51ST CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { MIS. DOC. No. 238.

OFFICIAL OPINIONS

OF

THE ATTORNEYS-GENERAL

OF

THE UNITED STATES,

ADVISING THE

PRESIDENT AND HEADS OF DEPARTMENTS

IN RELATION TO THEIR OFFICIAL DUTIES,

AND EXPOUNDING THE CONSTITUTION, TREATIES WITH FOREIGN GOVERNMENTS AND WITH INDIAN TRIBES, AND THE PUBLIC LAWS OF THE COUNTRY.

EDITED BY

A. J. BENTLEY, ESQ.

VOLUME XVIII.

[PUBLISHED BY AUTHORITY OF CONGRESS.]

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1890.

VOLUME XVIII.

CONTAINING

OPINIONS

OF

HON. BENJAMIN HARRIS BREWSTER,

OF PENNSYLVANIA,

AND

HON. AUGUSTUS H. GARLAND,

OF ARKANSAS.

ALSO CONTAINING OPINIONS GIVEN

BY

HON. JOHN GOODE, of Virginia,

Solicitor-General and Acting Attorney-General,

HON. GEORGE A. JENKS, of Pennsylvania,

Solicitor-General and Acting Attorney-General,

AND

HON. WILLIAM A. MAURY, of Virginia,

Acting Attorney-General.

TABLE OF TITLES.

OPINIONS

OF

BENJAMIN HARRIS BREWSTER, OF PENNSYLVANIA.

APPOINTED DECEMBER 19, 1881.

IMPORTED LEAF TOBACCO.

Clause in Schedule F of the act of March 3, 1883, chapter 121, imposing a duty upon "leaf tobacco," considered and commented on; and *advised* that the duty attaches to tobacco of the statutory description, irrespective of the bale or package in which it is imported, and that, consistently with the terms of the statute, bales and packages may be broken up in order to sort such different grades of leaf tobacco as may be contained therein.

DEPARTMENT OF JUSTICE,
April 23, 1884.

SIR: In yours of the 21st instant my attention is called to a clause in Schedule F of the act of 1883, chapter 121 (22 Stat., 503), which imposes duty upon "leaf tobacco." Without asking a direct question thereupon, you state a *doubt*, from which I gather that you desire advice whether that clause regards a *bale* or *package* as the dutiable unit of such leaf tobacco; and, if so, whether there is enough upon the face of it to indicate that Congress intended to refer to that bale or package which was known to commerce in March, 1883, so that a subsequent change thereof, with a view to avoid the duty imposed, may be regarded as fraudulent, and therefore be met by such counteracting administrative methods as may be found practicable.

The clause in question is as follows: "Leaf tobacco, of which eighty-five per cent. is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound."

I observe that nothing is said in the act as to *packages* or *bales*, or any other merely *commercial* form in which the merchandise is imported. Wholly irrespective of such com-

mercial form, the duty is levied directly upon the article rated by its qualities for certain sort of consumption; *i. e.*, into *wrappers*. A like remark is true of each of the seven paragraphs imposing duty upon tobacco.

Upon the face of the provision, therefore, I submit that the duty will attach to tobacco of the statutory description therein given, no matter what be the *vehicle* in which that tobacco is imported.

I submit further that such questions as arise touching the best way of administering the above statute, however important they may be practically, are at least inferior in degree to such as are presented by the words that convey the will of the legislature, and therefore give way to that will. No mere regulation can defeat a statute. So far as in any reasonable way is practicable, effect is to be given to the very words of the act; but no method that is impracticable will be supposed to have been intended.

I understand that no case has been presented within the exigencies of public business, and making use of the machinery of the custom house, to identify the boundary line betwixt such leaf tobacco as is dutiable at 75 cents per pound and such as is dutiable at 35 cents. If hereafter, in consequence of a co-operation by *producers* of tobacco in the *evasion* presented by your letter, the original *hands* shall be manipulated so as to mix light and heavy leaves in a manner that will practically prevent an identification at the custom-house of the above-mentioned *boundary line*, the matter will need interposition by Congress. At present, however, disregarding, as I think we may, certain terms (viz, *bale*, etc.) introduced into the discussion apparently because at one period in the administration of the law these were very properly supposed to meet questions then arising upon certain cargoes, etc.,—I say *disregarding* such terms, I advise that there is no reason in the words of the statute why *bales* and *packages*, etc., may not be broken up in order to sort such different grades of leaf tobacco as may be contained therein.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

HOLDING STATE OFFICES.

The holding of a State office by an officer or employé in the civil service of the United States is not prohibited by any act of Congress.

But by executive orders dated January 17 and 28, 1873, which have not been revoked, persons holding any civil office under the United States are expected, while holding such office, not to accept or hold any State, Territorial, or municipal office, with certain exceptions; otherwise they will be regarded as having resigned the office held under the United States.

In the case of an employé of the United States Fish Commission, not in the service by *appointment*, who holds the office of village constable: *Advised* that he may properly exercise the functions of the latter office, provided this does not interfere with the regular and efficient discharge of his employment under the Government.

DEPARTMENT OF JUSTICE,
April 26, 1884.

SIR: I have the honor to return herewith the letter of Prof. Spencer F. Baird, Commissioner of Fish and Fisheries, addressed to you under date of the 11th instant, which at his request and by your direction was referred to me for an opinion upon the inquiry therein submitted, namely, "Whether an employé of the United States Fish Commission, stationed in Massachusetts, is authorized to exercise the function of village constable with or without pay."

