

Editor's note: Appealed – aff'd in part, Civ. No. A-3-73 (D.Alaska Oct. 18, 1977), 438 F.Supp. 551; reversed & remanded, No. 77-3523 (9th Cir. June 12, 1979), 598 F.2d 531

UNITED STATES
v.
LEONARD F. NELSON

IBLA 71-57 (Supp. 1)

Decided January 14, 1977

Court remand of United States v. Nelson, 8 IBLA 294 (1972). That decision is vacated.

Appeal from Hearing Examiner's decision dismissing contest complaint against homestead entry reconsidered.

Hearing Examiner's decision reversed: final proof rejected - entry held for cancellation.

1. Alaska: Homesteads--Homesteads (Ordinary): Residence

To establish residency on a homestead there must be the intent to make the desired public lands the entryman's home, and also the intent to no longer have a home at the former residence; the law permits an entryman to have two residences, but he may have only one home.

2. Alaska: Homesteads--Homesteads (Ordinary): Residence

An entryman who, at the time he seeks to establish residence on the entry, owns a house which he leases furnished for 6 and 1/2 months and to which he returns a few days after he has completed the required 7 months on the entry did not establish his home on the entry in good faith, and thus has not met the residence requirement of the homestead law.

3. Alaska: Homesteads--Homesteads (Ordinary): Residence

A homestead entry made with no intention of establishing a permanent bona fide home on

the entry, but merely with a view to submitting a showing sufficient to support occupancy for the briefest time permitted under the law must be canceled, notwithstanding the proof offered shows full technical compliance with respect to inhabitancy of the land for the period required by the law.

4. Alaska: Homesteads--Homesteads (Ordinary): Cultivation

Cultivation of a homestead entry must include the breaking, planting or seeding and tillage for a crop and be done in such a manner as to be reasonably calculated to produce profitable results. The acts performed in attempted satisfaction of the cultivation requirements of the homestead law must be done in good faith seeking to establish a profitable agricultural operation on the entry.

An entryman who performs the minimum acts of cultivation, and seeds late in the last growing season and soon thereafter files final proof, who does not visit the entry to see the results of his attempts or pursue any further agricultural activity on the entry, and who does not establish that he had a market or use for the crop he could have grown, and where the results are meager, has not demonstrated that he made a good faith attempt to comply with the agricultural requirements of the homestead act.

APPEARANCES: James R. Mothershead, Esq., Assistant Regional Solicitor, Department of the Interior, Anchorage, Alaska, for the United States;
Eugene F. Wiles, Esq., of Delaney, Wiles, Moore, Hayes, & Reitman for Nelson.

OPINION BY ADMINISTRATIVE JUDGE RITVO

In United States v. Nelson, 8 IBLA 294 (1972), the Board held that final proof for Leonard F. Nelson's homestead settlement claim A-0587000-A must be rejected and the entry canceled on the ground that Nelson did not have a habitable house on the entry at the time of final proof. Upon judicial review, a decision of the District

Court affirming the Board's decision, Nelson v. Morton, 368 F. Supp. 692 (D.C. Alaska, 1973), was reversed and the case remanded for further proceedings. Nelson v. Kleppe, 529 F.2d 164 (9th Cir. 1976). The District Court, on remand, denied Nelson's motion for an order directing the Secretary to issue a patent. It then held that the Circuit Court had ruled only upon the habitable house issue and had not held that all the requirements for the issuance of a patent had been met. It concluded that the Board, and not it, should decide all other questions pertinent to the issuance of a patent and remanded the case to the Board to make such final determinations. In view of the Court's determination, the earlier Board decision in this case at 8 IBLA 294 is vacated.

The Board, in turn, requested the parties to submit statements of facts they consider to require determination.

The United States' submission, in effect, repeats the allegations of the complaint. Nelson, on the other hand, stated that the only issues of fact are whether the contestee had met the residency and cultivation requirements of the homestead law.

After reviewing the record in the case, it is my conclusion that the remaining factual issues are:

- (1) Whether Nelson cultivated at least one-eighth of the homestead acreage for at least 1 year prior to filing final proof. 43 U.S.C. § 164, 279 (1970).
- (2) Whether his attempt at cultivation was made in good faith.
- (3) Whether Nelson established and maintained his residence on the homestead to the exclusion of one elsewhere.

As we noted in our prior decision, supra, the Hearing Examiner found that Nelson had, in good faith, satisfied the residence and cultivation requirements of the homestead law.

Upon a careful examination of the record I have concluded that Nelson neither cultivated nor established and maintained a residence on the entry in good faith within the meaning of the homestead law. ^{1/}

On February 17, 1963, Nelson filed his Notice of Homestead Location. Because of problems with access to his entry, the land

^{1/} Although Congress has recently repealed the homestead act it postponed the effective date of the repeal as to Alaska until October 21, 1986. Section 702, Federal Land Policy and Management Act, P.L. 94-579, October 21, 1976.

office granted Nelson an extension until February 10, 1964, to establish residence. Nelson subsequently constructed an access road at a cost of \$600.

In January 1964 he erected a tent on the entry and began to build a house. With friends, he hauled material to the entry, using a dog team, ambulance and snowmobile. The ambulance and snowmobile were purchased for use at the homestead at a cost of \$1,000. Materials for the house cost Nelson \$979.95. Completed, the structure had one room, and was approximately 20 feet long and 24 feet wide. It was insulated and equipped with a generator, kerosene burner, electrical wiring, two heaters, cooking range, refrigerator, and furniture. Books, a T.V., and personal items were taken to the homestead.

