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THE ADMINISTRATIVE DETERMINATION OF PUBLIC LAND CONTROVERSIES

BY HENRY L. MCCLINTOCK*

IV. ADMINISTRATION OF JUSTICE

Whether the determination of controversies by the tribunals of the land department is to be classed as executive justice or as judicial justice, is a question whose answer would turn upon the exact definition of those terms, certainly it would be close to the border line, however that line might be drawn. While these tribunals are not technically courts, the controversies they determine, especially where those controversies are between individual adverse parties, and the procedure by which they are determined conform more closely to the questions and procedure of typical common law courts, than do those with which some so-called courts, for example, juvenile courts, deal. But the proper classification of the tribunals is less important than the proper performance of their functions. Whether they have succeeded in accomplishing the purpose for which they were developed cannot be certainly answered without a laborious study of them in actual operation. Some features of their work can, however, be tested to a certain extent by the standards of the administration of justice according to law, using only materials available in books.

Dean Pound has enumerated six advantages of justice according to law: (1) Law makes it possible to predict the course which the administration of justice will take; (2) law secures against errors of individual judgment; (3) law secures against improper motives on the part of those who administer justice; (4) law provides the magistrate with standards in which the settled ethical ideas of the community are formulated; (5) law gives the magistrate the benefit of all the experience of his predecessors; (6) law prevents sacrifice of

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128 Continued from 9 MINNESOTA LAW REVIEW 420, 542.
129 13 Col. L. Rev. 696, 709.
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ultimate interests to the more obvious and pressing, but less
weighty, immediate interests.

The first of these advantages, predictability, is of great,
importance in the administration of the land system. Before
a man, especially a settler, expends his time and money in an
endeavor to comply with the public land laws, and thereby to
acquire some land, he wants to know just what is required of
him. It is of less importance to him what the requirements
are, than that he should know what they are, otherwise he
may lose the benefit of all his efforts for failing to comply
with a particular requirement which is relatively unimportant
and with which he would have complied if he had known it
in advance. The acts of Congress prescribe in general terms
what the requirements are, the rules and regulations give more
specific directions, but always there is the impossibility of
foreseeing the infinitely varied combinations of facts, so that
predictability involves some means of determining the process
by which the laws and rules will be applied to the facts. Our
common law accomplishes this by its technique of deciding
cases with reference to the precedents of prior decisions. The
land department has in terms adopted the principle of stare
decisis.\textsuperscript{1}

Sometimes the rule is stated that the former dec-i-
sions will be followed unless clearly contrary to
law," and again it is stated that the previous executive construction of
a statute will not be changed except for cogent reasons.\textsuperscript{3}

The volumes of the reports of Land Decisions each con-
tain a table of overruled and modified cases. In the volume
last published\textsuperscript{4} there are over 350 cases listed as overruled
and 75 listed as modified.\textsuperscript{5} Of these 23 are marked as being
now authority. At first sight these figures appear to indicate
that the doctrine of stare decisis is "more honored in the
breach than in the observance." An examination of twenty of
the overruling cases, selected at random, except that they were

\textsuperscript{1}\textsuperscript{In re Ranch Coste, (1883) 1 Land Dec. 232, 239; In re Wisconsin
R. R. Farm Mortgage Land Co., (1886) 5 Land Dec. 81, 92; In re State
of Ohio, (1890) 10 Land Dec. 394, 396; Smith v. Hatfield, (1893) 17 Land

\textsuperscript{2}Rees v. Central Pac. R. Co., (1886) 5 Land Dec. 277; Kansas v.
United States, (1886) 5 Land Dec. 712, 713.

\textsuperscript{3}Taylor v. Yates, (1899) 8 Land Dec. 279; In re George-Big Knife,
(1891) 13 Land Dec. 511.

\textsuperscript{4}48 Land Dec. XV-XXI.

\textsuperscript{5}These figures are approximate only. Some cases are listed twice,
e. g., under California and state, so no exact count was made.
all decided since 1913, shows that in only one case was there any discussion of the doctrine of stare decisis, in two others the prior cases was expressly overruled without any other reference to it, in four cases the earlier decision was held to be contrary to statute and in four others the earlier decision was held to be unsound in principle or contrary to the better doctrine. These eleven cases, or a little over half, are all cases where the force of the earlier decision was expressly denied. Of the other nine, three were overruled because of a subsequent change in the statutes, one because of a change in a rule, and two because they were contrary to a subsequent court decision. None of these were within the doctrine. Two cases were overruled because there were conflicting lines of decision, and one case, listed as overruled, was not mentioned in the later case cited as overruling it but the reporter’s footnote stated that the holding of the later case in effect overruled the earlier one. These last two situations are perhaps as frequent in court reports as we find them here.