There is no act of Congress which forbids an officer or employé in the civil service of the United States to hold a State office. But by an Executive order, dated January 17, 1873, issued from the Department of State, notice was given that from and after the 4th of March, 1873, except as therein mentioned, "Persons holding any Federal civil office, by appointment, under the Constitution and laws of the United States, will be expected, while holding such office, not to accept or hold any office under any State or Territorial government, or under the charter or ordinances of any municipal corporation; and, further, that the acceptance or continued holding of any such State, Territorial, or municipal office, whether elective or by appointment, by any person holding civil office as aforesaid under the Government of the United States, other than judicial offices under the Constitution of the United States, will be deemed a vacation of the Federal office held by such person, and will be treated as a resigna-

tion by such Federal officer of his commission or appointment in the service of the United States." From the purview of this order, however, certain State offices, such as justices of the peace, notaries public, commissioners of deeds, etc., were excepted. Certain Federal officers were also excepted from its operation, so far as to permit them to accept and hold State offices where the same do not interfere with the discharge of their duties.

The above-mentioned order was supplemented by another Executive order, issued from the same Department, dated January 28, 1873. This second order further defines what offices and positions under the State, Territorial, or municipal governments are within, and what are not within, the scope and prohibition of the first order; and it declares that "employment by the day as mechanics or laborers in the armories, arsenals, navy-yards, etc., does not constitute an office of any kind, and those thus employed are not within the contemplation of the executive order;" but that "master workmen and others who hold appointments from the Government or from any Department, whether for a fixed time or at the pleasure of the appointing power, are embraced within the operation of the order."

I am not aware of any other regulations than those found in the executive orders aforesaid which apply to the holding of State offices by persons who are in the civil service of the United States. Nor am I aware that those orders have ever been revoked.

While the office of village constable, whether with or without pay, would seem to be of the class of offices which such orders forbid the holding of, yet unless the employé referred to in the inquiry of the Commissioner be an *officer* of the United States, unless he is in the service of the Government by *appointment* from some officer or Department thereof invested with the appointing power, he does not appear to come within the prohibition. Assuming that he is not in the service by appointment as above, I am of opinion that he is authorized (*i. e.*, not forbidden) to exercise the functions of the local office mentioned, and that he may properly do so, provided it does not interfere with the regular and efficient

discharge of his employment under the Government, of which the Commissioner or officer by whom he is employed can well be the judge.

I am, sir, very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

CLAIM OF VANN AND ADAIR.

Upon the facts presented in the matter of the claim of Vann and Adair for compensation for their services rendered the Osage Indians in 1869 and 1870 respecting the disposal of the lands of the latter: *Advised*, that the payment of the $50,000 awarded by the Commissioner of Indian Affairs and the Acting Secretary of the Interior in 1874 was a satisfaction in full of any claims that the said Vann and Adair had for their services.

DEPARTMENT OF JUSTICE,

April 30, 1884.

SIR: I have given attentive consideration to the claim of Vann and Adair, and to the questions in connection therewith, presented in yours of the 1st ultimo.

After the very careful statements of fact which accompany your letter, it is unnecessary that I shall do more than allude to such outlines thereof as are relied upon to support my conclusions.

It seems then that in 1868 the Osage Indians had entered into a project of treaty for the sale of 8,000,000 acres of land lying in Kansas to certain railroad companies at the price of $1,600,000, and that in November, 1869, this project was still pending unratified by the United States. Accordingly, during this last-mentioned month, the Osage tribe, having become dissatisfied with the bargain, employed Vann and Adair "to represent their interests before the Government of the United States at Washington, and in that connection to make effort to have set aside and annulled" the above treaty; and stipulated to pay them as compensation "one-half of any sum that through their efforts and representations might be allowed for the lands * * * beyond the amount stipulated for in said treaty." Thereupon the treaty was withdrawn by President Grant about the first of

the next session of Congress, and one bill, which proposed to give the Osages about 12½ cents for their land, having been defeated in January, 1870, an amendment was adopted to an appropriation act in July, 1870, which had the effect of giving to the Indians $1.25 per acre for the same. All occasion for effort by the claimants ceased in about eight months after their employment.

I do not find it asserted that the efforts of Vann and Adair as agents, etc., upon the subject-matter of their contract during the period important to the transaction by which the Indian Osages escaped from the toils of their *treaty* of 1868 and secured a position by which necessarily they in the course of time would receive for their lands some $10,000,000, or thereabouts—that is, from November 10, 1869, to July 15, 1870—were directed to any other matters than those mentioned above. Avoiding all appearance of meeting the strong terms in which the merits of Vann and Adair towards the Osages are characterized in some of the papers in the case by other strong terms which the law often applies to such transactions betwixt attorneys on the one hand and clients *inopes consilii*, and laboring under a notorious civil imbecility and inability upon the other, I content myself with saying that the arrangement of 1869 must be treated now as absolutely null and void. It lacks *legal* obligation, because it was never approved by the United States, acting through the President or otherwise; and it lacks *moral* obligation, because it displays upon its face that improvidence, the attribution of which to Indian tribes, by a general presumption of law, has given occasion for the necessity of *approval* as above. The treaty against which it was directed hardly awaited a first *push*. A pin prick seems to have disposed of it at once. Nor is there any appearance that the subsequent legislation—that, I mean, abandoned in January and that adopted in July—required important special prosecution. It seems that all this must easily have been anticipated by intelligent persons acquainted with the circumstances in November, 1869, and accordingly that to such the chances at that time appeared good for making under the terms of their contract, with but little trouble and in no long time, a fee of from one to several millions of dollars.

It is significant of the validity of this contract in point of fairness that the claimants appear never to have asked for its *approval*, and that they abandoned all claim thereunder as soon as they set about discussing with their clients the claim for compensation.

