under the judgment roll for that portion of the newly delineated claim embraced in the judicial award, and for the residue or additional tract under proper patent proceedings, a quite different situation would have been presented (see *Little Annie No. Five Lode Mining Claim*, 30 L. D., 488). The claimant, however, chose the former course.

The official survey is the initial step in the proceedings for the acquisition of mineral patent. The application for patent, notice thereof, entry, and patent must refer to and comport with it. It

constitutes the delimitation of the claim as a unit upon the survey records of the land department, and is the official and controlling advice of the locus and extent of the claim for which patent proceedings are prosecuted. Unless substituted by a later official survey in a proper case, and once made the basis of proceedings which culminate in a valid entry, no change in the boundaries or extent of the claim can be recognized. Obviously, it would be subversive of effective administration if these consummated proceedings could be reopened from time to time as applicants should see fit to enlarge their claims and apply for patent to the added tracts as portions of the former as to which patent proceedings had thus been prosecuted to completion; and the Department is without doubt that no authority of law therefor exists.

The entry based upon the first survey must be held to have constituted a waiver of any additional rights claimed by way of amendment of the original location; and the additional tract could be regarded, at most, only as having been embraced in an independent location, which would be subject to all the requirements of the law.

The decision of your office must be, and it is, affirmed.

SWAMP LAND—FIELD NOTES OF SURVEY.

INSTRUCTIONS.

The rule announced in departmental decision of March 20, 1905, in the case of *Wallace v. State of Minnesota* (33 L. D., 475), relative to the adjustment of swamp land grants where swamp is disclosed only on one of the surveyed lines of a section, vacated, without prejudice to the right of the State to make further showing with respect to the matter, if it so desires, and instructions given that, for the present, the rule laid down in *First Lester*, page 543, alone be followed.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 17, 1905.* (F. W. C.)

Your office decisions of October 1, and December 12, 1904, in the matter of the contest of *William J. Wallace v. State of Minnesota*, involving the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 35, T. 55 N., R. 10 W., 4th P. M., Duluth, Minnesota, held that said tract was not shown by the field notes of survey to be of the character of lands which passed to the State under its swamp land grant.

Upon appeal this Department March 20, 1905 (33 L. D., 475), affirmed your office decision rejecting the State's claim to this tract under its swamp land grant. In its appeal the State urged the adoption of a rule, in reading the field notes of survey, where swamp is given only upon one side of a section, that the margins of such

swamp be connected by the circumference of a circle the radius of which should be one-half the length of the section line within the swamp, for the purpose of the adjustment of the claim of the State under its swamp land grant.

The Department refused to adopt this rule, but stated that its application would not affect the result in the case then under consideration, and in that connection a tentative rule was suggested whereby the State's claim might be adjusted according to the portions of swamp land shown to be swamp and dry, where, because of the fact that there were no other defined lines of swamp along the surveyed lines of the section, the application of the rule found in *First Lester*, 543, seemed impossible. Even the application of this rule did not affect the result reached adverse to the claim of the State in the case then under consideration.

Since this decision was rendered the attention of the Department has been invited to the matter and the tentative rule hereinbefore referred to will not be followed. This action is, however, without prejudice to the right of the State to further present, by petition or otherwise, the matter of a change in the rule governing the adjustment of the swamp land grant, but for the present your office will be guided alone by the rule announced in *First Lester*, hereinbefore referred to.

RIGHT OF WAY—RAILROAD—ACT OF MARCH 3, 1875.

PHOENIX AND EASTERN R. R. CO. *v.* ARIZONA EASTERN R. R. CO.

No rights can be initiated by any railroad company under the provisions of section 1 of the act of March 3, 1875, granting rights of way through the public lands, prior to the organization of such company under the laws of a State or Territory.

A railroad company having adopted one line along the route provided for by its charter, and having filed a plat thereof with the Secretary of the Interior for approval under the act of March 3, 1875, may thereafter adopt another route and secure rights by constructing upon the changed location.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) June 17, 1905. (G. B. G.)

This is the appeal of the Phoenix and Eastern Railroad Company from your office decision of September 2, 1904, holding for rejection a map filed by said company, under section 4 of the act of March 3, 1875 (18 Stat., 482), showing a profile of its proposed amended line of road located on the *north* side of the Gila river from a point about two miles west of Kelvin, in unsurveyed township four south, range thirteen east, to a point opposite the town of Dudleyville, section thirty, township five south, range sixteen east, Tucson, Arizona, and

recommending for approval a map filed by the Arizona Eastern Railroad Company, under the same act, showing a profile of its proposed line of road located upon substantially the same ground.

The Phoenix and Eastern Railroad Company will be hereinafter designated as the Phoenix Company and the Arizona Eastern Railroad Company will be designated the Arizona Company.

The controlling facts of this case are as follows: It appears that the Phoenix Company was incorporated August 31, 1901; filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of organization thereunder July 21, 1902, which were accepted for filing by that officer August 7, 1902. Prior to the month of October, 1902, the same company caused a survey to be made of a line of railroad from the city of Phoenix, in Maricopa county, Arizona, to the town of Benson, in Cochise county, Arizona, adopted and approved the same, and caused a map or profile descriptive thereof to be filed, which was approved by the Secretary of the Interior October 16, 1902. That part of the line of railroad so located by the Phoenix Company which extends from a point two miles west of Kelvin to the town of Dudleyville was upon the *south* side of the Gila river, opposite to the right of way here in dispute. Between the 18th day of December, 1903, and the 3d day of March, 1904, the Phoenix Company caused to be made a survey of a line for said railroad on the *north* side of the Gila river, as hereinbefore described, and which is the line in dispute. March 10, 1904, the same company approved and adopted a map or profile of such survey as the map and profile of the amended definite location of that portion of the line of railroad as was shown thereon between mile 77 and mile 97, and thereafter, to wit, on the 14th day of March, at 11:20 A. M., caused said map to be filed with the register of the land office at Tucson, Arizona. Upon said map, and forming a part thereof, was endorsed by said Phoenix Company a relinquishment to the United States of all rights, titles, and privileges in the right of way south of the river, to take effect upon the acceptance of the map then filed, which is the same map held for rejection by your said office decision of September 2, 1904.

It further appears that the Arizona Company was incorporated February 16, 1904, filed with the Secretary of the Interior a copy of its articles of incorporation and due proof of organization thereunder, which were accepted for filing by that officer March 31, 1904. Between February 20 and March 12, 1904, this company had caused a survey to be made of a line of road between the points named upon the north side of the river, upon substantially the same ground as was the said surveyed line of the Phoenix Company. The circumstances attending the making of the survey and the filing of the plats clearly indicate that this company was fully apprised of the intentions of

the Phoenix Company, and sought to gain an advantage by first filing a map, based upon a mere preliminary survey, on February 24, 1904, which was afterwards withdrawn. March 12, 1904, the Arizona Company adopted a map or profile of survey for this portion of its line as the definite location of its road; and thereafter, to wit, on the 14th day of March, 1904, at nine o'clock A. M., caused the said map to be filed with the register of the land office at Tucson, Arizona, in substitution of its former map, which is the map your said office decision of September 2, 1904, recommends for approval.

The decision of your office rests upon the ground of priority in the filing of these maps, holding in respect to this that the Arizona Company was prior in time and therefore has the better right.

Section 1 of the act of March 3, 1875, *supra*, grants to any railroad company duly organized under the laws of any State or Territory, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, a right of way through the public lands of the United States to the extent of one hundred feet on each side of the central line of said road. Section 4 of the same act is as follows:

SEC. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

That no rights can be initiated under this act by any railroad company prior to the date of its incorporation would not seem to be a proposition upon which there should ever have been any doubt. There can be no grant until there is a grantee, and the only grantee named in the act is a railroad company, "duly organized" under the laws of any State or Territory. It then becomes a potential grantee and may become an actual beneficial grantee by complying with the further provisions of the act. It may be questioned whether such duly organized company could initiate a right thereunder prior to the filing with the Secretary of the Interior a copy of its articles of incorporation and due proofs of organization, but for the purposes of this case it will be enough to say that neither of the parties to this controversy initiated any right by acts performed prior to incorporation. *Washington and Idaho Railroad Company v. Coeur d'Alene Railway Company* (160 U. S., 77).

As early as October, 1902, the Phoenix Company began the con-

struction of its previously located road eastwardly from Phoenix, and as early as December, 1903, it had become apparent that a more feasible and better location for a railroad could be secured by a change of location from a point at or near Kelvin to a point opposite Dudleyville, by locating this section of its road on the north instead of the south bank of the Gila river. On the 18th of that month, the Phoenix Company began a survey of the new line on the north bank of the river, which survey was completed on the 3d day of March, 1904, adopted March 10, 1904, and a plat thereof filed in the local office March 14, 1904, as before stated, thus showing that this company proceeded with all reasonable dispatch to effect the change in its line, and it is shown that the construction followed immediately the change in location, and that the line of road has been actually constructed and is in use over the ground in dispute.

That a company having adopted one line along the route provided for by its charter, and having filed a plat thereof with the Secretary of the Interior for approval under the act of March 3, 1875, *supra*, may thereafter adopt another route and secure rights by constructing upon the changed location, is settled by the decision of the Supreme Court in the case of Washington and Idaho Railroad Company *v.* Coeur d'Alene Railway Company, *supra*.

The controlling question presented by this record is, whether the Arizona Company has any such rights by reason of its survey and the prior filing of its map of location as entitle it to a preference over the Phoenix Company. In other words, did the acts performed by the Arizona Company initiate such intervening rights as barred the Phoenix Company from acquiring rights under its prior survey, followed by the actual construction of its road, for, unless it did, no approval should now be given to the Arizona Company's maps of location covering the same ground.

As before stated, the Arizona Company knew of the changed intentions of the Phoenix Company when it first went upon the ground, and was in nowise misled by the old survey on the south side of the river; further, the amended location determined upon by the Phoenix Company was not the only location possible in the vicinity, and the circumstances do not seem to justify an imputation of improper motives to the Phoenix Company in making the change in this portion of its line.

It having been adjudged that a change in location is allowable under the statute, can it be that a second company, not in existence at the time the change is determined upon and while the first company is in occupation of the ground and proceeding with all reasonable dispatch in effecting the change, may be organized and by facilitating a survey and the preparation and filing of its map of location secure a preference right to approval of its maps? This is seriously

doubted, and in view of the actual construction by the Phoenix Company, which was the first upon the ground, the Department must refuse to give approval to the Arizona Company's map of location covering practically the ground now in the actual use of the other company, the claimed right to which under the facts stated must rest alone upon priority of filing in the local land office. Under the circumstances of this case, priority in filing the map is not controlling, and your office erred in so holding.

The decision appealed from is reversed. The Arizona Company's map is hereby rejected, and your office will, if upon further examination it finds the Phoenix Company's map in all respects regular, submit the same for formal approval.

FOREST RESERVE—RAILROAD GRANT—SEC. 3, ACT OF MARCH 2, 1899.

NORTHERN PACIFIC RY. CO. *v.* MANN.

Section 3 of the act of March 2, 1899, authorizing the Northern Pacific Railway Company, upon the relinquishment of lands in the Mount Ranier National Park and the Pacific forest reserve theretofore granted to said company, to select, in lieu thereof, an equal quantity of nonmineral public lands, does not contemplate the relinquishment by the company of the lands within these reservations falling within the secondary or indemnity limits of its grant, the same not having been selected and not being subject to selection at the date of the passage of said act, with the consequent right of selection of other lands in lieu thereof, but applies only to the lands within the primary or place limits to which the rights under the grant had attached at that date.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 19, 1905.* (F. W. C.)

The Department has considered the appeals by the Northern Pacific Railway Company and William J. Mann, from your office decision of February 24, 1904, awarding to Mann the right to complete homestead entry of the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 14, T. 43 N., R. 2 E., Coeur d'Alene land district, Idaho, and rejecting his application as to the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 15, same township and range, because of prior claim under selection made thereof by said railway company.

October 1, 1901, while the township in question was yet unsurveyed, the Northern Pacific Railway Company made selection of the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of said Sec. 15, in lieu of an equal quantity of other land, within the limits of its grant, under the provisions of the act of July 1, 1898 (30 Stat., 597, 620), and on the same day made selection of the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of said Sec. 14, in lieu of the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of

Sec. 21, T. 13 N., R. 9 E., State of Washington, under the provisions of the act of March 2, 1899 (30 Stat., 993).

The plat of survey of the township in question was filed in the local land office August 21, 1903. September 11, following, the company adjusted its previous selections to the lines of the public survey. On the date the plat was filed William J. Mann tendered a homestead application for the lands in sections 14 and 15, hereinbefore first described, which application was rejected for conflict with the selections made by the railway company, as stated. November 12, 1903, Mann filed an affidavit, duly corroborated, alleging that he had settled on the land in section 14 on May 20, 1901, and since continuously resided thereon, with improvements made of the value of about \$300, and that he has claimed the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 15 since June 1, 1902.

March 15, 1899, the governor of the State of Idaho made application; under the provisions of the act of August 18, 1894 (28 Stat., 372, 394, 395), for the survey of this township, which application was received at your office March 22, 1899, and by letter of March 29, 1899, the local officers were advised of the withdrawal of the lands in the township from entry and settlement as provided for in the act of 1894. Whether any publication was made by the State, as required by the act of 1894, is not clearly shown. Your office decision appealed from finds that no evidence has been filed of such publication, and in view of the conclusion hereinafter reached it will not be material to inquire further as to whether such publication was made; it is sufficient to say that no claim to the lands on account of the State has been presented.

The lands here in question are not within either the primary or indemnity limits of the Northern Pacific land-grant. The portion in the odd-numbered section was, however, included in the classification made by the mineral land commissioners under the act of February 26, 1895 (28 Stat., 683), as shown by their report made in October, 1899, being classified as mineral land, which classification received departmental approval March 26, 1901. As the lands are not within the limits of the Northern Pacific land-grant, such classification was unauthorized and can not be held as affecting their character. They were not returned as mineral at time of survey.

Upon considering the respective claims to the land in question, your office decision sustained the selection by the railway company of the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 15, made under the act of July 1, 1898, *supra*, said selection having been made long prior to any intention on the part of Mann to include that tract within his homestead claim.

In his appeal from your office decision rejecting his homestead application as to this tract he confounds the right of selection under the act of 1898 with that granted by act of June 4, 1897 (30 Stat., 11,

36), and further urges that the classification under the act of February 26, 1895, was sufficient to bar the selection.

The company's selection here in question seems to have been regular and valid, as far as shown by the record here, and clearly preceded any intention on the part of Mann to claim the land. Under the act of 1898 it had the right to select unsurveyed lands. No question is raised as to the sufficiency of the tract assigned as a base for the selection, and the classification under the act of 1895 can not, for the reasons hereinbefore given, defeat the right of selection. The Department therefore sustains the conclusion reached by your office in this respect, and Mann's application as to this tract will stand rejected.

With regard to the tract in section 14, particularly the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, selected by the railway company under the provisions of the act of March 2, 1899, your office rejected the selection upon the ground that the tract made the base therefor is a portion of an odd-numbered section within the indemnity limits of the Northern Pacific land-grant, not previously selected, and therefore does not afford a sufficient base for the selection of other lands under the provisions of the act of March 2, 1899, even though it is shown to be within the limits of the Pacific forest reserve.

In its appeal, the railway company contends that the purpose and intention of the act of March 2, 1899, was to offer the company a right of selection equal in amount to *all* the odd-numbered sections within either its primary or indemnity limits shown to be opposite constructed road and included within the boundaries of either the Mt. Ranier National Park or the Pacific forest reserve; that this was its understanding at the time it made relinquishment as provided for in that act, which relinquishment was accepted by the Department and which constituted an agreement which should not now be departed from.

The third section of the act of March 2, 1899, provides:

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

It is urged that in providing for the relinquishment of the lands "heretofore granted by the United States to said company," indemnity lands were included as well as the place lands, as both were lands granted. It is true that such expressions as "land granted," "granted lands," and "lands within the grant" and similar expressions, have been construed by this Department to include not only the lands within the place or primary limits, but also those within the secondary or indemnity limits, but when all the circumstances surrounding this matter are understood it seems clear that it was not intended by this act to grant a right of selection for other lands in lieu of those which might fall within these reservations, so far as the same were included within the secondary or indemnity belt.

In the first place, these indemnity or base lands were all unsurveyed and had been by proclamation dated February 20, 1893 (No. 44, 27 Stat., 1063), reserved from all settlement, entry or other disposition on account of the Pacific forest reserve thereby created. No selection was possible on account of the grant while the lands were unsurveyed, and, as a consequence, all right of further selection was terminated by the proclamation referred to so long as the lands remained reserved for forestry purposes. No good purpose was therefore apparent for providing for a release of these indemnity lands, and while it might be admitted that a right of selection would still exist should the reservation terminate, yet this furnishes no reason for securing the company's release, as the necessity therefor would surely cease upon the termination of the reservation.

A more controlling reason for denying the company a right of selection in lieu of these indemnity lands is, that to recognize such a right would clearly amount to an increase in the grant in this: that it would result in extending the granted limits to the outer indemnity limits in this locality. No such purpose is indicated, and under well-known rules of construction the claim which amounts to an addition or increase in the grant must be and is accordingly denied.

With regard to the claim that in relinquishing under the act of 1899 all its rights etc., in and to all lands granted by the act of July 2, 1864, and acts amendatory thereof and supplemental thereto, "by way of indemnity or otherwise," the railway company intended and did waive its indemnity privileges, it is sufficient to say that such fact, if understood at the time, was no cause for rejecting the relinquishment and that as the acceptance thereof was in the terms of the act of 1899 it can not be construed as enlarging its provisions.

In this view of the case it becomes unnecessary to consider Mann's allegation of settlement antedating the company's selection.

Your office decision is accordingly affirmed, and the company's selection of the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 14, will be canceled.

SURVEYOR GENERAL'S SCRIP—ACT OF JUNE 2, 1858.

JAMES A. O'SHEE.

Surveyor general's scrip issued under the act of June 2, 1858, can be located only on lands subject to private entry "at a price not exceeding one dollar and twenty-five cents per acre."

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 19, 1905.* (E. F. B.)

The Department has considered the appeal of James A. O'Shee from the decision of your office of December 21, 1904, holding for cancellation location made by appellant February 5, 1903, of lot 1, section 2, T. 4 N., R. 1 E., La. Mer., New Orleans, Louisiana, containing 32.48 acres, with surveyor general's scrip issued under the act of June 2, 1858 (11 Stat., 294), for 14.32 acres, and by payment of \$22.50 cash for the excess. The location was held for cancellation because the land located is double minimum land not subject to be located with such scrip.

When this case first came before your office the local officers were directed to notify the locator that he would be allowed thirty days to show cause why the entry should not be canceled. In response to that rule he asked for a review of your decision, alleging error in holding that the land is not subject to entry with such scrip and in not allowing him to remit the additional sum of \$40.60 in payment for the enhanced value of the land.

Appellant, in support of his contention, relies upon the decision of the Department in the case of Charles P. Maginnis (31 L. D., 222), in which it was stated that the act of March 3, 1855 (10 Stat., 701), making additional provision for the granting of military bounty land warrants, "is of the same character as the act of June 2, 1858." That expression had reference solely to the effect of the act of March 2, 1889 (25 Stat., 854), withdrawing from private cash entry all public lands, except those in the State of Missouri, upon the acts of March 3, 1855, and June 2, 1858, and was not intended to hold that all lands subject to location and entry with bounty land warrants were subject to location with scrip issued under the act of June 2, 1858. In other words, it held that the act of March 2, 1889, did not withdraw from location by military bounty land warrants and by surveyor general's scrip lands that were subject to location with such warrants or scrip at the passage of the act (Victor H. Provensal, 30 L. D., 616; James L. Bradford, 31 L. D., 132); but it was not intended to hold, nor is there any expression in the decision from

which any inference can be drawn, that the act of March 2, 1889, enlarged any right or benefit conferred by the act of June 2, 1858, or subjected to location any lands that were not subject to such location prior to the passage of the act.

That part of the act of March 3, 1855, which has been carried into the Revised Statutes as section 2415, provides that military bounty land warrants may be located "upon any lands of the United States, subject to private entry at the time of such locations at the minimum price," but—

When such warrant is located on lands which are subject to entry at a greater minimum than one dollar and twenty-five cents per acre, the locator shall pay to the United States, in cash, the difference between the value of such warrants at one dollar and twenty-five cents per acre, and the tract of land located on.

