

**Editor's note: Appealed -- remanded, Civ. No. A-173-73 (D. Alaska March 19, 1976)**

RUNE E. S. SAFVE

IBLA 71-273

Decided October 10, 1973

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting final proof and canceling homestead entry Anchorage 064020.

Affirmed.

Alaska: Homesteads! ! Homesteads (Ordinary):  
Commutation! ! Homesteads (Ordinary): Residence

It was proper to reject an alien's final proof for a commuted homestead entry where the governing statute requires that "the person commuting be at the time a citizen of the United States."

Alaska: Homesteads! ! Homesteads (Ordinary):  
Commutation! ! Homesteads (Ordinary): Residence

Where an entryman is obliged to absent himself from his homestead for six weeks, but files a final proof in commutation at the end of 14 months from the establishment of residence, the six weeks absence must be deducted from the period of his residence, as the regulation directs, "since actual presence on the land for not less than 14 months is required."

Alaska: Homesteads! ! Homesteads (Ordinary):  
Commutation! ! Homesteads (Ordinary): Cultivation

An entryman who seeks commutation of his homestead entry without having performed the requisite cultivation and without having applied for a

reduction of the cultivation requirement as prescribed by regulation must be held to have failed to comply with the law.

Equitable Adjudication: Substantial Compliance! ! Homesteads  
(Ordinary): Commutation

Where the final proof of a homestead entryman seeking commutation shows that he was an alien, that he had not met the minimum requirements of residence and cultivation, that he discontinued his residence on the entry 14 months and 8 days after it was initiated and never resumed residence thereon, and it appears that most, if not all of these deficiencies could have been corrected by appellant's continuing efforts, or excused upon proper application for relief, which was not done, the case presented is not an appropriate one for equitable adjudication, as it fails to demonstrate substantial good faith compliance with the requirements as a whole.

APPEARANCES: Robert W. Vater, Esq., and J. Bixby Willis, Esq., of Delaney, Wiles, Moore, Hayes & Reitman of Anchorage, Alaska, for appellant.

OPINION BY MR. STUEBING

Rune E. S. Safve has appealed from a decision of the Alaska State Office, which rejected his commuted homestead final proof and canceled his entry on the grounds that: (1) the applicant states in his final proof testimony that he is not a citizen of the United States, and (2) the final proof testimony is defective on its face in that it does not show completion of the amount of residence required by law.

On February 15, 1966, the Anchorage Land Office accepted a notice of location of settlement and occupancy for 160 acres of public land filed by Rune E. S. Safve for public land described as N 1/2 S 1/2, sec. 15, T. 18, N., R. 1 E., S.M., Alaska. The entryman filed a commutation final proof in 1969 in which he claimed improvements on the homestead including a house trailer, an outbuilding, and a road, valued at \$ 4,790. He stated that he was not a citizen of the United States and listed a period of claimed residence on the land from March 28,

1966, to June 5, 1967. During this time he admitted that he was absent from the entry from January 25 to March 10, 1967, because of hospitalization for back surgery. 1/ The entryman also admitted in his proof that he had not lived in the homestead since June 5, 1967, because of economics. As for appellant's cultivation, he shows no cultivation during his period of residence. He alleges, however, cultivation of 20 acres of oats in 1968, and 22 acres in 1969, which were not harvested. No reason is given for his failure to harvest.

The State Office found, on the basis of the proof itself, that Safve's periods of residence lacked one month seven days of meeting the 14 months of actual and substantially continuous residence requirement of commuted proof under 43 CFR 2511.4-2(b)(2) and 2567.5(d); and that under 43 U.S.C. § 231 (1970) and G.L.O. Cir. 589, 46 L.D. 297 (1918), Safve had not complied with the citizenship requirement for commutation and had not shown he had filed his petition for citizenship within seven years of filing his declaration of intention.

Appellant takes issue with the State Office rulings. He admits that at the time of proof he was not a citizen, but shows proof of citizenship acquired September 8, 1972. 2/ As to residence, he states that he was an actual resident in good faith for a period in excess of 14 months prior to submitting commutation proof. He argues that his temporary absence for emergency surgery did not change the character of his residence from actual and continuous. He alleges substantial compliance with the law and requests equitable adjudication.

Commutation is provided for in the following statutes:

43 U.S.C. § 164. Certificate or patent; issuance.

No certificate shall be given or patent issued therefor until the expiration of three years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, \* \* \* proves by himself and by two credible witnesses that he, she, or they have a habitable house upon the land and have actually resided upon and cultivated the same for the term of

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1/ Appellant submitted a letter with his final proof from a Dr. Perry A. Mead, M.D., to verify his surgery and treatment from December 22, 1966, to February 27, 1967. Hospitalization was from February 1 to February 16, 1967.