It is necessary to have a definite view of the character of the agreement of 1869 in order properly to judge of that of 1873. It is suggested on behalf of Vann and Adair that the former was binding upon the Osages, and therefore that they appear in this contention upon the footing of persons who have displayed great generosity—having voluntarily yielded up more than $2,000,000 of a justly earned compensation and contented themselves under the agreement of 1873 with less than 10 per cent. of what was fairly due. In my opinion there is, upon the contrary, no ground upon which the contract of 1869 can be considered to have imposed upon the Osages the debt therein defined, either as a legal or equitable obligation.

The most that can be said about it is that it created a relation because of which Vann and Adair had a right to be paid by the Indians whatever their services should be fairly estimated at after these had terminated. In other words, by performing services for which they had been asked, they were entitled afterwards to an account upon the footing of a *quantum meruit*. They must be regarded and treated as *reasonably intelligent* persons. They evidently claim at least *so much* in the present transaction. By failing, then, to submit their *contingent* compensation to the judgment of the President during the time that the contingency existed, they must be taken to have waived a consideration of that element, and to have put their case simply upon, as it were, a *count* for work and labor done.

That was really their situation before the Osage council in February, 1873, as well as before the Secretary of the Interior, and the Commissioner of Indian Affairs in July, 1874. In this connection I cannot avoid saying that their professions (conveyed in the agreement of February, 1873), that it was because of "sympathy and brotherly feeling" towards the Osages that they were willing to *reduce* their first fee and to accept of $330,000 (again reduced by the council to

$230,000), as if it were a modest compensation *ex æquo et bono* for what they had done, partakes strongly of the *farcical.* They seem to have partaken of the delusion that by this latter transaction they were themselves *benefactors*, and not beneficiaries; were surrendering, and not receiving, a thing of value.

This view, as I have already said, is plainly inadmissible.

Supposing (as I shall for this argument admit) that all other requisites, except *approval*, for a valid contract under section 2103, Revised Statutes, exist here, I think that the mere circumstance that the present contract at the time of its presentation for approval in 1874 had been *executed* did not except it (as is suggested in the papers) from the operation of that section. It was at that time a contract requiring the special *approval* in that section provided; the question presented being whether the services of Vann and Adair were worth *ex æquo et bono* $230,000, or if not so much, then what?

I am not called upon to rejudge the terms of the approval that was given. The claimants received $50,000 for services the substantial part of which was included within nine months. Let it be allowed that those services were faithful (although the virtue of faithfulness to a cause in which one reckons one's self to be an equal partner is neither very refined nor very heroical) intelligent, and valuable, yet $25,000 apiece compensation seems handsome. And if we allow that the *pregnant* period betwixt November, 1869, and July, 1870 (during which as we have seen all that was substantial must have been done), was followed by a sequel of some months' attendance, *ex abundanti*, at the Indian Office, during which Commissioner Parker enjoyed an opportunity of forming a favorable opinion as to their qualities and conduct, nevertheless that compensation does not become inadequate, or indeed less than ample, by being extended so as to cover even that. I mention this in order to say that the extent to which the approval of 1874 was given was to all appearance based upon arguments which might well control men of good sense and intelligence, and therefore, having been decided by persons whose duty it was to decide, *it established the operative form of the contract*, and made an end of controversy. Evidently

there was no place for *protest* by either party against *payments* thereunder. *That* would be mere idle grumbling. The approval determined all, and was a transaction as to which *protest* meant nothing.

It is said, however, that the Acting Secretary, who participated in this approval, afterwards stated that he *understood* his action therein not to be final, but only to warrant a payment upon *account;* and besides that, still later he stated in an official letter that after such approval the Commissioner and he had *opened* the approval for further evidence, etc.

A question is made as to the effect of these declarations.

As to the Secretary's statement of his understanding of what he and the Commissioner had done, I submit that it is without effect. Their act was required to be *in writing*, and also to be *indorsed* upon the written contract. That indorsement must speak for itself. This would be so even if *both parties* had expressed their *understanding*. Much more then when only one has done so.

Upon the face of the indorsement I think there is no room for doubt. The transaction is, although joint, *a single one*, and it is to be assumed that the parties *united* therein. If the words of one party be clear and those of the other not so clear, the latter would be referred to the former, and not *vice versa*. I submit that the language of the Secretary is not doubtful; but if it be so to any one, then, inasmuch as the language of the Commisioner cannot be so, *this* draws to its own the meaning of that of the Secretary. The case, it is to be observed, is not one of plain *contradiction*, for if it were there could have been no *approval* for any purpose.

Then as to the alleged *reopening*. If there be no evidence of a joint reopening beyond what was stated as above by the Secretary, I should doubt the *competency* thereof. I see no reason why rules upon like matters which have long prevailed on other tribunals of justice to the end of securing certainty and consistency in their action should not apply here, to the effect that an important quasi-judicial joint act in writing can be undone only by another joint act in writing, and that also *indorsed* upon the contract affected; that is, upon the original paper itself, or upon one duly attached

thereto. It is difficult to draw a line amongst the requirements of section 2103, and pronounce that those upon one side are *essential*, the others *not*. If, however, such a one be practicable, I am of opinion that an *indorsement* of all action that *approves*, or that *qualifies approval*, is essential.

I gather from the papers that there is no such indorsement.

I am inclined to doubt whether section 2103 intends that there shall be a *rehearing* as to an approval once indorsed and acted upon. The circumstances here do not require this point to be thoroughly considered; but as the course of the argument might otherwise intimate an opinion by me that repeated extensions of approval are competent, I may be allowed to enter this protest thereabout and save it for another occasion.