The act of June 2, 1858, restricts the location of scrip issued thereunder to "public lands of the United States subject to sale at private entry, at a price not exceeding one dollar and twenty-five cents per acre," but no provision is made, as in the case of bounty land warrants, for the location of such scrip upon land enhanced in value and known as double minimum lands.

The act of March 2, 1855 (10 Stat., 634), provides that where swamp lands have been disposed of by the United States, the State shall be authorized "to locate a quantity of like amount, upon any of the public lands subject to entry, at one dollar and a quarter per acre, or less." In construing this act, it has been held that a State is not entitled to locate swamp land indemnity scrip upon lands subject to entry at the enhanced or double minimum price, for the reason that "by the plain terms of the act of 1855 the State is limited in its selection of swamp indemnity lands to 'the public lands subject to entry at one dollar and a quarter per acre or less.'" Under that authority it must be held that the scrip issued under the act of June 2, 1858, is also limited to lands subject to private entry "at a price not exceeding one dollar and twenty-five cents per acre." (State of Iowa, July 16, 1903, unreported.)

Your decision is affirmed.

FEES AND COMMISSIONS—REGISTERS AND RECEIVERS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 20, 1905.

To Registers and Receivers of United States Land Offices in Alabama, Arkansas, Florida, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, and Wisconsin.

GENTLEMEN: The following are the fees and commissions allowed by law in full for all services rendered by registers and receivers in your respective land districts:

DECLARATORY STATEMENTS.

Preemption declaratory statement.....	\$2.00
Soldiers' and sailors' homestead declaratory statement.....	2.00
Coal land declaratory statement.....	2.00
Reservoir declaratory statement (act January 13, 1897).....	2.00

MINERAL APPLICATIONS AND ADVERSE CLAIMS.

For filing and acting upon each application for a patent.....	\$10.00
For filing and acting upon each adverse claim.....	10.00

TIMBER AND STONE LAND APPLICATIONS.

For filing and acting upon each application to purchase timber or stone lands, to be paid only when the entry is allowed.....	\$10.00
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HOMESTEAD ENTRIES, ORIGINAL ENTRY FEES AND COMMISSIONS, PAYABLE WHEN APPLICATION IS MADE.

For 160 acres, at \$1.25 per acre: Fee, \$10.00; commissions, \$4.00; total...	\$14.00
For 80 acres, at \$1.25 per acre: Fee, \$5.00; commissions, \$2.00; total....	7.00
For 40 acres, at \$1.25 per acre: Fee, \$5.00; commissions, \$1.00; total....	6.00
For 160 acres, at \$2.50 per acre: Fee, \$10.00; commissions, \$8.00; total...	18.00
For 80 acres, at \$2.50 per acre: Fee, \$5.00; commissions, \$4.00; total....	9.00
For 40 acres, at \$2.50 per acre: Fee, \$5.00; commissions, \$2.00; total....	7.00

FINAL HOMESTEAD COMMISSIONS (NO FEES), PAYABLE WHEN CERTIFICATE ISSUES.

For 160 acres, at \$1.25 per acre.....	\$4.00
For 80 acres, at \$1.25 per acre.....	2.00
For 40 acres, at \$1.25 per acre.....	1.00
For 160 acres, at \$2.50 per acre.....	8.00
For 80 acres, at \$2.50 per acre.....	4.00
For 40 acres, at \$2.50 per acre.....	2.00

(The commissions payable on a homestead entry of 160 acres or less must be computed at the rate of 2 per centum strictly on the cash value of the land applied for, except where a different basis for such computation is fixed by statute in particular cases.)

FINAL TIMBER-CULTURE COMMISSIONS (NO FEES), PAYABLE WHEN CERTIFICATE ISSUES.

For each final entry, irrespective of area or price..... \$4.00

(There is no distinction between minimum and double-minimum lands in timber-culture entries.)

MILITARY BOUNTY LAND WARRANTS.

For locating a 160-acre warrant..... \$4.00
 For locating a 120-acre warrant..... 3.00
 For locating an 80-acre warrant..... 2.00
 For locating a 60-acre warrant..... 1.50
 For locating a 40-acre warrant..... 1.00

(No fees are chargeable on warrants issued prior to February 11, 1847.)

(Revolutionary bounty land scrip is received and accounted for *as cash*, and *no fee* is chargeable to parties presenting such scrip.)

PORTERFIELD WARRANTS (ACT OF APRIL 11, 1860).

For locating these warrants the same fees are chargeable as are allowed for military bounty land warrants.

CASH ENTRIES.

The commissions of registers and receivers on cash sales of the public lands are paid by the United States, and no fees or commissions on such sales are chargeable to the purchasers, except in cases of homestead entries on ceded Indian reservations affected by the act of May 17, 1900 (31 Stat., 179), and computed under the provisions of the act of January 26, 1901 (31 Stat., 740), in which cases the entryman is required to pay a commission of 2 per centum on the cash price of the land (31 L. D., 106).

STATE SELECTIONS.

For each final location of 160 acres (or fraction thereof) under any grant of Congress to States (except for agricultural colleges)..... \$2.00

No fees are chargeable on State swamp-land selections, but a fee of \$2.00 is to be collected on each location of 160 acres, or fraction thereof, made with swamp-land indemnity certificates.

For method of computing fees, see "Railroad and other selections."

RAILROAD AND OTHER SELECTIONS.

For each final location of 160 acres (or fraction thereof) by railroads or other corporations..... \$2.00

(In computing the amount of fees payable on a list of State or railroad selections, the receiver will divide the total area by 160; the quotient will be the number of 160-acre selections on which a fee of \$2.00 each is chargeable. Should the quotient consist of a fraction over a whole number, the legal fee of \$2.00 will be collected for such fraction.)

AGRICULTURAL COLLEGE SCRIP.

For each piece of agricultural college scrip located----- \$4.00

PRIVATE LAND SCRIP, VALENTINE SCRIP.

For each piece of scrip filed on unsurveyed lands----- \$1.00

For each location of scrip----- 1.00

SUPREME COURT SCRIP.

No *fees or commissions* are allowed on the location of *supreme court scrip*, nor on the location of *Indian scrip* or other *private land scrip*, except as specially provided for by law and instructions.

REDUCING TESTIMONY TO WRITING.

Fees for reducing testimony to writing are allowed at the rate of 15 cents for each 100 words in the following cases only:

1. In making *final proof* in *preemption cases*.
2. In making *final proof* in commuted and noncommuted *homestead* and *timber-culture cases*.
3. In *establishing claims to mineral lands*.
4. In establishing claims to timber and stone lands.
5. In *hearings* before registers and receivers in *contested cases*.
6. The same fees are also payable to registers and receivers for examining and approving final-proof testimony taken in homestead and timber-culture cases in which the proof has been taken before some other officer authorized by law to take testimony in such cases.

No testimony fees are chargeable by registers and receivers for taking final proofs in desert-land entries.

No fees are allowed for reducing testimony to writing in any case where the writing is not done by the register or receiver, or by the employees in their office. In computing the fees for reducing testimony to writing, only the words actually written must be charged for at the rate allowed by paragraphs 10 and 11 of section 2238, R. S., and no charge is to be made for the printed words. The words written must be actually counted and charged for, and there can be no uniform fee of a specified sum applicable to every case of the same class of entries; that is, registers and receivers can not fix the fee at \$1.00 or any other sum for each preemption, final homestead, mineral, or other entry.

TRANSCRIPTS FROM RECORDS.

Registers and receivers are entitled to charge at the rate of 10 cents per hundred words for making transcripts of their records for individuals (act of Congress of March 22, 1904).

RECORD INFORMATION.

Registers and receivers for any consolidated land district are entitled to charge and receive for any record information respecting public lands or land titles in their consolidated land district such fees as are properly authorized by the tariff existing in the local courts of such district (sec. 2239, R. S.).

(Consolidated districts are those districts into which one or more previously existing districts have been merged.)

PLATS AND DIAGRAMS (REGISTERS AND RECEIVERS OF ALL DISTRICTS ARE ALSO AUTHORIZED TO FURNISH PLATS, DIAGRAMS, ETC.).

Under the second section of the act of March 3, 1883, authorizing a charge to be made for plats, diagrams, etc., the fees for the same are hereby fixed as follows:

For a diagram showing entries only-----	\$1.00
For a township plat showing entries, names of claimants, and character of entry -----	2.00
For a township plat showing entries, names of claimants, character of entry, and number -----	3.00
For a township plat showing entries, names of claimants, character of entry, number and date of filing or entry, together with topography, etc -----	4.00

The plat or diagram must be of standard size (Form 4-590 b), and it must be a correct and complete delineation of the particular township. There is no legal authority under said statute for registers and receivers to furnish a plat of a section or subdivision, or any other fraction of a township, and to charge or receive therefor a proportionate part of the authorized fee.

For lists of lands sold, furnished State or Territorial authorities for the purpose of taxation, compensation for the same at the rate of 10 cents per entry.

CANCELLATION NOTICES.

For giving notices to contestants of the cancellation of any preemption, homestead, or timber-culture entry----- \$1.00

No FEES, COMMISSIONS, OR REWARDS are required or allowed to be paid at United States land offices for extra services of any character whatever; and registers and receivers are absolutely prohibited by law from charging or receiving, directly or indirectly, any fee or compensation not expressly authorized by law, or for any service not imposed upon them by law, or a greater fee or compensation in any case than specifically allowed by law. Officers charging or receiving illegal fees, compensation, or gratuity are subject to *summary dismissal from office*, in addition to the penalties provided in title "Crimes," chapter "Official misconduct," United States Revised Statutes. Illegal fees received by clerks, employees, or agents are received by the land officers within the meaning and prohibitions of the law, and registers and receivers will be held personally and officially responsible therefor.

W. A. RICHARDS, *Commissioner*.

Approved May 20, 1905:

E. A. HITCHCOCK, *Secretary*.

FEES AND COMMISSIONS—REGISTERS AND RECEIVERS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 20, 1905.

To Registers and Receivers of United States Land Offices in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

GENTLEMEN: The following are the fees and commissions allowed by law in full for all services rendered by registers and receivers in your respective land districts:

DECLARATORY STATEMENTS.

Preemption declaratory statement.....	\$3.00
Soldiers' and sailors' homestead declaratory statement.....	3.00
Coal land declaratory statement.....	3.00
Reservoir declaratory statement (act January 13, 1897).....	3.00

MINERAL APPLICATIONS AND ADVERSE CLAIMS.

For filing and acting upon each application for a patent.....	\$10.00
For filing and acting upon each adverse claim.....	10.00

TIMBER AND STONE LAND APPLICATIONS.

For filing and acting upon each application to purchase timber or stone lands, to be paid only when the entry is allowed.....	\$10.00
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HOMESTEAD ENTRIES, ORIGINAL ENTRY FEES AND COMMISSIONS, PAYABLE WHEN APPLICATION IS MADE.

For 160 acres, at \$1.25 per acre: Fee, \$10.00; commissions, \$6.00; total...	\$16.00
For 80 acres, at \$1.25 per acre: Fee, \$5.00; commissions, \$3.00; total...	8.00
For 40 acres, at \$1.25 per acre: Fee, \$5.00; commissions, \$1.50; total...	6.50
For 160 acres, at \$2.50 per acre: Fee, \$10.00; commissions, \$12.00; total...	22.00
For 80 acres, at \$2.50 per acre: Fee, \$5.00; commissions, \$6.00; total...	11.00
For 40 acres, at \$2.50 per acre: Fee, \$5.00; commissions, \$3.00; total...	8.00

FINAL HOMESTEAD COMMISSIONS (NO FEES), PAYABLE WHEN CERTIFICATE ISSUES.

For 160 acres, at \$1.25 per acre.....	\$6.00
For 80 acres, at \$1.25 per acre.....	3.00
For 40 acres, at \$1.25 per acre.....	1.50
For 160 acres, at \$2.50 per acre.....	12.00
For 80 acres, at \$2.50 per acre.....	6.00
For 40 acres, at \$2.50 per acre.....	3.00

(The commissions payable on a homestead entry of 160 acres or less must be computed at the rate of 3 per centum strictly on the cash value of the land applied for, except where a different basis for such computation is fixed by statute in particular cases.)

FINAL TIMBER-CULTURE COMMISSIONS (NO FEES), PAYABLE WHEN CERTIFICATE ISSUES.

For each final entry, irrespective of area or price..... \$4.00
 (There is no distinction between minimum and double-minimum lands in timber-culture entries.)

DONATION CLAIMS.

For each final certificate for 160 acres..... \$5.00
 For each final certificate for 320 acres..... 10.00
 For each final certificate for 640 acres..... 15.00

MILITARY BOUNTY LAND WARRANTS.

For locating a 160-acre warrant..... \$4.00
 For locating a 120-acre warrant..... 3.00
 For locating an 80-acre warrant..... 2.00
 For locating a 60-acre warrant..... 1.50
 For locating a 40-acre warrant..... 1.00

(No fees are chargeable on warrants issued prior to February 11, 1847.)

(Revolutionary bounty land scrip is received and accounted for *as cash*, and *no fee* is chargeable to parties presenting such scrip.)

PORTERFIELD WARRANTS (ACT OF APRIL 11, 1860).

For locating these warrants the same fees are chargeable as are allowed for military bounty land warrants.

CASH ENTRIES.

The commissions of registers and receivers on cash sales of the public lands are paid by the United States, and no fees or commissions on such sales are chargeable to the purchasers, except in cases of homestead entries on ceded Indian reservations affected by the act of May 17, 1900 (31 Stat., 179), and commuted under the provisions of the act of January 26, 1901 (31 Stat., 740), in which cases the entryman is required to pay a commission of 3 per centum on the cash price of the land (31 L. D., 106).

STATE SELECTIONS.

For each final location of 160 acres (or fraction thereof) under any grant of Congress to States (except for agricultural colleges)..... \$2.00

No fees are chargeable on State swamp-land selections, but a fee of \$2.00 is to be collected on each location of 160 acres, or fraction thereof, made with swamp-land indemnity certificates.

For method of computing fees, see "Railroad and other selections."

RAILROAD AND OTHER SELECTIONS.

For each final location of 160 acres (or fraction thereof) by railroad or other corporations..... \$2.00

(In computing the amount of fees payable on a list of State or railroad selections, the receiver will divide the total area by 160; the quotient will be the number of 160-acre selections on which a fee of \$2.00 each is chargeable. Should the quotient consist of a fraction over a whole number, the legal fee of \$2.00 will be collected for such fraction.)

AGRICULTURAL COLLEGE SCRIP.

For each piece of agricultural college scrip located..... \$4. 00

PRIVATE LAND SCRIP, VALENTINE SCRIP.

For each piece of scrip filed on unsurveyed lands..... \$1. 00
 For each location of scrip..... 1. 00

SUPREME COURT SCRIP.

No *fees or commissions* are allowed on the location of *supreme court scrip*, nor on the location of *Indian scrip* or other *private land scrip*, except as specially provided for by law or instructions.

REDUCING TESTIMONY TO WRITING.

Fees for reducing testimony to writing are allowed at the rate of 22½ cents for each 100 words in the following cases only:

1. In making *final proof* in *preemption cases*.
2. In making *final proof* in commuted and noncommuted *homestead* and *timber-culture cases*.
3. In *establishing claims to mineral lands*.
4. In *establishing claims to timber and stone lands*.
5. In *hearings* before registers and receivers in *contested cases*.
6. The same fees are also payable to registers and receivers for examining and approving final-proof testimony taken in homestead and timber-culture cases in which the proof has been taken before some other officer authorized by law to take testimony in such cases.

No testimony fees are chargeable by registers and receivers for taking final proofs in desert-land entries.

No fees are allowed for reducing testimony to writing in any case where the writing is not done by the register or receiver, or by the employees in their office. In computing the fees for reducing testimony to writing, only the words actually written must be charged for at the rate allowed by paragraphs 10, 11, and 12 of section 2238, R. S., and no charge is to be made for the printed words. The words written must be actually counted and charged for, and there can be no uniform fee of a specified sum applicable to every case of the same class of entries; that is, registers and receivers can not fix the fee at \$1.00 or any other sum for each preemption, final homestead, mineral, or other entry.

TRANSCRIPTS FROM RECORDS.

Registers and receivers are entitled to charge at the rate of 10 cents per hundred words for making transcripts of their records for individuals (act of Congress of March 22, 1904).

RECORD INFORMATION.

Registers and receivers for any consolidated land district are entitled to charge and receive for any record information respecting public lands or land titles in their consolidated land district such fees as are properly authorized by the tariff existing in the local courts of such district (sec. 2239, R. S.).

(Consolidated districts are those districts into which one or more previously existing districts have been merged.)

PLATS AND DIAGRAMS (REGISTERS AND RECEIVERS OF ALL DISTRICTS ARE ALSO AUTHORIZED TO FURNISH PLATS, DIAGRAMS, ETC.).

Under the second section of the act of March 3, 1883, authorizing a charge to be made for plats, diagrams, etc., the fees for the same are hereby fixed as follows:

For a diagram showing entries only-----	\$1.00
For a township plat showing entries, names of claimants, and character of entry-----	2.00
For a township plat showing entries, names of claimants, character of entry, and number-----	3.00
For a township plat showing entries, names of claimants, character of entry, number and date of filing or entry, together with topography, etc-----	4.00

The plat or diagram must be of standard size (Form 4-590 b), and it must be a correct and complete delineation of the particular township. There is no legal authority under said statute for registers and receivers to furnish a plat of a section or subdivision, or any other fraction of a township, and to charge or receive therefor a proportionate part of the authorized fee.

For lists of lands sold, furnished State or Territorial authorities for the purpose of taxation, compensation for the same at the rate of 10 cents per entry.

CANCELLATION NOTICES.

For giving notices to contestants of the cancellation of any preemption, homestead, or timber-culture entry----- \$1.00

NO FEES, COMMISSIONS, OR REWARDS are required or allowed to be paid at United States land offices for extra services of any character whatever; and registers and receivers are absolutely prohibited by law from charging or receiving, directly or indirectly, any fee or compensation not expressly authorized by law, or for any service not imposed upon them by law, or a greater fee or compensation in any case than specifically allowed by law. Officers charging or receiving illegal fees, compensation, or gratuity are subject to *summary dismissal from office*, in addition to the penalties provided in title "Crimes," chapter "Official misconduct," United States Revised Statutes. Illegal fees received by clerks, employees, or agents are received by the land officers within the meaning and prohibitions of the law, and registers and receivers will be held personally and officially responsible therefor.

W. A. RICHARDS, *Commissioner*.

Approved May 20, 1905:

E. A. HITCHCOCK, *Secretary*.

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

FERGUSON *v.* NORTHERN PACIFIC RY. CO.

The Northern Pacific Railway Company is the lawful successor of the Northern Pacific Railroad Company and entitled to all the rights of the latter company in the administration and adjustment of the grant made in aid of the Northern Pacific railroad by the act of July 2, 1864, and acts amendatory thereof and supplemental thereto.

The Northern Pacific Railway Company is not restricted, in making selections under the provisions of the act of March 2, 1899, to lands in the odd numbered sections within the indemnity limits of its grant, but may make such selections from any of the public lands, of the class described in the act, "lying within any State into or through which the railroad of said Northern Pacific Railroad Company runs."

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 21, 1905.* (F. W. C.)

The Department has considered the appeal by Hugh R. Ferguson from your office decision of February 13, last, sustaining the action of the local officers in rejecting his proffered homestead application covering the NE. $\frac{1}{4}$ of Sec. 31, T. 40 N., R. 6 E., Lewiston, Idaho.

September 15, 1900, while the land was yet unsurveyed the Northern Pacific Railway Company made selection thereof under the provisions of the act of March 2, 1899 (30 Stat., 993), in lieu of an equal quantity of land specified, being a portion of an odd numbered section in place within the primary limits of its grant within the limits of the Pacific forest reserve in the State of Washington.

The township plat of survey was filed in the local land office February 24, 1904, and on the following day Ferguson tendered his homestead application, alleging settlement July 6, 1903, which application was rejected by the local officers for conflict with the prior selection by the Northern Pacific Railway Company; from which action Ferguson duly appealed.

March 21, 1904, the railway company filed a new list of selections conforming its previous selection to the lines of the public survey, the same being filed in accordance with the requirement found in section 4 of the act of March 2, 1899, *supra*.