Nelson's wife and children moved in on February 9, 1964, and lived there until July 16, 1964. They left to visit his wife's relatives. Nelson indicated at the hearing his wife's pregnancy was the primary reason for the family leaving. Nelson, however, lived continually at the homestead from February 7, 1964, until September 15, 1964.^{2/} During this period, his children were transferred to the local school and he and his wife worked in Anchorage, using the ambulance, snowmobile, and an automobile daily for transportation.

Nelson had owned a home in the Sand Lake area of Anchorage, which was leased furnished from February to September 1964. Contestee has stated he thought the lessee would eventually buy this home, but the lessee purchased a home elsewhere. The Nelsons, after suffering financial difficulties in his used car business and unexpected expenses on the homestead, problems with access, and restrictive ordinances^{3/} left the homestead and moved back to the Sand Lake house on September 15, 1964.

A month later Nelson was notified that the mortgage on his house was delinquent from May 1964 to October 1964. The mortgage was foreclosed on March 29, 1965. The Nelsons left for the lower 48 states for Army school in April 1965. They now live in Anchorage and have not returned to the homestead. Nelson stated at the hearing he was of the opinion that the city ordinances prohibited him from living on the homestead and participating in various activities

^{2/} Nelson's veteran status enabled him to fulfill the residency requirement in 7 months. 43 U.S.C. § 279 (1964); 43 CFR 2096.1-3.

^{3/} The city and borough ordinances declared the area where the homestead was located to be a watershed and prohibited any activity that would damage the watershed. Ordinance also prohibited cultivation or clearing unless an exception were granted. If an exception were granted, the ordinances required that any clearing or cultivation would be subject to the approval of the Soil Conservation Service.

necessary to establish a permanent home, but that he intended to move back when the problems were resolved.

Cultivation of the homestead was begun in the spring or summer of 1965. Friends with whom Nelson had arranged to clear the area, encountered various problems. These included, briefly, a temporary restraining order enjoining him from clearing the land, ^{4/} breaking down and sabotage of the caterpillar tractor, a required change of plans in the area to be cleared, and access problems. Approximately 20 acres were cleared by July 1966. ^{5/} The area was disked in both clockwise and counterclockwise direction, then disked laterally. Contestee paid \$4,833 to have the area cleared and cultivated.

Nelson testified that he had lived on a ranch before and had farming experience. However, he had no haying experience in Alaska; therefore, he consulted Weldon Snodgrass, Director of Agriculture for Alaska, about planting. Snodgrass sold him Engmo Timothy grass seed and advised him it was an excellent plant for Alaska. Snodgrass recommended he use from 2 to 4 pounds of seed per acre, although the agriculture experimental station had recommended 8 pounds per acre. During the last 2 weeks of August and the first week of September, contestee and a friend seeded the area by hand with whirlwind broadcasters, using approximately 80 pounds of seed.

At the hearing, the United States offered the testimony of Clifford W. Marcus, District Conservationist with the Soil Conservation Service. Marcus, on behalf of the Greater Anchorage Area Borough (for the role of this organization in the controversy, see Hearing Examiner's decision), had selected the areas to be cultivated. Marcus, who had 20 years of experience in giving homesteaders technical assistance in relation to the homestead law, testified that he never would have recommended the entry for homesteading because of the steepness of hillsides. In Marcus' report to the Greater Anchorage Area Borough he recommended that the cleared areas be disked and harrowed, that if possible the soil be packed by equipment and seeded, and then packed again, that 300 pounds per acre of 10-20-20 fertilizer be applied, and that 8 to 10 pounds per acre of Timothy seed be applied. Only Nelson's disking complied completely with Marcus' recommendations. He did not harrow after disking, cultipack, fertilize, or plant the recommended amount of seed.

An examination of the land in 1967 and 1969 revealed that the results were sparse indeed, that there was little evidence of Timothy grass.

^{4/} Supra note 3.

^{5/} It was stipulated at the hearing that the amount of acreage cultivated was not deficient.

Nelson stated that he had not returned to the entry in 1967 or thereafter until August 1968. He made no further attempt to reseed or otherwise cultivate the cleared areas.

Final proof seeking patent was filed by Nelson on November 25, 1966. An official examination of the homestead was made in August of 1967 by the land office. The grass had not matured to a point where it could be identified, and the growth was very sparse. After the contest was initiated, the area was again examined. At that time there was a sparse growth of Timothy interspersed with native grass and weeds. Some of the Timothy had grown 3 feet high. The residence was in a deteriorated condition, and there was no evidence that anyone had lived there.

The Hearing Examiner found that Nelson had satisfied both the residency and cultivation requirements of the homestead law and dismissed the complaint. The United States contends he was mistaken on both counts.

[1] The requirements to establish residency have been discussed extensively in United States v. Victor H. Cooke, 59 I.D. 489 (1947). (See also United States v. Lloyd W. Booth, 76 I.D. 73 (1969).

The chief rules * * * are as follows: First there must be intent to make the desired public lands the applicant's home, or fixed abode. This intent is called the amicus manendi, the intent to remain, and implicit in it of course, is the intent no longer to have a home at the former residence, or domicile; second, there must be actual bodily presence on the land entered, this act of inhabitation of the entry being called the factum. Moreover, these two elements must coexist. The mere intent to acquire a new home on the desired lands, if unaccompanied by the factum of bodily removal to the entry and bodily presence there, avails nothing; nor does the fact of removal and presence if those acts be not animated by intent.