I may also add that if reopenings by action aliunde be competent, the action of Secretary Chandler, in December, 1875, put an end to the one under consideration. His pointed and vigorous language imports a review of the case upon *the merits* and a determination thereof.

I need hardly add that the joint approval made in 1874, supposing it not to have been opened by the parties thereto, is now beyond the control of any successors of those who gave it.

Upon the whole, then, I submit, in reply to your first question, that Vann and Adair never had a legal claim against the Osages under the contract of February 8, 1873, for the sum of $230,000; and, in reply to your second question, that the *approval* of that contract by the Commissioner of Indian Affairs and the Acting Secretary of the Interior (July 8 and July 21, 1874, respectively) was an authoritative definition of the same, so that the payment and receipt of the $50,000 thereby awarded was a satisfaction in full of any claims that Vann and Adair had for their services, and so of that for $230,000 mentioned in the contract of 1873 as ratified by the Osage council.

I understand that as a consequence of the above answers you desire no notice by me of the other questions propounded.

It may be that I should add, in connection with the application (May 21, 1877) of the governor, chief counsellor, and business committee of the Osages addressed to the President, asking that the claimants should be paid the remainder due

upon the contract of 1873, which was subsequently transmitted by the President to Congress with a statement that there was no fund out of which the Executive can order payment, etc.; that it was wholly irregular; and was given proper direction by the President—who does not appear to have considered whether, if there had been a fund, such payment could have been ordered by "*the Executive*," meaning I suppose such part of the executive department as had jurisdiction of such questions. I doubt whether the President intended by the words used by him to claim that *he* could decide upon or review an *approval* of the contract of 1873, or indeed that he intended anything whatever more than a good-natured reference of the attorneys for the claim to *Congress*, where such claims generally sleep soundly.

And as to Attorney-General Pierrepont's succinct opinion transmitted by you, I have to say that no copy thereof was preserved or probably taken in this Department, nor have I been able to find here the letter to which it was a reply. The opinion is short, entirely in his own handwriting, stating results only, and apparently given in haste. The state of facts therefore upon which it was given does not appear to me; and, besides, it seems based upon the theory adopted by Mr. Cushing in 1853 (6 Opin., 49), without adverting to the fact that in the mean time the act of 1872 had relieved the *President* of the trouble of considering Indian contracts for the payment of money, etc., and had vested that duty elsewhere.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE INTERIOR.

ARMY OFFICER HOLDING CIVIL OFFICE.

Where an officer of the Army was tendered a place on a "board of experts," created by a city ordinance to determine the most durable and best pavement for the streets of the city: *Advised* that, in view of the provisions of section 1222, Revised Statutes, the place be not accepted by the officer.

DEPARTMENT OF JUSTICE,

May 9, 1884.

SIR: Yours of the 7th ultimo asks whether the case therein stated would constitute a violation of Revised Statutes, sec-

tion 1222, which, upon pain of forfeiting their commissions, forbids officers of the Army *to accept or exercise the functions of a civil office.*

The case is that the mayor of Philadelphia has selected Col. Q. A. Gillmore, Corps of Engineers, one of "a board of experts" to examine and report upon a pavement in that city, the authority for such selection having been conferred by an ordinance of the city of the 28th of May, 1883, which defines the duty of the board to be that of "*pointing* out to the councils the defects of the present system of paving the streets of Philadelphia, and, in comparison with the advantages of the Belgian block system, *making* a thorough and exhaustive report of the most durable and best pavement that can be devised by them for said streets, particular regard being had to its healthfulness, economy, smoothness, durability, and drainage, and estimating the probable cost of a better system;" the compensation of each member of the board not to exceed $10,000, inclusive of all individual expenses.

The question put by you on behalf of Colonel Gillmore, who solicits your instructions in that regard, is whether by taking a place upon that board he will be chargeable with having accepted or exercised the functions of a *civil office* within the meaning of section 1222, cited above.

I have read the papers connected with certain other such applications in the past, which you have transmitted along with that of Colonel Gillmore. I own that I should have found difficulty in coming to the conclusion which seems to have been reached in some of them—particularly that of Colonel Mendell. But as these have passed, I need say no more.

It is plain that the board in question has been constituted with reference to important public needs and is to discharge an important public duty. In the most comprehensive sense of the word *office*, therefore, places upon that board will be *offices*, and of course "civil offices."

Are they such within the purview of section 1222?

It seems to me that notwithstanding the gravity of the penalty therein inflicted, the policy of section 1222 points to a very liberal interpretation of the phrase "civil office." In *Evans's case* (74 Pa. St. Rep., 124), the question was

whether a person who had been appointed by the governor of the State "to collect a single claim, or rather a set of claims, against a particular debtor" (the United States) was a public officer. The court decided that he was; Sharswood, J. saying, *arguendo:* "Can it make any difference that a person is commissioned by the governor as a general agent to collect all claims of the Commonwealth, or as a special agent to collect only one particular claim."

I quote Evans's case not because the present question can be made to turn upon any special view as to the meaning of the word *office* in the courts of Pennsylvania, but because I understand the above language to convey the general legal meaning of that word. (15 Opin., 551.)

I have considered the provisions of the acts of 1838, 1868, 1870 and 1877, which now appear in sections 1222, 1223, and 1224, Revised Statutes, *together*, in coming to a conclusion upon the question put by you. That conclusion is advice that Colonel Gillmore do not accept appointment as a member of the board of experts in question.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF WAR.

DUTY ACT OF MARCH 3, 1883.

Goods which arrived in a port of the United States on the 30th of June, 1883, and from want of time to make other disposition of them remained on board ship until the next day, are to be regarded as in a public store or bonded warehouse within the meaning of section 10 of the act of March 3, 1883, chapter 121.