Ferguson alleges no claim to the land at or prior to the filing of the company's selection on September 15, 1900, but questions the company's right under that selection.

The third section of the act of March 2, 1899, *supra*, under which the selection here in question was made, provides as follows:

That upon execution and filing with the Secretary of the Interior, by the Northern Pacific Railroad Company, of proper deed releasing and conveying to the United States the lands in the reservation hereby created, also the lands in the Pacific Forest Reserve which have been heretofore granted by the United States to said company, whether surveyed or unsurveyed, and which lie opposite said company's constructed road, said company is hereby authorized to select an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any State into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and

released to the United States: *Provided*, That any settlers on lands in said national park may relinquish their rights thereto and take other public lands in lieu thereof, to the same extent and under the same limitations and conditions as are provided by law for forest reserves and national parks.

As provided by this section, a relinquishment was duly executed by the Northern Pacific Railroad Company, the Northern Pacific Railway Company, and the Central Trust Company of New York, conveying and relinquishing to the United States all the right, title and interest of the said grantors in and to the lands within the Mt. Ranier National Park and the Pacific forest reserve. This relinquishment, after being carefully examined in connection with the act of Congress under which it was made, was accepted as sufficient relinquishment under said act, and, as the Department had theretofore recognized the Northern Pacific Railway Company as the successor in interest to the Northern Pacific Railroad Company to the land-grant made by the act of July 2, 1864 (13 Stat., 365), and acts amendatory and supplemental thereto, it was stated in the departmental letter of July 26, 1899, accepting said relinquishment, that:

The Northern Pacific Railway Company, successor to the Northern Pacific Railroad Company, is therefore authorized, in accordance with the provisions of section 3 of said act, "to select an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any State into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States."

The appeal under consideration first questions the right of the Northern Pacific Railway Company to be recognized as the successor in interest to the Northern Pacific Railroad Company, in the matter of the selection and patenting of lands in satisfaction of the grant made in aid of the construction of the Northern Pacific railroad. This question was considered by Attorney General Harmon February 6, 1897 (21 Ops., 486), and this Department was advised that it should act upon applications for patents by the new company upon exactly the same considerations which should govern it in case there had been no foreclosure and the applications had been made by the old company.

It having been claimed by certain interested parties that matters and things affecting the question of the successorship were not brought to the attention of nor considered by the Attorney General at the time he rendered his decision of February 6, 1897, the matter was again submitted to the Attorney General March 18, last, and under date of April 12, last, this Department was furnished with the opinion of

the Attorney General in the premises, in which, after considering the various contentions of counsel, it was said, in conclusion :

It seems to me that the decision of my predecessor was correct, and accordingly I have to advise you that, in my opinion, you should continue to be governed by the rule there laid down.

It follows that the question as to the right of the Northern Pacific Railway Company to be recognized as the lawful successor of the Northern Pacific Railroad Company in the matter of the administration and adjustment of the land-grant made in aid of the construction of the Northern Pacific railroad, is not a matter open for further consideration by this Department.

With regard to the relinquishment contemplated and authorized by the act of March 2, 1899, *supra*, as before stated, it was duly executed and filed as required by the provisions of section 3 of that act, and was accepted by the Department as sufficient. Thereupon the right of lieu selection of an equal quantity of other lands, as provided for in said act of 1899, became a part of the general grant made in aid of the construction of the Northern Pacific railroad, and as, under the opinions hereinbefore referred to, given by the Attorney General, applications for patents by the Northern Pacific Railway Company are to be acted upon exactly in the same manner as though the applications had been made by the old or Northern Pacific Railroad Company, it follows that the Northern Pacific Railway Company is duly empowered to make selections under said act of March 2, 1899, and it but remains to be determined whether the land here in question is of the class of lands subject to selection under the terms of said act. There is no claim that the land in question is mineral in character. It was not so classified at the time of the actual government survey. It was unsurveyed at the time of selection, but by the terms of the act the company was authorized to select lands either surveyed or unsurveyed, the only requirement with regard to the selection of unsurveyed lands being that found in the fourth section of the act, which provides that—

In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and, within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by said local land office, a new selection list shall be filed by said company, describing such tract according to such survey.

With this condition the company has complied, as hereinbefore shown. As before stated, no allegation is made that an adverse right or claim had attached or been initiated to the tract in question at the time of the making of the selection in 1900. It is contended, however, that the company is restricted in its selection to lands

within the indemnity limits of its grant and to the odd numbered sections. The Department is unable to find any authority for such limitations. The third section of the act, upon the execution and filing with the Secretary of the Interior of a proper relinquishment, authorizes the company to select an equal quantity of lands of the class described, which does not restrict the selection to odd numbered sections, and with regard to place, the only limitation is the following: "lying within any State into or through which the railroad of said Northern Pacific Railroad Company runs." As the line of the Northern Pacific railroad runs into and through the State of Idaho, it seems clear, from what has been said, that the tract in question was, on September 15, 1900, subject to selection under the act of March 2, 1899. The Department therefore affirms your office decision, and Ferguson's homestead application will stand rejected.

SCHOOL LAND—SETTLEMENT PRIOR TO SURVEY—NOTICE OF ENTRY.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 21, 1905.

Registers and Receivers, United States Land Offices.

SIRS: In all cases where entries are allowed under section 2275, United States Revised Statutes, as amended by act of February 28, 1891 (26 Stat., 796), of lands within sections that have been or shall be granted, reserved, or pledged for the use of schools or colleges, upon an *ex parte* showing of settlement prior to the survey of the lands in the field, it will be the duty of the register to at once advise the proper State or Territorial authorities thereof by ordinary mail. Such notice will give the description of the land, the date of survey, the number of entry, name of entryman and the dates of alleged settlement and entry.

The States or Territories protesting against the allowance of entries will be required to attack same by affidavit of their authorized agents, duly corroborated, as prescribed in rule 1 of practice, when it will become your duty to order a hearing to determine the respective rights of the parties. (*Baxter v. Crilly*, 12 L. D., 684.)

These instructions are not intended to supersede or modify in any particular instructions of May 15, 1901 (30 L. D., 607), requiring the citation of the State or Territory in the published notice, and evidence of service at time of final proof.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved:

E. A. HITCHCOCK, *Secretary.*

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

F. A. HYDE & Co.

Questions involving the validity of a selection under the exchange provisions of the act of June 4, 1897, are matters between the government and the selector, and can not be affected by any attempted transfer of the selected lands the legal title to which is still in the United States.

It is within the jurisdiction and power, and is the duty, of the land department to inquire into and determine questions brought to its attention touching the legality or validity of claims asserted under the public land laws, at any time prior to the issuance of patent.

A purchaser, prior to patent, of lands selected under the act of June 4, 1897, acquires no greater estate or right in the lands than the selector possessed at the time of the purchase. He is charged with knowledge of the state of the title and takes subject to the risk of the consequences of any inquiry or investigation by the land department touching the validity of the selection, and, therefore, subject to the right of the land department to cancel the selection if found to be fraudulent, or for any other reason invalid.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 21, 1905.* (A. B. P.)

I am in receipt of your communication of June 5, 1905, with accompanying papers, relating to selection No. 3257, made in the name of F. A. Hyde and Company, under the act of June 4, 1897 (30 Stat., 36), of Sec. 10, T. 6 N., R. 3 E., Vancouver, Washington, in lieu of the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 36, T. 8 N., R. 18 W., and the E. $\frac{1}{2}$ and SW. $\frac{1}{4}$ of Sec. 36, T. 8 N., R. 19 W., S. B. M., situate in the Pine Mountain and Zaca Lake forest reserve, in the State of California.

The selection is one of a large number of unpatented forest lieu selections suspended by your office, under direction of the Secretary of the Interior, by order of November 21, 1902, and subsequent orders, to await the result of an investigation by this Department of certain alleged illegal and fraudulent transactions on the part of F. A. Hyde, John A. Benson, and their associates, in the matter of the acquisition from the States of California and Oregon, and the relinquishment to the United States, of the lands (sections 16 and 36, granted to said States for school purposes) which form the bases of such selections.

From the papers accompanying the communication it appears that one W. D. Wolverton claims the land embraced in the selection, as transferee of F. A. Hyde and Company.

It also appears that a number of communications have been addressed to your office on behalf of Wolverton, by H. W. Arnold, his attorney, wherein it is contended, in substance, that the selection should be relieved from suspension with a view to the approval thereof, without further delay, for the alleged reason that Wolverton is an innocent purchaser of the selected land, without notice of any

fraud in the selection, and therefore should not suffer loss because of such fraud, or be further inconvenienced by reason of the pending investigation.

In answer to this contention, your office, in substance, stated and held, and so notified Wolverton's attorney, that the question of the validity of the selection is a matter between the government and the selector company, and cannot be affected by any attempted transfer by the latter of the selected land, the legal title to which is still in the United States. The position taken by your office in this respect is clearly correct and is hereby approved.

There can be no doubt of the jurisdiction and power, or of the duty, of the land department to inquire into and determine questions brought to its attention, touching the legality or validity of claims asserted under the public land laws, at any time prior to the issuance of patent. *Knight v. United States Land Association* (142 U. S., 161, 177-181); *Michigan Land and Lumber Company v. Rust* (168 U. S., 589, 592-594); *Orchard v. Alexander* (157 U. S., 372, 379-384); *Parsons v. Venzke* (164 U. S., 89). And the principle is applicable, in all its force and effect, to selections under the act of June 4, 1897. *Kern Oil Company v. Clarke* (30 L. D., 550, 560, 565; on review, 31 L. D., 288, 302); *Cosmos Exploration Company v. Gray Eagle Oil Company* (190 U. S., 301, 308-312).

Wolverton's claim to protection under the doctrine of *bona fide* purchaser is wholly untenable. Having purchased before patent, he obtained at the most only an equitable title, the legal title being still in the government. He acquired no greater estate or right in the land than the selector company possessed. He was charged with knowledge of the state of the title, and bought subject to the risk of the consequences of any inquiry or investigation by the land department as to matters involving the validity of the selection. He holds the title subject to all equities existing upon it at the time of his purchase, and, therefore, subject to the right of the land department to cancel the selection if found to be fraudulent, or for any other reason, invalid. *Hawley v. Diller* (178 U. S., 476, 484-488); *Boone v. Chiles* (10 Pet., 177); *Root v. Shields* (1 Woolworth, 340); *United States v. Allard* (14 L. D., 392, 403-406); *Traveler's Insurance Company* (9 L. D., 316, 320-321); *Smith v. Custer* (8 L. D., 269, 277-279).

In view of the urgent request that the Department act at once, regardless of the pending investigation, and either approve or reject the selection, it is proper to state that such a course is not only impracticable, but, under the circumstances, impossible, upon any basis of good administration. This selection is but one of many hundreds involved in the investigation; and it would not be possible for the Department to act intelligently upon any of them in a determinative sense, until the work of the investigation shall be completed and its

results known. This work has been and is being pressed by the government with the utmost vigor consistent with thoroughness. The delay complained of by Wolverton is the unavoidable result of the methods employed by the parties involved in the fraudulent transactions under investigation, and is in no sense the fault of this Department.

It is the purpose of the Department to act finally upon the selection here in question, and upon others similarly situated, as soon as good administration will justify such action, and the interests of the government will not be prejudiced thereby.

It is stated in the letters from Wolverton's attorney to your office that the timber on the selected land was killed by forest fires in the year 1902, after the selection was filed, and if not soon removed it will become a total loss by reason of decay. The request is therefore made that Wolverton be allowed to remove the dead timber upon his furnishing indemnity to the government for the reasonable value thereof, to be paid in the event the selection shall be ultimately canceled. In answer to this, it is sufficient to say that there is no authority of law under which the Department could enter into such an arrangement.

You are directed to advise Mr. Wolverton of the matters herein stated and to furnish him a copy of this communication.

MINING CLAIM—ADVERSE PROCEEDINGS—PROSECUTION OF SUIT.

DAVIS ET AL. *v.* McDONALD ET AL.

The question whether an adverse claimant has exercised reasonable diligence in prosecuting to final judgment a suit instituted under the provisions of section 2326 of the Revised Statutes is one for determination by the court in which the suit is pending, and not by the land department.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 23, 1905.* (G. N. B.)

May 2, 1904, Samuel Davis filed in the local office an affidavit, together with certain exhibits, in the nature of a protest against the application for patent, by John McDonald *et al.*, for the General Grant lode mining claim, survey No. 41, Salt Lake City, Utah, land district. It is stated in the affidavit, among other things, in substance, that the affiant and others, July 11, 1895, located the Bluebird lode mining claim, which since that time has been in the open and exclusive possession of the locators; that upon the survey of the claim, with the view to making application for patent, conflict with

the General Grant lode claim was shown; that the General Grant claim has long been abandoned, no work having been done upon it for many years; that certain adverse suits commenced in court against the application for patent for the General Grant claim have not been prosecuted with reasonable, or any diligence whatever; and that the parties to the suits have long since abandoned them. The affidavit concludes with a request that the application for patent for the General Grant claim be rejected in order that the affiant and his co-owners may apply for a patent for the ground embraced therein as a part of the Bluebird claim.

May 5, 1904, the local officers forwarded the papers to your office for instructions. June 2, 1904, your office denied the request for the rejection of the application for patent on the ground, in effect, that the adverse suits are still pending in court, and during such pendency the function of the land department is suspended.

Davis has appealed to the Department.

It appears from the record that John McDonald *et al.* filed application for patent for the General Grant lode mining claim, January 26, 1876; that during the period of publication, Monroe Salisbury filed four adverse claims, and in due time brought separate suits thereon in the district court for the Territory of Utah; that Thomas C. Jackson *et al.* also filed an adverse claim and commenced suit in time in the same court; that the suits have not been determined or dismissed; that since May 31, 1876, no action has been taken in any of them; and that no answer, plea, demurrer, or motion has ever been filed.

The appellant contends that it rests with the land department to determine, in behalf of one claiming an interest in the land, not a party to the suits, whether there has been *reasonable diligence* in prosecuting the suits to final judgment. This contention cannot be sustained. The question is one for determination by the court in which the suits are pending. The land department cannot determine it. *Richmond Mining Company v. Rose* (114 U. S., 576, 583). It can make no difference that one not a party to the suits raises the question. The appellant asserts an interest in the land, and, with a proper showing of such interest, there would seem to be no doubt that the court is open to him to secure relief by intervention in the pending suits, or otherwise, as he may be advised.

As the record now stands, the adverse suits appear to be still pending. Until they shall be disposed of, or the adverse claims waived, proceedings in the land department affecting the land are stayed. *Richmond Mining Company v. Rose, supra.*

It devolves upon the appellant to show that the pending suits have been determined or abandoned, or the adverse claims waived,

before the request for the rejection of the General Grant application may be considered.

The decision of your office is affirmed.

SURVEY—NOTICE OF FILING OF TOWNSHIP PLAT—INDEMNITY SCHOOL SELECTION.

STATE OF CALIFORNIA *v.* KOONTZ ET AL.

After the lands in a township have been surveyed and plat thereof received in the district land office, they are not considered as open to entry, selection, or other form of disposal, until notice, fixing the date of official filing of the plat, has first been given, as prescribed by departmental regulations.

Departmental decision in this case of May 23, 1904, 32 L. D., 648, construed.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 23, 1905.* (F. W. C.)

Your office letter of February 3, last, retransmitted the record in the case of the State of California *v.* Koontz *et al.*, involving certain indemnity school selections filed December 24, 1901, for lands in T. 5 S., R. 20 E., M. D. M., Stockton land district, California, with request for instructions.

The plat of that portion of this township surveyed by Pearson was officially filed December 24, 1901. It had been actually received at the local land office prior to this time, but under the usual notice given in accordance with departmental regulations, was not considered as officially filed for the receipt of applications until 9 a. m. on that date.

December 23, 1901, after the survey of the lands, the surveyor general, *ex officio* register of State lands, prepared, and forwarded through the mails from Sacramento, a list of school indemnity selections from lands in said township, which list was received at the district land office at Stockton, on the morning of December 24, 1901, between the hours of 8 and 9 a. m. This list included lands within that portion of the township previously surveyed, but the greater portion was from the lands surveyed by Pearson and are the ones toward which your inquiry is directed.

At the time of the opening at 9 a. m., certain applications to purchase, under the timber and stone act of June 3, 1878 (20 Stat., 89), portions of the lands included in the State's list, were presented, and with regard to the disposition of these applications to purchase the local officers divided, and in considering the conflicting rights of the applicants to purchase and the State, under its indemnity selections, your office decision of April 16, 1903, held that the State's list was prematurely filed, and for that reason accorded to the conflicting

applicants to purchase the superior right, and further held for cancellation the entire list, from which the State appealed.

This appeal was considered in departmental decision of May 23, 1904 (32 L. D., 648), wherein your office decision of April 16, 1903, was affirmed in so far as it accorded the superior right to the applicants to purchase present at the time of the opening of the land office on December 24, 1901, the day the plat was considered as officially filed. In said decision it was stated:

It can not be held, however, that the State's application was illegal or void because received through the mails before 9 a. m. on the date fixed for receipt of entries; at most it was irregularly presented. *Dickie v. Kennedy* (27 L. D., 305). . . . Where, as in this case, the list was accepted as to lands not claimed at the time of the filing of the plat, no good reason appears for, at this date cancelling such selections, and, to that extent, and for the reasons herein given, your office decision is reversed and such selections will be permitted to stand unless other and sufficient reasons appear for cancelling the same.

It may be here stated that the State's list seemed to embrace only four selections, the different items being numbered—

3346 A,	3347 A,	3348 A,	3349 A,
“ B,	“ B,	“ B,	“ B,
			“ C.

And as the list, under the column R. and R. number, gave four separate numbers, viz., 441, 442, 443 and 444, it was stated in the departmental decision of May 23, 1904, *supra*: “With the exception of the tracts in conflict the local officers accepted the State's selections, giving to each a serial number.”

Your office letter of February 3, last, retransmitting the record in this case, enclosed a report from the register of the Stockton office, dated November 23, 1904, from which it appears that each separate item in the State's list was treated as a separate selection, without regard to the serial number given it by the State; that fees were only collected for a portion of the lands selected; and that all of the selections which were free from conflict were not actually accepted, neither were they actually rejected. It follows, as a consequence, that certain of the selections included in the list were not acted upon by the local officers, and it is largely because of this fact that your office letter of February 3, last, re-presenting the matter, inquired whether said selections are protected under the departmental decision hereinbefore made.

As appears from what has been hereinbefore said, the Department assumed that the selections, where not in conflict, had all been accepted, and, as they had stood for several years, it was not believed good administration required, as between the United States and the State, the cancellation of the selections, if they were found to be otherwise regular and valid.

As the case suggested the advisability of establishing a rule of

administration governing the presentation of State selections for lands in a township about to be formally opened to entry, it was said:

On the filing of the plat of survey, intending applicants for lands under the public land laws, and those desiring to make selection of any portion thereof under congressional grants, should have equal opportunity in making claim to the lands. The manner of presenting these claims is controlled entirely by departmental regulations.

If the State desires, she might, through the proper person, present her list of selections at the local land office and in this manner would be accorded the same consideration as other applicants present at the time of opening the district land office. She may, however, forward her list to the local office through the mails, but in the event that it reaches that office before the time of opening, it should be considered as proffered after the claims of all those present at the time of the opening of the office have been received. *Lewis v. Morris* (27 L. D., 113, 118).

It was not intended thereby to give recognition to a selection made prior to the survey of the land, as by law the State is limited in its selections to the unappropriated surveyed public lands, but it was believed that, without injury to anyone, the State might be relieved from the expense incident to a trip to the local land office upon the filing of each plat of survey.

Under the practice in force since about 1885, the lands in any given township, after they have been surveyed and the plat thereof received in the district land office, are not considered as open to the receipt of entries, selections, or other forms of disposal, until notice has first been given as prescribed by departmental regulations, and in such notice a date is fixed as the date of official filing of the plat. The above rule gives recognition to the selection only as having been filed on the date fixed for the receipt of entries and in turn after all those present at the local land office at the time of the opening on that date.

Since the departmental decision, the State has proffered a list, in which it seems to have been the intention to specifically designate bases for the portions of the former selection free from conflict, but upon which the local officers have noted conflicts with two applications pending on appeal before your office or this Department.

In disposing of these conflicts the relative rights of the parties will be adjudicated, and, because of their pendency, no opinion is at this time expressed upon the State's rights to the tracts involved, but, as to the balance, the list, as originally presented, will be considered as filed immediately after the opening on December 24, 1901.