Of the 23 listed as restored to authority, eight were so restored by decisions since 1914 and these later decisions have been examined. One was not a decision but a circular of instruction that had been previously amended, and now was restored to read as it did originally. Two decisions overruled prior decisions without noting that the overruled decisions had themselves overruled still earlier decisions, which the reporter regarded as restoring the authority of the latter. One decision noted that the rule established by an earlier case had been overruled by two later cases but concluded, “upon mature consideration” that the later ones were unsound and overruled them. The other four decisions had all been overruled by the same decision, and later were restored by the same decision. These cases are interesting examples of the attitude of the department toward overruling opinions. The four cases first overruled had held that default by the widow and heirs of a homestead entryman in complying with the statute would not avail the contestant if such default was in good faith cured before the initiation of the contest. In Hon v. Martina there had been neither residence nor cultivation on the land before the entryman’s death and there was good

139(1912) 41 Land Dec. 119.
reason to believe the only cultivation thereafter was merely color-
able. The assistant-secretary said:

"In some cases heretofore decided . . . the department, in its desire to do what it believed to be justice to the widows and heirs of deceased entrymen, has been led into a somewhat liberal interpretation of the letter of the statute above quoted in order to meet extenuating circumstances in the cases under consideration. Here, however, the matter is entirely without complication. At the time this contest came on for hearing the plain requirements of the law had not been complied with, and compliance therewith was no longer possible."

Notwithstanding the clear distinction on the facts thus pointed out the earlier cases were expressly overruled in so far as they conflicted with that decision.

_In re Alice O. Reder_237 raised the same question again. The decision stated that _Hon v. Martinas_238 held the default could not be cured, and that the conclusion reached in that case was probably correct, under the circumstances involved therein, but some principles were stated in that decision which were not in accord with the present views of the Department. It therefore, modified the decision in _Hon v. Martinas_239 to conform to the present views.

It is quite obvious that the Land Department uses the term "overrule" in a much broader sense than do the courts, and includes in overruled cases those in which the language is merely limited to the particular facts by a later decision. The explanation probably is that the department is much more consciously "making law" by its decisions, than are the courts. A large part of its work is the preparation of rules and regulations, which manifestly are laws, and naturally the principles stated in its decisions, prepared in the same office and largely by the same men and printed in the same reports come to be regarded as part of the legislative work of the department. That it does, not conceive of its function in making these decisions as merely that of finding and applying the law which has always existed is shown by _In re Hall_240 where an application for reconsideration of a rejected claim for repayment on the ground that under subsequent Departmental rulings claimant was entitled to it was denied, the decision

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237 (1914) 43 Land Dec. 196.
238 (1912) 41 Land Dec. 119.
239 (1914) 43 Land Dec. 119.
240 (1915) 44 Land Dec. 113.
stating that a final adjudication would not be disturbed because of a subsequent change in the construction of the law which governed the case at the time it was originally adjudicated.\textsuperscript{141}

With that view of the effect of the opinion, it is wise for the department, whenever it believes a rule has been stated too broadly, to modify or overrule the opinion, thereby in effect repealing a rule, but such cases must be eliminated in estimating whether the cases overruled are so numerous as to defeat the right of the decisions of the department to claim the advantage of predictability, the first of the elements of justice according to law.

In this connection attention may be called to the finality of decisions by the department. Of course, when the patent is already issued, or nothing remains to be done but the performance of the ministerial duty of issuing it, the jurisdiction of the department over the land involved ceases, and the decisions are final so far as the department is concerned.\textsuperscript{142} The same principle applies where private rights become vested by approval of a survey\textsuperscript{143} or of a right of way.\textsuperscript{144} But so long as the jurisdiction of the department continues, the secretary is not bound by prior findings or rulings in the same case.\textsuperscript{145} Where the register and receiver had issued a certificate on a claim based on a settlement in Louisiana, under which possession had been held for twenty years, and bona fide purchasers had acquired rights, the successors of the district officers could not cancel that certificate and award the land to another.\textsuperscript{146}

There is no statute fixing the period during which the department can reconsider its decisions, and formerly the practice permitted applications for review and rereview after a rehearing. This practice has now been abolished by Rules of Practice, Rule 84, and the decision of the secretary becomes

\textsuperscript{141}It must be borne in mind that the department usually would not apply the doctrine of res judicata where the controversy was solely between an applicant and the government. See In re Robinson, (1914) 43 Land Dec. 221, also a repayment case.

