JONES, *First Assistant Secretary:*

George Bartholoma has appealed from the decision of the Commissioner of the General Land Office, dated June 27, 1911, dismissing his protest against the public sale to James A. McClure, under the act of June 27, 1906 (34 Stat., 517), of the N. ½ NE. ¼ (lots 1 and 2), Sec. 4, T. 1 S., R. 42 W., 6th P. M., Topeka, Kansas, land district. Certificate issued to McClure on March 16, 1911.

It was alleged in the protest and the supporting affidavits that Bartholoma, at whose instance the Commissioner directed the sale, bid the sum of $203 for the tract, that being all the money in his possession; that he thereupon requested the local officers to be permitted to make a higher bid and go to his home that he might obtain the balance of the money, which request was denied by the local officers, who awarded the land to McClure, who had made the next and highest bid.

It is clear from the provisions of the act of June 27, 1906, *supra*, and the regulations of June 6, 1910 (39 L. D., 10, 13), that only a cash sale was contemplated. The regulations specifically require the purchaser to immediately deposit the amount of his bid with the receiver. The rule announced in Rosa Alheit (40 L. D., 145), and John W. Browning (42 L. D., 1), in so far as they differ from the conclusion herein announced are overruled. It is directed that, hereafter, published notice of sale of an isolated tract shall specifically state that the purchaser will be required to immediately deposit with the receiver cash to the amount of his bid.

In his appeal to the Department Bartholoma alleges, under oath, that at the public sale of this land, "it was knocked off to a man that the salesman called Mr. James, and he was allowed to go out and go down town to get the money." If this averment be true, the action of the local officers constituted such an irregularity as would require the vacation of the sale and the offer of the land anew. The action appealed from was proper upon the record considered by the Commissioner, but in view of the charge now made by Bartholoma, the case is remanded to the General Land Office for such investigation and, if necessary, hearing, as may be deemed proper.

RICE v. SIMMONS.

Decided July 22, 1914.

PRACTICE—LAND DEPARTMENT MAY CONSIDER ENTIRE RECORD.

The government is a party in interest in every contest, and the land department may properly consider all that the record contains in order to do justice in the case, irrespective of technical *inter partes* rules of pleading and practice, and whether the parties themselves are entitled to have any particular portion of the record considered or not.

SETTLEMENT—ENTRY OF RECORD.

A possessory right is acquired by settlement and entry as against all except the government; and so long as an entry remains of record no rights can be acquired as against the entryman by settlement upon and occupation of the land, notwithstanding the statutory life of the record entry has expired.

CONTEST SUBSEQUENT TO PROOF—EQUITABLE ADJUDICATION.

One who files a contest charging default subsequent to the submission of proof is merely a protestant, and acquires by virtue of such contest no such adverse claim as will prevent confirmation of the entry by the Board of Equitable Adjudication.

RESIDENCE—DURESS.

Where a homestead entryman was prevented from establishing residence by persons in occupation of the land embraced in the entry, such persons will not be heard to say that the entryman did not establish residence at the time he attempted to do so and was prevented by them.

JONES, *First Assistant Secretary:*

The Department has considered motion for rehearing filed by Peter Rice in the above-entitled cause wherein decision was rendered March 12, 1914 [not reported], reversing that of the Commissioner of the General Land Office and dismissing the contest filed by said Rice against the homestead entry involved in said cause made by Virginia Esther Simmons.

Since the filing of this motion a number of affidavits have been filed as in support thereof, and as showing either that the contest charge is true or that, as particularly contended in the motion, Rice or others have since the expiration of the time under the law for the submission of proof on Simmons's entry acquired some adverse interest in the lands embraced in said entry which precludes confirmation of the entry by the Board of Equitable Adjudication, as directed in the Department's decision.

These affidavits are not technically entitled to consideration herein as in support of this motion, nor do they appear to afford any sufficient basis for further hearing in the case. Considering the matters stated therein, however, in connection with the motion, reply and briefs filed and oral argument heard at great length and the entire record, the Department finds no reason for modifying its decision herein. The facts in the case were stated in detail in said decision, and no misstatement therein of any material fact appears. As Rice admits in this motion, the testimony in the case is conflicting on many vital questions, and the record fairly warrants the finding of facts as given in said decision. The objection that consideration was improperly given by the Department in said decision to certain letters written by Simmons is not well taken. These letters were in the record of Simmons's entry when Rice filed contest, and the Government being a party in interest in every contest, the Department may properly consider all that the record contains in order to do

justice in a case, irrespective of technical *inter partes* rules of pleading and practice, and whether the parties themselves are entitled to have any particular portion of the record considered or not.