Your office letter suggests questions affecting the validity of the selections on other grounds than the time when the list was actually received, but under the departmental decision these matters are properly subject to consideration and decision by your office in further adjustment of the State's rights.

RESERVOIR SITE—APPROVAL OF MAPS—ACT OF MARCH 3, 1891.

W. GRANT WHITNEY.

The Secretary of the Interior is clothed with discretion in the matter of the approval of maps of location of reservoir sites filed under the act of March 3, 1891, and where, in his opinion, approval of the same would be detrimental to the public interests, he may decline to make such approval.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 24, 1905.* (F. W. C.)

The Department has considered the appeal by W. Grant Whitney from your office decision of May 7, 1904, rejecting his application for an enlargement of a reservoir site in township 7 north, ranges 1 east and 1 west, Boise City, Idaho, application for which was made under the provisions of sections 18 to 21 of the act of March 3, 1891 (26 Stat., 1095).

Whitney's prior application for a reservoir site in this locality received departmental approval August 18, 1900. His present application for an enlargement thereof was referred to the Director of the Geological Survey for consideration and report, and in the report of the Director, under date of April 28, 1904, he states that it was Whitney's plan originally to build a dam 42 feet high; that—

The present application is based upon plans for a dam 93 feet above low water level. So far as our engineer has been able to learn, Mr. Whitney has made no arrangement for irrigating any land in the vicinity of this dam. The application was filed after the withdrawal of lands in the Payette valley under the provisions of the reclamation act, and at the time when it was well understood that the government would find it necessary to utilize all feasible reservoir sites along the river. . . . The plans for an irrigation system to reclaim the lands in this valley will require the construction of a dam at or near the point proposed by Mr. Whitney. This dam would flood almost identically the same area as that included in Mr. Whitney's application. . . . It would be a serious interference with the plans of the reclamation service if this extension of his rights were to be granted. I have, therefore, to recommend that his application for right of way be not approved.

The Commissioner's decision rejecting the present application was agreeable to the recommendation of the Director of the Geological Survey.

In his appeal Whitney states that the report of the Director of the Geological Survey incorrectly states the facts as to the work done by him under his approved application, as will more fully appear from affidavits to be hereafter filed in this case. No such affidavits have, however, been filed. He urges that the Secretary of the Interior is not, under the law, vested with any discretion in the matter of the approval of maps of location filed under the act of March 3, 1891, and as his application is regular in form it must, as a consequence,

receive departmental approval. With this contention the Department is unable to agree.

The Secretary of the Interior is charged with the supervision of the public business relating to the public lands. (See section 441 of the Revised Statutes.) This means, as said by the Supreme Court in the case of *Knight v. Land Association* (142 U. S., 161, 177), that in the administration of the trusts devolving upon the government by reason of the laws of Congress, the Secretary of the Interior "is the supervising agent of the government to do justice to all claimants and to preserve the rights of the people of the United States." In the exercise of the discretion thus vested in the Secretary of the Interior, it is believed that Whitney's application for an extension or an enlargement of the reservoir site to the use of which he is entitled under the approval heretofore given by this Department, should not receive departmental approval at this time. The application is therefore denied and the papers are herewith returned.

HOMESTEAD—SOLDIERS' ADDITIONAL—ASSIGNEE—CERTIFICATION.

ALEXANDER B. McDONALD.

Where application for a certificate of soldiers' additional right was made at a time when the practice of certifying such rights was in vogue, and was denied on the ground that the right upon which the application was based had been exhausted, a certificate of the right will now be issued, in view of the discontinuance of the practice of certifying such rights, notwithstanding it is now held, in accordance with a later ruling of the land department, that the right in question has not been exhausted.

As between one applying to locate a soldiers' additional right based upon the regular assignment of said right by the widow of the soldier, and one claiming under an alleged sale of the right by the soldier during his lifetime, conditioned upon the certification or approval of said right by the land department, though the practice of certifying such rights had theretofore been discontinued, the additional privilege will be awarded to the former.

The rule that the Department will not undertake to determine rights claimed under an alleged assignment of a soldiers' additional homestead privilege, in the absence of an application for the exercise of said privilege, will not prevent a consideration and determination of the respective rights of two persons claiming as assignees of the same additional right, upon the application of either of them to exercise it.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 26, 1905.* (C. J. G.)

An appeal has been filed by Alexander B. McDonald, assignee of Mary F. Wilkins, widow of Charles Wilkins, who died on or about March 12, 1889, from the decision of your office of January 21, 1905, holding for rejection his application, filed January 7, 1902, to make

soldiers' additional entry for the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 10, T. 161 N., R. 82 W., containing 40 acres, Minot, North Dakota.

The application is based upon the military service of said Charles Wilkins, his original homestead entry for 80 acres made in 1865, at Fort Dodge, Iowa, an additional entry for 40 acres made by him in 1874 at Des Moines, Iowa, and an assignment of the additional right, dated November 27, 1901, by the widow, to Frederick W. McReynolds, who in turn assigned the same to said Alexander B. McDonald.

In 1881 your office denied an application of the soldier for certificate of right, because under the practice at the time it was held that he had exhausted his right by the additional entry made at Des Moines, Iowa. In 1899 your office denied the application of D. H. Talbot to have certified the right of the soldier to make additional entry under section 2306 of the Revised Statutes, and to have the same re-certified in the name of said Talbot, for the reason that the practice of re-certifying such rights no longer prevailed. The action of your office was affirmed upon appeal by departmental decision of January 22, 1900 (not reported), it being held, in addition to the reason given by your office, and following the case of D. H. Talbot (29 L. D., 273), that "the Department will not undertake to determine rights claimed under an alleged assignment of a soldiers' additional homestead privilege, in the absence of an application for the exercise of said privilege." A motion for review was likewise denied by departmental decision of June 23, 1900 (not reported), said decision being promulgated and the case closed by your office July 6, 1900.

Talbot was notified of the application of Alexander B. McDonald by your office June 20, 1903, and given an opportunity to show cause, if any, why said application should not be allowed. In response he transmitted an affidavit setting forth the proceedings had on his own application, insisting, as he had done before, that he is the owner by assignment of the additional right of Charles Wilkins, and inviting attention to papers already on file in your office in support of his application for certification of said right, which he asked be made a part of the presentation of his case. Again, he further asked that his application be allowed and a "certificate issued constructively as now 'pending' within the meaning of your circular of February 13, 1883," and that the same be "recertified *nunc pro tunc*, as though having actually been issued prior to the passage of the act of Congress approved August 18, 1894. Otherwise I do not wish to exercise the right," etc.

Among the papers referred to by Talbot is one executed before B. F. Reed, by Charles Wilkins, March 30, 1881, constituting and appointing said Talbot his attorney—

to obtain for me the examination and approval of my claim to additional lands, to which I am entitled under and by virtue of section 2306, Revised Stat-

utes, . . . to receive the certificate of the General Land Office, acknowledging my said right and to locate for me and in my name, place and stead . . . such lands as I may be entitled to enter under said section 2306, Revised Statutes, as additional to my original homestead. . . . Hereby giving unto my said attorney full powers of substitution, and to ask for and receive the patent for the land so located by my additional right.

Also the following paper, dated Algona, Iowa, May 2, 1881:

Received of D. H. Talbot, of Sioux City, Iowa, the sum of one dollar, in part payment for my additional homestead right; the said right being given to me under and by virtue of section 2306, R. S., as additional to my original homestead of 80 acres, described as the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of section 22, township 96, range 30, and which was by me taken at the United States Land Office at Fort Dodge, Iowa, on or about the — day of —, 1865.

And I do hereby covenant that I have not heretofore made any agreement to, or have I sold to other than the said D. H. Talbot my said right to an additional entry under Sec. 2306, R. S., and that the said Talbot will owe me the balance of \$2.50 per acre as soon as my claim is approved.

The foregoing paper is signed by Charles Wilkins and witnessed by B. F. Reed. There are also two affidavits executed by Wilkins April 24, 1881, and witnessed by B. F. and John Reed, one of which relates to his military record and the other to his compliance with law in respect to his original homestead. May 5, 1903, your office rejected the application of McDonald because of insufficient evidence as to the identity of the widow, Mary F. Wilkins, but upon reconsideration, it being made to appear that she was drawing a pension as the widow of the soldier, your office on December 3, 1903, held that the identity of said Mary F. Wilkins who made the assignment of the additional right under which McDonald claims was satisfactorily established, and thereupon recalled and vacated said decision of May 5, 1903. Your office, however, at the same time held McDonald's application for rejection with privilege of showing cause, for the reason—

the papers above quoted, appearing to show that during his life time Mr. Wilkins sold his additional right to Mr. Talbot.

A motion for review of this action was filed and with it an affidavit by Mary F. Wilkins bearing upon the nature of the transaction between her husband and Talbot. In said affidavit she states that she has been advised of the Talbot claim. She further says that she was married to and living with said Charles Wilkins on May 2, 1881, and for a long time before as well as after that date, and that had her husband sold his additional right at that time she would know of it; that she is certain he never did sell said right; that to the best of her recollection and belief her late husband did, about May, 1881, agree with some one to her unknown to sell his additional right for the sum of \$100, if said right was affirmed by the General Land Office, but he received no consideration for the promise; that the sale was

never completed, the land office having refused to approve the right; that her husband executed no assignment of his right at that time but simply papers in proof of said right; that she does not deny that her husband signed an agreement to sell his right, in case it was approved, as well as a receipt for one dollar on account, but she has no personal knowledge of his ever having signed such a paper, and to the best of her knowledge and belief he never received even the one dollar on account.

After setting out the facts and considering the papers filed by the respective claimants, your office, on February 26, 1904, rendered decision holding that the evidence furnished by McDonald does not overcome the showing made by Talbot. Accordingly, the action taken by your office December 3, 1903, was adhered to and the motion for review denied. McDonald was allowed further time in which to show cause why his application should not be denied. A motion to quash the rule laid upon him to show cause was filed by McDonald, accompanied by an affidavit of B. F. Reed, the officer before whom a part of the papers between Wilkins and Talbot were executed, and who witnessed all of them, in which he says that he—

was well acquainted with the late Charles Wilkins for 25 years prior to his death, and has been well acquainted with his widow, Mary F. Wilkins, for about 24 years; that affiant in 1881 was a Notary Public and performed many services for said D. H. Talbot in connection with said Talbot's hunt for soldiers' additional homestead claims; that it was the custom of said Talbot to have the soldier execute proof papers of his additional right, which were sent on to Washington, D. C., to the General Land Office for approval, and if they were approved said Talbot would then buy the right from the soldier and pay him for it; that affiant does not remember of a case where said Talbot paid for such a right prior to its approval by the Land Office; that affiant does not now remember particularly anything about said Wilkins additional right, but so far as affiant does remember said Talbot pursued his usual custom in regard to handling the same; that affiant is well acquainted with said Mary F. Wilkins, and that she is woman of the *highest* probity and honesty and truthfulness, and her word can be fully relied on by the Land Office.

By decision of January 21, 1905, your office declined to modify its former action in the premises, it not being deemed that any new material evidence had been offered, and as no appeal had been taken from such action, rejected the application to enter of McDonald. He has appealed here, as hereinbefore stated.

Ordinarily, under the rule announced in the case of D. H. Talbot, *supra*, the claimed right of Talbot herein would not be considered in the absence of an application by him to exercise such right. But in view of the adverse claim arising under the assignment of the widow of the soldier, the continued insistence of Talbot that he is entitled to a certificate notwithstanding the repeated refusals of the same, his failure to apply for the exercise of the right although confronted by another claim to said right, the fact that an application

has actually been made for the exercise of the identical right claimed by Talbot, and as there is a right to which some one is entitled, it is deemed proper to adjudicate the matter upon the record now before the Department.

The assignment of the right in question by the widow of Charles Wilkins was made with full knowledge that the land department had repeatedly, persistently and finally refused to issue a certificate of such right in favor of Talbot. Primarily such refusal by your office was for the reason that the former practice of certifying soldiers' additional rights was discontinued in 1883; and by the Department because Talbot had not applied to exercise his alleged right, it being held that the Department will not undertake to determine rights claimed under an alleged assignment of a soldiers' additional right in the absence of an application for the exercise of said right. The latter rule had become well established, it was announced in the case of D. H. Talbot, *supra*, which has been followed in the case of D. H. Talbot, on review (30 L. D., 39). The rule did not involve any change of practice, but was founded on what was and is regarded, for the reasons given in those cases, as a sound, beneficial and necessary administrative policy. The assignment by the widow of the additional right of her deceased husband appears to be in all respects regular, her identity is recognized by your office as being satisfactorily established, she believed her husband had not sold the right, she has received a valuable consideration for her claim and the same has passed into the hands of the applicant herein, McDonald, who applies to locate said right. These proceedings were had, as stated, after a final refusal to certify the right to Talbot, who apparently acquiesced therein, so far as taking any further action is concerned, until notified by your office of the pendency of McDonald's application. Your office rejects this latter on the ground that the evidence appears to show that Wilkins during his lifetime sold the right to Talbot, but does not feel called upon actually to determine the fact in so many words, presumably in view of the rule above referred to, although practically holding the legal effect of the papers in question to be in Talbot's favor.

The power of attorney given by Wilkins to Talbot was not on its face a power coupled with an interest. It merely authorized the grantee to obtain approval of the soldiers' additional right, to locate such lands as the grantor might be entitled to enter thereunder and to receive the patent for the lands so located. It did not authorize the grantee to sell such lands or to receive the proceeds or to apply the same to his own use. The ordinary rule is that such a power is revoked by the death of the grantor. Whatever object may have been contemplated in the paper given by Charles Wilkins as a receipt, it is plain that the transaction therein referred to was made dependent

upon the issuance of a certificate of additional right by the General Land Office, in accordance with the practice in vogue at the time. The application of Talbot, as alleged owner of the right, for the issuance now of a certificate therefor and the recertification of the same in his name is based on such practice, subsequently changed, and upon the case of *Webster v. Luther* (163 U. S., 331), holding said right to be assignable. Whatever may have been the intention of the parties to the instrument upon which Talbot relies, the same as drawn amounts to little more than a mere option, assuring to Talbot a preferred right of purchase after approval of the claim. The alleged sale was made with full knowledge that such approval would have to be obtained; and the effect of this is not altered by the fact that it was subsequently held that the issuance of a certificate of additional right was unauthorized and unnecessary. Talbot insists that there was a sale and that he is now the owner of the right, but this is not necessarily shown by the papers in question or the surrounding circumstances. It is perhaps true that it was the intention to make a sale, but the papers as drawn failed to consummate that purpose upon failure to secure approval of the claim. By the terms of the instrument the purchase money was not to be paid until after the approval of the claim. In the absence of such approval neither party was bound, and especially was Talbot not bound to complete the purchase by making the designated payment, even though a certificate were procured. The evidence shows that this transaction was similar to many others in which Talbot was engaged, all dependent for their consummation upon the prior certification of the rights involved. In this case he has relied and is now relying solely on his claim to such certification, in fact says he does not otherwise desire to exercise the right. But the denial of his application for a certificate did not affect his privilege of otherwise applying to exercise his alleged right. In face of the adverse claim, appearing to be regular in all respects, it was incumbent upon him to show that he was owner of the right, the adjudication of which could not ordinarily be had in the absence of an application for the exercise of said right. Prior to notice of McDonald's application he had made no effort in this direction, nor does he do so now. And in view of his laches in this respect in the presence of an adverse claim, and the long lapse of time, of the repeated refusals to issue a certificate to Talbot and the long-established and often-announced rule governing this matter, and in the absence of any tender of the purchase money by him with a view to completing the alleged sale to him, it might very properly be held, regardless of the merits of the case, that he has waived whatever right he may possess and is now barred from asserting any further claim in the premises. A certificate of additional right can not be issued in Talbot's favor, that

has been finally determined, and this would be true if it were conclusively established that there was in fact a sale to him of 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." Elijah C. Putman (23 L. D., 152). It being determined that there was no sale of the right of Wilkins during his lifetime, it follows that upon his death the law cast the same upon his widow.

The decision of your office herein is reversed, the application of Talbot for a certificate is again denied, and the application of McDonald will be allowed if no other objection shall appear.

OFFICERS AUTHORIZED TO TAKE FINAL PROOFS—RIGHT TO ACT AS AGENTS OR ATTORNEYS BEFORE LAND DEPARTMENT.

INSTRUCTIONS.

Paragraph 10 of the circular of March 24, 1905, 33 L. D., 480, relating to the admission to practice before the land department, as agents or attorneys, of officers authorized by section 2294 of the Revised Statutes to take final proofs, modified.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 26, 1905.* (G. J. H.)

March 24, 1905 (33 L. D., 480), the Department approved a circular relative to the taking of final proofs, etc., paragraph 10 of which reads as follows:

No person will, while holding an office which authorizes him to take final proofs, be recognized or permitted to appear as an agent or attorney for others in any matter affecting in any way the title to public lands which may be pending before the Department of the Interior, or any of its subordinate offices or officers, nor will such persons while holding such offices be permitted to enroll themselves in that Department, or before any of its offices, as agent or attorney.

May 4, 1905, A. T. Bodle, sr., probate judge of Meade county, Kansas, addressed a communication to your office, relative to said paragraph, as follows:

I am just in receipt of a circular issued by the Interior Department, which orders, among other things, that officers authorized to take final proofs shall not be allowed to appear as agents or attorneys before the Department in any case affecting the public lands, approved March 4, 1905.

For several years I have been acting as attorney before the Department in matters of contest, but recently have been elected probate judge of Meade county, Kansas. Now, if consistent with the public service, I wish that my authority to take proofs be withdrawn, to the end that I be permitted to appear as attorney in contest cases before the Department.

May 10, 1905, said letter was referred to the Department for consideration, and on May 17th was returned to your office with request for report on the matter therein presented. May 25th your office reported, among other things, as follows:

In so far as this regulation affects U. S. commissioners, and clerks and judges of United States courts, it is amply supported by your unpublished decision of March 22, 1901 (W. B. A.), in the matter of the application of M. J. Barrett, of Minot, North Dakota.

In submitting the circular above quoted from for your consideration and approval, it was believed that the reasons which induced the application of the rule mentioned to United States commissioners would, with equal force, prevent judges and clerks of local courts from either enrolling or appearing as attorneys, and this office is not advised of any method by which the power to administer oaths and take proofs under the public land laws, conferred by Congress upon judges and clerks of local courts, could be withdrawn by your Department. In view, however, of the fact that there is no statute which forbids judges and clerks of this class from appearing as attorneys in the prosecution of any claim against the United States, as is the case with Federal officers under section 5498, R. S., the effect of the regulation referred to upon judges and clerks of local courts might possibly be suspended by any act on the part of such judges and clerks as would prevent them from exercising the powers conferred upon them by amended section 2294, R. S.

If your office deems it advisable to do so, the register and receiver might be notified by this office to decline to recognize any act of Judge Bodle in administering oaths under that section. Under these circumstances, the reasons for the rule would no longer exist, and it is not seen why he could not be permitted to appear as an attorney.

Probate judges, being judges of courts of record, are authorized by section 2294 of the Revised Statutes, as amended by the act of March 11, 1902 (32 Stat., 63), to take final proofs.

Section 5498 of the Revised Statutes provides:

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.

While said section clearly embraces United States commissioners, as officers of the United States, as held in the case of M. J. Barrett, decided March 22, 1901 (P. & M. Div.), referred to in your report, it is not believed that it was contemplated by Congress in the enactment of said statute that it should apply to all the officers authorized to take final proofs enumerated in section 2294 of the Revised Statutes. In

the regulations governing the recognition of attorneys to represent claimants before the Department of the Interior and the bureaus thereof, approved July 15, 1901 (31 L. D., 545), no such construction is placed upon said section 5498. Said regulations merely require in that respect (paragraph 7, p. 547) that an applicant for admission "must also state whether he holds any office of trust or profit under the government of the United States." No requirement is placed upon him to show whether he is an officer authorized to take final proofs, and there is nothing in such regulations which would warrant a refusal to admit him to practice on such ground.

Paragraph 13 of the circular of December 15, 1885 (4 L. D., 297, 299), is as follows:

Officers taking applications, affidavits or final proofs, will not be permitted to act as attorneys in the case.

