

The notice of contest and hearing must be served personally "in all cases when possible, if the party to be served is resident in the state or territory in which the land is situated, and shall consist in the delivery of a copy of the notice to each person to be served." Rule 9, Rules of Practice. If this rule be not complied with, the local officers acquire no jurisdiction to hear and determine the contest. *Driscoll v. Johnson* (11 L. D., 604); *Farrier v. Falk* (13 L. D. 546).

The contestee was a resident of Kansas, the State in which the land in dispute is situated, and that fact was known to the contestant, as he mailed the notice of contest to the contestee at Newton, Kansas.

The attorneys for the contestee entered a special appearance for the purpose of contesting the jurisdiction of the local officers. This action did not confer jurisdiction upon that tribunal. *Branner v. Chapman* (11 Kan., 118); *William W. Waterhouse* (9 L. D., 131); *Davison v. Beatie* (14 L. D., 689); *Harkness v. Hyde* (98 U. S., 476).

Neither did the attorneys for Rice waive the illegality in the service of said notice by making the motion for a continuance, and afterwards participating in the trial. In *Harkness v. Hyde*, *supra*, the principle is clearly stated, as follows:

Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only when he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived.

Your judgment is affirmed.

---

#### PRACTICE—NOTICE—STONE LAND—SETTLEMENT RIGHT.

##### CLARK ET AL. *v.* ERVIN.

A stipulated postponement to a day certain waives all objection as to notice of the time fixed for trial.

Land chiefly valuable for the building stone it contains is not by such fact excluded from entry under the settlement laws.

Prior to the act of August 4, 1892, there was no authority for a placer location on land chiefly valuable for a deposit of common building stone, and a location of such character will not defeat a subsequent settlement claim initiated prior to the passage of said act.

*Secretary Noble to the Commissioner of the General Land Office, February 13, 1893.*

On January 16, 1893, I directed you to return the record in the case of *M. S. K. Clark and William Elmendorf v. Robert N. Ervin* for further consideration. I am now in receipt of said record and the unproulgated judgment of the Department dated January 9, 1893.

The record shows that the land in question, to wit: the NE.  $\frac{1}{4}$  of Sec. 14, T. 1 N., R. 7 E., Rapid City, South Dakota, was located as a stone placer claim on May 27, 1889. Subsequently Clark and Elmendorf became possessed of the whole tract by purchase. On November 12, 1889, Robert N. Ervin settled on the tract, soon after filed his pre-emption declaratory statement therefor, and on April 15, 1890, advertised that he would make final proof and payment for the land on June 14, 1890. Clark and Elmendorf protested against his proof, alleging that the ground was only valuable for the stone it contained.

A trial was had between the parties on June 19, 1890. Thereafter the register and receiver rejected the proof of Ervin, and recommended that his filing be cancelled, holding that the tract was chiefly valuable for the stone it contained.

On November 19, 1890, you considered the case on appeal, affirmed the finding of the register and receiver, and held "that the value of the tract is for its minerals only, and therefore subject to disposal under the U. S. mining laws."

Ervin appealed from your judgment to this Department, contending that you erred in holding that the tract was more valuable for its stone than for agriculture, and that you should have refused to consider the evidence in the record, because taken irregularly and without due notice to claimant.

The last named contention is untenable, for the record shows that he stipulated in writing that the trial should be postponed until June 19, and on that day he appeared and submitted proof, etc.

Even if there was any irregularity about the trial being held when it was, and none is shown, he waived all objections thereto by entering into said stipulation.

The proof shows that this tract is more valuable for the building stone it contains than it is for agricultural purposes. Still I do not think that this showing is at all important in arriving at the rights of the parties in this case. The tract here in question is not shown to be mineral land, hence it may properly be entered under the settlement laws.

It might also, since August 4, 1892, be entered under the placer law, since the act of that date (27 Stat., 348), provides that land chiefly valuable for building stone may be entered under the placer laws. It does not follow, however, that land chiefly valuable for building stone shall be considered as mineral land, or that such land may not also be entered under the homestead law, or that it might not have been entered under the pre-emption law prior to its repeal. It then becomes a question of the priority of the claims.

The tract was located as a placer claim on May 27, 1889, which was several months prior to the initiation of Ervin's pre-emption claim. It follows, I think, that if the placer location was a valid one, the claim of Ervin must be rejected. After a legal mineral location has been

made, a claim may not be initiated for the same land under the settlement laws, unless on proof furnished it is shown that the location is invalid, or that the ground is not mineral, or that no discovery has been made; in other words, the mineral claim must be disposed of before an entry can be made under the homestead law.

In this case I find that no law existed allowing land chiefly valuable for common building stone to be entered under the placer law prior to August 4, 1892. *Conlin v. Kelly* (12 L. D., 1.)

Since the claim of Ervin was initiated long before this act of August 4, 1892, *supra*, was passed, he is entitled to the land, if he has in good faith complied with the pre-emption law, because the placer location was illegal, the tract not being subject at that time to such location. The land was therefore public land at the date of Ervin's settlement, and filing, and while it is shown to be chiefly valuable for building stone found on portions of it, it still has considerable value for agricultural purposes, and is worth, according to the evidence, at least \$5 per acre for that purpose.

The proof fails to show that Ervin has not acted in good faith. In fact, it is shown that he established residence on the tract on November 12, 1889, and has never abandoned it. He built a house, the materials alone of which cost \$75. He furnished his house with all necessary furnishings for sleeping and cooking and eating. He was occasionally absent for a few days to earn money upon which to maintain himself. He has never been away as much as ten nights altogether after his residence was established until after his final proof was made; he was on the land every day in November after making settlement on the 12th, and when working in town invariably went to his home after his work was finished. He kept two horses on the land, and while he did not cultivate the land extensively, he made efforts to have it plowed. He did have three acres plowed, and paid one Boomer \$20 for plowing five acres. The cultivation by Ervin is shown to have been but meagre, but his other improvements, and his continuous residence on the tract indicate a bona fide intention on his part to take this land as a home to the exclusion of one elsewhere.

Your judgment is therefore reversed, and you are directed to approve the proof of Ervin.

The departmental decision of January 9, 1893, recalled by letter of January 16, 1893, is modified as herein stated, and the claim of the mineral locators is rejected for the reasons herein given.