2/ Appellant filed proof of citizenship in a letter dated March 15, 1973.

three years succeeding the time of filing the affidavit and makes affidavit that no part of such land has been alienated, except as provided in section 174 of this title, and that he, she, or they will bear true allegiance to the Government of the United States, then in such case he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law: Provided, That upon filing in the local land office notice of the beginning of such absence the entryman shall be entitled to a continuous leave of absence from the land for a period not exceeding five months in each year after establishing residence, and upon the termination of such absence the entryman shall file a notice of such termination in the local land office, but in case of commutation the fourteen months' actual residence required by law must be shown, and the person commuting must be at the time a citizen of the United States: \* \* \* Provided further, That the entryman shall, in order to comply with the requirements of cultivation herein provided for, cultivate not less than one! sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one! eighth, beginning with the third year of the entry and until final proof \* \* \*. (Emphasis added).

43 U.S.C. § 173. Commutation after fourteen months.

All commutations of homestead entries shall be allowed after the expiration of fourteen months from date of settlement. Nothing in sections 161-164, 169, 171, 173, 175, 183, 184, 191, 201, 211, 239, 254, 255, 271, 272, 277 and 278 of this title shall be so construed as to prevent any person who shall avail himself of the benefits of section 161 of this title from paying the minimum price for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of such entry, and obtaining a patent therefor, upon making proof of settlement and of residence and cultivation for such period of fourteen months. (Emphasis added.)

For Alaska, the Departmental regulations on commutation are set forth in 43 CFR 2567.5(d):

(d) Commutation of entries. To the extent of not more than 160 acres an entry may be "commuted" after not less than 14 months' residence upon the land, cultivation of the area commuted to the extent required under the ordinary homestead laws and payment of \$ 1.25 per acre; that is, the claimant must show the existence of a

habitable house on the land at the time of final commutation proof, that residence for the period of not less than 14 months was actual and substantially continuous, and cultivation of one! sixteenth of the area during the second year of the entry, and, if commutation proof is submitted after the second entry year, one! eighth of the area the third entry year and until the submission of final commutation proof. In such cases the homesteader is entitled to a 5 months' leave of absence in each year, but cannot have credit as residence for such period, since actual presence on the land for not less than 14 months is required. \* \* \* (Emphasis added.)

With reference to the first issue, appellant's lack of citizenship, the statute quite clearly states " \* \* \* and the person commuting be at the time a citizen of the United States." 43 U.S.C. § 231 (1970). Appellant, as noted in the decision below, had filed his declaration of intent to become a citizen more than seven years prior to the filing of his commutation proof, but had not yet completed the naturalization process. The fact that the Naturalization Act has since been amended to omit the requirement for the filing of the declaration of intent does not mitigate his dilatory conduct in this regard. <sup>3/</sup> In any event, as a non! citizen he was not entitled to file a commutation proof. If he was to become a citizen within a few months, as he alleges, he could simply have continued his efforts to comply with the requirements of the homestead law until he became a citizen and was eligible in that respect to file his proof. Instead, he filed his proof as an alien, which is forbidden by law. Even so, were this the only basis for the rejection of the proof, and if it appeared that he had fully complied with all of the other homestead requirements, we would have little difficulty in concurring with the minority that there was substantial compliance, and that equitable adjudication might properly be invoked to excuse this deficiency, provided that he had in fact become a citizen in the interim, which he has now shown, albeit naturalization did not occur until after the five! year statutory life of the entry had expired. See Instructions, 49 L.D. 538 (1923); Nikosaus Zahm, 46 L.D. 320 (1918).

However, it is apparent that he has also failed to meet the residence and cultivation requirements. Further, it would seem in some doubt that he has a bona fide intent to make the entry his

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<sup>3/</sup> Although Safve did finally complete the naturalization process and become a citizen, we must note that he apparently did not pursue that objective with great diligence. He filed his declaration of intention on July 20, 1962, and received his citizenship on September 8, 1972. No explanation for the delay was offered.

permanent farm home, and the fact that he resided on the entry in a house trailer raises the question of whether he complied with the requirement for a permanent habitable house on the entry. It is not shown whether he took the trailer with him when he departed.

