unlawful or invalid in any respect, and that there was no evidence in said pretended contest upon which the said pretended entry of the said Evans should or could legally have been allowed." These allegations, however, merely state the opinion of the pleader with reference to the evidence which was laid before the department, and for that reason they are merely conclusions of law. To enable a court to decide whether the conclusions so stated are right or wrong, all the testimony with respect to which the aforesaid opinion is expressed should have been set out, inasmuch as the question whether there is any evidence tending to establish a given fact is a question of law, which can only be determined after all the testimony has been considered and examined.

Our attention is also directed to other allegations of the bill, which charge, in substance, that, at the time of his entry on the lands in controversy, Evans had exhausted his power to take up coal lands under the laws of the United States; that he completely abandoned all his right, title, and interest to the lands long prior to his pretended entry; and that he failed to show in his declaratory statement that he had discovered any coal on said lands, or had opened a mine thereon. These allegations are made without any apparent reference to the contest before the land department, or to the evidence with respect to such allegations which may have been laid before the department in the course of the contest, or to the findings of the department with respect thereto. The allegations are made precisely as they might be if the issues tendered were open to consideration in the case at bar, entirely unaffected by the findings and decision of the land department. This theory is erroneous. The contest having been tried and determined before a special tribunal constituted for that purpose, its judgment can only be overturned for errors of law, by showing that it misconstrued or misapplied the law applicable to the case made before the land department, and the bill of complaint does not advise us what evidence was produced before the department relative to Evans' qualifications to enter coal lands, or relative to his acts of abandonment. This court cannot say that the law was misconstrued by the officers of the land department, unless their findings upon questions of fact are disclosed, or enough undisputed facts are disclosed, which were proven before the department, to make it plain that an error of law was committed, and that the complainant company was thereby deprived of its rights. Marquez v. Frisbie, 101 U. S. 473, 476; Sanford v. Sanford, 139 U. S. 642, 647, 11 Sup. Ct. 666. No decision by the land department would have any weight, or afford any protection to a successful litigant in that department, if, without any statement of what the facts were as presented to the department, the whole controversy could be opened in the courts by general allegations, such as are found in the present bill, that the successful litigant had exhausted his right to enter land, or was otherwise disqualified, or had abandoned his entry. These are matters which were properly cognizable before the land department when the contest was pending. The presumption is that all such questions were brought to the attention of the department, and were duly considered and properly decided. The

burden was on the complainant, therefore, when it sought to reopen the controversy for errors of law, to show what the facts were before the land department to which the law was applied. We are forced to conclude that, by the averments of the present bill, this burden was not successfully discharged.

It is insisted, however, that the bill states a cause of action, and sufficiently shows an error of law, such as invalidates the decision of the land department, within the ruling made in the case of Sanford v. Sanford, supra. This position, we think, is untenable. In the case referred to, which was a suit to enjoin an action of ejectment brought by the holder of a patent, the proceedings before the land department in which the patent had been obtained showed beyond controversy that the patentee had been allowed to file a second declaratory statement against certain land, which was not embraced in his first pre-emption claim, while he continued to hold and occupy the land that he had originally entered. The court held that the filing of such second pre-emption claim was expressly prohibited by section 2261 of the Revised Statutes of the United States, and that it clearly appeared that the land department had misconstrued the law, and deprived the plaintiff of his rights, by permitting such second filing to be made, and in issuing a patent thereon. It was on this ground alone that relief was afforded to the plaintiff against the action of the land department. We fail to see that the decision in question lends any support to the complaint which was filed in the case at bar.

It is finally contended that the action of the land department in canceling the McMaster entry, and in granting the patent to Evans, was void, because the bill shows that no notice of the contest which was inaugurated by Evans was given either to McMaster, or Bell, or to Bell's lessee. It is worthy of comment that the bill contains no direct averment that the complainant company had notice of the contest, but, in view of its failure to allege that no such notice was given, it must be presumed that it was duly notified of the proceedings in question; that it took an active part therein; that it had full opportunity to assert before the land department all the defenses against the Evans entry which it now makes; and that it was eventually defeated. Under these circumstances, we are of opinion that the action of the land department in canceling the McMaster entry is binding upon the complainant, unless such action is successfully assailed for fraud or mistake of law, notwithstanding the fact that its predecessors in interest, who had parted with all of their title to the land in dispute, were not notified of the pending controversy. It results from these views that the demurrer to the bill was properly sustained, and the decree of the circuit court is therefore affirmed.

