hereof or of the general regulations promulgated and in force at the date hereof, and such default shall continue 60 days after service of written notice thereof by the lessor, then the lessor may, in his discretion, terminate and cancel this lease.

It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors, or assigns of the respective parties hereto.

IN WITNESS WHEREOF:

THE UNITED STATES OF AMERICA,
By ______________________________,
Secretary of the Interior, Lessor.
______________________________,

Witness to the signature of Lessee:
______________________________.
______________________________.

E. CLARK WHITE v. ALFORD ROOS

Decided July 28, 1936

HOMESTEAD APPLICATION—SEGREGATIVE EFFECT—DOCTRINE OF RELATION.

The rule that an application to make entry of land subject thereto by a qualified applicant is equivalent to an entry so far as the applicant is concerned, and while pending reserves the land from other disposition, cannot be invoked by a subsequent applicant to defeat a claim initiated before the prior application was rejected, as the rule is but an application of the doctrine of relation, which cannot be invoked by one not in privity with the first applicant.

MINING CLAIM—REJECTION OF CONFLICTING HOMESTEAD APPLICATION—EFFECT UPON MINING CLAIM.

A mere application to make a stock-raising homestead works no severance of the mineral from the surface estate, and upon the rejection of the application an intervening mining claim attaches to the surface as well as to the minerals.

DEPARTMENTAL DECISION DISTINGUISHED.

Case of *Filtrol Company* v. *Brittan and Echart* (51 L. D. 649), distinguished.

WALTERS, *First Assistant Secretary:*

E. Clark White has appealed from a decision of the Commissioner of the General Land Office dated October 14, 1935, which affirmed the local register in dismissing his contest application against the stock-raising homestead entry of Alford Roos (Las Cruces 041372), made October 30, 1930. The protest was based upon the alleged location of the Procrustean lode claim, made July 1, 1925, for part of the land within the entry. The contest application was rejected on the ground that at the date of the location of the claim the land embraced therein was included in a valid subsisting application (018208) of Wade Hotchkiss, made under the stock-raising act,

which was finally rejected April 2, 1928, for a reason that did not exist on July 1, 1925, and protestant had not amended his mining location since it was made.

The reason for the rejection was the failure of the stock-raising applicant to file a nonwater-hole affidavit as required by the regulations of May 25, 1926.

The Commissioner's reasons for his decision are as follows:

> The Department in *Filtrol Company* v. *Brittan and Echart* (51 L. D. 649), held that a mining location made for land embraced in a stock-raising homestead entry would not automatically become enlarged to include the land as well as the minerals if the entry should be canceled, and in *Rippy* v. *Snowden* (47 L. D. 321) and in numerous other cases, it has held that a *prima facie* complete homestead application segregates the land as completely as though entry had been made.
>
> The rules announced in the cases cited are in full force and effect and govern the Land Office in its decisions in like cases. Taken together they obviously mean that a mining location made for land embraced in a prima facie complete stockraising homestead application for land subject to entry does not include the land but entitles the locator merely to the minerals in the land and such use of the surface as is granted by section 9 of the stock-raising homestead act, and such a location does not automatically become enlarged upon rejection of the application so as to include the land as well as the minerals.
>
> In the opinion of this office, the question raised in the application to contest comes within the rule established by the decisions referred to, and the owner of the mining claim therefore is entitled only to the minerals in the land, together with the right to the use of so much of the surface as may be reasonably necessary to mine and remove the minerals.

In *Rippy* v. *Snowden* (47 L. D. 321), the right of Rippy to make an additional stock-raising entry based on application to make enlarged entry, accompanied by petition for designation, subsequently acted upon favorably, was upheld on the ground that this application segregated the land completely and that he was later determined to be qualified to make a second entry.

The Department said, "Under such circumstances, all rights under the entry relate back to the date the application was filed * * *"; that an application to enter is an entry when accompanied by the required showing and payment. A correct statement of the rule is that an application to enter land subject thereto is equivalent to an entry, *so far as the rights of the applicant are concerned*, and while pending reserves the land from other disposition. *Goodale* v. *Olney* (12 L. D. 324); *Samuel J. Haynes* (Id. 645); *McMichael* v. *Murphy* (20 L. D. 535). The rule has been applied in favor of applicants to make entry in *Louise E. Johnson* (48 L. D. 349), *Condas* v. *Heaston* (49 L. D. 374), *Rudolf* v. *Balke* (50 L. D. 633), and many other cases. But the Department is not aware of any case where a stranger to the application has been given the benefit of the rule to support his subsequent application. The qualification indicated in

italics to the rule above is important, for the rule is but an application of the doctrine of relation, which is only applied for the security and protection of persons who stand in some privity with the party that initiated the proceedings and acquired the equitable claim or right to the title. It does not affect strangers not connecting themselves with the equitable claim or right. *Gibson* v. *Choteau* (13 Wall. 93); *McCune* v. *Essig* (118 Fed. 273, 277). The rule is not applicable in this case, first, because the Hotchkiss claim was never allowed, but was rejected, and therefore never related back to give his application the segregative force of an entry, and, second, because there is no privity between the entry of Roos and the application of Hotchkiss to enable the former to invoke the doctrine of relation.

In *Filtrol Company* v. *Brittan and Echart* (51 L. D. 649) it was held that the rights of a mineral claimant who has located a mining claim for mineral in land covered by a stock-raising homestead entry are not automatically enlarged to include the land upon cancelation of the entry. As the application of Hotchkiss never became an entry, so as to relate back to the date of its inception, the present case is not within the rule in the *Filtrol* case. The location of White, so far as it was a claim to the surface, could not attach while the application of Hotchkiss subsisted (*Ruben L. Givney*, decided July 8, 1936, unreported), but upon its rejection, no estate having been actually granted to Hotchkiss and no severance of the mineral and surface estate having been effected, we see no reason why White did not, in the absence of some superior claim, under the mining law, become invested with the full rights of a mining locator.

The Commissioner's decision, dismissing White's protest, must therefore be reversed.

Reversed.

ASSIGNMENT OF DUTIES TO THE GENERAL LAND OFFICE IN CONNECTION WITH ADMINISTRATION OF THE TAYLOR GRAZING ACT—DEPARTMENTAL ORDER NO. 884, OF MARCH 11, 1935, MODIFIED*

[Circular No. 1402, modifying Circular No. 1356]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 30, 1936.

REGISTERS, UNITED STATES LAND OFFICES:

You are advised that departmental order of March 11, 1935, allocating certain duties to the General Land Office in connection with

*NOTE.—Order appears at pages 224 and 225.