It results that in the absence of an intent to remain, no inhabitation of the new abode on the entry, no actual residence there, whether for 3 years or for longer, is sufficient to create the homestead residence and home envisaged by the homestead law any more than it would create a new domicile. Without the requisite intent the dwelling place on the entry and the entryman's actual residence therein do not constitute home and homestead residence, but only the actual situs of the entryman; nor is homestead residence or home established any more than a change of domicile is effected,

if despite removal to the new place there is an intention to return to the former dwelling place as the home. Exactly as acquisition of a new domicile involves "a present, definite, and honest purpose to give up the old and take up the new place as the domicile" so establishment of homestead residence and home involves a present, definite, and honest purpose to give up the old dwelling place as home and to take up the entry as home. Accordingly, when bodily presence on the entry is initiated within the statutory period of 6 months and at the same time the requisite intent is present, homestead residence is at once established, just as a new domicile at once comes into being when bodily presence in a new jurisdiction is found to coexist with an intent to have a fixed abode there. (59 I.D. at 502).

As stated in Cooke, supra, double residency may cast doubt upon the entryman's intent to establish a home on the entry. It lists three classes of double residence which raise presumptions against the entryman's good faith. These three are those in which during the life of the entry occupancy of either a former home or some other off-entry dwelling has been maintained: (1) by entryman and his family during long absences from the entry, no one remaining on the entry; (2) by the entryman alone, his family living on the entry; (3) by the family only, the entryman living alone on the entry. The presumption of bad faith may or may not be confirmed in these cases.

However * * * [t]he law permits an entryman to have two residences. However he may have only one home, which must be on the entry. He must not have any present intention of again making his former home his residence. (United States v. Cooke, supra at 506).

The crucial issue is whether Nelson went on the homestead with the intention of establishing a home there to the exclusion of one elsewhere or whether he merely took up residence there always intending to return to his house at Sand Lake. The Cooke case, supra, discussed in detail the problem of determining whether there has been compliance with the residence requirements in cases involving double residence. Here the entryman did not maintain a second residence. He had leased his prior home and there was no evidence that he spent more than a few nights off the entry after he had moved on to it. While the controlling principle remains unchanged, the primary external fact, the second residence, which casts doubt on the entryman's intent to establish a home on the entry, is absent. Nevertheless, since it is impossible to read the mind of the entryman to determine what his true intentions are, it is necessary to examine all his acts pertaining to the entry to determine, if possible, whether he truly intended to make the entry his home.

What the entryman did is not disputed. By dint of great exertions and at some expense he lived, on the entry with his family under difficult conditions. He and his wife and children managed to travel back and forth to work and school only by the exercise of great ingenuity and determination. Finally, while his family left the entry in July for a 6-week visit to Pennsylvania, the entryman himself stayed on the entry until the middle of September.

In view of this redoubtable performance why is the entryman's intent questioned? The troubling facts are that he leased furnished his comfortable home at Sand Lake for the 6-1/2 months from February 18 to August 31, 1960, and that he returned to this home in mid-September just after the required homestead residency period had been satisfied. As the Hearing Examiner said:

Standing alone this would be convincing evidence supporting the contestant's contention that the contestee intended the Sand Lake residence, not the homestead to be his home or domicile but it does not stand alone.

The Contestee testified that he fully intended to live on the homestead and that he attempted to sell his Sand Lake house but because of the access problem resulting from the Smith's refusal to permit crossing of the corner of their property, the inadequacy of the house, and the lack of sanitary facilities, he decided to move back to Anchorage in July 1964 on a temporary basis (Tr. 678, 679, 698). He also testified that he has every intention of returning to the entry and building a new house at another location as soon as he resolves the access problem (Tr. 698, 733, 734).

Although his explanation is reasonable, it might be suspect as a self-serving statement were it not for the fact that while spending substantial sums in developing the homestead the Contestee did not meet the mortgage payments of his Sand Lake house. Financial limitations forced him to choose between the homestead and Sand Lake. He sacrificed Sand Lake. I, therefore, credit his explanation and find that he did meet the residency requirements of the homestead law.

[2, 3] We cannot agree that such weight is to be given to the decision to let the mortgage payments on the Sand Lake house fall into arrears. The combination of business difficulties and expenditures for the house on the homestead had apparently placed Nelson in financial straits. However, his decision not to meet the mortgage payments did not immediately cost him the Sand Lake house. If his business had improved, he doubtless could have paid the arrears and restored his good standing. His choice was only that of a debtor

who chose between a more and less pressing demand on his resources and hoped that his situation would improve. That it did not and that he eventually lost his home is of little help in establishing his state of mind in February of 1964.

Of decisive importance, in our view, are the facts that he leased his Sand Lake house furnished for a period that coincided almostly exactly with the period of required residence and that he returned to it as soon as the 7-month period had expired. It is also noteworthy that he removed only personal possessions to the homestead. Furthermore, he has never returned to the homestead to live and has permitted the house he built on the entry to deteriorate. Finally, appellant's cultivation was, at best, meager.

As the Department found in Boothe, *supra*:

* * * Appellant's reported residential use of the entry was all accomplished within the first [here second] year of the entry and there is no evidence of any effort after that to improve the living quarters [here Nelson stated he had no intention of living again in the house and he permitted it to deteriorate], which were temporary at best, to make them suitable for permanent residence. * * * Moreover, it is to be noted that appellant's cultivation of the land was, at best, meager and that in appellant's own view the improvements placed on the land were not suitable for use as a permanent home.

There is then, no basis in the evidence of record for inferring the existence of one of the two essential elements of residence, that is, an intent on the part of the appellant in going upon the entered land to make the entry his home. Rather, the record fully supports the finding of the hearing examiner that appellant "left his living quarters in Fairbanks on May 30, 1959, with the intention of satisfying the minimum requirements of the homestead law and then to return immediately to Fairbanks." We concur also in his determination that appellant did not satisfy the second essential of homestead residence, that is, physical occupancy of the entry for the minimum period, in this case, of seven months. Failure to comply with these requirements is a proper basis for cancellation of the entry. Melvin O. Wright, A-30839 (December 29, 1967), and cases cited. At 86.