This regulation would seem to be in the interest of good administration; but no good reason is perceived why such officers, if eligible to admission to practice under the regulations, and admitted in accordance with such regulations, may not act as attorneys in other cases in no wise coming before them for their official action in connection therewith.

Paragraph 10 of the circular of March 24, 1905, above referred to, is modified in accordance with the views herein expressed.

CONTESTANT—PREFERENCE RIGHT—APPLICATION TO PURCHASE
UNDER TIMBER AND STONE ACT.

TODD *v.* HAYS.

An application to purchase under the provisions of the act of June 3, 1878, is not an "entry" within the meaning of section 2 of the act of May 14, 1880, awarding a preference right to the successful contestant of an entry, and one who successfully contests such an application is therefore not entitled to the preference right conferred by said section.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 26, 1905.* (D. C. H.)

This case involves the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and lots 3 and 4 of Sec. 18, T. 2 N., R. 6 W., Oregon City, Oregon, and is before the Department on the appeal of Susan O. Todd from your office decision of December 22, 1904, dismissing her protest against the timber and stone application of Charles E. Hays for the said land and sustaining his entry of the same. When the case was first before the Department it was ascertained that since the rendition of your said decision and the appeal therefrom, Todd had filed an affidavit of

contest against Hays's entry, making substantially the same charges and raising practically the same issues presented by her protest, and the case, by letter of May 11, 1905, was returned to your office for appropriate action on said contest. The case has since been recalled for further consideration by the Department and for a ruling upon the questions presented by Todd's aforesaid appeal. It appears from the record that the above described land was originally covered by the timber and stone application of one Eureka H. Quick, that said application was successfully contested by Charles E. Hays, and upon the relinquishment of Quick's claim under her application, Hays was awarded a preference right of entry, and in the exercise of said right he filed a timber and stone application for said land, and pending the submission of final proof thereon, Susan O. Todd filed protest against the allowance of Hays's application, charging that Hays's contest against the aforesaid application of Quick was speculative and fraudulent and that Hays should not have been awarded a preference right thereunder.

The local officers on July 16, 1904, rejected said protest. Todd appealed to your office on August 15, and on October 1st, 1904, filed a supplemental protest against Hays's proof and entry which had then been allowed under his aforesaid application, alleging, in addition to the matters set forth in her original protest, that at the time the aforesaid case of Hays *v.* Quick was closed, she, Todd, had an application on file to purchase the land in question under the timber and stone act, that her said application was entitled to priority over that of Hays and that a preference right cannot be acquired under a contest against a mere applicant to enter lands.

Your office by decision of December 22, 1904, dismissed Todd's protest, and from that decision she has appealed to the Department.

The main and controlling question presented by the appeal is, whether a person who successfully contests an application to enter lands under the act of June 3, 1878 (20 Stat., 89), and pays the land office fees incident to such contest, is entitled to the preference right conferred by section 2 of the act of May 14, 1880 (21 Stat., 140).

The act of May 14, 1880, *supra*, gives a preference right of entry to the person who has contested an *entry* and procured the cancellation thereof, and the contention of the appellant, briefly stated, is, that Hays, not having contested an entry, but simply an application to purchase and enter the land in question, did not thereby acquire a preference right of entry and that the entry made thereunder was improperly allowed.

There is a marked difference between an entry and a mere filing of application to purchase and enter lands, under the act of June 3, 1878, *supra*. The entry, the effect of which is to segregate the land,

springs into existence when the necessary proof submitted in support of the application has been approved by the local office, the purchase price of the land paid, and a receipt given therefor. Until this stage of the proceedings has been reached, the application is a mere offer to purchase, or the expression simply of a desire to establish a claim to the land, which, while it has the effect of excepting the land from other disposition pending the consideration of said application, does not segregate the land.

In the case of *State of California v. Nickerson* (20 L. D., 391) the Department held that an application to purchase under the act of June 3, 1878, *supra*, is not an appropriation of the land, and in the instructions of August 22, 1889 (9 L. D., 335), it is said that an application to purchase under said act does not operate as a segregation of the land covered thereby, but simply prevents the land from being entered by another, pending the consideration of such application; and that the applicant has no right to, or control over, the land until his application has been finally allowed. It thus appearing that, under said act, an application which has not ripened into an entry does not segregate the land, and that it confers upon the applicant no right to or equity in the land covered thereby, it therefore follows that a contest against such an application, although conducted to a successful termination, does not carry with it a preference right. *Jacoby v. Kubal et al.* (29 L. D., 168).

The decision of your office is accordingly reversed. Hays's entry will be canceled and Todd will be allowed to proceed with her aforesaid application in the regular way.

SECOND HOMESTEAD ENTRY—ACTS OF JUNE 5, 1900, AND APRIL 28, 1904.

COX *v.* WELLS.

Construing the acts of June 5, 1900, and April 28, 1904, relating to second homestead entries, together, the earlier act is held to be modified by the later, and all applications to make second homestead entry filed subsequently to the date of the later act should be disposed of thereunder, so far as the provisions of that act are applicable.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 26, 1905.* (E. P.)

July 29, 1904, Levi F. Wells, as the successful contestant against the homestead entry of Peter G. Cox, embracing the NE. $\frac{1}{4}$ of Sec. 1, T. 34 N., R. 11 W., O'Neill land district, Nebraska, made homestead entry of the land described. Against Well's entry, said Cox, on August 24, 1904, presented an affidavit of contest, alleging (as ap-

pears from so much of said affidavit as is set forth in your office decision of December 29, 1904, the affidavit itself not being with the record herein) that—

he is well acquainted with the tract of land embraced in the homestead entry of Levi F. Wells, No. 19662, made July 29, 1904, at the U. S. Land Office at O'Neill, Nebraska, for the NE. quarter of Section 1, Twp. 34 N., of Range 11 W., and knows the present condition of the same; that the said Levi F. Wells at the time he made said entry was not a qualified homestead entryman in this, to wit: that prior thereto, on the 20th day of May, A. D. 1892, the said Levi F. Wells, at the said U. S. land office at O'Neill, Nebraska, made homestead entry for the following described tract of land, to wit: SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 26, and N. $\frac{1}{2}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 35, Twp. 33, Range 8; thereafter, on the 15th day of Nov., 1892, the said Levi F. Wells, for a valuable consideration, relinquished said entry to the U. S.; that said relinquishment was wholly voluntary and was made for the purpose of speculation on the public domain; that said Wells [did not] for any cause lose or forfeit said entry but his relinquishment thereof was free and voluntary and for the purpose of fraudulently making money in the entry on said land.

Affiant further charges that said entry No. 19662 for said NE. quarter of Section 34, range 11 W., was speculative and fraudulent and made in the interest of another person and not solely for the benefit of the said Wells; and for further cause of action affiant says that he has a prior and superior right to said land as against said Wells; that at the time said entry was made on said land affiant was a settler on said land, was residing thereon and had valuable improvements thereon, worth about two thousand dollars, with about one hundred acres of the same in cultivation and affiant was at that time in every way a qualified homestead entryman and affiant further charges and alleges that the contest filed by the said Wells against this affiant's former homestead entry on said tract of land was speculative, fraudulent and void and filed for speculative purposes and in the interest of other persons and not for his own benefit; that said Wells was employed, hired and paid by others than himself to file said contest with the view and purpose that others than he might acquire title to said land and that the said Wells by reason of said contest acquired no preference right to enter said land.

This affidavit was rejected by the local officers on the ground that it did not state a cause of action, it being held by them that Wells, having forfeited his former entry prior to the passage of the act of June 5, 1900, was qualified under the provisions of said act to make the entry in question, and that the same was not therefore subject to contest because of the fact that he had made said former entry.

On appeal by Cox from the action of the local officers, your office, by decision of December 27, 1904, held as follows:

The original entry of Wells was made prior to the act of June 5, 1900 (31 Stat., 267), and his right to make a second entry is provided for in said act, and therefore your action rejecting the contest for insufficiency of charge was correct and is hereby affirmed.

From your office decision Cox now prosecutes an appeal to the Department.

The application to make the entry in question was filed after the

approval of the act of April 28, 1904 (33 Stat., 527), entitled "An act providing for second and additional homestead entries and for other purposes," the first section of which provides as follows:

That any person who has heretofore made entry under the homestead laws, but who shall show to the satisfaction of the Commissioner of the General Land Office that he was unable to perfect the entry on account of some unavoidable complication of his personal or business affairs, or on account of an honest mistake as to the character of the land; that he made a *bona fide* effort to comply with the homestead law and that he did not relinquish his entry or abandon his claim for a consideration, shall be entitled to the benefit of the homestead law as though such former entry had not been made.

That portion of the act of April 28, 1904, above set forth, like the third section of the act of June 5, 1900, relates to persons who had, prior to its passage, lost or forfeited their homestead entries, and were for either of said reasons unable to perfect the same. The act of 1904, however, imposes conditions or restrictions that were not imposed by the act of 1900, the earlier act providing merely that *any person* who had from any cause theretofore lost or forfeited his homestead entry, should be entitled to the benefits of the homestead law, as though such former entry had not been made, while the latter act requires such a person, in order to entitle himself to the benefits of the homestead law, regardless of his former entry, to show to the satisfaction of your office that he was unable to perfect such former entry on account of some unavoidable complication of his personal or business affairs or a mistake as to the character of the land; that he made a *bona fide* effort to comply with the homestead law, and that he did not relinquish such entry or abandon the claim for a consideration. The Department is of the opinion that the effect of the act of April 28, 1904, is to modify the act of June 5, 1900, or place a limitation upon the operation thereof; and that all applications to make second homestead entry, filed subsequently to approval of the act of April 28, 1904, should be disposed of thereunder so far as the provisions of the same are applicable.

It appears from the record herein that Wells's application to make a second homestead entry was filed July 29, 1904, and that his former entry was made in April, 1892, and canceled by relinquishment November 15, of the same year. It is alleged by Cox in his affidavit of contest that Wells relinquished his former entry for a valuable consideration, and that, therefore, he was not, on July 29, 1904, qualified to make a second homestead entry. In view of the provisions of the said act of April 28, 1904, the Department is of opinion that this charge constitutes a sufficient cause of action, and that a hearing should be ordered thereon.

The affidavit of contest, as before stated, is not with the record now before the Department, and informal inquiry at your office has failed to disclose its whereabouts. You will therefore cause further

search to be made therefor, and, if found, it will be returned to the local officers, with instructions to issue notice thereon. If, however, it be not found, your office will give Cox a reasonable time to file a copy thereof, and, if so filed, the same action will be taken with reference thereto as if it were the original.

The decision appealed from is accordingly reversed.

MINING CLAIM—ADVERSE PROCEEDINGS—LODE WITHIN PLACER.

THE CLIPPER MINING CO. *v.* THE ELI MINING AND LAND CO. ET AL.

The rejection by the land department of an application for patent to a mining claim, because of failure to establish the presence in the land involved of mineral deposits of such extent and value as to justify the issuance of patent, does not amount to a determination that the location upon which the application is based is invalid.

The judgment of a court of competent jurisdiction, pursuant to section 2326 of the Revised Statutes, goes only to "the question of the right of possession" of the land in controversy, as between the parties litigant, and it remains in every case for the land department to determine all other questions touching the right to patent.

A placer claimant who, on the strength of his placer location, prevails in an adverse suit under section 2326, Revised Statutes, against an applicant for patent to lode claims within the placer limits, may take title to the lodes under the judgment roll, if at all, only as *lodes within a placer*; and if the land embraced in the placer claim is not of patentable placer character, the lodes are not in that situation and as such available to the placer claimant.

If the land embraced in the placer claim be found to be non-placer in the patentable sense, so that the placer claimant can not take the legal title thereto, the basis of his claim to the lodes disappears and no prejudice to the claim of the lode applicant can have resulted from the judgment of the court awarding the placer claimant the right of possession of "the ground in controversy," as part of the placer, in which the lodes are.

An application for placer patent relative to the date of the filing of which the question of the known existence of lodes within the placer limits is to be determined is one which may result in the acquisition of title.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 27, 1905.* (F. H. B.)

There is in dispute here a portion of the tract embraced in what is known as the Searl placer mining claim, situate in or near the city of Leadville, Colorado. The placer claim, and various portions of it, have frequently been in controversy before the land department and the courts, during a long period of years; and the case now before the Department arises on a "petition for orders of execution under former departmental decisions" affecting the portion here involved. The facts essential to an understanding of the pending controversy may be summarized as follows:

The Searl placer was located December 14, 1877; and The Eli Mining and Land Company, A. D. Searl, F. C. Schroeder, A. T. Britton, and H. J. Gray now claim succession in interest under the location, by sundry mesne conveyances.

April 5, 1879, the county judge of Lake county, Colorado, on behalf of the inhabitants of "North Leadville," filed townsite application covering the land embraced in the Searl placer location. This application was resisted by the then placer claimants, with the result that, after hearing had, the Department, by decision of April 17, 1880 (7 Copp's L. O., 36), affirming, on appeal, your office decision of December 24, 1879, held that the evidence submitted was not sufficient to overcome the presumption of the mineral character of the land raised by the surveyor-general's return (theretofore made) and by the proximity of known valuable mines, and rejected the townsite application accordingly.

In the interval between the presentation of that application and the departmental decision rejecting it, the placer claimants applied for patent to their claim, then embracing 152.02 acres. Thereafter (November 10, 1882), and by reason, it would appear, of the filing of a number of adverse claims, by lode claimants, during the period of publication of notice of the application for placer patent, and the timely commencement of suits thereunder, and of the presentation of several applications for patent to lodes alleged to exist within the placer claim, with respect to one of which a hearing was ordered and had, A. D. Searl, who had in the meantime succeeded to the interests of the other claimants, filed amended application for patent (survey No. 435), whereby all save two of the asserted lode claims were excluded and the placer claim was reduced to an area of 101.918 acres, the adverse suits being thereupon dismissed.

November 14, 1882, a special agent of your office reported, *inter alia*, that the land was supposed to contain lodes or ledges of carbonate mineral and that the placer claim was clearly fraudulent. Two days later a protest was filed on behalf of some two hundred of the residents of Leadville, in which it was alleged, among other things, in substance, that the ground embraced in the location was not placer in character; that the claimant never intended to work the premises as a placer claim; and that the ground was almost entirely covered by lode locations, and was immediately adjacent to a well defined system of lodes. Thereupon, by departmental direction, a hearing was ordered, to determine whether the land was subject to patent under the placer application and the status of all existing claims and interests; and all prior orders and proceedings were suspended.

Hearing was accordingly had, November 15, 1883, at which appearance was made and the testimony submitted by and on behalf of

protestants and the placer claimant, as well as on behalf of the government. In due course your office, March 6, 1886 (12 Copp's L. O., 310), on appeal from a determination by the local officers adverse to the placer claimant, found and held, among other things, upon consideration of the evidence submitted, substantially, that no mineral deposits of consequence had been discovered in the ground in controversy; that, whilst discovery of a lode within the placer survey was not shown, the probable existence of mineral in rock in place was indicated; and that the placer claimant had not acted in good faith, but had attempted to acquire title to the land because of its value for townsite purposes and for the lodes supposed to be contained therein. The placer application was held for rejection. On appeal, the Department, November 13, 1890, expressing the opinion that by a fair preponderance of the evidence it appeared that continued prospecting for several years had failed to disclose in any appreciable quantity the presence of valuable placer mineral in the claim or to establish as a "present fact," within the meaning of section 2329, Revised Statutes, the placer character of the land, found no sufficient warrant for disturbing the concurring conclusions below, and affirmed the judgment of your office (Searl Placer, 11 L. D., 441). Motion for review was denied by the Department, June 22, 1891 (12 L. D., 663). No application for placer patent has since been filed.

November 24, 1890, the grantors of The Clipper Mining Company (the present lode claimant) located the Castle, Congress, Clipper, and Capitol lode mining claims, within the present boundaries of the Searl placer. August 31, 1893, the company filed application for patent to the lode claims (survey No. 6965), and duly published and posted notice thereof for the statutory period. During that period the Eli company and others, first above mentioned, the then and present placer claimants, filed in the local office their adverse claim, and seasonably commenced suit thereunder in the district court in and for Lake county, Colorado. February 18, 1895, the lode claimant, relying upon the adjudications by the land department whereunder the placer patent application had been rejected, formally applied to make lode entry under its patent proceedings. The local officers disallowed the application to enter, because of the pendency of the adverse suit; their action being sustained successively by your office, April 27, 1895, and by the Department, May 13, 1896 (Clipper Mining Co., 22 L. D., 527), in which latter decision it was said and held (p. 528):

It is contended by counsel for applicant that the judgment in the Searl placer "was a complete and final adjudication" that the land embraced therein was not placer ground, and could not be entered as such, hence the adverse claim filed by Searl *et al.*, based as it is upon land for which application for patent

has been rejected, ought not to be accepted by the Department as a legal or proper adverse claim, and its application should be received and patent issue notwithstanding.

It is not deemed necessary to enter into an extended discussion of the propositions suggested by counsel. It is sufficient for the purpose of disposing of this case to say that so far as the record here shows the Department is ousted of all jurisdiction until the case now in court is finally disposed of. Under the provisions of section 2326, when the adverse claim is filed all proceedings in the Department "shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction."

* * * * *

The judgment of the Department in the Searl placer case went only to the extent of rejecting the application for patent. The Department did not assume to declare the location of the placer void, as contended by counsel, nor did the judgment affect the possessory rights of the contestant to it.

June 8, 1898, judgment was entered by the district court, as of April 25, 1898, in the adverse suit in favor of the placer claimants, plaintiffs, who were adjudged to be "the owners and entitled to the possession of the" premises in question, and were awarded their costs and execution therefor.

August 4, 1898, the placer claimants filed in the local office certified copy of the judgment roll, and, paying the purchase price prescribed by law for lode claims, were allowed by the local officers to make entry (No. 4347) for the four lode claims; and against the allowance of the entry the Clipper company filed protest. In due course your office, by decision of December 20, 1898, reversed the action of the local officers and held the entry for cancellation, on the stated ground 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 the land to them as part of the placer claim and not otherwise; and that such judgment did not establish in them any right to make lode entry or receive lode patent. August 25, 1899, the Department, on appeal (*Clipper Mining Co. v. Searl et al.*, 29 L. D., 137, 140), affirmed your decision, and added:

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.

As stated in the departmental decision, pending that appeal and on March 7, 1899, the Clipper company sued out writ of error from the Supreme Court of Colorado to reverse the judgment of the district court in the adverse suit, and supersedeas of the judgment was allowed.

April 8, 1901, the appellate court affirmed the judgment of the court below (*The Clipper Mining Co. v. The Eli Mining and Land Co. et al.*, 29 Colo., 377; 68 Pac. Rep., 286); and petition for rehearing was denied March 3, 1902.

May 2, 1904, the Supreme Court of the United States, on error to the Supreme Court of Colorado (194 U. S., 220), affirmed the judgment of the latter.

May 7, 1904, The Clipper Mining Company (hereinafter called "petitioner") presented here the petition first above referred to, in which the Department is asked—

First: To resume consideration of this cause at the point where action was suspended by departmental decision of August 25, 1899;

Second: To enforce the doctrine of *res adjudicata* in respect to the several decisions of the Department declaring against the alleged placer character and value of the ground in controversy;

Third: To enter a formal order to give effect to your previous decisions, if, in your opinion, any such order is necessary, so as to perfect the record to show the complete extinction of the placer location; and

Fourth: To instruct the local land officers at Leadville, Colorado, to entertain this petitioner's Application to Purchase the CLIPPER, CAPITOL, CASTLE, and CONGRESS lode claims (Mineral Application No. 4359, dated August 31, 1893; Mineral Survey No. 6965), dated February 18, 1895, and, upon receipt of the proper fees and payments, to allow a mineral entry and issue the prescribed final receipts and certificates.

A further incident of the case is a second formal application by petitioner, June 27, 1904, to make entry for the lode claims, which has been rejected by the local officers and from which rejection an appeal has been taken in usual course. The papers in this proceeding have been forwarded by your office, without action thereon, for consideration in connection with the pending petition.

The petition is resisted by the placer claimants, The Eli Mining and Land Company *et al.* (hereinafter called "respondents"), who have filed motion to dismiss it, to vacate departmental order of suspension of August 25, 1899, *supra*, and to reject finally petitioner's application for lode patent.