The statute, supra, states, "\* \* \* that in case of commutation the fourteen months' actual residence, as now required by law, must be shown \* \* \*" (Emphasis supplied). This is mandatory language. The term "actual residence" cannot rightly be construed to mean "constructive residence." Here, the entryman was obliged to be absent for good and sufficient reason for a period of six weeks. The regulations make provision for this. Upon written notice to the land office he would have been entitled to up to one year's leave of absence in case of "sickness or other unavoidable cause." 43 CFR 2567.5(a). But the regulation provides that such leave of absence, even if it had been properly sought, which it was not, could not be credited to the residence period where a commutation of the entry is involved, "since actual presence on the land for not less than 14 months is required." 43 CFR 2567.5(d). There is no ambiguity here which requires construction or interpretation. The language of the regulation speaks with absolute clarity and perfect precision. It clearly requires that the 6! week absence, even if had it been properly undertaken, must be deducted from the residence, and cannot be equated with "a weekend in town." Josephine M. Locher, 44 L.D. 134 (1915). The term "actual residence" as used in the homestead laws means personal presence and physical occupation of the premises as a home. It means precisely the same thing as actual inhabitancy. Hazel L. Hartley! Johnson (On Rehearing), 51 L.D. 513 (1926). All appellant had to do to meet the requirement was to remain in residence for five more weeks. Instead, he departed almost as soon as 14 months elapsed from the date of his original establishment of residence, or what he apparently regarded as his earliest opportunity.

Cultivation of one! sixteenth of the area was required in 1967. None was performed. The reason given is that appellant's back injury prevented his compliance. We find this entirely plausible and reasonable, but we do not agree that he is thereby entitled to receive a patent as though the cultivation had actually been performed. Here again, the procedure is prescribed by regulation. An entryman who, after making entry and establishing residence, has met with misfortune which renders him reasonably unable to cultivate the prescribed area may be allowed a reduction. To obtain this reduction, application must be made to the manager within 60 days of the occurrence of the misfortune. 43 CFR 2511.4-3(b)(2). A \$ 5 service fee must accompany the application. 43 CFR 2511.4-3(b)(5). No such application was filed, no service fee was paid. Again, had appellant simply remained on his entry and proceeded to comply to the best of

his ability, we are confident that he would have been granted a reduction in cultivation to cover this period, even though he filed a tardy application. See Bobby L. Cox, 7 IBLA 277 (1962); Earl R. Barnard, A-30920 (May 27, 1968).

The dissent argues that appellant avoided the need to apply for a reduction in cultivation and payment of the \$ 5.00 filing fee by giving notice of having met with a misfortune that rendered his reasonably unable to cultivate the required area, such notice having been given the BLM within 60 days of the event, as prescribed in 43 CFR 2511.4-3(b)(2). We cannot agree that such notice was given. The only evidence of record which might be so regarded is the following letter from the appellant to the Bureau:

I would like to request a letter stating I have not as yet earned title to my homestead. I need this information for aid from the Dept. of Health & Welfare as I will be entering the hospital this month for an operation.

/s/ Rune E. S. Safve

This (the entire text) was apparently dictated by the appellant to a Bureau employee, who added the following notation:

He states he will not receive aid for his hospital bills if he does not give this letter to welfare Dept. before entering hospital.

This falls considerably short of the sort of notice contemplated by the regulation. It does not in any way indicate that the surgery, or the reason therefore, constituted a "misfortune," or that relief from cultivation was either needed or desired, or the nature of the medical problem, or the anticipated duration of any disability which might be associated with it. The letter's stated purpose was to obtain a statement from BLM attesting to the fact that no patent had been issued so that the appellant might qualify for welfare assistance, and it cannot be construed as anything other than that. The casual mention of "an operation" was merely incidental.

The whole impression derived from this record is that of an entryman unwilling to devote more time than what he conceived to be the legal minimum to the matter of acquiring a patent. A commutation proof need not be filed after 14 months purported compliance; that is merely the minimum possible term. An entryman who is not in

full compliance at that point is under an obligation to continue his efforts and bring himself into compliance. Commutation proof may be made at any time during the term of the entry. Also, appellant might have proceeded to prove his entry in regular fashion without attempting commutation. He was, as pointed out by the dissenting members of this Board, "in need of more time." However, he elected not to take it. There is no reason why his election to file final proof at that time should operate to excuse the many deficiencies in his compliance.

Appellant's precipitate departure from the entry precisely 14 months and 8 days from the date residence was first established, coupled with his failure to return and resume residence ever again, raises the question of his bona fide intention to establish his permanent farm home on the entry. See United States v. Booth, 76 I.D. 73 (1969); United States v. Cook, 59 I.D. 489 (1947).