\textsuperscript{142}United States v. Schurz, (1880) 102 U. S. 378, 26 L. Ed. 167.

\textsuperscript{143}Stone v. United States, (1864) 2 Wall. (U.S.) 525, 17 L. Ed. 765.


\textsuperscript{146}Tate v. Carney, (1860) 24 How. (U.S.) 357, 16 L. Ed. 693.
final if no motion for rehearing is made within 30 days as required by Rule 83.

The second and third advantages of justice according to law, security against errors of individual judgment and against improper motives on the part of those who administer justice depend very largely on the same factors of selection, training and control of those who decide controversies and may be considered together.

The registers and receivers are very generally political appointees and may be expected to regard their office as political rather than judicial in character. Their continued tenure in office depends upon the political success of their party, not upon their own success in correctly deciding the questions submitted to them. It is, therefore, not to be expected that, where those questions involve political issues, or one of the parties in the case has political influence, the register and receiver can render an impartial decision. Again the local officers have no special training for the work of deciding cases. Even if, as is generally the case, one of them is a lawyer, he is not particularly apt to be of a judicial temperament and has no special incentive to acquire or develop a rational technique of deciding his cases. But the function of the registers and receivers as judges is comparatively unimportant. Except that due weight is given to their opinion as to the credibility of witnesses who testified in person before them, the General Land Office forms its decisions quite largely as that of a court of first instance.

In our regular courts of law, control is exercised over trial judges, to exclude arbitrary action by the judicial habit or technique of deciding according to law, by the criticism of the bar and by the right of appeal. In the General Land Office, the decision is nominally that of the commissioner or assistant commissioner, who are political appointees who need not have, though they generally do have, legal training. Even if they are selected because of their fitness for the office, it may be their administrative, not their judicial fitness that is considered. If they actually decided the cases, and the appeals from them were actually decided by the secretary of the interior, also a political officer, it would be hard to find any of the forms of control exercised over them, which are exercised over judges. But when we consider those by whom the deci-
sions are actually framed, the situation is different. All of these men are under the civil service, appointed originally because of their fitness, as well as that could be tested by examination. Their tenure does not depend on the popularity of their decisions. Most of the decisions are written, and all must be approved by lawyers, who, during their service in the office, can develop a habit and technique of deciding the particular types of cases they have to deal with much better than the average trial judge who has to handle all the various forms of cases, if not simultaneously, at least during a succession of short assignments to the different divisions of the court. Because the decisions are not promulgated in the names of those who write them, and most of them are written without hearing a personal argument, the criticism of the bar cannot be as potent a check on the Land Department subordinates as on a judge. On the other hand there is the check of the opinion of their associates and superiors in the office, where their work is known and where their future advancement is to be determined. There is no reason why the appeal should not be as effective a control in the Land Department as in a court. The question remains whether the Land Office has an established tradition of judicial integrity. Former rule of practice, 108, as it existed before 1886,147 authorized attorneys to make verbal inquiries of the chiefs of divisions as to the papers or status of a case but prohibited personal inquiries of any other clerk in the division except in the presence or with the consent of the head thereof. An assistant law clerk, who was then performing duties similar to those of the present Board of Law Review, testifying before a Senate investigating committee in 1882,148 stated that, notwithstanding the rule against conferences without permission, the attorneys for the land grant railroads generally managed in some way to get their views before the clerks who were considering their cases. This was before the organization of the office had reached its present complexity, and there seem to be no more recent criticisms along this line. In the present rules of practice, rule 90 covers the right of access to papers by attorneys but has no provision as to consultation with clerks. The omission of that

147See In re Lamar, (1887) 5 Land Dec. 400.
provision is some indication that the problem is no longer existent. The rule could not prevent communication outside of the office and if it has been supplanted by a tradition of the office, the control is more effective.