Many years ago the Department fully considered an analogous situation. Gilbert Satrang, 37 L.D. 683 (1909). There the entry-man purchased and deeded a home to his wife in Canton, South Dakota, the town in which he was employed. He made an entry for land in

the Dickinson, North Dakota, land district and went upon the land in May 1905, 6 months later. In June he rented the house in Canton furnished for an indefinite period. His wife then went upon the land and remained there until about November 1905 when she returned to Canton. Claimant remained on the land until Christmas and filed commutation final proof in January 1906. He then returned to Canton where he found employment and thereafter resided.

After pointing out that Satrang had remained on the homestead for just the period necessary to file commutation final proof, the decision affirmed the rejection of the final proof, stating:

If mere occupancy of a homestead claim for a period of eight months, commenced before the expiration of six months from date of entry will entitle the claimant to purchase the land, this claimant has complied with the law and is entitled to a patent. But if title to land under the homestead law can only be acquired by establishing and maintaining an actual bona fide residence and by improving and cultivating the land with the honest purpose of making the land a home, this entry must be canceled for the reason that it is impossible to avoid the conclusion that every act of claimant, from the inception of entry until the making of final proof, was made with a studied purpose to perform such acts only as he considered essential to a show of compliance with the mere letter of the law and regulations, with a view solely of acquiring title to the land by purchase, and that he never at any time had an honest intention of making the land a home.

The aim and object of the homestead law is the donation of the public lands to settlers seeking to establish agricultural homes thereon, upon the condition that actual residence be established thereon and that the land be cultivated and improved. It was designed to have the public lands settled upon and improved by homeseekers rather than to have them disposed of for the purpose of revenue.

Residence within the meaning of the homestead law must be established and maintained with the intent to make a permanent home upon the land to the exclusion of a home elsewhere. It cannot be acquired by mere occupancy with a view solely to acquiring title by a colorable compliance with the law, but actual residence must be maintained in good faith with the intent to make it permanent. Mary Campbell (8 L.D., 331); Dayton v. Dayton (Ib., 248); Desmond v. Judd (22 L.D., 619); George W. Harpst (36 L.D., 166). Such intent must be

present at the initiation of every entry, whether the title is acquired after the full period of residence prescribed by law, or at the expiration of the shorter period under the commutation provisions of the act. There is but one character of residence applicable to every homestead entry, and that means a residence having the character of permanency, and established and maintained with such intent.

To construe the commutation provisions of the homestead law as meaning that a person having the proper qualifications may make entry with a view to the purchase of the land after a short period of occupancy, but with no intention of occupying the land after the submission of final proof or after he shall have acquired the title as a home, would defeat the very purpose of Congress as expressed in the act of March 2, 1889, withdrawing from private entry all public lands except in the State of Missouri, and as declared in the act of March 3, 1891, that no public lands, except abandoned military and other reservations, isolated and disconnected tracts and mineral and other lands, the sale of which has been authorized by law, shall be sold at public sale.

The intent of the commutation provision is indubitably derivable from the act itself. An onerous task was imposed of five years' residence and cultivation as a condition to the granting of title. In the mutability of human affairs it was evident that some who accepted the proposal in utmost good faith, with intent to comply strictly, would be unable to do so, and others could not without unreasonable inconvenience and loss. Without some such provision, they would be compelled to lose all expenditure for improvement and all time served on the entry period, as well as the loss of the homestead right.

The commutation provision was the relief offered against such unforeseen casualties and accidents. There might be an infinite variety of them, failing health, disabling injuries, offers of better employment, and the infinite variety of things that within five years change the desires and aims of many lives.

It was to meet this accident of life that the commutation provision was framed to relieve. It follows that there must have been an original bona fide intent to make the land a home.

Throwing the light of the preemption law on the homestead act confirms this construction. The commutation provision of the homestead law had stood for thirty-one years as a standing offer to sell land conditioned on "making proof of settlement and cultivation as provided by law granting preemption rights." When the policy for sale of the public lands was definitely abandoned by the acts of March 2, 1889, and March 3, 1891, the provision was amended to conform to such policy, and commutation of the entry was allowed only after the extension of fourteen months from date thereof, upon "making proof of settlement and of residence and cultivation for such period of fourteen months." Such change in the act emphasized the intent and object of such provision and clearly indicated, by the extension of the time, that its purpose was to prevent the evasion of the policy not to sell the public lands, by requiring the entry to be made in good faith with a view to the establishment and maintenance of a permanent home.

"The element of good faith is the essential foundation of all valid claims under the homestead law." Lee v. Johnson, 116 U.S., 48, 52. Applying that test to this case, claimant never at any time established a residence upon the land within the meaning and intent of the homestead law, and his occupancy of the land, though continuous for a period of eight months, was not maintained with a view to making a permanent home upon the land, but solely for the purpose of acquiring title thereto. Such intent and purpose, which is clearly shown by his acts at the time of the initiation of his claim, is strongly corroborated by his conduct subsequent to the making of final proof, which will always be considered in connection with other testimony as illustrating the intent and purpose of making the entry.

Your decision is affirmed.

It is my conclusion then that Nelson did not go upon the entered land with the intent to make it his home. Rather I find that he left his Sand Lake home with the intention of satisfying the minimal requirements of the Homestead Law and then returning to his home. Thus he failed to establish a residence on the entry. United States v. Lloyd W. Booth, supra. Consequently, his final proof must be rejected and his entry canceled.

[4] Turning now to the cultivation issue, I find that appellant's attempt at cultivation was not made in good faith.