EVANS et al. v. DURANGO LAND & COAL CO. et al.[1]

(Circuit Court of Appeals, Eighth Circuit. April 12, 1897.)

No. 850.

1. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.
A suit in which the complaint sets up an entry of public land by the plaintiff and the subsequent issue of a patent, and seeks to establish an interest in the land during the interval, by an application of the doctrine of relation, is a case of federal cognizance, since the determination of the applicability of such doctrine to the case requires the construction of federal statutes and a consideration of the effect of acts thereunder. Romie v. Casanova, 91 U. S. 379, distinguished.

2. SAME—TRESPASS.
A complaint charging a continuing trespass, and demanding a lump sum as damages, states but a single cause of action, though the title under which the plaintiff claimed was different at different periods of the time covered by the trespass; and, if the adjudication of one such title involves a federal question, the case is one of federal cognizance, though no such question is involved in the other title.

3. PARTIES—SUIT BY ASSIGNOR AND ASSIGNEE.
The rule that a debtor cannot be sued for a part of an entire demand does not prevent the maintenance of a suit by the assignee of a part of such a demand and his assignor, holding the remainder, to recover the whole demand.

4. TRESPASS—PLEADING.
Under the Code of Procedure of Colorado, a complaint in an action for the wrongful removal of coal from certain land, need not allege that the plaintiff was in possession at the time of the alleged trespass.

5. SAME—LAND PATENTS—TRESPASS.
A patent for public land will not be held to take effect, by virtue of the doctrine of relation, as of the date of the initial step taken by the patentee, to obtain a title to the land, where it appears from the allegations of the complaint filed by the patentee that the rights by him acquired by such initial step were lost by his lack of diligence, and the effect of such an application of the doctrine of relation would be to render a party accountable for a large quantity of coal mined on the land, who had made a cash entry of the land after the patentee's right to the land had apparently been abandoned, and who had opened and developed mines at large expense, and had worked them for several years, with the knowledge of the patentee. Sanborn, Circuit Judge, dissenting, on the ground that the patentee had an interest from the taking of the first step, which ripened into a title, and consequently that the doctrine of relation did apply.

In Error to the Circuit Court of the United States for the District of Colorado.

This was a suit at law brought in the district court of Gunnison county, Colo., by Roger C. Evans, R. G. Carlisle, John Tetard, and Sprigg Shackleford, the plaintiffs in error, against the Durango Land & Coal Company, John A. Porter, William A. Bell, James H. Barlow, and William J. Palmer, the defendants in error, to recover the value of certain coal alleged to have been mined and removed from certain lands situated in Gunnison county, Colo. The suit presents another phase of the controversy which was considered in the case of Coal Co. v. Evans, 80 Fed. 425. In the trial court the case was tried and decided on demurrer to the complaint, which was in the following form: "Plaintiffs, complaining of the defendants, allege: First. That Roger C. Evans, one of the plaintiffs herein, who was at the time a citizen of the United States, and in every respect duly qualified so to do, filed in the United States land office, at Leadville, Colo., on October 2, 1880, his certain coal declaratory statement, number 44, claiming the east half of the northwest quarter of section ten, and the north half of the northeast quarter of section four, all in township fourteen south, of range eighty-six west of the sixth principal meridian, under the

[1] Rehearing denied May 24, 1897.