The case has been orally argued before the Department by counsel for the opposing parties, and elaborate briefs covering the respective contentions have been filed. Succinctly stated, these contentions are as follows:

By petitioner: That the departmental decision of November 13, 1890, was a final and conclusive adjudication and determination of the non-placer character of the land in dispute, and therefore of the invalidity, *ab initio*, of the placer location, so that no obstacle is opposed to the granting of the relief prayed in the petition.

By respondents: That the judgment of the court in the adverse suit, that respondents "are the owners and entitled to the possession of the ground in controversy," is binding upon the land department and is an absolute bar to any claim by petitioner here.

Both parties invoke the doctrine of *res adjudicata*: petitioner, as to the decision of the Department; respondents, as to the judgment of the court. The effect of each—decision and judgment—will therefore be in turn considered.

I.

From the foregoing statement of the case it will be observed that the four lode claims here involved were located several days after the rejection by the Department of the application for placer patent; and the lode locations are alleged by petitioner to have been made and maintained upon faith of the decision in that instance, as within the exclusive province of the land department and as conclusive of the placer question, as well as upon the locators' knowledge of the lode character of the ground. It is insisted by petitioner that, notwithstanding the concluding expression of the Department, above quoted, in its decision of May 13, 1896, respecting the effect of the decision of November 13, 1890, rejecting the placer application, the earlier decision was unavoidably a determination of the invalidity of the placer location, since a valid location of that character can not be made on non-placer ground.

The conclusion thus drawn is unsound. In order to comprehend the effect of the decision in question it must be borne in mind that the direct object of attack, in the proceedings which the decision closed, was the application for placer patent, with the defeat of which the protestants rested. The rejection of the application, which fully answered the controlling issue involved, was based upon the conclusion, drawn from the evidence submitted at the hearing theretofore had, that the placer claimant (Searl) had failed to establish, as a then present fact, the presence in the claim of placer mineral deposits of such extent and value as to justify the issuance of patent: not upon a definitive finding of the non-placer character of the ground and of the total absence of discovery requisite to location. The Depart-

ment did not undertake, in any sense, and it was wholly unnecessary under the issue presented that it should undertake, to determine the validity or invalidity of the placer *location*. The application for placer patent, and the proofs submitted to support it, formed the subject of inquiry, and beyond this the issue did not go. The expression in the departmental decision of May 13, 1896, referred to by petitioner and above quoted, therefore correctly states the scope of the earlier decision. No rights in his adversaries having supervened, the placer claimant was merely remitted to the position he occupied immediately prior to filing his application, with no apparent obstacle to the enjoyment of the benefits of further efforts to develop the extent and value of mineral deposits in the land; and whatever rights may now subsist are represented in the present claimants.

In this connection it may be pointed out that in disposing of the adverse suit the trial court found "from the evidence that the Searl placer was duly located, as required by the law, in 1877," and that annual labor had continuously been performed to the time of trial. Upon this point the Supreme Court of the State, in the course of its review of the judgment below, first deciding against petitioner's contention that the departmental decision of November 13, 1890, extended to a determination of the invalidity of the placer location as made upon non-placer ground, and against petitioner's plea of *res adjudicata* in that behalf, in passing to the consideration of the merits said:

In discussing this feature of the case, it must be considered as established that the Searl placer was an existing valid location at the time of the attempted location of the lode claims. We make this statement, as counsel for plaintiff in error themselves admit that such issue was present in the case, and was determined by the trial court upon conflicting evidence, and, as bearing upon this point, they make no question but that the same was rightly determined.

In its turn, the Supreme Court of the United States said in this connection (pp. 222-3):

It is the settled rule that this court, in an action at law at least, has no jurisdiction to review the conclusions of the highest court of a State upon questions of fact. *River Bridge Co. v. Kansas Pac. Ry. Co.*, 92 U. S. 315; *Dower v. Richards*, 151 U. S. 658; *Israel v. Arthur*, 152 U. S. 355; *Noble v. Mitchell*, 164 U. S. 367; *Hedrick v. Atchison &c. Railroad*, 167 U. S. 673, 677; *Turner v. New York*, 168 U. S. 90, 95; *Egan v. Hart*, 165 U. S. 188. It must, therefore, be accepted that the Searl placer claim was duly located, that the annual labor required by law had been performed up to the time of the litigation, that there was a subsisting valid placer location, and that the lodes were discovered by their locators within the boundaries of the placer claim subsequently to its location. So the trial court specifically found, and its finding was approved by the Supreme Court.

As against this, it is contended that the Land Department held that the ground within the Searl location was not placer mining ground, nor subject to entry as a placer claim, that such holding by the Department must be accepted as conclusive in the courts, and therefore that the tract should be adjudged

public land and open to exploration for lode claims and to location by any discoverer of such claims. It is true that the Commissioner of the General Land Office, in rejecting the amended application for the placer patent, said that he was not satisfied that the land was placer ground or that the requisite expenditure had been made, and further that the locators had not acted in good faith, but were attempting to acquire title to the land on account of its value for town site purposes and for the lodes supposed to be contained therein. This decision was affirmed by the Secretary of the Interior; but notwithstanding this expression of opinion by these officials, all that was done was to reject the application for a patent. As said thereafter by the Secretary of the Interior upon an application of the Clipper Mining Company for a patent for the lode claims here in dispute:

“The judgment of the department in the Searl placer case went only to the extent of rejecting the application for patent. The department did not assume to declare the location of the placer void, as contended by counsel, nor did the judgment affect the possessory rights of the contestant to it.” 22 L. D. 527.

So far as the record shows—and the record does not purport to contain all the evidence—the placer location is still recognized in the department as a valid location. Such also was the finding of the court, and being so there is nothing to prevent a subsequent application for a patent and further testimony to show the claimant's right to one.

It is thus seen that the Department's statement of the effect of its decision of November 13, 1890, has been sustained by the trial court's findings of fact and by the successive constructions of that decision by the highest court of the State and of the United States.

II.

The trial court further found, as the transcript of the record discloses, that petitioner's grantors “discovered a lode claim within the boundaries of the Searl placer, but that the discovery was made subsequent to the location of the placer.” Holding that the entry “upon a valid subsisting location of a placer mining claim owned by and in the possession of the plaintiffs did not initiate any right whatever,” the court adjudged the plaintiffs (respondents) to be “the owners of and entitled to the possession of the ground in controversy.” Respondents, on their part, as has been said, rely upon that judgment, affirmed by the Supreme Court of the State, whose judgment is in turn affirmed by the Supreme Court of the United States, as conclusive upon the land department and petitioner and as *res adjudicata* that the latter's lode locations were and are invalid and insufficient to sustain any claim based thereon. They earnestly contend, therefore, that, in view of the judicial award, the Department is without jurisdiction to entertain the pending petition.

That the judgment of a court of competent jurisdiction, pursuant to section 2326, Revised Statutes, goes only to “the question of the right of possession” of a mining claim, as between the parties litigant, and that it remains in every case for the land department to determine all other questions touching the right to patent, are settled

principles. In the case of *Perego v. Dodge* (163 U. S., 160, 168) the court said:

It must be remembered that it is "the question of the right of possession" which is to be determined by the courts, and that the United States is not a party to the proceedings. The only jurisdiction which the courts have is of a controversy between individual claimants, and it has not been provided that the rights of an applicant for public lands as against the government may be determined by the courts in a suit against the latter. *United States v. Jones*, 131 U. S., 1; *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U. S., 683, 694.

In the case of *Alice Placer Mine* (4 L. D., 314, 316), to which in its decision in this case the United States Supreme Court refers and from which it quotes with approval, the Department said:

The judgment of the court is, in the language of the law, "to determine the question of the right of possession." It does not go beyond that. When it has determined which of the parties litigant is entitled to possession, its office is ended, but title to patent is not yet established.

Upon the authority of cases cited in the notes the jurisdiction of the land department in that behalf is stated in *Lindley on Mines* (2nd Ed., Vol. II, Sec. 765) thus:

Notwithstanding the judgment of the court on the question of the right of possession, it still remains for the land department to pass upon the sufficiency of the proofs, to ascertain the character of the land, and determine whether the conditions of the law have been complied with in good faith.

As to all matters which by statute are exclusively confided to the courts, the conclusive and binding force of the judgment is fully recognized by the department. As to other matters, the department exercises its power of investigation and determination.

One may obtain a judgment awarding him the right of possession and yet not be properly equipped to receive the patent. The judgment roll proves the right of possession only.

The land department must, under the law, be the judge as to when, under what circumstances, and how the government shall part with its title.

In most of the cases in which the force and effect of these judicial awards of the right of possession have been considered the adverse suits have arisen between rival lode or rival placer claimants, and certain it is that in any such case the patent must issue to the party prevailing, if to either. The contending parties asserting titles of the same character, both claiming the ground as mineral and both relying in the one case upon the lode, in the other upon the placer, character of the land in controversy, the judgment is conclusive and binding as between them. The mutually asserted character of the land thereafter established in the proceedings before the land department, the judgment claimant, rendering due compliance with the law in all other respects, is entitled to patent; but if, on the other hand, the land prove not to be of that character, neither party may receive patent, since both stand upon the same footing in that particular. Shown by proceedings before the land department in a

proper case to be agricultural, not mineral, in character, the land, though embraced in a prior judicial award of the right of possession to one of two contending mineral claimants, becomes at once subject to agricultural appropriation and patent.

In the present case, it must be kept in mind, the foundation of the title set up by respondents is their placer location. As placer claimants they adversed petitioner's lode application, opposing their claimed placer possessory right to petitioner's claimed lode possessory right, and relying upon the rights arising under their placer location, if good, to defeat petitioner's claim to the lodes, as unknown to exist at the date of that location. The trial court found as a fact that the lodes were discovered and located, after the date of the placer location, by the grantors of petitioner; and it was solely because of the entry upon the placer location, as valid in its inception and still subsisting by reason of the continued performance of annual labor, in violation of the "exclusive right of possession and enjoyment of all the surface included within the lines" thereof guaranteed by the statute, that the court held no rights to have arisen in the lode locators as against respondents. In other words, it was the rights accruing to the latter as placer claimants which were held to have been invaded. A successful adverse claimant prevails upon the strength of his title under his own location, and is not subrogated to possessory rights under the location of his defeated adversary. Having prevailed in the adverse suit solely on the strength of their placer location, only by virtue of their right to placer patent, if any, could they take title under the judgment roll to these lodes. They could take them, if at all, only as *lodes within a placer*. Obviously, unless their claim is of patentable placer character the lodes are not in that situation and as such available to respondents.

As the land department may inquire, at the instance of an agricultural protestant, or of its own motion, concerning the character of the land theretofore involved in an adverse suit and awarded to one of the parties litigant, and dispose of the land as the facts may be found to justify, so may it inquire here as to the placer character of the land in controversy and adjudicate rights of the claimants thereto accordingly. This is in accordance with settled principles, and is plainly pointed out by the Supreme Court of the United States, thus:

We must not be understood to hold that, because of the judgment in this adverse suit in favor of the placer claimants, their right to a patent for the land is settled beyond the reach of inquiry by the government, or that the judgment necessarily gives to them the lodes in controversy.

* * * * *

The land office may yet decide against the validity of the lode locations and deny all claims of the locators thereto. So also it may decide against the placer location and set it aside, and in that event all rights resting upon such location will fall with it.

Respondents contend, however, as to the jurisdiction of the Department here, that but two questions are presented which are within the scope of its inquiry, namely:

1. Was the ground here involved subject to location under the placer mining laws on December 12 [14], 1877, the date of the Searl placer location?
2. Were there any known lodes therein contained on November 10, 1882, the date of the last application for placer patent thereon?

The first question is not now involved. The trial court has found the placer claim to have been "duly located, as required by the law," and the finding is accepted. It affords, however, no basis for a conclusion that respondents have been clothed throughout with full rights as placer claimants and that the land is subject to placer patent. But, respondents contend, the determinative inquiry should be: Was the ground involved more valuable for placer mining than for agricultural purposes at the date of the location? If this were true it would be enough to point out that this question was essentially answered in the negative, after full hearing and under successive appeals, at and as of a much later date. The second question is immaterial, inasmuch as the placer application mentioned was rejected and has since been of no force or effect. A placer application such as is contemplated by the principle invoked, that is, relative to the date of the filing of which the question of the known existence of lodes within the placer limits is to be determined, is one which may result in the acquisition of the equitable title. This necessarily comprehends the placer character of the land embraced in it; and the application referred to failed because that essential feature was not established. In any event, no dispute remains as to the existence of the lodes or the time of their discovery.

If the land embraced in the placer location is found to be non-placer in the patentable sense, so that respondents can not take title to the lodes in question in connection therewith, the basis of their claim to the lodes disappears, no prejudice to the claim of petitioner can have resulted from the judgment, and no obstruction to the completion of the latter's patent proceedings, if in themselves regular, would then remain. Indeed, to hold otherwise would be to deny patent to both parties. Nearly ten years elapsed between the date of the hearing which resulted in the rejection of the placer application and the date of the application for lode patent. What placer development may have occurred in the interval remains to be determined, for as of the latter date petitioner's rights are to be determined. Petitioner points out, as conclusive, the following admission in respondents' brief:

Now, there is no dispute as to the *present* character of the ground here involved. *It is admittedly lode.*

If this could be taken as an unequivocal admission of the non-placer character of the land embraced in the placer location as of the date last mentioned the case would seem to be relieved of further question. It can not, however, be so taken.

The parties have been fully heard, and the record is therefore returned to your office, with the direction that, upon application by petitioner, a hearing be ordered in the usual manner, at which full opportunity will be afforded both sides for the submission of such evidence as they may have touching the character of the land embraced in the placer location, whether patentably placer or not, as of the date of the application for lode patent. If the hearing shall be had, the case will thereafter be regularly adjudicated in accordance with the showing made, agreeably to the views above expressed; otherwise, the petition will be dismissed.

YAKIMA INDIAN RESERVATION—UNALLOTTED LANDS—ACT OF
DECEMBER 21, 1904.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 28, 1905.

REGISTER AND RECEIVER,
Vancouver, Washington.

GENTLEMEN: On April 22, 1904, sections 1, 2, 11, 12 and 13, T. 6 N., R. 13 E., and N. $\frac{1}{2}$ T. 6 N., Rs. 14 and 15 E., were withdrawn from settlement, entry, filing, selection, or other appropriation, pending action by Congress and until further directed by this office, said lands lying west and adjoining the Yakima Indian reservation proper in Washington, had been excluded by erroneous boundary survey, and the same being claimed by the Yakima Indians as a part of said reservation.

By the act of December 21, 1904 (33 Stat., 595), the claim of the Yakima Indians to said tract of land adjoining their present reservation on the west, excluded by an erroneous boundary survey and containing approximately 293,873 acres, was recognized and it was declared that said tract shall be regarded as a part of the Yakima Indian reservation for the purpose of said act, which contained the following provision:

That where valid rights have been acquired prior to March fifth, nineteen hundred and four, to the lands within said tract by *bona fide* settlers or purchasers under the public land laws, such rights shall not be abridged.

As the act makes provision for the disposition of the surplus or unallotted lands within the reservation, it becomes material to know

at the earliest possible date which of the lands are excepted out of the reservation by reason of the protection extended to the *bona fide* settlers and purchasers under the public land laws.

As to lands within townships so withdrawn of which the plats have already been filed in your office, you will cause the inclosed notice to be published in the Goldendale Sentinel, at Goldendale, Klickitat county, Washington, and in the Vancouver Independent, at Vancouver, Washington, for thirty days, in accordance with the authorization also inclosed herewith, and pursuant to said notice parties claiming rights by virtue of settlement upon said lands prior to March 5, 1904, will be allowed three months from the date of such notice within which to make entry.

In case there are unsurveyed lands within said area in which rights are claimed by virtue of settlement prior to March 5, 1904, the parties will be allowed to make entry within the period allowed under the provisions of the act of May 14, 1880 (21 Stat., 140), after the filing of the township plat in your office.

You should require each settler to file with the usual homestead application an affidavit, corroborated by the oaths of two credible persons, setting out in detail such facts and circumstances as will show that the applicant has honestly and in good faith complied with the requirements of the homestead law in the matter of residence and cultivation under a settlement made prior to March 5, 1904, and unless the facts set out in such affidavits convince you that the applicant has followed his settlement with proper residence and cultivation you should reject the application, subject to the right of appeal.

A purchaser within the intent of the act is one who has made entry and to whom certificate issued prior to March 5, 1904, and in case any party in the prosecution of his application to purchase had, prior to March 5, 1904, made a lawful tender of the purchase money under his claim, the fact that, due to contest or otherwise, the certificate had not actually issued prior to that date will not deprive the party of the protection extended by said proviso.

It is not known whether there are any mineral lands within the area claimed by the Indians and whose title thereto is recognized by the act, but it is deemed advisable that in the notice hereinbefore directed to be given to settlers upon these lands, parties in possession of a valid mining claim upon any of the lands within said area, should also be notified to come forward within the time therein directed and give notice of such claim and make showing as to the nature and character thereof, in order that their rights may be determined.

You are directed to at once report to this office a complete list of all sales, or applications to purchase which were accompanied by the purchase money, and also from time to time hereafter make similar

reports as to entries made by settlers under these instructions, as well as to mineral claims reported to you. It is especially desired that you keep this office constantly advised as to any change of the status of the lands mentioned in this letter, as this knowledge is imperatively needed to facilitate the final disposal of these lands.

It appears from the records of this office that certain entries have been made for lands within the parts of the township hereinbefore described subsequent to such order of withdrawal, and you will forthwith examine your records and furnish a list of all entries that have been so allowed of such land and report upon what authority the same were allowed.

In addition to the publication of notice as hereinbefore directed, you will post a copy of said notice in your office for the period of thirty days.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved:

E. A. HITCHCOCK, *Secretary.*

YAKIMA INDIAN RESERVATION—UNALLOTTED LANDS—ACT OF
DECEMBER 21, 1904.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 28, 1905.

REGISTER AND RECEIVER,
North Yakima, Washington.

GENTLEMEN: By my letter "C" of April 22, 1904, certain lands described therein in Ts. 8, 9 and 10 N., R. 11 E., Ts. 7, 8, 9, 10 and 11 N., R. 12 E., Ts. 7, 8, 9, 10 and 11 N., R. 13 E., Ts. 7, 8, 9, 10 and 11 N., R. 14 E., Ts. 7 and 8 N., R. 15 E., were withdrawn from settlement, entry, filing, selection or other appropriation pending action by Congress, and until further directed by this office, said lands lying west and adjoining the Yakima Indian reservation proper in Washington, had been excluded by erroneous boundary survey, and the same being claimed by the Yakima Indians as a part of said reservation.

By the act of December 21, 1904 (33 Stat., 595), the claim of the Yakima Indians to said tract of land adjoining their present reservation on the west, excluded by an erroneous boundary survey and containing approximately 293,873 acres, was recognized and it was

declared that said tract shall be regarded as a part of the Yakima Indian reservation for the purpose of said act, which contained the following provision:

That where valid rights have been acquired prior to March fifth, nineteen hundred and four, to the lands within said tract by *bona fide* settlers or purchasers under the public land laws, such rights shall not be abridged.

As the act makes provision for the disposition of the surplus or unallotted lands within the reservation, it becomes material to know at the earliest possible date which of the lands are excepted out of the reservation by reason of the protection extended to the *bona fide* settlers and purchasers under the public land laws.

As to lands within townships so withdrawn of which the plats have already been filed in your office, you will cause the inclosed notice to be published in the North Yakima Republic, at North Yakima, Washington, and in the Prosser Bulletin, at Prosser, Washington, for thirty days, in accordance with the authorization also inclosed herewith, and pursuant to said notice parties claiming rights by virtue of settlement upon said lands prior to March 5, 1904, will be allowed three months from the date of such notice within which to make entry.

In the unsurveyed townships within said area in which rights are claimed by virtue of settlement prior to March 5, 1904, the parties will be allowed to make entry within the period allowed under the provisions of the act of May 14, 1880 (21 Stat., 140), after the filing of the township plat in your office.

You should require each settler to file with the usual homestead application an affidavit, corroborated by the oaths of two credible persons, setting out in detail such facts and circumstances as will show that the applicant has honestly and in good faith complied with the requirements of the homestead law in the matter of residence and cultivation under a settlement made prior to March 5, 1904, and unless the facts set out in such affidavits convince you that the applicant has followed his settlement with proper residence and cultivation you should reject the application, subject to the right of appeal.