The dissenting members would exercise greater leniency in this case than this Board has extended to other entrymen whose failure to comply with the several requirements was attributed to misfortune. See Lois A. Mayer, 7 IBLA 127 (1972); Gene L. Brown, 7 IBLA 71 (1972). On the other hand the Board has been quite liberal in extending equitable adjudication in those instances where the entrymen had done everything within their power to meet the requirements, but were prevented by misfortune from doing so with reference to some one particular, such as their ability to cultivate the requisite area during one year, Bobby L. Cox, *supra*; Robert W. Blondeau, 1 IBLA 8 (1970), or the failure to file a timely final proof, Juanita J. Anderson, 4 IBLA 170 (1971).

The distinction is that in the first class of cases the misfortune had not prevented full compliance and there was a failure to meet multiple requirements, whereas in the second class of cases there was a failure to meet only a single requirement, and that was by a misfortune which made compliance impossible.

In this case there was a failure of at least three requirements, *i.e.*, citizenship, residence and cultivation. The misfortune, a need for surgery, was genuine, but it did not preclude compliance. Citizenship could have been obtained, the interruption in residence could have been made up, and the failure to cultivate during the period of disability could have been explained and excused. All that was needed was for the entryman to remain on his entry and comply with the regulations, even if such compliance dictated that he remain for the full

term of an ordinary homestead, rather than seek to shortcut the process by commuting before he was in full compliance.

One who seeks to acquire title under the commutation provisions of the law is, in effect, representing to the Government that he has achieved full compliance with all of the prerequisites, and that he therefore need not continue to demonstrate compliance throughout the regular five! year term of an ordinary homestead. He asks that this purported full compliance be recognized, and that he be excused from the performance required of his fellow entrymen who elect to prove up over a regular five! year term. Accordingly, one who submits a commutation proof must be held even more strictly to full compliance than one who files a regular final proof after five years.

This Board has held that equitable adjudication is limited to those cases where the applicant has demonstrated substantial compliance with the law, failing only in some minor particular, but that it will not be available to an entryman who has failed in every aspect to meet the mandatory requirements. Gene L. Brown, supra.

The record suggests that appellant was motivated to discontinue his homestead residence by economic need. While understandable in human terms, the Department has consistently held that the inability of an entryman to meet the financial demands of residing upon and developing his entry is not a circumstance which will excuse his noncompliance. United States v. Lance, 73 I.D. 218 (1966); Virgil H. Belisle, A-29954 (March 24, 1964); LaDean Butler, A-28673 (February 7, 1962); Joseph S. Holt, A-28468 (November 22, 1960). Likewise, an entryman's misunderstanding of the requirements of the regulations will not constitute a misfortune. Robert W. Blondeau, supra.

The risk of failure is inherent to the homestead undertaking. Literally thousands of honest, industrious citizens have attempted to homestead, incurred hardships, experienced misfortune, suffered losses, and finally failed. The rewards of the homestead acts are reserved for those who succeed.

We see no basis to extend equitable adjudication in the circumstances of this case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing  
Member

We concur:

Newton Frishberg  
Chairman

Douglas E. Henriques  
Member

Frederick Fishman  
Member

Martin Ritvo  
Member

I concur in the result:

Joan B. Thompson  
Member

MR. GOSS DISSENTING.

I submit that appellant's homestead effort is a substantial! ! though imperfect! ! compliance with each requirement of the law, and I therefore find it necessary to dissent. The appeal does not require invocation of the doctrine of equitable adjudication, although that doctrine is an important secondary reason for sustaining the appeal.

Citizenship

Appellant acquired United States citizenship on September 8, 1972. Since appellant completed his naturalization prior to the issuance of patent, the purpose of the citizenship requirement in 43 U.S.C. § 231 (1970) is fulfilled. Apparently no adverse claim has intervened prior to appellant's naturalization. In such circumstances the present status of naturalization has a retroactive effect; it confirms title and is deemed a waiver by the United States of all liability to forfeiture. Osterman v. Baldwin, 73 U.S. 116, 122 (1867).

With respect to a mining claim transferred to one who was not a citizen as required by statute, but who later was naturalized, the Supreme Court in Manuel v. Wulff, 152 U.S. 505 (1894) stated at 508-11:

This court [in Gouverneur's Heirs v. Robertson, 6 U.S. 614 (1826)] \* \* \* said:

\* \* \* \* \*

"That an alien can take by deed, and can hold until office found, must now be regarded as a positive rule of law, so well established, that the reason of the rule is little more than a subject for the antiquary."

\* \* \* \* \*

\* \* \* Inasmuch as this proceeding was based upon the adverse claim of Wulff to the application of Moses Manuel for a patent, the objection of alienage was properly made, but this was as in right and on behalf of the government, and naturalization removed the infirmity before judgment was rendered.