As in the appellate courts, we have the published reports of opinions as a powerful check on arbitrary decisions, in the Land Department we have the Land Decisions. In each of these there have appeared since 1894 the names of the attorneys in the solicitor's office, who really prepare the decisions, but there is nothing to show which decisions each of them prepared. Here again, though, there would be the opinion of the office to act as a check. The force of this office opinion would increase with the length of service. Of the nineteen men whose names appear in the first list, published in 1894, two are still in the office. Of the twenty-five who were there ten years ago, ten are still in the office and one other is first assistant secretary, in whose name most of the opinions are issued. The members of the board of appeal are appointed by the secretary of the interior. The first board, appointed in 1915, was composed of three men who had been in the solicitor's office, one since 1912, one since 1908, and one since before the first list was published in 1894. These three continued to compose the board, notwithstanding several changes in the office of secretary, including one change of political control, until one of them became first assistant secretary, whereupon the vacancy on the board was filled by the appointment of another attorney who had been in the office since 1901. The fact that these appointments are not made for political reasons is strong evidence that the trend of department opinion is toward an independent judicial treatment of the controversies it must decide.

Of course, if personal or political pressure is strong enough, either the Commissioner or the Secretary may disregard the opinion of the subordinates and decide as he chooses. According to In re Honolulu Consolidated Oil Co. that happened after the president had prevented Secretary Lane from putting into effect, a decision reached by him, in which the board of appeals unanimously concurred, and a contrary decision was rendered by Secretary Payne, who succeeded Secretary Lane, and who, it should be added, was a

10(1921) 48 Land Dec. 303.
lawyer of conspicuous ability. But it must be only in very exceptional cases that such a thing would occur, for the organized opinion of men who have devoted years to a study of the special field involved must have tremendous weight.

The other three advantages of justice according to law, a fixed standard, the benefit of past experience, and the recognition of ultimate interests are secured by law, regardless of the character of the tribunal which administers them. There can be little doubt that the Land Department secures all of them. Most of the questions dealt with are to be determined by the application of rules of law, although the standard of good faith must very often be applied. Even the equitable adjudications are made, not solely with reference to the circumstances of the particular case, but in accordance with rules prescribed by the board.150

Dean Pound enumerates four disadvantages of law:151
(1) Rules must be made for cases in gross and men in the mass and must operate impersonally and more or less arbitrarily; (2) science and system carry with them a tendency to make law an end rather than a means; (3) a developed system tends to attempt rules where they are not practicable and to invade the legitimate domain of justice without law; (4) as law formulates settled ethical ideas, it can not, in periods of transition, accord with the more advanced conceptions of the present.

The first and fourth of these are inherent in any system of law. The third has little importance in the Land Department, which deals exclusively with property rights, par excellence the domain of law. The second disadvantage, the tendency to mechanical justice, is particularly noticeable in matters of procedure which ought to be regarded only as a means to secure the proper decision of the controversy on the merits, but which frequently operate to prevent such a decision, and this suggests an inquiry as to how successful the Land Department procedure is in securing decisions on the merits. Such an inquiry is particularly desirable in view of the almost exclusive control of the Land Department over its own rules of procedure and of the agitation at present looking towards a similar control by the courts over procedure before them.

150 R. S. sec. 2450.
Advocates of the plan to control procedure by court rules claim that under that plan, where the rules are made by the organ which is familiar with the problems involved and which must apply the rules, the great mass of procedural questions which now occupy the time of our courts will be eliminated and the cases will be much more often disposed of on their merits, and the experience of the Land Department seems to support that claim.

In the first two hundred pages of the last volume of the Land Decisions\(^1\) there are 57 decisions in litigated cases reported. The reporter has written 96 syllabus paragraphs for these cases, of which 89 deal with questions affecting the substantial rights of the parties and only 7 with matters of procedure. In 15 of these cases the decision of the commissioner was reversed, one of the reversals was for error in holding an answer insufficient. In only 5 cases was it necessary to send the record back for further proceedings and none of these required whole new trial. Generally it was sent back for taking proof on a point which the secretary deemed material, or to proceed with the hearing in accordance with the decision. The index to the same volume shows only 13 practice points, or 15 if we include evidence under practice. In only three of these cases, involving 4 of the 13 points, was there a reversal on the practice ground, one for refusing a continuance asked because of contestant's sickness and refused on the erroneous theory the rules governing continuance for absence of witness applied, and the other two on questions of the sufficiency of the pleadings which were, to a large degree at least, substantive points. In the digest of the first forty volumes of the Land Decisions, the title "Practice" occupies 55 pages out of a total of 880 pages. It must be remembered that this title includes not only the subject matter of the practice titles in ordinary digests, but also the subject matter of "Appeal and Error" which in the Second Decennial Digest occupies 1½ of the 23 volumes, or a larger percentage of the contents than all of the title "Practice" in the Land Decisions Digest.