The remaining question for determination in this appeal is whether or not the work done by the entryman during the fourth entry year constituted an acceptable method of cultivation under the circumstances of this case to meet the cultivation requirements on his entry. The homestead laws and the pertinent regulations, 43 CFR 2096.1(4)b, provide that there must be cultivation of 1/8 of the area prior to and until submission of final proof.

The specific cultivation requirements for homestead claims in Alaska are no more restrictive than the general homestead requirements for the 3-year proof of cultivation under 43 CFR 2511.4-3(a)(1). ^{6/} See United States v. Grediagin, 7 IBLA 1, 5 (1972). In construing the cultivation requirements for agricultural entries in Alaska the Department has recognized the unusual problems attendant to the area such as extreme weather conditions, and short growing season. However, such difficulties must be accepted as hazards of homesteading in Alaska and homesteaders must contemplate compliance with the terms of the law notwithstanding. Gilbert v. Oliphant, 70 I.D. 128, 132 (1963).

The Department has never attempted to lay down a fixed rule as to what constitutes satisfactory cultivation. It has long held, with respect to entries under both the Desert Land Act, 43 U.S.C. § 321 et seq. (1970), and the homestead laws, that the breaking, planting or seeding and tillage for a crop which constitutes cultivation must include such acts and must be done in such a manner as to be reasonably calculated to produce profitable results and that a mere pretense of cultivation will not satisfy the requirements of the law. United States v. Garrett, A-31064 (May 28, 1970). See also Gilbert v. Oliphant, *supra*; Jess H. Nicholas, A-30065 (October 13, 1964), *aff'd* in Nicholas v. Secretary of the Interior, 385 F.2d 177 (9th Cir. 1967). Moreover, the crux of a determination of whether an entryman has satisfied these requirements is not necessarily what results were obtained, but it is whether the method used was reasonably calculated to produce profitable results. Therefore, an entryman's failure to produce a useful crop does not in and of

^{6/} 43 CFR 2511.4-3 (formerly 43 CFR 2667.5) provides:

"(a) * * * (1) Cultivation of the land in a manner reasonably calculated to produce profitable results is required for a period of at least 2 years. This must consist of actual breaking of the soil, followed by planting, sowing of seed, tillage for a crop other than native grasses, and, in areas where rainfall is inadequate, the application of such amounts of water as may reasonably be required to produce a crop * * *."

"(2) During the second year not less than one-sixteenth of the area entered must be actually cultivated, and during the third year, and until final proof, cultivation of not less than one-eighth must be had * * *."

itself disqualify the entryman's acts as sufficient cultivation. United States v. Garrett, *supra*, p. 13.

However, the attempt at cultivation must be a good faith effort and not a mere pretense. United States v. Reed, A-30354 (September 24, 1965); Gilbert v. Oliphant, *supra*; Charles Edmund Bemis, 48 I.D. 605 (1922). It must be "more than a token compliance with the cultivation requirements of the homestead law without real meaning in the development of agriculture." Jess H. Nicholas, *supra*.

I have carefully reviewed the facts relating to Nelson's attempts at cultivation and his lack of any subsequent attempt to improve the land for the production of crops.

As the Department has stated:

* * * the obvious purpose of the homestead laws is the agricultural development of the land with the raising of crops. This purpose must be kept in mind in considering the showings of the appellant. * *
* John A. Bartel, A-29664 (October 11, 1962).

I can find nothing in the record to support a finding that Nelson intended in good faith to develop the land in his entry for agricultural purposes. Indeed the record is devoid of any indication that even if a crop had been raised, Nelson had any prospect of disposing of it. I conclude that his activities were not for the purpose of producing profitable results or a good faith effort to establish a profitable agricultural operation on the entry. They were, at best, determined efforts to comply with the technical requirements of the law to acquire 160 acres of public land.

The dissent does not meet the issues in the case. It is not whether or not the Hearing Examiner was persuaded by Nelson's demeanor to accept Nelson's explanations. It is plain that Nelson's testimony left the Hearing Examiner unconvinced. Although he observed and listened to Nelson, he did not reach his conclusion on the basis of what he heard or saw. What convinced him, as his decision makes clear, is his interpretation of Nelson's action in not keeping his mortgage payments current. If he had been convinced by his observation of Nelson he would not have had to try to derive Nelson's intent from an extraneous fact. This is not a conclusion reached from observation of a witness, but is one based on an interpretation of human behavior that this Board is as competent to make as the Hearing Examiner.

The issue here is a serious one that should be considered on its merits and not avoided by reliance on a rule of practice.

The dissent comments that there is no evidence of bad faith to impel a contrary conclusion. The Hearing Examiner, as we have quoted, found that the facts "Standing alone would be convincing evidence" supporting the allegation of bad faith. The United States need not present evidence that "impels a finding" of failure to comply with the homestead law. All it need do is present a prima facie case, and then the burden of proof shifts to the entryman. The dissent would place the burden of proof on the United States.

Finally the dissent comments that Nelson may not have been "sufficiently sophisticated" to realize that the mortgage might not be foreclosed immediately. This, of course, is wild surmise. Nelson was a businessman and nothing in his dealings with his entry indicates a lack of the degree of sophistication needed to make a choice between (1) giving up a chance to acquire 160 acres of valuable land and (2) perhaps having the mortgage on his home foreclosed at some time in the future.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board's decision in 8 IBLA 294 is vacated, decision of the Hearing Examiner is reversed, Nelson's final proof is rejected and his entry canceled for the reasons stated in this opinion.

Martin Ritvo
Administrative Judge

I concur.

Joan B. Thompson
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN DISSENTING:

I believe that contestee has satisfied the homestead laws as to cultivation and has established his home on the entry in good faith, thus meeting the residence requirements of the homestead laws. The majority's indulgence in pure conjecture to defeat Nelson's right to the land is completely unwarranted.