DEPARTMENT OF JUSTICE,
May 13, 1884.

SIR: Yours of the 8th has been considered. It mentions the recent decision in the cases of Frank A. Sartori and John B. Sartori against Hartranft, collector, and in connection therewith asks in effect whether that shall be acquiesced in. The principle therein expressed is, that goods which arrived in a port of the United States upon the 30th of June, 1883, and from want of time to make any other disposition of them remained on board ship until the next day, are to be re-

garded as *in a public store or bonded warehouse* within the meaning of section 10 of the customs duties act of March 3, 1883, and therefore are subject to the *less* rate of duty imposed thereupon by that act.

I observe and appreciate what you say as to the practical difficulty in which you have been placed in settling the operation of that section upon goods situated like the present, the *new* duties being in some cases *greater* and in others *less* than the *old*.

Upon the whole, however, I advise that the rule laid down in the cases of Sartori be acquiesed in.

I may add that there is some color in its language for thinking that section 10 is to apply only in cases where the new duty is less than the old: the expression "shall be subject to no other duty than," etc., imports a *favor;* and this view accords with the fact that the act of 1883 in general *reduced* the rates of duty theretofore imposed; and perhaps the expression would have been made clearer if Congress had not anticipated that, because of the three months which were to elapse before the statute went into effect, importers would take care to leave in warehouse none of that class of goods upon which the duty would be increased. A positive provision of that sort would probably have had little effect; so that, inasmuch as *de minimis non curat lex*, Congress may have intended to leave the *exceptional* cases of a transition from less to greater duty to the operation of existing general law, which determines the rate by the date of *importation*.

I suggest this *quære* as an *obiter dictum* pertinent to cases *vice versa* to those of the Sartoris and alluded to in yours.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

STATE QUARANTINE GROUNDS.

Inspectors of customs can not lawfully be prevented by the local health officers from landing at quarantine stations in the discharge of their duties; but the former, while visiting and remaining at such stations, should observe all reasonable regulations in the interest of public health.

DEPARTMENT OF JUSTICE,
June 5, 1884.

SIR: In reply to yours of the 26th ultimo, asking whether the health authorities of the State of South Carolinia can legally prevent an inspector of customs of the United States, who has been assigned to duty at the quarantine grounds, from landing at that place, I answer that the duty of a State to police its navigable waters and coasts in the interest of health does not conflict with the duty of the United States to police the same grounds in the interest of their revenue. There is no conflict in point of theory upon these matters, and the good sense of the officers intrusted with these duties respectively will no doubt prevent any collision in point of fact. Such I understand from a recent note to be the general experience of your Department upon the present matter.

The United States have a clear right to see for themselves, and by the eyes of their own officers, whether their customs laws are enforced at quarantine stations as well as at other places. They direct their officers to execute this duty with a reference to the State health laws and regulations. Such conformity, however, is not to amount to an abstention from official duty.

Upon the other hand, that universal rule by which, upon conflict between State and United States laws, the former necessarily give way would not justify customs officers from *excluding* health officers from policing places which the former might have found it necessary to occupy in the course of duty.

Questions of some delicacy as to relative precedency and superiority of function may arise between these two classes of officials. Their happening need not be anticipated; and they will probably be settled, as generally heretofore, by an exercise on both sides of liberality and good sense.

The present, however, is not a doubtful matter. Obviously,

health officers can not prevent inspectors from landing at the quarantine station. Although inspectors must conform their official action whilst visiting and remaining at such stations (as well as elsewhere) to all reasonable regulations in the interest of public health, no regulation which forbids their enjoying ample opportunities for then and there protecting the public revenue is reasonable.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

INSPECTION OF STEAM FERRY-BOATS.

The word "charter" covers the case of boats licensed, under a general law, by a county court to traverse ferry routes established by such courts.

Steam-vessels plying regularly between Albany and Troy, in New York, for freight and passengers, would be ferry-boats under the second clause of rule VII, paragraph 2, of "General Rules, etc., of the Board of Supervising Inspectors of Steam Vessels."

DEPARTMENT OF JUSTICE,

June 7, 1884.

SIR: I have considered the questions which by yours of the 3d instant are stated in connection with certain sections of the Revised Statutes upon the subject of inspecting steam ferry-boats, and with paragraph 2 of rule VII, "General Rules, etc., of the Board of Supervising Inspectors of Steam Vessels" (form 2101), pages 183 and 185, and I now submit a reply.

First. I am of the opinion that the word "charter," rule VII, paragraph 2, as above, covers the case of boats licensed, under a general law conferring that power, by a county court to traverse ferry routes established by such court.

"Charter" seems to be a proper word to express a power of granting to individuals rights which otherwise belong to the public, whether such grant by the State is made *directly* or *indirectly*.

I submit this upon general principles; but if this proposition were more doubtful than I apprehend it to be, the regulation in question is not to be construed as intended to narrow the

legal meaning of the word ferry-boat in sections 4426, etc, for *regulations* can not change the meaning of legal terms in the statute which authorizes such regulations. They have a well-established but a narrower scope of operation than this. I conceive that those who framed rule VII did not *intend* to limit the meaning of sections 4426, etc., but only to convey to subordinate officials engaged in enforcing the inspection laws their own view of that meaning.

By chartered ferry, therefore, I submit is intended any ferry established in accordance with law.

Second and third. What I have said above probably renders it unnecessary to reply more particularly to your second and third questions. I observe that the language of sections 4405 and 4462 varies from that of the act of 1870, which is the basis of those sections. Whether under 4462 the Secretary can modify a regulation really authorized by 4405 may demand more consideration than seems to be here demanded, inasmuch as I think that rule VII, paragraph 2, is even now to be read as if the word *license* were added to the word *charter*.