One great factor in limiting the number of practice questions that have to be decided is the power of the department to waive breaches of the rules of practice when the substantial interests

\(^1\)Vol. 48.
of adverse parties are not thereby affected. This power was recognized by the United States Supreme Court in *Lytle v. Arkansas*, decided in 1850. The commissioner had promulgated a rule that proof of pre-emption claims must be taken in the presence of the register and receiver, but the claim involved in that case had been allowed though the proof was taken in the presence of the register only. Mr. Justice McLean, writing the majority opinion, said:

"The law did not require the presence of the land officers when the proof was taken, but, in the exercise of his discretion, the commissioner required the proof to be so taken. Having power to impose this regulation, the commissioner had the power to dispose with it, for reasons which might be satisfactory to him."

A similar conclusion was reached in *Knight v. United States Land Association*, where the objection that the appeal to the secretary of the interior was not in regular form was dismissed with the remark that it was immaterial whether the appeal was regular according to the established rules of the department or whether the secretary on his own motion takes up the case and disposes of it in accordance with law and justice. This power has been frequently exercised in the reported decisions. Sometimes the department has supported its power to disregard its rules on the analogy of the exercise of a similar power by the courts with reference to their rules. Of course, this power will not be exercised to the prejudice of rights acquired in reliance on the rule, and the secretary will not in every case exercise supervisory jurisdiction where the party has lost his rights to appeal by failure to comply with the rules. The circuit court of appeals for the eighth circuit has strongly objected to the power of waiving breaches of the rules of procedure, but the situation before it was one where clearly the rule should have been applied, for the

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155 Mr. Justice McLean had served as Commissioner of the General Land Office before his elevation to the Supreme Bench.
157 See In re Oregon, (1889) 9 Land Dec. 360; In re Pike's Peak Lode, (1892) 14 Land Dec. 47.
160 Stevens v. Robinson, (1886) 5 Land Dec. 111, 112; Cassidy v. Arey, (1886) 5 Land Dec. 235, 236; the language in these decisions, standing alone, might be construed as denying the power to exercise supervision.
result of the decision of the Land Department was to award the land to one who had made an entry, in violation of a rule, before the decision of the department cancelling a prior entry had been received at the local office, and thereby to penalize the observance of the rule by adverse claimants who waited until the decision was received.

Rule 38 of the Rules of Practice provides for noting objections to evidence, apparently recognizing the applicability of the rules of evidence, and an examination of the title "Evidence" in the digest of the Land Decisions shows that those rules are recognized and applied. But here, again, the mechanical application of technical rules is not manifest. In this digest, covering forty volumes of reports there are 235 paragraphs under the title of "Evidence," of which 61 relate to depositions, 23 to burden of proof and 15 to presumptions. In the index to volume 48 there are no paragraphs under the title "Evidence" and of the cross references under that title, only two relate to admissibility of evidence. Such a situation is one we would expect in view of the fact that the commissioner and secretary review the facts as well as the law so that there is no occasion to reverse a decision because of the reception of incompetent evidence, but that evidence can be disregarded.

The decisions of the department are based on the evidence introduced. The register and receiver can inspect the premises, provided they give notice to the parties, but they can use their knowledge obtained by such inspection only to understand the evidence, not as a substitute for it. This follows what is probably the orthodox common law rule as to the effect of a view by the jury and, in the Land Department, is supported by the necessity of having the facts in the record on which the decision must be based, but it is hard to see how the officers could separate their mental processes in the manner required by the rule, and the interests of justice would probably be better served by permitting them to state in the record the physical conditions noted by them, and having that statement considered with the other evidence.

On the whole, the Land Department has achieved a large degree of success in attempting to give speedy and cheap adjudication of a vast number of litigated controversies, while at the same time preserving to a very large degree the safeguards of the administration of justice according to law, as developed by our courts of common law.