provisions of the statutes of the United States relating to the sale and disposition of the coal lands of the United States. That on the 7th day of October, 1880, the said declaratory statement was suspended by order of the commissioner of the general land office of the United States, and that the right of said Evans to acquire further title to said lands was suspended and held in abeyance by the United States until such time when the necessary and proper instructions should have been issued by the said commissioner. That on the 26th day of November, 1881, and during the time when the rights of plaintiff Roger C. Evans were suspended as aforesaid, one Byron McMaster made, executed, and delivered to defendant William A. Bell, as trustee, a warranty deed for the lands above described. That the said defendant Bell took the said conveyance from the said McMaster, for and in the interest of himself and the defendants Porter, Palmer, Barlow, and others. That thereafter, and during the suspension of the rights of plaintiff Evans, as aforesaid, to wit, on the 1st day of December, 1881, the said Byron McMaster made a pretended entry of the said lands in the United States land office at Leadville, Colo. That the said pretended entry was made while the said lands in section four were withdrawn from sale by the United States, and without notice to plaintiff Evans. That, while said pretended entry purported to be made for the sole use and benefit of the said Byron McMaster, it was made for the use and benefit of defendants Bell, Porter, Palmer, Barlow, and others, who were interested with defendant Bell in the transaction. That said pretended entry was fraudulent and void, by reason of the facts stated aforesaid. That thereafter the necessary and proper instructions relating to the sale and disposition of the said lands were issued by the commissioner of the general land office of the United States, and plaintiff Roger C. Evans was notified that he must appear at the United States land office at Gunnison, Colo., and make his final proof, enter and pay for said lands; and that within due time from the date and service of said notice, to wit, on the 27th day of June, 1892, plaintiff Roger C. Evans appeared at the United States land office at Gunnison, Colo., made his final proof for the said land, and offered to pay for and enter the said land; and that the register and receiver of the said land office refused to accept the money tendered in payment for said land, as by a rule of the interior department of the United States they were required to do, on account of the erroneous and fraudulent entry of the said McMaster, and referred the matter of the rights of claimants for the said lands to the commissioner of the general land office of the United States; and that thereupon plaintiff Roger C. Evans made his affidavit of contest against the claim of said McMaster, William A. Bell, and the Durango Land & Coal Company, and charged that the said claim of the said parties was based upon the fraudulent entry of McMaster. That said entry was made for the use and benefit of William A. Bell, the Durango Land & Coal Company, and others. That it was made without notice to plaintiff Evans that said entry was not made for the use and benefit of said McMaster, and was fraudulent and void; and prayed that the entry of said McMaster be canceled, and that he (the said Roger C. Evans) be allowed to enter the said lands. That upon the filing of said affidavit, and by reason of the charges made therein against the entry of said McMaster, the commissioner of the general land office of the United States ordered that there should be held at the United States land office at Gunnison, Colo., a contest and hearing to determine the rights of the claimants of the said land. That said order for contest was issued on the 17th day of September, 1892, and that upon the 27th day of September, 1892, the register and receiver of the United States land office at Gunnison, Colo., issued their notice of the hearing of said contest, and fixed the date for said hearing for November 15, 1892. That the defendant Bell deeded the said lands to the defendant the Durango Land & Coal Company on the 8th day of January, 1885, and before the institution of said contest. That the notice of said contest was directed to and duly served on the said Byron McMaster, William A. Bell, and the Durango Land & Coal Company, and they and each of them were required and commanded to appear on the 15th of November, 1892, at the said land office, and offer their proofs to sustain their claim to the said land."

The complaint further showed, in substance, the following facts: That the contest so as aforesaid inaugurated was duly heard by the register and receiver of said land office; that said officer decided the contest on January 18, 1893,

after all the proofs were in, and after the argument of counsel, said officer holding that, as the entry by said McMaster was made presumably for the use and benefit of the Durango Land & Coal Company, the same was fraudulent and void, and should be canceled; that an appeal from such decision was subsequently taken to the commissioner of the general land office by the Durango Land & Coal Company, and to the secretary of the interior, and that the decision aforesaid was affirmed by each of said officers; that, in pursuance of such decision, the entry of McMaster was canceled, and the said Evans was thereupon allowed to enter the lands; that said Evans, in pursuance of such decision, accordingly entered and paid for the lands on December 31, 1894, receiving the usual receiver's receipt in duplicate for the money so paid; that on February 28, 1895, a patent was issued by the United States to the said Evans for the east half of the northwest quarter of section ten, in township fourteen south, of range eighty-six west; that on March 20, 1895, Evans sold and conveyed to the plaintiff Sprigg Shackleford an undivided two-thirds interest in the lands so entered by him, and a two-thirds interest in any claim that he (the said Evans) might have against the defendants herein, on account of the extraction of coal from said lands; that, at the same date, the plaintiff Shackleford sold and conveyed to the plaintiffs R. G. Carlisle and John Tetard an undivided one-third interest in the land and claim which he had thus acquired from said Evans; that between October 2, 1880, and March 20, 1895, the plaintiff Evans was the owner of and entitled to the exclusive use and occupation of the aforesaid east half of the northwest quarter of section ten, in township fourteen south, of range eighty-six west, situated in Gunnison county, Colo., and that from March 20, 1895, all of said plaintiffs had been the owners of said land, and entitled to the exclusive use and occupation of the same; that between January 8, 1885, and August 26, 1895, the defendants jointly, by their agents and employés, wrongfully entered into and upon said lands last described, and into a vein of coal under the surface of said land, and wrongfully mined and extracted therefrom 1,445,000 tons of coal, and converted the same to their own use. In view of the premises, plaintiffs demanded judgment against the defendants for the sum of $1,445,000.