The crucial issue is contestee's state of mind in making and perfecting the homestead entry. The hearing examiner, who had functioned in that capacity for some two decades in an exemplary manner, found, after considering the demeanor of contestee, that contestee had acted in good faith. Contrariwise, the majority opinion finds bad faith based upon a cold record and an assertedly minimal compliance with the law by contestee. To suggest, as the majority does, that Nelson's demeanor played no part in the examiner's findings of good faith, is to ignore the realities of a trial judge's modus operandi.

The impact of demeanor evidence is enunciated in State Director for Utah v. Dunham, 3 IBLA 155, 78 I.D. 272, 273-5 (1971), in which the Board stated:

It is clear that the agency, rather than the examiner, is the primary fact finder. United States v. T. C. Middleswart et al., 67 I.D. 232 (1960). His findings may be reversed by the agency even when not clearly erroneous, Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 492 (1951). Cf. Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S. 358, 364 (1955); Administrative Procedure Act, sec. 8, 5 U.S.C. sec. 557 (1970).

It is axiomatic that there are no prescribed rules or methods of evaluating the credibility of oral testimony. In the brief time that the witness testifies, it is difficult for the trier of the facts to ascertain whether the witness is telling the truth. More important in this regard than knowledge of the substantive law and the law of evidence is the natural and acquired shrewdness and experience by which an observant man forms an opinion as to whether a witness is or is not telling the truth. The most acute observer would never be able to catalogue the nuances of voice, the passing shades of expression, or the unconscious gestures which he had learned to associate with

falsehood; and if he did, his observations would probably be of little use to others. Every man must learn matters of this sort for himself, and though no sort of knowledge is as important to a hearing officer, no rules can be laid down for its acquisition. No process is gone through the correctness of which can be independently tested. The judge or hearing officer has nothing to trust but his own nature and acquired sagacity. Stephen, The Indian Evidence Act with an Introduction to the Principles of Judicial Evidence, 41-43.

Creamer v. Bivert, 113 S.W. 1118, 1120-21 (Mo. 1908), illuminates this concept as follows:

* * * [O]ne witness may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify. * * *

The impact of demeanor evidence is similarly enunciated in Broadcast Music, Inc., et al. v. Havana Madrid Restaurant Corp., 175 F.2d 77, 80 (2d Cir. 1949) as follows:

* * * For the demeanor of an orally-testifying witness is "always assumed to be in evidence." It is "wordless language." The liar's story may seem uncontradicted to one who merely reads it, yet it may be "contradicted" in the trial court by his manner, his intonations, his grimaces, his gestures, and the like – all matters which "cold print does not preserve" and which constitutes "lost evidence" so far as an upper court is concerned. For such a court, it has been said, even if it were called a "rehearing court," is not a "reseeing court." only [sic] were we to have "talking movies" of trials could it be otherwise. A "stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the

substance nor the flavor of the fruit before it was dried." It resembles a pressed flower. The witness' demeanor, not apparent in the record, may alone have "impeached" him. * * * [Footnotes omitted.]

In National Labor Relations Board v. James Thompson & Co., Inc., 208 F.2d 743, 745-46 (2d Cir. 1953), where the National Labor Relations Board reversed a credibility finding of an examiner, and the court in turn reinstated the reversed finding, Judge Learned Hand stated:

This issue seems to us to be one on which the examiner's finding should have prevailed under the doctrine of Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 * * *. As was inevitable, the Supreme Court did not try to lay down in general terms how far the Board should accept the findings of its examiner. Plainly it did not mean them to have the finality of the findings of a master in chancery, or of a judge; but it necessarily left at large how much less reluctance the Board need feel in disregarding them than an appellate court must feel in doing the same to the findings of a district judge. The difficulty is inherent in any review of the findings of a judicial officer who chooses between discordant versions of witnesses whom he has seen, because the review does not bring up that part of the evidence that may have determined his choice. Over and over again we have refused to upset findings of an examiner that the Board has affirmed, not because we felt satisfied that we should have come out the same way had we seen the witnesses; but because we felt bound to allow for the possible cogency of the evidence that words do not preserve. We do not see any rational escape from accepting a finding unless we can say that the corroboration of this lost evidence could not have been enough to satisfy any doubts raised by the words; and it must be owned that few findings will not survive such a test.

So tested, it seems to us that the examiner's finding should stand * * *.

In United States Steel Co. (Joliet Coke Works) v. National Labor Relations Board, 196 F.2d 459, 467 (7th Cir. 1952), the court, in adopting the findings of the examiner despite the contrary findings of the agency, used the following standard:

* * * [W]e may not disregard the superior advantages of the examiner who heard and saw the witnesses for determining their credibility, and so for ascertaining the truth.

Nelson filed his notice of location on February 17, 1963. He was granted an extension until February 10, 1964, to establish residence. He constructed an access road costing \$600. In January 1964, he erected a tent on the homestead and with friends hauled materials to the entry using a dog team, ambulance, and snowmobile. The two latter items were purchased for \$1,000.

His wife and children moved onto the homestead on February 9, 1964, and resided there until July 16, 1964, when they left to visit his wife's relatives. Nelson testified that the pregnancy of the wife was the motive for the family leaving. He lived continually on the homestead from February 7, 1964, to September 15, 1964. By reason of his veteran's status, he thus fulfilled the residence requirement. 43 U.S.C. § 279 (1970); 43 CFR 2096.1-3. Nelson's children attended the local school and he and his wife worked in Anchorage, using the ambulance, snowmobile and an automobile daily for transportation. These facts tend to sustain the hearing examiner's finding of bona fides.