V. Relations With the Courts

Congress has never provided for review by the courts of the decisions of the Land Department, though there has been some demand for such review, and that demand was supported at one time by President Taft. It could not well be claimed that a right to such review was guaranteed by the fifth amendment to the constitution since, insofar as the decision is between the applicant and the government, the final determination of the rights of the applicant by the department can be made a condition to the disposition of the government's property, and insofar as it is between adverse claimants, the question can be considered by the courts in a suit in equity after the government has conveyed the title to either.

But numerous attempts have been made to induce the courts to control the action of the department by injunction or mandamus. The same principles apply in determining the right to either of these remedies. If the act is of such a nature that the performance of it cannot be compelled by mandamus, the performance of it cannot be restrained by injunction. The general rule that courts will not interfere to control the acts of executive officers in matters committed to their judgment and discretion applies. As a general principle, the acts of the department are discretionary until the right to the land has become vested in the applicant. The court has enjoined a secretary from annulling the act of a predecessor by which a right of way for a railroad over the public lands had become vested, has required the issuance of a patent for an Indian allotment, the right to which had become vested and has enjoined him from entertaining proceedings which cast a cloud on the title to a Mexican grant which had become vested. In the last case the court said that the crux of the case was whether title had passed out of the United States. This principle does not seem to have been observed in the early case of *Litchfield v. The Register* where an injunction to re-

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\(^{165}\)Ibid.


\(^{169}\)1870) 9 Wall. (U.S.) 575, 19 L. Ed. 681.
strain the consideration of pre-emption entries was refused, though the land was claimed under a grant to the state of Iowa and the court said the determination of that question involved judgment and discretion. The decision can be sustained on the other grounds stated in the opinion that if the injunction were granted the pre-emption claimants, who were not parties, would have no remedy for the determination of their claims, whereas if it were denied and the secretary allowed the claims, the complainant would still have his remedy by bill in equity. In *Noble v. Union River Logging R. Co.* it was apparently settled that the only jurisdictional fact as to which the decision of the department could be collaterally attacked was that the land involved was a part of the public domain. The principle that the title of the government must be divested before there is a right to mandamus was applied in *Duncan Townsite Co. v. Lane,* where the entry had been cancelled for fraud after the land had been sold to the townsite company which claimed to have purchased in ignorance of the fraud. The court denied the writ on the ground that the company had only an equity and was seeking by the writ to acquire the legal title.

The construction of the applicable statutes is a matter which has been committed to the judgment of the Land Department and the courts will not interfere with such construction unless the meaning of the act is plain and the construction of it is so unreasonable as to be arbitrary. A construction of "vacant land" as not including land in actual possession under local mining customs of a requirement of a statement of the character of the land verified by oath of the applicant as requiring personal knowledge by the applicant, of "opening or improvement" on coal claims as requiring the opening and development of a producing mine and not mere prospecting work, and of an act withdrawing land from entry temporarily as requiring only the suspension, not the rejection of entries were held to be the exercise of judgment and not controllable. But a construction of a statute entitling the entryman to patent within two years after the issuance of the receiver's

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\[1(1893) 147 U. S. 165, 37 L. Ed. 123, 13 S. C. R. 271.\]
\[3United States ex rel. Riverside Oil Co. v. Hitchcock, (1903) 190 U. S. 316, 47 L. Ed. 1073, 23 S. C. R. 698.\]
\[5United States ex rel. Alaska, etc., Co. v. Lane, (1919) 250 U. S. 549, 63 L. Ed. 1135, 40 S. C. R. 33.\]
receipt when there was no pending contest or protest, as authorizing the cancellation of an entry because a report to the department recommending cancellation had been received before the expiration of the two years, was held to be so arbitrary as to be controllable, in view of the meaning of "contest" and "protest" in land proceedings and the purpose of the statute to prevent indefinite delay in the investigation of the validity of entries.\textsuperscript{176}

Even where the secretary directed patent to issue after the confirmation by Congress of one of the claims while an application of the adverse claimant for rehearing was pending before the secretary, and it was contended the confirming act was unconstitutional, the court stated that the secretary's determination of conflicting rights could not be controlled, and that the application was an attempt to use mandamus as a writ of error.\textsuperscript{177} But this case does not necessarily support the proposition that the secretary's determination of a constitutional question cannot be controlled by mandamus or injunction, since it could not be shown his action was based on the statute and not on his decision of the rights of the claimants, and the patent had already been issued and could not be revoked by him. Apparently the court has never been called upon to determine its power to control action of the Land Department based upon statutes alleged to be invalid.