The defendants below entered their appearance to the suit, and in due time filed a petition and bond for the removal of the cause to the circuit court of the United States for the district of Colorado. In the latter court a motion to remand the case to the state court was made and overruled. The defendants then filed a demurrer to the aforesaid complaint, which demurrer was sustained, and a final judgment was entered, dismissing the suit at the plaintiffs' cost. The plaintiffs sued out a writ of error, assigning as grounds for reversal that the motion to remand the case should have been sustained, and that the demurrer should have been overruled.

John R. Smith and Sprigg Shackleford (S. D. Crump with them on the brief), for plaintiffs in error.

Lucius M. Cuthbert and David C. Beaman (Henry T. Rogers and Daniel B. Ellis were with them on the brief), for defendants in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The motion to remand the case to the state court appears to have been properly overruled. If the plaintiffs had contented themselves, as they might have done, with the simple averment that they were the owners of the land in controversy, and that the defendants had wrongfully entered upon said lands, and unlawfully removed coal therefrom, to the plaintiffs' damage in a certain sum, it is doubtless true that the complaint would not have disclosed a federal question, and, under repeated decisions, the venue could not have been changed

to the federal court. Tennessee v. Union & Planters' Bank, 152 U. S. 454, 14 Sup. Ct. 654; Chappell v. Waterworth, 155 U. S. 102, 15 Sup. Ct. 34; Postal Tel. Cable Co. v. Alabama, 155 U. S. 482, 15 Sup. Ct. 192; Kansas v. Atchison, T. & S. F. Ry. Co., 77 Fed. 339. But the complaint was not so drawn. It was carefully framed for the purpose of showing that, by filing his so-termed "coal declaratory statement" on October 2, 1880, the plaintiff Evans acquired such an interest in the lands in controversy that when a patent therefor was issued on February 28, 1895, he became entitled to recover the value of all coal which had been mined and removed from the land without his consent between the dates last aforesaid. Inasmuch as the plaintiffs demanded judgment for coal removed long prior to December 31, 1894, when Evans was permitted to enter and pay for the lands, and during a period while the defendants were evidently in the possession of the same under the uncanceled entry of McMaster, the question is presented by the complaint whether the doctrine of relation, which is invoked, entitled the plaintiff Evans, after he had received a patent, to demand compensation for all trespasses committed on the land subsequent to the filing of his declaratory statement. It is true that the doctrine of relation is a doctrine of the common law, but the fact remains that it cannot be applied in the present case without considering, in the first instance, the nature and extent of the interest in the land which Evans acquired by filing his declaratory statement, nor without determining how far his rights under such declaratory statement were affected by the alleged order of suspension made by the commissioner of the general land office on October 7, 1880, nor without considering what were the rights of the parties with respect to the lands while the alleged contest between them was pending and undetermined in the general land office. These are all questions which involve an examination and construction of the laws of the United States before the doctrine of relation, on which the plaintiffs rely, can be intelligently applied. The case therefore bears no analogy to a class of cases in which it is held that a suit is not one of federal cognizance, because the title to certain land which is in controversy originally emanated from the United States, provided that title is not in dispute, but the litigation affecting the land relates to other matters. Romie v. Casanova, 91 U. S. 379. In the case at bar, it appears, we think, from the face of the complaint, that the claim preferred by the plaintiffs cannot be adjudicated without construing certain federal statutes, and considering the effect of certain proceedings in the land office which have been taken thereunder. It follows, therefore, that the case is one of federal cognizance, and that the motion to remand it was properly denied. St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. R. Co., 32 U. S. App. 372, 15 C. C. A. 167, and 68 Fed. 2.