Fourth. I am of opinion that steam-vessels plying regularly between Albany and Troy, in New York, for freight and passengers, would be *ferry-boats* under the *second* clause of rule VII, paragraph 2, above referred to.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

POSTMASTERS' SALARIES.

Opinion of February 13, 1884 (17 Opin., p. 658), on the subject of the readjustment of postmasters' salaries, referred to and explained.

DEPARTMENT OF JUSTICE,
June 14, 1884.

SIR: Your letter of this date states that it is claimed under the acts of 1864, 1866, and 1883 (relating to postmasters' salaries), as interpreted by my opinion of February 13 ultimo, that a postmaster whose salary was duly readjusted on July 1, 1868, for the ensuing biennial period, and whose readjusted

salary during that period was 10 per cent. less than the compensation which he would have received during such period if computed upon the basis of commissions under the act of 1854, is not entitled to be paid the difference between such salary received and such computed compensation for the period in question.

In my judgment the claim is not well founded, and there is nothing in the opinion that was intended to sustain such a conclusion or that seems to me to have that effect.

In *McLean's case* (95 U. S., 753), referred to in my opinion, the court declared that the readjustment directed by the legislation of 1864 and 1866 "takes effect in all cases prospectively." The above claim is for a retrospective settlement; a proceding not warranted by the said acts, according to my understanding of them and of the opinion of the Supreme Court.

Very respectively,

BENJAMIN HARRIS BREWSTER.

The POSTMASTER GENERAL.

RELIEF OF FITZ JOHN PORTER.

The bill "For the relief of Fitz John Porter," passed at the first session of the Forty-eighth Congress, considered, and objections thereto, constitutional and other, stated.

DEPARTMENT OF JUSTICE,
June 23, 1884.

SIR: In compliance with your request I have examined the bill for the restoration of Fitz John Porter to the Army, and now have the honor to submit to you my views thereon.

In March, 1878, an application was made to the President by Fitz John Porter for relief in his case. Subsequently, in April of the same year (to the end that the President might be fully informed of the facts of the case, and be enabled to act advisedly upon said application), a board of Army officers was convened to examine, in connection with the record of the trial by court-martial of Major-General Porter, such new evidence relating to the merits of said case as is now on file in the War Department, together with such other evidence

as may be presented to said board, and to report, with the reasons for their conclusion, what action, if any, in their opinion, "justice requires should be taken on said application by the President."

The board so convened made a report to the Secretary of War, dated March 19, 1879, in which, after giving the result of their investigation, they state that, in their opinion, "justice requires at his (the President's) hands such action as may be necessary to annul and set aside the findings and sentence of the court-martial in the case of Maj. Gen. Fitz John Porter, and to restore him to the positions of which that sentence deprived him, such restoration to take effect from the date of his dismissal from service."

On the 5th of June, 1879, the proceedings and report of the board were transmitted to Congress by the President, who, in his accompanying message, said: "I have given to this report such examination as satisfies me that I ought to lay the proceedings and conclusions of the board before Congress. As I am without power, in the absence of legislation, to act upon the recommendations of the report further than by submitting the same to Congress, the proceedings and conclusions of the board are transmitted for the information of Congress, and such action as in your wisdom shall seem expedient and just."

On the 4th of May, 1882, upon the application of said Fitz John Porter, the President, by pardon, remitted so much of the sentence of said court-martial as forever disqualified him from holding any office of trust or profit under the Government of the United States.

Such being the condition of his case, a bill "for the relief of Fitz John Porter" was passed at the present session of Congress, and is now with the President for his approval.

The bill contains a preamble which recites the fact that the board of Army officers, convened as aforesaid, stated in their report of March 19, 1879, that in their opinion "justice required at his (the President's) hands such action as may be necessary to annul and set aside the findings and sentence of the court-martial in the case of Maj. Gen. Fitz John Porter, and to restore him to the positions of which the sentence deprived him, such restoration to take effect from the

date of dismissal from the service," and also the fact that the President, on the 4th of May, 1882, remitted so much of the sentence of said court-martial as forever disqualified the said Fitz John Porter from holding any office of trust or profit. The preamble then concludes: "Therefore, that justice may be done the said Fitz John Porter, and to carry into effect the recommendation of said board." Following this is the enacting clause.

The enacting words of the bill read thus: "That the President be, and he is hereby, authorized to nominate and, by and with the advice and consent of the Senate, to appoint Fitz John Porter, late a major-general of the United States Volunteers and a brevet brigadier-general and colonel of the Army, to the position of colonel in the Army of the United States of the same grade and rank held by him at the time of his dismissal from the Army by sentence of court-martial promulgated January 27, 1863, and, in his discretion, to place him on the retired list of the Army as of that grade, the retired list being thereby increased in number to that extent; and all laws and parts of laws in conflict herewith are suspended for this purpose only: *Provided*, That said Fitz John Porter shall receive no pay, compensation, or allowance whatsoever prior to his appointment under this act."

The end proposed by this bill, as declared in its preamble, is "that justice may be done to the said Fitz John Porter, and to carry into effect the recommendation of said board." The recommendation of said board is "to annul and set aside the findings and sentence of the court-martial" in his case, and "to restore him to the positions of which the sentence deprived him, such restoration to take effect from the date of dismissal from the service."