In the Matter of Krogstad, 4 Land Dec. 564, Mr. Justice Lamar, when Secretary of the Interior, ruled that, an alien having made homestead entry and

subsequently filed his intention to become a citizen, the alienage at time of entry, in the absence of an adverse claim, would not defeat the right of purchase. Jackson v. Beach, 1 Johns. Cas. 399; Gouverneur v. Robertson, 11 Wheat. 332; and Osterman v. Baldwin, 6 Wall. 116,!! were cited to the point that naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture, and a confirmation of title. This seems to have long been the settled rule in the Land Department. Mann v. Huk, 3 Land Dec. 452; Lord v. Perrin, 8 Land Dec. 536; so that if there had been no adverse claim in the land office, Moses Manuel's application, which appears, in respect of this question, to have been made in good faith, would not have been rejected on the mere ground of alienage when he made it. And as Moses Manuel was the grantee of a qualified locator, and became naturalized before the order, we conclude that there was error in the direction of a non! suit. (Emphasis added.)

The rule of relation back was summarized in Herrington v. Martinez, 45 F. Supp. 543, 546-47 (S.D. Calif. 1942), a mining case involving a naturalization problem analogous to that of Safve:

If, in fact, the defendant subsequently became a citizen of the United States (as averred in the answer), this would cure all defects to his ownership in the mining claims, under the following rule: "Where an alien who has located or acquired a mining claim on public lands subsequently becomes a citizen or declares his intention to become such, before any rights have intervened, such declaration operates by relation to the date of location and renders his claim valid from that time; upon such declaration he is entitled to the benefit of work previously done and of a record previously made by him in locating a claim." 40 C.J., § 149, p. 772. (Emphasis added.)

As the Supreme Court pointed out in Manuel, supra, the retroactive effect of naturalization is the settled rule of the Department. In Phillips v. Sero, 14 L.D. 568 (1892), the right of an alien homesteader was held to relate back to the date of his settlement, where the homesteader became a citizen before an adverse claim or contest was initiated, despite the fact that final proof was made before naturalization:

On January 15, 1877, Joseph Sero made homestead entry No. 96 \* \* \*.

He submitted final proof May 23, 1882, and on the same day final certificate No. 281 was issued.

\* \* \* \* \*

He first declared his intention to become a citizen on October 10, 1883, and on September 8, 1884, he was naturalized \* \* \*.

While his proof was made when he was an alien, yet the defect of alienage was cured by his becoming a citizen before any adverse claim or contest was initiated, and in such cases the Department has ruled that the right of the claimant relates back to the date of his settlement. Kelly v. Quast, 2 L.D., 627; Mann v. Huk, 3 L.D., 452; Ole O. Krogstad, 4 L.D., 564; Jacob H. Edens, 7 L.D., 229; Paulus Kundert, id., 362; Rougeot v. Weir, 13 L.D., 242; Lyman v. Elling, 10 L.D. 474. (Emphasis added.)

If appellant's citizenship is not to be held to relate back to the time of his final proof, then Phillips and the long line of similar departmental cases should be overruled.

#### Residence

With respect to residence for commutation under 43 CFR 2567.5(d), the Land Office decision in effect equates "actual and substantially continuous residence" with "actual and substantially continuous presence" on the land, and rules that for commutation the latter is necessary for the full 14! month period.

If section 2567.5(d) is to be construed to require 14 months "actual presence" instead of 14 months "actual residence," we must find a statutory basis for such a requirement. Nowhere in the commutation statute is there such a requirement. The homestead commutation law refers not to "presence" but to "actual residence" in 43 U.S.C. §§ 164 and 231 (1970) and "proof of residence" in section 173. Under section 173, the 14 months residence required is 14 calendar months from date of entry.

Ownership acquired pursuant to the commutation statute is not a shortcut of questionable legality, but is a bona fide purchase procedure established by Congress. There is no reason for the term "actual residence" to be given a more strict construction under the commutation provisions of the homestead law than under the other provisions of the statute. "Actual residence" means the same in either case, for frequently a homesteader does not decide to purchase the land under the commutation procedures until after he has completed a portion of the required residence.

When considering the meaning of "actual residence" the courts have not required continuous physical presence on the entry for the entire qualifying period, if there is evidence of a good faith intent to establish a home on the homestead. The Circuit Court of Appeals held in United States v. Medland, 281 F. 649 (8th Cir. 1922) at 652:

Titles cannot be set aside on mere suspicion. There is substantial evidence to show his residence for the required period of time. It must be borne in mind that he was a bachelor, and was working at times along lines which took him temporarily away from the place. That does not destroy the character of residence. \* \* \*

We think the facts here show that, while defendant was away from the premises a good deal, he was a poor man, and had to work away from the land in order to make his living. That fact in itself is no indication whatever of fraud, and should not weigh against him. The evidence to contest his right does not go beyond the realm of suspicion. (Emphasis added.)