It is admitted this contest filed by Rice is in the interest of the oil company of which he and Schwinn are directors. Whether Schwinn was technically Simmons's agent is immaterial. It is clear from the record that both friendly and business relations of more or less confidence had existed between them, that his acts contributed toward keeping her from reestablishing residence on the land after final rejection of her first submitted proof and until the filing of this contest, and that he was instrumental in connection with Rice, this contestant, and others of the oil company, in their occupation of said lands for oil purposes and in attempting to dispossess her thereof as soon as, if not before, the expiration of seven years from the date of making her entry, when they thought they might technically secure the lands by virtue of such occupation thereof by them and this contest.

Neither such occupation of said lands, however, nor this contest gave Rice or said company any right to or interest in said lands as against Simmons. Her settlement and entry gave her possessory property in said lands as against all except the Government. See cases of United States *v.* Buchanan (232 U. S., 72), and Gauthier *v.* Morrison (ibid., 452).

The fact the time fixed in the homestead law for the submission of final proof on said entry expired October 29, 1910, is immaterial so far as the application of this rule is concerned. So long as an entry remains of record no other rights, by application or settlement, can be acquired as against the entryman. Circular (29 L. D., 29); Emma H. Pike (32 L. D., 395). Even though the statutory life of the record entry has expired. Walker *v.* Snider (19 L. D., 467); Zickler *v.* Chambers (22 L. D., 208).

The acts of said company and of Rice and Schwinn prior and subsequent to October 29, 1910, were in trespass against Simmons's entry then intact of record, and all her rights thereunder, of which was the right to equitably perfect said entry even after seven years. Such a contestant as Rice, whose contest was based alone upon a charge of Simmons's default on her entry since 1907, has by reason of such contest no such interest in the lands embraced in the contested entry as constitutes an adverse claim to said lands, preventing confirmation of the entry by the Board of Equitable Adjudication. He is a mere protestant. Walker *v.* Snider, *supra*, Cooke *v.* Villa (19 L. D., 442); McCraney *v.* Heirs of Hayes (33 L. D., 21); Sitzler *v.* Holzemer (ibid., 422).

The expiration of the time fixed by law for the submission of final proof on Simmons's entry did not debar her from subsequently sub-

mitting proof thereon. She had never been called upon to show cause why her entry should not be canceled for failure to submit proof within the seven years, as required by the regulations in such cases previous to cancelling an entry for that reason. The submission of proof after that period is not an extension of the entry but is allowable in the equitable perfection thereof. Opinion (34 L. D., 351, 355–356). An amended paragraph 33 of the regulations governing the Board of Equitable Adjudication (39 L. D., 320) expressly provides that there shall be submitted to said board—

> All homestead and timber-culture entries in which good faith appears, and a substantial compliance with law, and in which there is no adverse claim, but in which full compliance with law was not effected, or final proof made, within the period prescribed by statute, and in which such failure was caused by any sufficient reason not indicating bad faith.

While Simmons's first submitted commutation proof was rejected as insufficient, no finding of bad faith on her part was then made, and her bad faith has not been established herein. The presumption of her good faith should prevail. She reestablished residence on the land, pursuant to the Commissioner's direction made in October, 1910, that she should do so if she desired to retain it, within a reasonable time after being so directed by him, and attempted to do so at once but was prevented by this contestant and his associates. He and they can gain nothing by reason of such acts, and they can not be heard to say she did not reestablish her residence when she attempted to and was so prevented by them. They have no such claim or interest, by reason of their occupation of the lands or of this contest, as precludes submission of her entry and second proof to the Board of Equitable Adjudication, as directed by the Department.

This motion is accordingly denied.

WILSON v. CARSON.

Decided July 25, 1914.

UNSURVEYED DESERT LAND—ACT OF MARCH 28, 1908.

The act of March 28, 1908, conferring a preference right of entry upon persons who prior to survey take possession of unsurveyed desert land and reclaim or in good faith commence the work of reclaiming the same, has no retroactive effect.

JONES, *First Assistant Secretary:*

Zuie N. Wilson has appealed from the decision of the Commissioner of the General Land Office, dated September 11, 1913, sustaining the action of the local officers in rejecting her desert land