If the Land Department in the exercise of its discretion rejects all claims to a tract of land, there is no redress for the parties, even though the rejection is based on a construction of the law which is in fact erroneous. If patent has been issued to one of the claimants, the legal title has passed to that claimant, and the patent is conclusive as to his ownership of the land in all actions at law.\textsuperscript{178} But a court of equity can require the holder of the patent, as it can the holder of any legal title, to convey it to another who has a better equitable right to the land or can declare the holder a trustee.\textsuperscript{179} In the leading case of \textit{Johnson v. Towsley}\textsuperscript{180} the scope of the inquiry in such a suit was outlined, and it was held in effect that three questions could be considered, whether the action of the department was procured by fraud, imposition or mistake, whether the department had misconstrued the law and

\textsuperscript{176}Lane v. Hogland, (1917) 244 U. S. 174, 61 L. Ed. 1066, 37 S. C. R. 558.

\textsuperscript{177}In re Emplem, (1896) 161 U. S. 52, 40 L. Ed. 613, 16 S. C. R. 487.


\textsuperscript{179}Lindsey v. Hawes, (1839) 2 Black (U.S.) 554, 17 L. Ed. 265.

\textsuperscript{180}(1871) 13 Wall. (U.S.) 72, 20 L. Ed. 485. See ante p. 438.
whether there were equities between the parties themselves which required the patentee to hold for the benefit of the other. The third question is not one on which the department could pass, but in determining the other two the courts have indirectly exercised a control over the department which has been of more far-reaching effect than the direct control. A consideration of their attitude toward the department in these suits is worth noticing.

The courts accept the findings of the department on controverted questions of fact, in subsequent suits in equity concerning the title to the land. At first the court seemed to hold that the decision of the Department could be set aside for fraud consisting only of perjury in the proofs submitted. But later cases have applied the rule which governs attacks on court judgments and decrees for fraud and decline to grant relief for perjury at the hearings, the consideration of which would require a retrial of the issues. In *Colorado Coal & Iron Co. v. United States*, the court said in the course of its opinion that a homestead patent could be annulled if the proof of residence was false, but the holding in the case was that such fraud did not render the patent void, and the title of a bona fide purchaser thereunder could not be defeated. The state and lower United States courts follow the rule that the fraud must be more than false testimony at the hearing.

In determining questions of law on which the Department has previously passed the courts give special force to the rule that the construction of a statute by the executive department entrusted with its enforcement is entitled to great weight. In *Hawley v. Diller*, Mr. Justice Harlan said that the rule was first stated by Mr. Justice Miller in the circuit court for Nebraska and had been followed in numerous decisions. The rule may have been formulated by Mr. Justice Miller, but the principle underlying it had been recognized in *Barnard's Heirs v. Ashley's Heirs*.

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185 32 C. Cyc. 1052 and cases cited in note 15.


188 (1855) 11 How. (U. S.) 345. See ante page 435.
White charges that the Land Department has "disregarded a Supreme Court decision and an act of Congress, apparently to favor railroad interests." To support his charge he refers to the testimony of one of the law clerks at a Senate hearing in 1882. The portions of the testimony quoted by him seem to support his charge, but a reading of the whole testimony shows that the department opinion criticized purported to follow the Supreme Court decision not to disregard it. He states that the uniform ruling of the department had been that the grant to the railroad within the indemnity limits took effect at the same time as that within the granted limits, but that the Supreme Court in *Ryan v. Central Pacific R. Co.*, said that the rights within the indemnity limits were merely "floats" which attached to the specific land when the latter was selected. This was the contention of the railroad in that case as the lands in controversy were not open to entry at the time of original grant, but were when the indemnity selection was made. The witness charged that the subsequent holding of the department that land covered by an entry at the time of the indemnity selection, but thereafter abandoned by the entryman and entered by a purchaser of his improvements, belonged to the railroad was contrary to the cited decision of the Supreme Court and that after two years and a half of delay the Department adopted the construction of the witness.