A federal court construction of "actual residence" as used in the federal statute appears in United States v. Anderson, 238 F. 648 (D. Montana 1917):

At all times all his personal property in Montana was upon this homestead, and it was his only home. At no time was he absent from the land six months. \* \* \* Of the three years' period of residence required to earn the land, he was undoubtedly absent a considerable \* \* \* part.

But this did not disturb his continuous actual residence upon the homestead. "Actual residence," within the Homestead Law, means no more than residence! ! true substantial and real; not fictitious, nominal, or pretended. It does not require continuous presence on the land, but only that it be habitation fixed and maintained with intent to continue it so long as the homestead law requires, in this case, three years. It is consistent with \* \* \* absence \* \* \* turning largely on circumstances and intent and good faith evidenced by acts and conduct. No good policy would be subserved by insisting an entryman in a case like this should "loaf" upon the homestead, and the law does not insist. (Emphasis added.)

I submit that the Court definition of actual residence as meaning "true, substantive and real; not fictitious, nominal, or pretended" should be applied by the Board. As to the case now on appeal, there is no Congressional intent that a homesteader after an injury be required to "loaf" on the entry rather than seeking to correct the injury through surgery. Nor is there any reason to penalize him by requiring a longer period of residence than that required of a neighboring entryman who was not so injured.

As recognized by the Department in Fred Lidgett, 35 L.D. 371, 372 (1907), presence is but one indication of residence:

The best evidence of residence is the substantially continuous presence of the claimant on the land, and where the entryman seeks to perfect his entry within a shorter period than that allowed for the submission of ordinary final proof, the Department will refuse to accept any other. (Emphasis added.)

Appellant's residence was actual, and not merely legal or constructive. There is nothing in the record to show that during the 14 month period, while in the hospital or otherwise, appellant ever intended to change his residence; neither is there a showing that he had any home elsewhere, or any property elsewhere (see Anderson, supra), or that he took any action whatsoever to establish any other residence until after the required period. Had appellant been injured on a short trip to town, and involuntarily hospitalized, his situation would not have been different.

Appellant's reasonably short absence for surgery did not interrupt his residence; it was not necessary for him to obtain a leave of absence under section 231. Section 2567.5(d) was written to require only that the entryman show 14 months actual and substantially continuous residence. In a naturalization case, In Re Deans, 208 F. 1018 (W.D. Ark. 1913), the District Court construed "residence" and "continuously" at 1019, 1021 as follows:

[I]t has been generally held whether a party's removal constitutes a change of residence depends upon his intention in making such removal, or, as stated in The Venus, 8 Cranch, 253, 279 (3 L. Ed. 553), a leading case which has been frequently followed with approval:

"In questions on this subject the chief point to be considered is the animus manendi; and courts are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appear that the intention of

removing was to make a permanent settlement, or for an indefinite time, the right of domicile is acquired by residence of a few days. This is one of the rules of the British courts, and it appears to be perfectly reasonable."

The converse of the rule is equally correct.

\* \* \* \* \*

And this is the construction placed upon the present naturalization act by the courts, so far as the reported cases show. In Re Schneider, (C.C.) 164 Fed. 335, it was held that:

"The word 'continuously' is not used literally as requiring the applicant to remain at all times physically within such jurisdiction, but applies to changes of domicile only; and a sailor by going to sea does not abandon his residence." (Emphasis added.)

That portion of section 2567.5(d) which specifies actual presence for 14 months, where an entryman requires a leave of absence, must be construed as an interpretation of section 231 rather than as the imposition of a new requirement by the Secretary; it does not apply to appellant's case. It is submitted that the requirement as to 14 months presence in 43 CFR 2511.4-2 and 2567.5(d) was intended to be imposed only when "residence" under section 231 is "slightly broken" under section 2511.4-2(b)(2) and when it is therefore necessary for the entryman to obtain a leave of absence.

Had Congress intended to require actual presence, it could have so stated. It would of course be beyond the authority of the Department to substitute a requirement of actual presence for a statutory commutation requirement of actual residence. Since it is reasonable to construe the actual presence requirement of section 2567.5(d) to apply only where the actual residence is in fact broken, it would be error to construe the section to change the statutory requirement of "actual residence" into the much more restrictive requirement of "actual presence." A regulation which operates to create a rule out of harmony with the statute would be void. Lynch v. Tilden Produce Co., 265 U.S. 315, 320-22 (1924).