The majority opinion seems to rest upon the fact that Nelson owned a home in the Sand Lake area of Anchorage which was leased furnished from February to September 1964, the required period of residence on the homestead. The record does not establish whether the entryman-contestee or the lessee fixed the period of the lease. It is pure conjecture to assume that Nelson fixed such term, as the majority opinion suggests. Nelson believed that the lessee would eventually buy the house, but the latter bought a home elsewhere. Because of financial reverses and problems with access to the homestead, Nelson left the homestead and moved back to the Sand Lake home on September 15, 1964.

The mortgage on that house was foreclosed on March 29, 1965. The Nelsons left for the lower 48 States for Army school in April 1965. At the time of the hearing, they lived in Anchorage. Nelson testified that he believed that city ordinances prohibited him from living on the homestead and participating in endeavors necessary to establish a permanent home, but that he intended to move back when the problems were resolved. It is obvious that the hearing examiner

found Nelson's testimony credible. The hearing examiner found that Nelson, while spending substantial sums in developing the homestead, failed to meet the mortgage payments on his Sand Lake home. The hearing examiner stated:

* * * Financial limitations forced him to choose, between the homestead and Sand Lake. He sacrificed Sand Lake. I, therefore credit his explanation and find that he did meet the residency requirements of the homestead law.

The majority's statement, "However, his decision not to meet the mortgage payments did not immediately cost him the Sand Lake house," is not of any consequence. Nelson's required mortgage payments were in arrears from May 1964 to October 1964, a period of some six months. It is not inconceivable that the mortgage could have been foreclosed after the first month's arrears and it is unreasonable to assume that Nelson was sufficiently sophisticated to anticipate such delay in foreclosing the mortgage on the Sand Lake property. To deprive Nelson of his entry on a countervailing basis is to imbue him with the knowledge of a law school alumnus and with the expertise of one dealing with real estate on a continuing basis.

The majority finds as follows: "It is our conclusion then that Nelson did not go upon the intended land with the intent to make it his home."

I submit that while such an inference may perhaps be drawn from the facts, I am unaware of any presumption of mala fides. Indeed, the officer in the best position to determine Nelson's intent, i.e., the hearing examiner, found that Nelson acted in good faith, and there is no evidence which impels a contrary conclusion.

The majority finds a lack of good faith in Nelson's cultivation because of "his lack of any subsequent attempt to improve the land for the production of crops." In short, the majority faults Nelson for not doing more than the law requires to establish a right to a patent. Cf. United States v. Adamson, A-23837 (May 10, 1944).

It has been long established that the breaking, planting or seeding and tillage for a crop which constitutes cultivation of the soil for a homestead entry must include such acts and be done in such a manner as to be reasonably calculated to produce profitable results. However, the Department has been very liberal in the application of this requirement. For example, evidence that an entryman disked the land in his entry but neither cleared the area nor turned the soil and, by using a hand broadcaster, spread

the seed on the top of the ground, was found to constitute sufficient cultivation under the homestead laws. United States v. Garrett, A-31064 (May 28, 1970). The Department properly noted that the question was not whether crop growth resulted from such methods, but was "whether the method used was reasonably calculated to produce profitable results." Id. at 13. Based upon the evidence in the record of unrefuted testimony that other homestead entries in Alaska had gone to patent upon a showing of cultivation not demonstrably different from that of the appellant's and of the failure of the BLM to establish that such cultivation did not constitute acceptable practice when performed on land adaptable to cultivation by ordinary methods, the Department concluded that the method used was reasonably calculated to produce profitable results. Id. at 14.

Less activity on a homestead entry in Alaska than that of the entryman in United States v. Garrett, *supra*, has been found by this Department as satisfactory cultivation. In the appeal of United States v. Grediagin, 7 IBLA 1 (1972), an entryman's final proof was rejected by the BLM for failure to show cultivation during his fourth entry year. On appeal from that decision the entryman explained that he was unable to cultivate during that entry year due to the frozen condition of the moss-covered ground. He claimed that he root-raked the field and burned roots during that entry year, however, was unable to finish the root burning due to the wetness of the ground after it thawed. The Office of Appeals and Hearings ordered a hearing, limiting the issue to whether the method of cultivation employed by the claimant during that fourth entry year satisfied the requirements of the homestead laws. The hearing examiner found that Grediagin had cultivated the lands during that year "in the only manner possible under the weather and climatic conditions prevailing calculated to produce profitable results." Id. at 3. The BLM, on appeal from the hearing examiner's decision, contended "that the regulations required an actual breaking of the soil, planting, or sowing of seed, and tillage of the land in order for cultivation to have occurred * * *." Id. at 6. However, the Department pointed out that cultivation can exist without fulfilling those requirements:

* * * Tillage of the land or other appropriate treatment for the purpose of conserving the moisture and with a view of making a profitable crop in the succeeding year, without the sowing of seed, is deemed "cultivation" where the manner of cultivation is necessary or generally followed in the locality. 43 CFR 2511.4-3(a)(1) (1972), formerly 43 CFR 166.23(a) (1962).

Id.

The Department, relying on Stewart v. Penny, 238 F. Supp. 821 (D. Nev. 1965), observed that the homestead laws should be liberally construed in the favor of the entryman. And, in view of this policy, the Department reasonably construed that the actions of Grediagin during his fourth entry year constituted sufficient "cultivation" under the homestead laws.

The key element in considering whether the entryman's activities were reasonably calculated to produce profitable results is the entryman's good faith effort to comply. In United States v. Little, A-30466 (January 18, 1966), it was the entryman's lack of such an effort which formed the basis of the cancellation of his homestead entry. The fact that:

* * * He showed only a rough clearing of 20 acres in the entry which did not leave all of it suitable for disking and planting, that he planted only half of the requisite area in the third year, and that none of his planting was done with the expectation of producing a crop * * * [could not] be accepted as satisfying the cultivation requirements of the homestead laws.