In an opinion dated March 15, 1882, which I had the honor to give, at your request, upon the application for relief made by Fitz John Porter in his letter to you of December 23, 1881 (the relief there being asked in the following words: "To annul and set aside the findings and sentence of the court-martial and to nominate me to the Senate for restoration to my rank in the Army," etc.), I considered the subject of the power of the President to grant the relief thus sought,

and, after an examination of authorities, reached the conclusion that where the sentence of a legally constituted court-martial, in a case within its jurisdiction, has been approved by the reviewing authority and carried into execution, it can not afterwards be reviewed and set aside; that the proceedings are then at an end—the action thus had upon the sentence being, in contemplation of the law, *final;* and accordingly that the President, in the case under consideration, could afford the applicant no relief through a revision of the sentence.

Without assuming to enter into the merits of the charges submitted to and determined by the court-martial which tried and convicted Fitz John Porter, I may, in this connection, observe that those charges were preferred in due form, and that the court, which was ordered on the 1st of December, 1862, was composed of two major-generals and seven brigadier generals, and continued in the performance of its duties until the 10th day of January, 1863, when it made its findings and sentence, and adjourned. As its records will show, by it there was a thorough investigation, and the accused was heard fully in his defense. The findings of the court were then submitted to President Lincoln, and after careful consideration by him were finally approved, and the sentence of the court duly executed.

This ended the whole subject in law and in fact; for, as has been said by a judicial writer of the highest authority, when such is the result, and "when judgment is once pronounced, both law and fact conspire to prove the accused completely guilty." The rank of these officers and their eminent character at that time secured for their findings the approval of the public, and the known mildness and benevolence of Abraham Lincoln satisfied the people of the United States that he would have disapproved any unjust or harsh judgment.

A court-martial is to be respected in its judgments the same as any other court. Its findings, when rendered and approved according to the due forms of that law which creates it, are to be treated as would be the final judgments of a court of final jurisdiction in the law. The Supreme Court of the United States has recently declared that a court-martial

such as this was "is the organism provided by law and clothed with the duty of administering justice in this class of cases. Its judgments, when approved as required, rest on the same basis and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under like circumstances." Such a judgment the President has no power to review and annul or set aside. Neither has Congress a right to review and annul or set aside the findings and sentences of such a court.

The people of the United States in their Constitution have said that one of the first objects of creating that Government was to "establish justice," and to that end by the Constitution they restrained the authority of Congress, and for the safety of the people excluded it from assuming any of the absolute power possessed and exercised by the British Parliament. The safety and peace of society stand only on the stability of the law and its judgments.

Certainty is the mother of repose and peace, and it is that which all human law seeks to arrive at; and uncertainty is the mother of contention. It is all-important that no final judgment should ever be held precariously at the fluctuating discretion of any power. The certainty of the law gives it its sanction.

However, notwithstanding the declaration in the preamble above referred to, it will be observed that the enacting clause of the bill does not directly purport to annul and set aside the sentence.

When that sentence was passed, Fitz John Porter held three commissions in the military service—one as colonel of a particular regiment of infantry in the regular Army, another as brevet-brigadier-general in the regular Army, and a third as major-general of Volunteers—and its execution involved not only the loss of each of these three commissions, but subjected him to the further penalty of being "forever disqualified from holding any office of trust or profit under the Government of the United States." Through the exercise of the pardoning power of the President he has been relieved from the latter penalty and thereby become restored to the right to hold office formerly enjoyed by him. The enacting

clause does no more than provide for restoring him to the position of colonel in the Army formerly held by him. But this, if accomplished, would not relieve him from all the consequences of the sentence, as, for instance, the loss of the brevet commission of brigadier-general, and also the major-general's commission. In providing for such partial restoration to his status in the military service which was lost by operation of the sentence, and leaving some portion of the punishment thereby incurred to stand untouched, the bill can not be regarded as an attempt to directly annul or set aside the sentence, but it evidently is an attempt to do so in an elusive way.

The effect of the bill, then, is to *authorize* the President, with the advice and consent of the Senate, to appoint Fitz John Porter to the position of colonel in the Army of the same grade and rank held by him at the time of his dismissal therefrom by the sentence, leaving it discretionary with the President to also place him on the retired list of the Army as of that grade. It supplies the President and the Senate with the authority, *to that extent*, to "carry into effect the recommendation of said board" through the exercise of the appointing power.

Such authority either is or is not coupled with a duty to exert it. If not, the bill partakes of the character of recommendation or advice only, as it would leave the exercise of the appointing power in the particular case thereby authorized wholly dependent upon the pleasure of the President and Senate. On the other hand, could the President and Senate be required, as in duty bound, to exercise that power, and appoint Fitz John Porter to the position of colonel in the Army under the authority thus imparted? In answer to this it is submitted that Congress cannot impose such requirement, and thus virtually assume a power (that of making an appointment to office) which does not constitutionally belong to it. Furthermore, if the bill be viewed as making it imperative upon the President to appoint, it must be deemed to make it equally imperative upon the Senate to "advise and consent" thereto. But these terms imply the right to exercise judgment and discretion, with which right such requirement would be inconsistent.

I am aware that the power of Congress over military and naval appointments has been put upon grounds not applicable to civil appointments. During the administration of President Monroe a difference of opinion upon that subject was developed between the Executive and the Senate upon the occasion of carrying into effect the act of March 2, 1821, for reducing the military establishment. The President submitted to the Senate certain nominations (viz, James Gadsden, to be adjutant-general, and Nathan Towson, to be colonel of artillery), accompanied by a message explaining his views of the act and principles adopted by him in executing it. In this message he observed: "In filling original vacancies in the artillery and in the newly-created office of adjutant-general, I consider myself at liberty to place in them any officer belonging to any part of the whole military establishment, whether of the staff or line. In filling original vacancies, that is, offices newly created, it is my opinion, as a general principle, that Congress has no right under the Constitution to impose any restraint by law on the power granted to the President, so as to prevent his making a free selection of proper persons for these offices from the whole body of his fellow-citizens." And further on he again observed: "Having already suggested my impression that in filling offices newly created to which, on no principle whatever, any one could have a claim of right, Congress could not, under the Constitution, restrain the free selection of the President from the whole body of his fellow-citizens, I shall only further remark, that if that impression is well founded all objections to these appointments must cease. If the law imposed such restraint it would in that case be void."