Under section 2511.4-2(b)(2), infra, residence need not be continued until final proof except in certain situations.

Regulation Unclear

To cancel appellant's entry for inadequate residence, after his claimed expenditure of \$ 4,790 and his back injury, would violate a fundamental rule of construction of the Board. If an entryman is to be deprived of his entry because of his failure to comply with a regulation, that regulation should be so clear that there is no basis for the entryman's noncompliance therewith. Cf. Duncan Miller, 5 IBLA 35 (1972); Madge V. Rodda, 70 I.D. 481 (1963).

The regulation herein concerned! ! when construed with the statute! ! does not clearly set forth what "actual presence" means, nor does it specify that 14 months actual presence on the land is a requirement in Alaska except where an entryman finds it necessary to interrupt his period of actual residence. While in Josephine M. Locher, 44 L.D. 134 (1915), the Department recognized that short absences on necessary business do not break a period of "actual residence," the Department has not construed the section 2567.5(d) requirement of "actual presence." "Actual presence" seems more restrictive than the "actual residence" discussed in Locher. If "actual presence" means "daily presence," though not necessarily continuous, for the fourteen months, then a homesteader who leaves for a few days' visit to neighbors or to town, could be required to show residence on the property longer than the required 14 months. Return to the homestead could be delayed by an accident or a snowstorm, imposing an additional requirement for "actual presence" above the 14 months set forth in the statute. This additional requirement has no foundation in "residence" required by statute, and the regulation is unclear. There is even more reason for a homesteader! ! with a claimed investment of \$ 4,790 over a three year period! ! to be protected under Rodda from loss of substantial rights than an appellant who seeks to purchase or lease United States lands or minerals. Such appellants have been accorded Board consideration under the Rodda rule. Louis Alford, 4 IBLA 277 (1972); Mary I. Arata, 4 IBLA 201, 78 I.D. 397 (1971); Georgette B. Lee, 3 IBLA 272 (1971); A. M. Shaffer, 73 I.D. 293 (1966).

Good Faith

Appellant's absence, required in connection with his surgery, is no evidence of bad faith. Neither, under the Anderson rule, quoted supra, is there a showing of bad faith from appellant's departure from the claim after completing what he apparently believed to be the required 14 months of substantially continuous residence. Fourteen months residence, and fourteen months only, is required. It will be noted that section 2511.4-2(b)(2) sets forth an exception

to any general requirement 1/ for residence at the time of commutation proof and specifically recognizes that termination of residence alone is not bad faith:

[T]he failure to continue the residence until filing of notice to submit proof will not prevent its acceptance if the Bureau of Land Management be fully satisfied of entryman's good faith, and provided no contest or adverse proceedings shall have been initiated for default in residence, or other good cause, prior to filing of such notice. \* \* \*

The majority questions the good faith intent of the entryman to establish a farm home, and raises additional issues as to harvesting of crops and whether a habitable house existed on the entry at the time of final proof. Appellant certifies that a habitable house was on the land at time of final proof. There are many possible reasons for crop failure or prevention of harvesting which may not disprove the allegation of cultivation. Such matters involve questions of fact. A homestead entry is not to be canceled for defects not appearing on the face of the record without giving the entryman an opportunity to be heard. See Don E. Jonz, 5 IBLA 204, 207 (1972); Johnnie E. Whitted, 61 I.D. 172, 174 (1953).

### Cultivation

Appellant was required to cultivate 1/16 of his entry during his second entry year. 43 CFR 2567.5(d). Appellant's proof alleges cultivation of 1/8 of the entry in the third and fourth entry years. This was done pursuant to State Office instructions. The file contains a note dated June 28, 1968, "advised to cultivate this year and submit final proof! ! also submit documentation on medical reasons for not cultivating." Appellant's back injury and surgery apparently left him incapacitated and unable to perform physical labor during the second entry year. His return, during the two succeeding years to continue the farming of his entry, is a clear indication of his good faith attempt to comply with the requirement of law which he had not yet met.

Appellant qualified for a reduction in cultivation requirements from 1967 under 43 CFR 2511.4-3(b)(2):

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1/ It is not necessary to consider the issue of whether the general requirements for residence in section 2511.4-2 have been superseded by the Alaska requirements for residence in connection with commutation of entries under section 2567.5(d).