As to the Act of Congress, he charged that the department had rendered a decision contrary to the Act April 21, 1876, protecting the settlers in certain claims against the railroads, that when the statute was called to the department's attention it modified its decision to conform, but that the original decision was later followed in other cases without noticing the modification.

Though the witness did, in other parts of his testimony, intimate the railroad attorneys improperly influenced the clerks in the office, the point he was trying to make principally was that the force was insufficient for the proper consideration of the cases it had to decide.

180 Administration of G. L. O., pp. 151-56.
182 Land grants in aid of railroads generally granted each odd numbered section, not mineral or already settled upon, within a specified distance of the line of the road, and then provided that in lieu of the lands excepted from that grant, the railroad might select other lands within zones still further from the railroads. The lands so selected were designated indemnity or lieu lands.
183 (1878) 99 U. S. 382, 25 L. Ed. 305.
But later a case did arise when the department refused to follow the language of a Supreme Court decision, and again railroad land grants were involved. In *Sjoli v. Dreschel*, the Court stated that the result of the holdings in prior cases was that the railroad acquired no interest in particular lands in the indemnity limits until the selections were approved by the secretary. Notwithstanding this plain language, the department, fortified by the opinions of two attorneys general, continued to regard the lands as withdrawn from entry from the date of the selection. Six years after its former decision, the question again came before the Supreme Court. Mr. Justice White, writing the opinion of the court, said that *Sjoli v. Dreschel* was not an authoritative opinion, since in that case the settlement actually was made before the railroad's selection. (The Land Department had awarded the land to the settler on that ground.) The general language of that case must be restricted to the particular facts, to follow the reasoning would overthrow the uniform rule by which the Land Department has administered land grants from the beginning. Mr. Justice Harlan, who had written the opinion in *Sjoli v. Dreschel*, and Mr. Justice Day dissented.

**VI. Conclusion**

The development of the administrative machinery in the land office for the determination of controversies arising over the disposition of the public lands cannot be ascribed to any preconceived preference for administrative as distinguished from judicial procedure. For, as we have seen, in the beginning both the land department and the courts were apparently of the opinion that such controversies should be left for the decision of the courts whenever that decision could be obtained. It cannot be ascribed to the character of the questions involved, for, generally, these questions are simply those of compliance by the claimant with the requirements of law, or of a contest between rival claimants over right to possession of land; both of which questions are of a nature that has always been regarded as being within the peculiar province of the courts to determine. Nor can the development of this machinery be ascribed to any general tendency of the times favoring administrative, as against judicial, determinations of questions, since the development took place during the first eighty years of the nineteenth century, during which time, in almost every other

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193 (1905) 199 U. S. 564, 50 L. Ed. 311, 26 S. C. R. 154.
field, the courts were extending their jurisdiction over controversies unknown to the courts in England, to such an extent that it was doubtful whether any question could be considered as not within the jurisdiction of the courts. The only reason that can be found for the development of this machinery and for the change in the attitude of the courts and of the land department with reference to the determination of these controversies, is the impossibility of handling the volume of business that the land department had to handle by any ordinary court machinery. The amount of work done by the land department in the time of its greatest activity was so great that "doing a land office business" became proverbial.

Today our courts themselves are confronted with a similar problem, especially in our larger cities. The volume of business is becoming too great for our present judicial machinery to handle efficiently, and the problem of how the work can be speeded up has been the subject of much earnest discussion. Is it possible that a study of the methods by which the land department solved a similar problem during the last century will be of assistance at the present time? Two of the features of the organization of the land department which have been prominent in aiding it to expedite its business, the centralized administration of all the tribunals in one department, and the control by the department of its own procedure have been advocated by those proposing reforms of our judicial machinery. Here in our own experience we have an opportunity to study the advantages and defects of these suggested reforms.

Of course, the organization of the land department could not be transferred bodily to the courts, but if it could be demonstrated that these two principles have successfully operated in the land department, is there not good reason to believe that the same principles, in a form adapted to the different conditions, will be equally beneficial in aiding the courts to meet the problem? That the land department has been successful on the whole in meeting its problems can safely be affirmed, when we consider the vastness of the task with which it was confronted, the almost negligible delay with which that task was performed, as contrasted with the delay incident to court procedure, and the general satisfaction with the results obtained by the department, manifested by the increasing respect of the courts for the decisions of that department, and more clearly by the almost total absence of interference by Congress with the operations of the department.