A purchaser within the intent of the act is one who has made entry and to whom certificate issued prior to March 5, 1904, and in case any party in the prosecution of his application to purchase had, prior to March 5, 1904, made a lawful tender of the purchase money under his claim, the fact that, due to contest or otherwise, the certificate had not actually issued prior to that date, will not deprive the party of the protection extended by said proviso, and all pending applications should be at once disposed of accordingly.

It is not known whether there are any mineral lands within the

area claimed by the Indians and whose title thereto is recognized by the act, but it is deemed advisable that in the notice hereinbefore directed to be given to settlers upon these lands, parties in possession of a valid mining claim upon any of the lands within said area, should also be notified to come forward at once and give notice of such claim and make specific showing as to the nature and character thereof and a description of the lands so claimed, in order that their rights may be determined.

You are directed to at once report to this office a complete list of all sales, or applications to purchase which were accompanied by the purchase money, and also from time to time to hereafter make similar reports as to entries made by settlers under these instructions, as well as to mineral claims reported to you. It is especially desired that you keep this office constantly advised as to any change of the status of any of the lands mentioned in this letter, as this knowledge is imperatively needed to facilitate the final disposal of these lands.

In addition to the publication of notice as hereinbefore directed, you will post a copy of said notice in your office for the period of thirty days.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

Approved:

E. A. HITCHCOCK, *Secretary.*

SCHOOL LAND—INDEMNITY.

PEDERSON *v.* STATE OF WASHINGTON.

An individual claim embracing a portion of a school section in place should be treated as an entirety, and where the State elects to reimburse itself for land included in such claim by selecting indemnity for a portion thereof, it thereby abandons or waives claim to the entire tract included in the entry.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) June 28, 1905. (E. J. H.)

On August 10, 1897, John W. Lindsey made homestead entry for the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 36, T. 35 N., R. 38 E., Spokane, Washington, land district. In his affidavit settlement was alleged to have been made on June 26, 1895, prior to survey in the field. Said survey was made in May and June, 1896.

August 10, 1902, the State of Washington filed at the North Yakima land office indemnity school land selection for two forty-acre tracts in lieu of the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of said section 36, covered by Lindsey's homestead entry.

October 14, 1903, Lindsey's homestead entry was canceled on relinquishment.

March 8, 1904, Charles Pederson made homestead entry for the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of said section 36, upon which he alleged settlement on March 1, 1904, and March 10, 1904, Ben Aspend made homestead entry for the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of said section, upon which he alleged settlement March 7, 1904.

June 27, 1904, your office decision held that the State having made the foregoing selections in lieu of the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of said section 36, while Lindsey's entry was existing and valid, it is deemed to have waived its right thereto and the homestead entry of Pederson covering said NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and that of Aspend covering said SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ were allowed to stand as to said tracts.

It was also held that the State having made no selection in lieu of the NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of said section 36, its title to said tracts under its school land grant became complete upon the cancellation of Lindsey's entry, in the absence of any claim of settlement by Pederson and Aspend prior to survey. The entry of Pederson as to said NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, and that of Aspend as to the said NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, was held for cancellation, from which Pederson has appealed to the Department, but no action has been taken by Aspend.

With the appeal Pederson has filed his corroborated affidavit, showing that he purchased the improvements Lindsey had on said N. $\frac{1}{2}$ of NE. $\frac{1}{4}$, the most of which were upon the NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, and secured his relinquishment of entry; that he has since expended money and labor in further improving the land, and has built a log barn thereon, sixteen by twenty-four feet; that the other forty-acre tract embraced in his entry (NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$) is of little value and he would be unable to make a living thereon; that at the time he obtained said relinquishment of Lindsey he understood that the State had selected other land in lieu of the entire N. $\frac{1}{2}$ of NE. $\frac{1}{4}$, and relying thereon made said purchase of improvements, and upon the cancellation of Lindsey's entry was allowed to make homestead entry of the land.

By filing the indemnity list of selections on August 10, 1902, on account of eighty acres embraced in Lindsey's homestead entry, the State clearly recognized Lindsey's superior claim to the land under his homestead allowed August 10, 1897, and indicated its purpose not to await the final consummation of said entry but to treat the land embraced therein as excepted from its grant and select other lands in lieu thereof under the indemnity provision of its grant, as it was fully authorized to do. So far as shown by the record now before the Department, the State has only made indemnity selection on

account of one-half the land embraced in Lindsey's entry. Whether it was advised of the allowance of the homestead entries by Pederson and Aspend, following the cancellation of Lindsey's entry, does not appear, but, although Pederson duly served his appeal from your office decision, holding a portion of his entry for cancellation, upon the State Land Commissioner, no appearance has been entered on the part of the State nor has any objection been filed to the recognition of his homestead entry, and it may be that the State has already selected other lands in lieu of the remaining eighty acres covered by Lindsey's entry, or contemplates so doing.

In the opinion of this Department good administration requires that the individual claim embracing a portion of a school section in place, should be recognized as an entirety, and where the State, as in this case, elects to reimburse itself for land included in such a claim by selecting indemnity for a portion thereof, it thereby abandons or waives claim to the entire tract included in such entry.

Pederson was clearly misled by the action of the State in selecting indemnity on account of Lindsey's entry and induced thereby to purchase Lindsey's possessory claim and since occupy and improve the land, and in view of the fact, as before stated, that the State is not asking cancellation of his entry, it might be fairly assumed that it does not intend to make claim to this land, but rather to satisfy its grant through the selection of other lands in lieu of the entire tract embraced in Lindsey's entry.

For the reasons given, your office decision, in so far as it held Pederson's homestead entry for cancellation, is reversed and said entry will be permitted to remain intact awaiting final proof at proper time.

FOREST RESERVE—OPERATION OF WITHDRAWAL,

HIRAM C. SMITH.

An order by the land department withdrawing public lands from entry or other disposition, is operative, unless otherwise limited, from the time it is made.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 29, 1905.* (J. R. W.)

Hiram C. Smith appealed from your office decision of October 24, 1904, rejecting his application 9156, your office series, under the act of June 4, 1897 (30 Stat., 36), to select the W. $\frac{1}{2}$ and lot 5, Sec. 3, with other lands, amounting to 2490.37 acres, in townships 26 north, ranges 12 and 13 east, M. D. M., Susanville, California, in lieu of

land relinquished to the United States, in the San Jacinto forest reserve, Riverside county, California.

The only question presented by the appeal is the time of taking effect of an order of temporary withdrawal, and whether the land was subject to selection at the time the application was presented. October 22, 1902, the townships 26 north, ranges 12 and 13 east, with other lands, were temporarily withdrawn from disposal for consideration of their inclusion in the proposed Diamond Mountain forest reserve, which fact was communicated to the local office by your office letter of that date, but did not reach the local office until after October 24, 1902, on which day Smith presented his application, so that the withdrawal was not shown, and by the local office record the land appeared to be subject to selection. The withdrawal is yet in force. Your office held that the withdrawal took effect on the day of its date, and that the land was not subject to selection. It is claimed that an order of withdrawal takes effect only from the date of its receipt at the local office, and that your office erred in holding otherwise.

An order of withdrawal of land from entry operates upon the status of the land affected, reserving it from private appropriation. When made by authority of law and by a competent officer, it has the force of law, and if unlimited as to the time of its taking effect must, like any other law, operate from the time it is made. Whether its operation shall be limited to a future event, like its receipt by the local office, or until some prescribed publication, rests solely in the discretion of the officer making the order, having due regard to public necessity or expediency, and of justice to those who may seek to appropriate such lands. An act of this kind differs in no essential respect from an act of Congress or a proclamation by the chief executive. The public interest would often be seriously affected and the order in great part or wholly defeated if its effect depended upon its receipt by some local officer to whom it must first be transmitted, or the happening of some future event. It was held in *Lapeyre v. United States* (17 Wall., 191) that the President's proclamation of June 24, 1865, was effective as soon as signed by the President and sealed with the seal of the United States, although not "published or promulgated anywhere or in any form" prior to the morning of the 27th of June, 1865. The reasoning of the court in that decision is here applicable and conclusive.

This rule has heretofore been applied in similar cases of orders of this character. *Emma F. Zumwalt* (20 L. D., 32); *Currie v. State of California* (21 L. D., 134). The case first cited is criticised by counsel as made without discussion of the principle, and the later one as in view of counsel illogical, in that it "holds that a withdrawal

of this character must be construed most liberally in favor of the *public* which term the decision, curiously enough, applies in favor of the *government*." "The public" is a term entirely appropriate to express organized society, or the government, and is fitly so used when speaking of the State, as organized society, or government, in connection with its public interests and matters of public or general welfare and concern. The context shows that it was used in this sense with view to effectuating the withdrawal, advancing and conserving those matters of public concern prompting it. This rule rests upon the principle that the welfare of the many must be advanced, even though inconvenience may be caused to individuals whose rights have not vested—recognized in so many judicial decisions, and so well founded as not to need extended citation. In the present instance one individual, under three applications, seeks to obtain private right to about 5500 acres of lands withdrawn from private appropriation with view to their reservation for conserving public necessities. However uninformed he may have been, it is obviously contrary to public policy to restrain the operation of a withdrawal, properly made by authority of law for public uses, until publication or notice of the fact shall be received by a distant officer.

The Department can not therefore accede to the suggestion of counsel that, by analogy to the rule as to cancellation of entries laid down in *Stewart v. Peterson* (28 L. D., 515), and instructions of July 14, 1899 (29 L. D., 29), its former decisions on this subject are not now authority, or that withdrawals for public use operate from receipt of notice at the local office. The analogy is not good. The reasons for giving such orders immediate effect are so cogent as to move the Department to adhere to its former rulings.

It is true that by its general circular the land department refers the public to its local offices for "information regarding vacant public lands," and the act of March 3, 1883 (22 Stat., 484), requires local officers on application and payment of a fee to "furnish plats or diagrams of townships in their respective districts showing what lands are vacant and what lands are taken," etc., but the Secretary of the Interior is made the supervising head of the land department. All acts of local officers are subject to his supervisory authority. Their acts done in ignorance of recent orders, or in disregard of established public or private right have never been held to conclude the United States or to cast upon the government a liability to make their representations good or to respond for their lack of information or their misconduct.

Your office decision is affirmed.

MINING CLAIM—ADVERSE—VERIFICATION BY CORPORATION.

LOUISVILLE GOLD MINING CO. *v.* THE HAYMAN MINING & TUNNEL CO.

A corporation is a resident, subject, or citizen of the State in which it is created and can have no legal residence beyond the boundaries of such State. An adverse claim under the mining laws, asserted by a corporation created under the laws of Colorado, sworn to by the President of such corporation in Louisville, Kentucky, is not properly verified under the provisions of section 2335 of the Revised Statutes or the act of April 26, 1882.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 29, 1905.* (G. N. B.)

July 28, 1903, The Hayman Mining & Tunnel Company filed application for patent to the Big C No. 1 and North Star No. 1 lode mining claims, survey No. 16,580, Leadville, Colorado, land district. Notice was published and posted, the first day of publication being July 31, 1903. During the period of publication, the exact date not appearing, the Louisville Gold Mining Company, alleged owner of the Copper Jack and Queen of the West lode mining claims, in conflict with the claims applied for, presented for filing at the local office an adverse claim, signed by the president of the company and sworn to by him before a notary public in Louisville, Kentucky. September 29, 1903, the local officers notified the company that the adverse claim could not be accepted because not accompanied by proof of authority in the president to act in the premises as the company's agent, and because not sworn to within the land district in which the claims are situated. A motion for review was filed, which the local officers denied, October 9, 1903. Upon appeal, your office, February 29, 1904, held the adverse claim to be properly verified, but that inasmuch as proceedings in court were not commenced thereon within the time prescribed by the statute (Sec. 2326, R. S.), the adverse claim presents no reason for a stay of the application for patent.

The adverse claimant has appealed to the Department.

An important question presented by the record, though not strictly in issue on the appeal, is whether the adverse claim is properly verified. Section 1 of the act of April 26, 1882 (22 Stat., 49), provides—

That the adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated; and the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record of the United States or the State or Territory where the adverse claimant may then be, or before any notary public of such State or Territory.

The Louisville Gold Mining Company is a corporation organized under the laws of the State of Colorado. As such corporation it can have no residence outside that State. Thompson in his Commentaries on the Law of Corporations (Vol. 6, Par. 7999), states the prevailing rule to be, in substance, that a corporation is a resident, subject, or citizen of the State in which it is created and can have no legal existence beyond the boundaries of that State; that it must dwell in the place of its creation, and cannot migrate to another State.

In Clark on Corporations (p. 76) it is said:

A corporation, being a mere creature of local law, can have no legal existence beyond the limits of the sovereignty where created. This is none the less true because the corporation is allowed to do business in another State by the comity of the latter. This does not make it a citizen of the latter State for the purpose of Federal jurisdiction, or for any other purpose. The same principle applies where a statute uses the word "inhabitant" or "resident," and corporations are within the purpose of the law. A corporation cannot be an inhabitant of any State other than that by which it is created.

In *Bank of Augusta v. Earle* (13 Pet., 519, 588), the Supreme Court said:

It is very true, that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that State only, yet it does not by any means follow that its existence will not be recognized in other places; and its residence in one State creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible and intangible; yet it is a person, for certain purposes in contemplation of law, and has been recognized as such by the decision of this court.

In *Ex parte Schollenberger* (96 U. S., 369, 377), the Supreme Court said, on the same subject:

A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter.

In *Shaw v. Quincy Mining Company* (145 U. S., 444, 450), the Court, after quoting the language hereinbefore given from *Bank of Augusta v. Earle*, said:

This statement has been often reaffirmed by this Court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the State by which it was created, although it may do business in other States whose laws permit it.

See also *Railroad Co. v. Koontz* (104 U. S., 5, 11, 12); *St. Clair v. Cox* (106 U. S., 350, 354, 356); *Canada Southern Railway v. Gebhard* (109 U. S., 527, 537).

Under the act of 1882, *supra*, if the adverse claimant resides outside the land district where the claims involved are situated, or is at the time beyond the district limits, the oath to the adverse claim may be made in the State or Territory "where the adverse claimant may then be." That the facts in this case do not bring the Louisville Gold Mining Company within the terms of this statute is shown by the authorities herein cited. A corporation created under the laws of Colorado, its residence is in that State and in that State only. It could not migrate therefrom, or change its residence to the State of Kentucky, or follow its president to that State.

Prior to the act of 1882 the oath to an adverse claim was required to be made *by the claimant*, and to be verified before an officer authorized to administer oaths within the land district wherein the claims were situate (Sec. 2335, R. S.). That act gives power to any duly authorized agent or attorney in fact, cognizant of the facts stated in the adverse claim, to make the oath. This provision of law is ample to have afforded relief in the present case. The oath to the adverse claim by the president of the corporation made in Louisville, Kentucky, does not meet the requirements of the law. Treated as the oath of the corporation, it is not within the act of 1882 because at the time the oath was made, the corporation was not residing, nor did it have its being, in the State of Kentucky. Treated as the oath of the president, as agent of the corporation, it cannot be accepted, because not made within the land district where the claims are situated. (Par. 80 of the Mining Regulations, 31 L. D., 474, 487.)

In view of the foregoing it is clear that the adverse claim in question has not been verified in accordance with law, and, therefore, presents no reason for a stay of proceedings under the application for patent.

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

This much determined, it becomes unnecessary to pass upon other questions suggested in the record.

FINAL PROOF—WIDOW—HEIRS.

DAVID R. WEED.

There is no law authorizing the submission of final proof by the heirs of a deceased entryman during the lifetime of his widow.

Where final proof is submitted by and on behalf of the heirs of a deceased entryman, during the lifetime of his widow, there is no authority of law for the issuance of final certificate and patent thereon in the name of the widow.

Secretary Hitchcock to the Commissioner of the General Land Office,
(F. L. C.) *June 30, 1905.* (E. P.)

June 13, 1896, David R. Weed made homestead entry of the NE. $\frac{1}{4}$ of Sec. 12, T. 38 N., R. 16 W., Eau Claire land district, Wisconsin.

November 7, 1903, Hose Weed, a son of David R. Weed, then deceased, submitted final proof on behalf of the heirs of the entryman, and in a corroborated affidavit filed at that time, alleged that on November 28, 1898, the entryman died, leaving a widow, Jennie Weed, his second wife, and three minor children by his first wife—

that prior to the death of said David R. Weed she [Jennie Weed] left the home of said David R. Weed on the land in question, with a man named Michael O'Brien and never returned thereto, and has never since resided upon said land or cultivated the same, and in fact has never been heard from since, except that affiant learned about one week after the death of said David R. Weed, she married the said Michael O'Brien.

It appearing to the local officers from the proof submitted that the heirs of the entryman had cultivated the land for the necessary period after the death of the entryman, the proof was approved and final certificate issued in the name of the heirs.

Your office, by decision of March 9, 1904, held as follows:

There is no authority of law for the submission of final proof by one of the heirs during the life time of the widow. It has been decided, however, by this office, in the case of Luther B. Parker, by letter to Register and Receiver, Huntsville, Alabama, August 8, 1899, that such final proof may be allowed to stand, providing that heirs are willing to have the certificate and patent issue in the name of the widow, in which case, the entry can be submitted to the Board of Equitable Adjudication.

In view of said decision, should the heirs of David R. Weed elect to have final certificate and patent issued on the proof submitted, in the name of Jennie O'Brien, formerly Jennie Weed, widow of David R. Weed, they will be allowed to file an application to that effect, signed and acknowledged by each of them.

Notify Hose Weed at Downing, Wisconsin, the post office address given in the proof, that unless he files such evidence or appeals herefrom within 60 days from service of notice, the entry will be canceled without further notice to him from this office.

The Department is of opinion that there is no authority of law for the ruling of your office to the effect that, with the consent of the heirs of the entryman, certificate and patent may issue in the name of the entryman's widow upon the proof submitted. She was not one of the class for whose benefit such proof was submitted; she has never submitted proof; she has not, as appears from the record herein, in any respect complied with the law in the matter of residence upon the land or cultivation thereof since the death of the entryman. She would not, therefore, be entitled to receive patent for the land even if the heirs should consent thereto.

So much of your office decision, however, as holds that there is no authority for the submission of final proof by the heirs of an entryman during the lifetime of the entryman's widow, is clearly in accordance with the recent rulings of the Department (See *Steberg v. Hanelt*, 26 L. D., 436; *Keys v. Keys*, 28 L. D., 6). The final proof submitted on behalf of Weed's heirs will, therefore, be rejected, and the final certificate canceled.

The decision appealed from is accordingly modified as herein indicated.

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A stranger to a contest will not be heard to question the sufficiency of the service of notice of the contest...	65
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Where the first publication of notice of contest is not made within sixty days from the date of the execution of the affidavit filed therefor, the filing of a second affidavit after the expiration of the sixty days, supplementary to the first and not of itself sufficient as a basis for service by publication, and the publication of notice thereon, can have no effect to confer jurisdiction upon the local officers.....	337
A contestant is entitled to notice of the dismissal of his contest for want of prosecution; and where he is not served with notice of such action, his rights are in no wise prejudiced or affected thereby, and an intervening contest against the same entry by another party is no bar to the reinstatement of his contest.....	85
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The mere filing of a second affidavit of contest, which is immediately withdrawn before any action is taken thereon, except to note the filing on the records of the local office, does not constitute a waiver by the contestant of his right to prosecute the contest theretofore initiated.----- 85

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No such right is acquired by a contest against a homestead entry by one having no claim to the land, but who is seeking merely to secure a preference right, prior to the cancellation of the entry, as will prevent the acceptance of final proof on such entry, even though not submitted until after the expiration of the statutory period, and the submission of the case to the board of equitable adjudication for appropriate action.--- 21

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No such right is acquired by a contest against a homestead entry by one having no claim to the land, but who is seeking merely to secure a preference right, prior to the cancellation of the entry, as will prevent the acceptance of final proof on such entry, even though not submitted until after the expiration of the statutory period, and the submission of the case to the board of equitable adjudication for appropriate action----- 21

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The right to make soldiers' additional entry is a property right, and where not exercised by the soldier during his lifetime, nor by his widow or the guardian of his minor children after his death, it remains an asset of the soldier's estate----- 245

The right to make soldiers' additional entry is limited to such an amount of land as added to the amount previously entered shall not exceed one hundred and sixty acres, even though the entryman may have paid cash for a portion of the original entry as excess land----- 274

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LODE.