(2) A reduction may be allowed also if the entryman, after making entry and establishing residence, has met with misfortune which renders him reasonably unable to cultivate the prescribed area. In this class of cases an application for reduction is not to be filed, but notice of the misfortune and of its nature must be submitted to the manager of the land office, within 60 days after its occurrence; upon satisfactory proof regarding the misfortune at the time of submitting final proof a reduction in area of cultivation during the period of disability following the misfortune may be permitted. (Emphasis added.)

Since an entryman is not required to make an application for reduction, he is not required to pay an application service fee of \$ 5 under section 2511.4-3(b)(5):

All applications for reduction in area of cultivation must be accompanied by an application service fee of \$ 5 which will not be returnable. (Emphasis added.)

It is sufficient that an ill entryman notify the land office manager of his misfortune within 60 days, as appellant did in this case. Proof of the misfortune was submitted at time of final proof, as the section requires. The reduction as to the second entry year should be allowed and appellant's further compliance with the homestead requirements should be considered on remand. 2/

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2/ Under section 2567.5(b), cultivation of 1/8 of the entry must continue "until the submission of final proof, unless the requirements in this respect be reduced upon application duly filed." While appellant alleges he continued cultivation until proof filed, the record does not show whether he continued to cultivate until citizenship was obtained. The Supreme Court decision in Osterman, supra, citing the doctrine of relation back, would indicate that lack of citizenship is a defect sui generis and that a subsequent naturalization is a waiver by the United States with the retroactive effect of curing all defects. Under this reasoning, additional cultivation would not be required. The issue need not be decided until after determining whether appellant did continue his cultivation until citizenship was obtained and, if not, whether a reduction in the cultivation requirement is to be allowed.

An additional reason for relief to be granted as to cultivation during the second entry year is set forth in 43 CFR 1871.1-1. 3/ That section authorizes equitable adjudication where, due to an obstacle beyond the control of the entryman, he has not effected full compliance within the period authorized.

Under the circumstances, appellant's incapacity would qualify as an "obstacle over which the party had no control." Does this obstacle permit equitable consideration of his later cultivation? The reasoning of the District Court in Lance v. Udall, Civil No. 1864! N, January 23, 1968 (D. Nev.), is applicable:

It is our interpretation of the statutes that they are intended to vest discretion in the Secretary to grant patents or other relief where there has been less than substantial compliance with some statutory requirement be it cultivation, residence, time for final proof or whatever, accompanied by substantial good faith compliance with the requirements as a whole. \* \* \*

What this entryman \* \* \* clearly needed was more time, and if the statute authorizing equitable adjudication has any obvious purpose at all, it should be applied in aid of a sincere, hard! working homesteader \* \* \*. (Emphasis added.)

See also Francis I. Hunt, 8 IBLA 390 (1972).

Appellant alleges he has substantially complied with the residence and citizenship requirements. He was in need of more time,

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3/ The regulation provides:

"The cases subject to equitable adjudication by the Director, Bureau of Land Management, cover the following:

"(a) Substantial compliance: All classes of entries in connection with which the law has been substantially complied with and legal notice given, but the necessary citizenship status not acquired, sufficient proof not submitted, or full compliance with law not effected within the period authorized by law, or where the final proof testimony, or affidavits of the entryman or claimant were executed before an officer duly authorized to administer oaths but outside the county or land district in which the land is situated, and special cases deemed proper by the Director, Bureau of Land Management, where the error or informality is satisfactorily explained as being the result of ignorance, mistake, or some obstacle over which the party had no control, or any other sufficient reason not indicating bad faith, there being no lawful adverse claim." (Emphasis added.)

as in Lance, in order to comply with the cultivation requirements. Under section 1871.1-1, the equitable adjudication authority of the Secretary applies to "all classes of entries," i.e., to commutations as well as to ordinary homesteads. There is therefore no requirement that the law as to ordinary homesteads. The departmental language in Lidgett, supra, to the effect that one seeking commutation must show full compliance with the cultivation requirement, does not outweigh the principles expressed in Lance. The granting of an extension in time is within the authority of the Secretary, and the extension should be granted in the interest of equity.

It is submitted that to remand the matter for further proceedings would be in accordance with Department decisions as to naturalized citizens and as to those entrymen who have no residence or place of abode off of the homestead. The Board's decisions Lois A. Mayer, 7 IBLA 127 (1972) and Gene L. Brown, 7 IBLA 71 (1972) are not relevant. Mrs. Mayer did not cultivate during the entry and did not comply with the requirement of at least seven months' residence per year. Mr. Brown did not cultivate, did not have a habitable house at time of final proof, and was absent from the homestead in excess of five months each entry year.

Joseph W. Goss  
Member

I concur:

Anne Poindexter Lewis  
Member