Passing to the question whether the complaint states a cause of action, it is to be observed that it charges a continuous trespass committed by the defendants, which commenced January 8, 1885, when the land was conveyed to the Durango Land & Coal Company, and ended on August 26, 1895. The alleged trespass covers a period of about eight months from and after December 31, 1894, when, as the

complaint shows, Evans was allowed to enter and pay for the coal lands in controversy, and received a receiver's receipt therefor. No reason is perceived, therefore, why the complaint did not show a good cause of action as to the coal mined and removed subsequent to the latter date, whatever may be the view ultimately entertained as to the plaintiffs' right to recover for the coal mined and removed prior thereto. It is suggested, however, that the circuit court of the United States for the district of Colorado had no jurisdiction of the cause of action for trespasses committed subsequent to December 31, 1894, and that so much of the complaint as charges trespasses after that date may be ignored. This suggestion appears to be based on the assumption that the trespasses last mentioned were separate and distinct from those committed prior to December 31, 1894, and that an action to recover damages therefor involved the consideration of no federal question. In other words, it seems to be taken for granted that the complaint stated two causes of action, one of Federal cognizance, and another that was exclusively cognizable by the local or state courts. We think that this assumption is untenable. The complaint, as we view it, states but a single cause of action for a continuous trespass of some years' duration. It contains but one count, and the damage claimed is a lump sum for the injury done to the land during the entire period that it is alleged to have been wrongfully occupied by the defendants. It is doubtless true that so much of the plaintiff's claim as is founded upon trespasses committed prior to December 31, 1894, is subject to certain defenses, which cannot be as well made against the claim for trespasses committed subsequent to that date; but the fact that different defenses may be pleaded to parts of an entire claim does not establish that the claim itself is made up of different and independent causes of action. Pirie v. Tvedt, 115 U. S. 41, 5 Sup. Ct. 1034, 1161; Railroad Co. v. Ide, 114 U. S. 52, 5 Sup. Ct. 735; Barth v. Coler, 19 U. S. App. 646, 649, 9 C. C. A. 81, and 60 Fed. 466. Even if it happens, therefore, that the plaintiffs will only be able to show a right to recover for such coal as was mined and removed subsequent to the entry of December 31, 1894, yet that result will not deprive the federal court of its right to enter a judgment for the value of coal so mined and removed. The cause of action stated in the complaint is clearly single and indivisible, and the plaintiffs have so stated their cause of action as to show that an adjudication upon their claim as presented necessarily involves the construction of federal statutes. It results from these facts that the trial court, by the proceedings for removal, lawfully acquired jurisdiction of the entire case; that is to say, the right to enter a judgment for any portion of the demand which the plaintiffs showed themselves entitled to recover, and that jurisdiction could not be affected by subsequent events. If, for any reason, the plaintiffs fail to recover for the injury done to the land prior to December 31, 1894, such failure will no more impair their right to recover for injuries, if any, done subsequently, than would a failure to prove that they had sustained the entire amount of damage laid in the complaint, or a failure to prove that the damages exceeded $2,000. St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. R. Co., supra.

It is further urged that the demurrer was properly sustained, because the complaint shows that the plaintiff Evans had assigned an interest in the cause of action sued upon to his co-plaintiff Shackleford, and that the latter had, in like manner, sold and assigned a part of his interest to the plaintiffs Carlisle and Tetard. This contention is without merit. While it is true that the law does not permit a debtor to be sued for a part of an entire demand which has been assigned by his creditor to a third party, yet the doctrine in question does not prevent an assignment of a part of a demand, provided the assignor and the assignee join in a suit to enforce the entire claim. The rule which is invoked by the defendants rests upon the ground that a debtor ought not to be annoyed by several suits brought by different parties to collect parts of a claim or debt, which might have been enforced by the creditor in a single suit. The reason upon which the rule against splitting a cause of action rests has no application to a case like the one at bar, where all the persons who have acquired an interest in the demand join in a single action to enforce it. It is a matter of no concern to a debtor whether his creditor assigns an interest in the debt to third parties, provided no more than one suit is brought to collect it.