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If the land embraced in the placer claim be found to be non-placer in the patentable sense, so that the placer claimant can not take the legal title thereto, the basis of his claim to the lodes disappears and no prejudice to the claim of the lode applicant can have resulted from the judgment of the court awarding the placer claimant the right of possession of "the ground in controversy," as part of the placer, in which the lodes are ----- 660

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In determining the qualifications of an applicant to make homestead entry under the provisions of the act of June 6, 1900, the status of the applicant at the date of his application must control, and if he has at such time attempted to but for any cause failed to secure title in fee to a homestead under existing law, he is qualified to make entry under the provisions of said act..... 125

Where a person, in violation of the provisions of the act of March 3, 1901, goes upon the land opened to settlement and entry by said act, prior to the expiration of the sixty-day period, he does not, by his wrongful presence on the land at the expiration of such period, acquire any right thereto which will be recognized by the land department as superior to the rights of one who goes upon the land immediately upon the expiration of the sixty-day period and makes settlement thereon as soon as it becomes legally subject to settlement and entry under said act..... 192

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Where, after decision therein by the Secretary of the Interior, a case before the land department is erroneously closed, and patent inadvertently issued to the successful party, during the pendency of a motion for review of such decision, the institution of suit for the cancellation of such patent will not be recommended by the land department unless it appear from an examination of the motion for review that it is based upon grounds which would have warranted entertainment of the same had it been regularly considered and acted upon prior to the issuance of the patent..... 295

The decisions of the courts and of the Department are to the effect that when patent once issues the land therein embraced passes beyond the jurisdiction and control of the land department, but they do not question the latter's right to determine, at least in the first instance, what public lands have been patented and what remain subject to its jurisdiction and control..... 91

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Practice.

See *Rules Cited and Construed*, page XXX.

GENERALLY.

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In case the record transmitted with an appeal is so contradictory and conflicting that a satisfactory conclusion as to the real facts in the case can not be reached, the Department may, upon its own motion, order a rehearing. 517

The writ of certiorari provided for by rule 83 of the Rules of Practice is designed as a remedy in cases in which the Commissioner of the General Land Office formally decides that a party has no right of appeal, and is not intended to perform the office of an appeal in case a party fails to appeal within the time prescribed by the Rules of Practice. 39

While the Department may, and in a proper case should, review the proceedings of the General Land Office in respect to the public lands, in the absence of an appeal, it will not ordinarily exercise this power upon the application of a party to the proceedings, in the absence of a clear and concise designation of the errors complained of by him. 39

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An application to make homestead entry of land embraced in a prior application to purchase under the act of June 3, 1878, is not a sufficient ground for requiring a hearing to determine the character of the land. 534

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A stranger to a contest will not be heard to question the sufficiency of the service of notice of the contest. 65

A contestant is entitled to notice of the dismissal of his contest for want of prosecution; and where he is not served with notice of such action, his rights are in no wise prejudiced or affected thereby, and an intervening contest against the same entry by another party is no bar to the reinstatement of his contest. 85

No jurisdiction is acquired by publication of notice of a contest where the first publication was not made until after the expiration of sixty days from the date of the execution of the affidavit filed therefor. 337

Where the first publication of notice of contest is not made within sixty days from the date of the execution of the affidavit filed therefor, the filing of a second affidavit after the expiration of the sixty days, supplementary to the first and not of itself sufficient as a basis for service by publication, and the publication of notice thereon, can have no effect to confer jurisdiction upon the local officers. 337

Lands involved in a contest or other controversy before the land department should not be passed to patent until the defeated party in such proceeding shall have been given notice of the closing of his case, with record evidence of its service, and lapse of reasonable time for him to seek relief against irregularity or error of such final order. 295

REVIEW.

Where, after decision therein by the Secretary of the Interior, a case before the land department is erroneously closed, and patent inadvertently issued to the successful party, during the pendency of a motion for review of such decision, the institution of suit for the cancellation of such patent will not be recommended by the land department unless it appear from an examination of the motion for review that it is based upon grounds which would have warranted entertainment of the same had it been regularly considered and acted upon prior to the issuance of the patent. 295

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holding" claimant by the 17th section of the act of March 3, 1891, must be exercised, but the 18th section of said act, as amended by the act of February 21, 1893, requires that notice of the claim must be filed with the surveyor general within two years from the first day of December, 1892; and the effect of such notice filed within that time is to withhold from entry under the public land laws all tracts covered by the claimant's occupancy and possession until the claim is finally adjudicated or rejected.....	61	In determining the quantity of land to which title may be acquired under the public land laws within the limitation contained in the act of August 30, 1890, as amended by the act of March 3, 1891, lands secured by the applicant under section 3, act of September 29, 1890, should be taken into consideration...	370
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Private Entry.		Until the legal title to public lands passes from the government, inquiry as to all equitable rights comes within the cognizance of the land department, and the Secretary of the Interior, as the head of that department, may take such action with reference thereto as to him seems in accordance with law.....	13
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INDEMNITY.

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The act of February 8, 1887, confirming the assignment to the New Orleans Pacific Railway Company of the grant made to the New Orleans, Baton Rouge and Vicksburg Railroad Company by the act of March 3, 1871, in excepting from the confirmation all lands occupied by actual settlers at the date of the definite location of the line of road and still remaining in their possession or in

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possession of their heirs or assigns, did not thereby limit the terms of the grant of 1871, from which there was excepted all lands which had been sold, reserved, or otherwise disposed of by the United States, or to which a pre-emption or homestead claim may have attached at the time the line of said road was definitely fixed, but merely added a new condition; hence the company has no right of selection under the provisions of the act of June 22, 1874, in lieu of lands covered by a homestead entry at the date of the definite location of the line of road, but is relegated to the indemnity provision of the act of 1871 in supplying any deficiency in its grant occasioned by the disposal of such lands.....	324	and title to the land, which is within the limits of a forest reserve, thereafter reverts in the United States under the exchange provisions of the act of June 4, 1897, may be permitted, under the act of April 15, 1902, to carry his claim to completion.....	367
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ance of entries in school sections, based upon settlement prior to survey ----- 638

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A mineral location, made prior to the admission of the State of Utah into the Union, was not of itself sufficient to establish the mineral character of the land located so as to defeat the grant to the State for school purposes made by section 6 of the act of July 16, 1894; but where the State was specially notified of the pendency of an application for patent under such location, and made no objection by way of protest or otherwise to the allowance of the mineral entry, it is bound by the record made upon such application, and a hearing for the purpose of determining the character of the land is unnecessary ----- 37

By reason of the legislation affecting the unallotted lands in the Uintah Indian reservation, which amounts to an appropriation thereof, no claim on the part of the State (Utah) to any portion thereof will be recognized, either under its grant of specific sections in place in support of common schools, or under the provisions of the act of March 2, 1895 ----- 610

Under its grant of school lands made by the act of February 22, 1889, the State of Montana is entitled to sections sixteen and thirty-six within the boundaries of the former reservation of the Gros Ventres and other tribes of Indians, where such lands have not been appropriated by a *bona fide* settler prior to their identification by survey ----- 181

Lands in section sixteen or thirty-six in the State of Washington which at the date of survey were in the possession and occupation of an Indian living apart from his tribe, and improved by him, and for which application for allotment has been made by the Indian occupant under the provisions of section four of the act of February 8, 1887, are "otherwise disposed of by or under the authority of an act of Congress," within the meaning of that term as employed in section ten of the act of February 22, 1889, making a grant

to the State of sections sixteen and thirty-six in each township in support of common schools, and are therefore excepted from the grant -- 454

INDEMNITY.

An individual claim embracing a portion of a school section in place should be treated as an entirety, and where the State elects to reimburse itself for land included in such claim by selecting indemnity for a portion thereof, it thereby abandons or waives claim to the entire tract included in the entry ----- 675

Under the provisions of the act of February 28, 1891, amending section 2275 of the Revised Statutes, the State (California) may, if it so elects, waive its right to portions of sections sixteen and thirty-six in place, and select other lands in lieu thereof, upon proof showing the present character of the lands to be mineral, without regard to their known mineral character at the date of their identification by the lines of the public survey ----- 356

By the action of the Department in its decision of February 13, 1904, permitting certain indemnity school land selections filed by the State (California), previously accepted and placed on record, and based upon lands alleged to be lost to the State because included within a temporary withdrawal with a view to their examination preliminary to the creation of a forest reserve, to stand, pending final determination of the boundaries of the proposed reserve, which would fix the status and determine the question of availability of the base lands, it was not the intention to include mere applications previously presented by the State, but which had not been formally accepted ----- 483

Where the State (Washington) leases a tract as school indemnity land, and it is subsequently discovered that it has never made selection thereof, and a homestead entry is thereupon made therefor by one having full knowledge of the actual possession and occupancy of the State's lessee, such entry will be canceled and the State given opportunity to select the land, on a proper assignment of base therefor, where necessary for the protection of its lessee; and in the event of the failure of the State to make such selection, the lessee, if he be qualified, will be permitted to make entry of the land ----- 339

Scrip.

Sioux half-breed scrip is not assignable, and a power of attorney to locate the same can not be made irrevocable, nor create any interest in the attorney, but is subject to revocation at any time prior to location of the scrip thereunder----- 562

The granting of applications for the return of scrip rests in the sound discretion of the head of the land department, and is controlled substantially by the same principle that governs in applications for the return of purchase money covered into the Treasury----- 315

An entryman will not be permitted to relinquish his entry or to allow it to be canceled and withdraw his scrip where the entry can be confirmed and where the only obstacle to confirmation is the arbitrary refusal of the entryman to supply the necessary proof----- 315

Land warrants (Valentine scrip) are not commercial or negotiable paper, and the doctrine applying to innocent holders of commercial paper acquired before maturity has no application thereto; and an assignee of such warrants can acquire no greater interest as against the government than belonged to the warrantee ----- 544

Surveyor general's scrip issued under the act of June 2, 1858, can be located only on lands subject to private entry "at a price not exceeding one dollar and twenty-five cents per acre"----- 625

Selection.

See *Railroad Grant; Reservation; School Land; States and Territories; Swamp Land.*

Settlement.

Under section 3 of the act of May 14, 1880, the rights of a homesteader who settles upon land prior to making entry thereof relate back to the date of settlement----- 386

As between one who has a subsisting settlement upon a tract of land embraced in an invalid Indian allotment at the date of the cancellation of the allotment, and one who immediately upon such cancellation files application to make homestead entry of the land, without having made settlement thereon, the right of the settler is superior to that of the applicant ----- 494

Rights acquired by settlement and improvement upon unsurveyed land,

and duly and timely asserted upon the filing of the plat of survey, will, as against an intervening indemnity railroad selection made under the act of August 5, 1892, or a lieu selection under the provisions of the act of June 4, 1897, made long prior to the filing of the township plat of survey and with full knowledge of the settlement claim, be protected in its entirety, even though the lands claimed may be in different sections and the improvements of the settler be confined to the lands in one section ----- 513

States and Territories.

See *School Land; Swamp Land.*

Instructions of February 1, 1905, restoring to entry certain lands in Nebraska withdrawn under section 1, act of April 28, 1904----- 386

Where a land grant to a State or Territory does not convey the fee simple title to the lands granted, or require patents to be issued therefor, the title thereto does not pass until the approved list of selections of such lands has been certified to the State by the Commissioner of the General Land Office----- 13

Where, after application by the State of Utah for the survey of lands under the provisions of the act of August 18, 1894, but prior to the filing of the plat of survey, a temporary withdrawal embracing the land was made with a view to the establishment of a forest reserve, and the State was thereafter, within due time after the filing of the plat of survey, permitted to make selections of the lands, subject to final determination of the boundaries of the proposed reserve, such selection, being still of record on May 29, 1903, the date of the proclamation creating the Logan forest reserve, embracing the land in question, is a "lawful filing" within the meaning of that term as used in the excepting clause of the proclamation, and the approval of the selection and certification of the lands to the State, subsequent to the creation of the reserve was proper----- 283

Statutes.

See *Acts of Congress and Revised Statutes cited and construed*, pages xxvi and xxix.

Survey.

Claims upon unsurveyed lands and bordering on bodies of water,

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which under the regulations governing the survey of public lands would be meandered upon extension of the public surveys, should be meandered to conform to what would be the line established by a public survey and upon which the public-survey lines would be closed.....	593	an actual survey, but upon a casual observation of the land and deduction from the conditions shown along the the survey line, will not be deemed sufficient to establish the character of the land as swamp and overflowed within the meaning of the act of September 28, 1850.....	56
The artificial elevation of the level of a meanderable body of water can not be permitted arbitrarily to substitute a new mean high water mark for the natural mean high water mark which the regulations contemplate as defining the meander course.....	593	In order to bring a case within the exception named in paragraph one of the departmental regulations, of March 16, 1903, providing for the adjustment of the swamp land grant in the State of Minnesota, it is necessary to show that it involves an actual <i>bona fide</i> settlement claim, which can not be done without proof of residence actually begun upon the land.....	27
The land department has no authority to meander an artificial lake which was not established until subsequently to the approval of the survey of the township and after a large part of the lands therein had been disposed of by the government according to the official plat.....	50	Where the field notes of survey are the basis of adjustment of the swamp land grant to a State, and the intersections of the lines of swamp or overflow with those of the public surveys alone are given, those intersections may be connected by straight lines; and all legal subdivisions, the greater part of which are shown by these lines to be within the swamp or overflow, will be certified to the State; the balance will remain the property of the government.....	47
After the lands in a township have been surveyed and plat thereof received in the district land office, they are not considered as open to entry, selection, or other form of disposal, until notice, fixing the date of official filing of the plat, has first been given, as prescribed by departmental regulations.....	643	Where only one line is intersected by swamp, or for any other reason the above rule can not be applied in the adjustment, the plats of survey may be used to supplement the field notes, but they are referred to only in such cases, and in no case can they be considered as overcoming or controlling the field notes of survey.....	47
Swamp Land.		Where swamp is disclosed only upon one of the surveyed lines of a section, thus rendering the application of the rule of adjustment laid down in First Lester, page 543, impossible, the State's claim under its swamp land grant should be adjudged by the portions of the surveyed line shown to be swamp and dry—if the greater part be swamp the tract will pass to the State, and if the greater part be dry it will remain the property of the government.....	475
Swamp and overflowed lands within the Fort Sabine military reservation, in the State of Louisiana, at the dates of the swamp land grants of March 2, 1849, and September 28, 1850, did not pass to the State by virtue of said grants.....	13	The rule announced in departmental decision of March 20, 1905, in the case of Wallace v. State of Minnesota (33 L. D., 475), relative to the adjustment of swamp land grants where swamp is disclosed only on one of the surveyed lines of a section, vacated, without prejudice to the right of the State to make further showing with respect to the	
Lands which have been finally adjudged by the land department to be of the character granted to the State by the act of March 12, 1860, and to have passed to the State under said grant, are not thereafter subject to other disposition.....	101		
Where it is not clearly shown by the field notes of survey that a tract of land was at the date of survey swamp land, and the State has never made formal claim to such tract under the swamp land grant, although lists of lands selected as swamp and overflowed within the township where the tract is located were filed many years ago, and it is shown by the testimony adduced at a hearing had on a contest involving the character of the land that such tract is not swamp land, the markings upon the plat of survey showing the extension of a swamp within the section, not based upon			

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matter, if it so desires, and instructions given that, for the present, the rule laid down in First Lester, page 543, alone be followed-----	616	
Until patent issues for lands claimed by the several States under the swamp land grant of September 28, 1850, the United States has not been divested of the legal title, and until that time the land department has full jurisdiction over such lands, regardless of the fact that lists regularly submitted, and duly approved, have been transmitted to the proper officer of the State-----	13	
Where a land grant to a State or Territory does not convey the fee simple title to the lands granted, or require patents to be issued therefor, the title thereto does not pass until the approved list of selections of such lands has been certified to the State by the Commissioner of the General Land Office-----	13	
Timber and Stone Act.		
Circular of July 1, 1904, relative to suspension of applications to purchase lands in Yakima Indian reservation under act of June 3, 1878--	83	
Lands embraced in a railroad indemnity selection are not subject to entry or purchase under the timber and stone act, and no right or claim can be initiated to such lands by an application to enter or purchase the same -----	426	
Lands covered by a growth of trees whose existence and maintenance operate to preserve the waters of a stream for irrigation purposes, but which are of no commercial value when severed from the soil, are not subject to disposal under the act of June 3, 1878, as lands "chiefly valuable for timber"-----	34	
An appeal from the action of the local officers rejecting an application to purchase under the timber and stone act entitles the applicant only to a judgment as to the correctness of such action at the time it was taken-----	426	
The purchase money under the act of June 3, 1878, must be placed in the hands of the receiver at the time of the submission of final proof, and when so paid is in contemplation of law public money, subject to forfeiture under the provisions of section two of said act-----	566	
Timber and stone entries under the act of June 3, 1878, are within the intent and operation of the confirmatory provisions of the act of		10
March 3, 1891-----		10
The general departmental order of November 18, 1902, suspending action in all timber and stone entries in the States of California, Oregon and Washington, pending investigation, is not a contest or protest within the meaning of section 7 of the act of March 3, 1891, and does not bar the operation of the confirmatory provisions of said section-----		10
An application to make homestead entry of land embraced in a prior application to purchase under the act of June 3, 1878, does not constitute a protest against the timber land application, and is not a sufficient ground for requiring a hearing to determine the character of the land -----		534
No such right is acquired by a purchase of land under the timber and stone act made in violation of an order suspending such lands from entry as entitles the purchaser to be heard upon the question as to the validity of a prior railroad selection, or other claim asserted to the land, before carrying into effect an order for the cancellation of the purchase thus erroneously allowed-----		426
Under the provisions of section 3 of the act of June 3, 1878, the register is required to furnish a timber and stone applicant a copy of the final proof notice, which notice the applicant shall cause to be published as prescribed by the act; and where an applicant acquires no knowledge that such notice has been issued until after the date set for the submission of proof, he is not in default merely because he fails to submit proof on such date-----		365
An application to purchase land under the act of June 3, 1878, excepts such land from other disposition until the date first advertised for the submission of proof, and, in cases where the applicant is prevented by accident or unavoidable delay from submitting proof on such date, ten days additional, but no longer; and upon the expiration of the final proof period, if the applicant is then in default in the matter of proof, a previous withdrawal of the land for forestry purposes immediately attaches thereto, and all rights under the application to purchase cease and determine-----		285
Lands embraced within applications to purchase under the act of June 3, 1878, at the date of the order of July 31, 1903, temporarily withdrawing certain lands for for-		

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 estry purposes, are, so long as the provisions of said act are complied with by the applicant, excepted from such order; but where the claimant under any such application fails to submit proof on the day fixed therefor in the published notice, or within ten days thereafter where prevented by accident or unavoidable delay from submitting it on the day set therefor, the application ceases to have any effect to reserve the lands embraced therein from other disposition, and the withdrawal thereupon immediately attaches and becomes effective as to such lands ----- 265

Timber Cutting.

There is nothing in the act of July 5, 1884, providing for the disposition of lands in abandoned military reservations, authorizing the disposition of the timber growing upon any such reservation, separate and apart from the lands ----- 413

The provisions of the act of March 3, 1891, authorizing the use of timber on nonmineral public lands, have no application to lands in abandoned military reservations subject to disposition under the act of July 5, 1884 ----- 413

Townsite.

Regulations of August 1, 1904, concerning the manner of acquiring title to town sites on public lands in Alaska ----- 163

Under the provisions of section 16 of the act of March 3, 1891, a

townsite entry by an incorporated town may be made upon mineral lands of the United States, subject to the limitations and conditions prescribed, and therefore such an entry, upon surveyed lands, even though the lands be mineral, should, in its exterior limits, be made in conformity to legal subdivisions, as required by section 2389 of the Revised Statutes ----- 542

Warrant.

Land warrants are not commercial or negotiable paper, and the doctrine applying to innocent holders of commercial paper acquired before maturity has no application thereto; and an assignee of such warrants can acquire no greater interest as against the government than belonged to the warrantee ---- 544

Water Right.

See *Right of Way.*

Congress has control over navigable streams and the waters thereof, and no claim based upon appropriation of such waters for irrigation purposes, made without the sanction of Congress, should be recognized by the Secretary of the Interior as valid ----- 391

Witnesses.

Circular of June 27, 1904, amending circular of March 20, 1903, under act of January 31, 1903, relative to compulsory attendance of witnesses ----- 58