Id. at 4. (Emphasis added.) In the present case, Nelson endeavored to cultivate promptly but was hindered by a restraining order enjoining him from clearing the land, the breaking down and sabotage of the caterpillar tractor and access preclusion to the entry. The area was disked clockwise and counter-clockwise, and Nelson expended \$4,833 to have the area cleared and cultivated. One must strain at a gnat to find a lack of good faith in cultivation when faced with an entryman who has overcome such obstacles in endeavoring 1/ to meet the requirements of the homestead laws. I note that the author of the majority opinion came to a contrary conclusion in Kimball v. Selby, 20 IBLA 23 (1975) despite Selby's failure to disk the soil. Nelson did disk the land in his entry. It is significant that the parties to

1/ Contestee's good faith in cultivation is further manifested by clearing of the areas designated for cultivation by the Soil Conservation Service (T. 616, Ex. G-22), and following the farming advice that he had sought from Rowland Snodgrass, Chairman of the Agricultural Stabilization Conservation Committee for the area involved. The hearing examiner made a specific finding that "[c]ontestee made a bona fide effort at cultivation, which although unsuccessful was performed 'in a manner reasonably calculated to produce profitable results.'"

the contest stipulated that the amount of acreage cultivated was not deficient (Tr. 642). However, I note that the majority's finding of lack of good faith in cultivation is a determination made in vacuo, and does not rest upon any specific facts.

In Stewart v. Penny, 238 F. Supp 821, 830-831 (D. Nev. 1965), the court found that the entryman had met the cultivation requirements of the homestead laws and adverted to the liberal policy of the Department on that subject as follows:

In United States v. Cooke, 59 I.D. 489, cited by the Director, the Secretary, in an exhaustive opinion dealing primarily with the good faith of a questionable residence, reversed the Commissioner and sustained the homestead entry on the premise that all that the entryman did "indicated purpose, determination, industry and good faith." This is true of Stewart. In Helen E. Dement, 8 L.D. 639, the Secretary again sustained a homestead entrywoman, stating: "It is right and proper to take into consideration the degree and condition in life of the entryman in determining whether the improvements show good faith." Citing the Dement case, the Department, in Kendrick v. Doyle, 12 L.D. 67, held:

"In the former contest it does not appear that there was any question about the house being on the land. This entryman is sixty-six years old and in infirm health and poor. He has made his living by raising goats and chickens on the land; he keeps from twenty-five to fifty goats on the tract. His improvements cost him about \$100.

"In the case of May A. Taylor (7 L.D., 200), the proof showed no breaking of the land, but some cutting of grass for hay, and that the land was principally used for pasturage and that the entryman did not take the land for the purpose of tillage. It was said: — "It (the proof) further shows that said track is illy adapted for tillage and the raising of grain or other agricultural crops requiring the breaking and cultivation of the soil. But raising stock and grass is an agricultural pursuit, etc.

"The entry was passed to patent.

"In *Helen E. Dement* (8 L.D., 639), it was said: –

"It is right and proper to take into consideration the degree and condition in life of the entryman in determining whether the improvements show good faith.

"If it should be admitted that all the contestant claims is true, it would show the entryman, acting in good faith, built his house a little outside of the lines of his land, by a mistake that any one might have made; that he has maintained continuous residence and done the best he could, under the oppression and trespassing of the contestant and those acting in harmony with him, to make a living on the land and maintain his home there, and taking the case as it stands, I can not concur in your findings and judgment.

"Your decision is therefore reversed, and the contest dismissed."

That the homestead laws should be liberally applied in favor of the entryman is established by law and is not a matter of a whim or predisposition of the particular Secretary of the Interior who graces the office. The Supreme Court of the United States has established the principle. *Ard v. Brandon*, 1895, 156 U.S. 537, 15 S.Ct. 406, 39 L.Ed. 524:

"The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the

officers charged with the duty of acting upon his application."

In *Clements v. Warner*, 1861, 24 How. 394, 16 L.Ed. 695, the Court said:

"The policy of the Federal government in favor of settlers upon public lands has been liberal. It recognizes their superior equity, to become the purchasers of a limited extent of land comprehending their improvements, over that of any other person."

We cannot find in this record a scintilla of evidence pointing to lack of good faith.

The Department for at least 3 decades has been particularly liberal in accepting minimal compliance with the cultivation requirements of homesteads in Alaska. Relief was granted to an Alaskan homesteader even though he cultivated 3-3/4 acres, in lieu of the 10 acres required, of an 80-acre entry. *Grady Allen Phillip*, A-24188 (February 26, 1946). Where an entryman attributes his failure to cultivate the land to shortages of tractors, farm machinery, and tractor fuel, his showing was accepted. *Frank L. Price*, A-23982 (June 5, 1945).

A failure to meet the cultivation requirements during World War I was excused because help was unavailable. *United States v. Heirs of Amelin G. Scace*, A-5566 (October 6, 1923).

Even in the lower 48 states, the Department has from time to time evinced liberality vis-a-vis the cultivation requirements. A mere breaking of the soil without planting seed was excused in *Thomas C. Burns*, 9 L.D. 432 (1889), on the basis of the entryman's statement that "after the breaking was done, it was too late to plant it to crops." See *Clark S. Kathan*, 5 L.D. 94 (1880); *John E. Tyrl*, 3 L.D. 49, 50 (1884). In contradistinction, as noted above, Nelson cultivated the full acreage required by law albeit his valiant efforts resulted in little.

I would grant Nelson the patent he has earned.

Frederick Fishman
Administrative Judge