A further contention that the complaint, as a whole, is insufficient, because it fails to allege that the plaintiffs below were in possession of the land in controversy at the date of the alleged trespass, is, in our opinion, equally without merit. The action was brought in a state where the Code of Procedure has been adopted, and the various forms of action known to the common law have been abolished. The owner of property, whether in or out of possession, is entitled to recover for all injuries done to it by a wrongdoer. At common law, if he was in possession when the injury was done, he might obtain redress therefor in an action of trespass quare clausum fregit, whereas, if he was out of possession, he was compelled to bring an action on the case. These common-law forms of action having been abolished by the Code, a cause of action is sufficiently disclosed if the fact of ownership in the plaintiff, and the fact that an injury has been done to the land without the permission of the owner, are stated in ordinary and concise language. Fitzpatrick v. Gebhart, 7 Kan. 35, 42, 43. Tested by this rule, the complaint is sufficient.

This brings us to the question of chief interest and importance which arises in the case, namely, whether the complaint shows a right of recovery in the plaintiffs for the coal mined and removed from the land in controversy prior to December 31, 1894, when Evans entered the land, and paid the purchase money. It may be conceded that a patent for public land has, on several occasions, been held to take effect as of the date of the initial step taken by the patentee, under the laws of the United States, to obtain a title to the land. Landes v. Brant, 10 How. 348, 372, 373; Lynch v. Bernal, 9 Wall. 315, 325; St. Onge v. Day, 11 Colo. 368, 18 Pac. 278; Shepley v. Cowan, 91 U. S. 330, 337; Cothrin v. Faber, 68 Cal. 39, 4 Pac. 940, and 8 Pac. 599; Chavez v. Chavez De Sanchez (N. M.) 32 Pac. 137, 145. Nevertheless, there appears to be no hard and fast rule giving a patent effect by relation as of a date anterior to the time when an entry is fully con-

summated by the payment of the purchase money, or by the doing of some other equivalent act, such as the surrender of a land warrant or the selecton of land to supply an ascertained deficiency in a land grant. It is generally agreed that, when such acts are performed, the equitable title becomes complete, subject, of course, to the right of the land department to cancel the entry, or the selection, prior to the issuance of the patent, for good and sufficient cause shown, why the entry or selection should not have been allowed. The doctrine of relation is a legal fiction, which was invented and is applied solely for the protection of persons who, without fault of their own, would otherwise sustain an injury. Being of equitable origin, and designed to prevent fraud and injustice, it is a doctrine which is never applied when it would have a contrary effect. Gibson v. Chouteau, 13 Wall. 92, 101; Reynolds v. Plymouth Co., 55 Iowa, 90, 93, 7 N. W. 468; Calder v. Keegan, 30 Wis. 126; Musser v. McRae, 44 Minn. 343, 46 N. W. 673; Hussman v. Durham, 165 U. S. 144, 17 Sup. Ct. 253. In the case last cited (Hussman v. Durham) the supreme court said:

"A title by relation extends no further backwards than to the inception of the equitable right. * * * In other words, the United States does not part with its rights until it has actually received payment, and if, by mistake, inadvertence, or fraud, a certificate of location, which is equivalent to a receipt, is issued, when in fact no consideration has been received, no equitable title is passed thereby; and a conveyance of the legal title does not operate by relation back of the time when the actual consideration is paid."

In that case the court accordingly declined to give a patent effect by relation as of the date when the initial step was taken to acquire a title to certain public land by the location of a land warrant, where the result of giving it such effect would have been to subject the land to the claims of the holder of a tax title, although he had paid taxes which were assessed when the land was apparently subject to taxation, and had afterwards expended money in improving it.

In the light of these principles the complaint must be examined. The plaintiffs found their right to recover for coal mined and removed prior to December 31, 1894, on the allegation that Evans filed a coal declaratory statement on October 2, 1880. The filing of this statement, assuming the facts stated therein to be true, gave Evans, in the language of the statute, "a preference right of entry," nothing more and nothing less. Section 2348, Rev. St. U. S. Manifestly, it did not create such a complete equitable title as is acquired when public land is entered and paid for. To have made his equitable title complete, Evans should have proved his rights and paid for the land within one year after October 2, 1880. In default of so doing, the statute (section 2350, Rev. St. U. S.) declared that the land filed against should be subject to entry by "any other qualified applicant." The complaint shows affirmatively that this was not done; that no payment was made by Evans until December 31, 1894; and that, after the year limited for making payment had expired, Byron McMaster was permitted by the officers of the land department to enter the land, on the theory, no doubt, that Evans' preference right of entry had been forfeited. The only reason stated in the complaint why the entry of McMaster was eventually canceled by the officers of