The Committee on Military Affairs of the Senate, to whom these nominations and the message of the President were referred, in their report dissented from the above doctrine, remarking: "The Constitution of the United States provides that 'Congress shall have power to make rules for the government and regulation of the land and naval forces.' Under this article of the Constitution it is competent for Congress to make such rules and regulations for the government of the Army and Navy as they may think will pro-

mote the service. This power has been exercised from the foundation of our Government in relation to the Army and Navy. Congress has fixed the rules in *promotions and appointments.* Every promotion is a new appointment, and is submitted to the Senate for confirmation. In the several reductions of the Army and Navy Congress has fixed the rules of reduction, and no Executive heretofore has denied this power in Congress, or hesitated to execute such rules as were prescribed."

The committee having recommended that the Senate do not advise and consent to the nominations mentioned, they were rejected by the Senate. (See Niles's Reg., vol. 22, pp. 406–423.)

One of my predecessors, in an opinion dated January 9, 1873 (14 Opin., 164), in which the same subject is considered, after reviewing the action of both the executive and legislative branches of the Government in regard to the promotion and appointment of officers in the Army, concludes thus: "It may therefore be regarded as definitely settled by the practice of the Government that the regulation and government of the Army include, as being properly within their scope, the regulation of the appointment and promotion of officers therein. And as the Constitution expressly confers upon Congress authority to make rules for the government and regulation of the Army, it follows that that body may, by virtue of this authority, impose such restrictions and limitations upon the appointing power as it may deem proper in regard to making promotions or appointments to fill any and all vacancies of whatever kind occurring in the Army; provided, of course, that the restrictions and limitations be not inconsistent or incompatible with the exercise of the appointing power by the department of the Government to which that power constitutionally belongs."

Conceding, however, all that is here claimed for Congress under the provision of the Constitution adverted to, it does not follow that the right to regulate appointments to offices in the Army can be carried to the designation of particular individuals to fill such offices, without imposing an unconstitutional restriction upon the appointing power. The right of Congress to regulate is itself limited by the necessity of leaving due scope to the appointing power for the exercise

of judgment and will in performing its functions, as contemplated by the Constitution. As was observed by Chief-Justice Marshall, delivering the opinion of the court in *Marbury* v. *Madison* (1 Cranch, 53, 54), the clauses of the Constitution relating to that power "seem to contemplate three distinct operations: First. The nomination: this is the sole act of the President, *and is completely voluntary.* Second. The appointment: this is also the act of the President, *and is also a voluntary act*, though it can only be performed by and with the advice and consent of the Senate. Third. The commission: * * * The last act to be done by the President is the signature of the commission. He has then acted on the advice and consent of the Senate to his own nomination. The time for deliberation has been passed. He has decided. His judgment, on the advice and consent of the Senate concurring with his nomination, has been made, and the officer is appointed." Farther on he also observed: "The discretion of the Executive is to be exercised until the appointment has been made."

Whatever powers Congress has upon the subject of appointments in the Army must be derived from some one or more of the following clauses of the Constitution: "The Congress shall have power" * * * "to declare war," etc. "To raise and support armies," etc. "To make rules for the government and regulation of the land and naval forces." "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers," etc. (Sec. 8, Art. I.)

But another clause of the Constitution, already adverted to, declares that the President "shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, * * * and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law," etc. (sec. 2, Art. II). This is a power expressly given to the President by the same instrument which gives to Congress the powers above mentioned, namely, to make rules for the government and regulation of the land forces, etc.

From the "foregoing powers" conferred upon Congress, the power to designate by law a person to fill a military

office can not be implied; since this would be in direct conflict with the power of appointment expressly given the President as above. Regarding the bill as imposing, or attempting to impose, upon the President a duty to appoint the person designated therein, it is without any support in the Constitution. It is an assumption of an implied power which is not based upon any express power, and clearly invades the constitutional rights of the President.

Congress has no right to enact as a law that which will be ineffectual. It can not enact advice or counsel. It must make laws that are rules of action, not "expressions of will, that may or may not be followed." Counsel is a matter of persuasion, law is a matter of injunction; counsel acts upon the willing, law upon the unwilling also. (Blackstone's Commentaries, 44.) If, then, this bill be an injunction commanding the President to appoint, it is a usurpation; and if it be only counsel, it is without the essential element of a law; and Congress can enact nothing but that which is to have the full vigor and effect of a law.

But, again, the bill is subject to objection upon the ground that Congress thereby in effect creates an office only upon condition that it is to be filled by a particular individual named. If this principle were adopted generally in the creation of offices, it would obviously result in constraining the appointing power to accept the condition imposed and fill the offices with the individuals designated by Congress; thus frustrating the design of the Constitution, which is that officers must be alone selected according to the judgment and will of the person and body in whom the powers of nomination, advice and consent, and appointment are vested.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

FILLING VACANCIES IN OFFICE.

The provisions of section 1769, Revised Statutes, relative to filling vacancies during a recess of the Senate, are limited to vacancies happening by death or resignation or expiration of term of office, but do not apply to original vacancies.

When an office is created by a law taking effect during a session of the Senate, and no nomination is made thereto, the original vacancy thus existing may be filled by the President during the ensuing recess of the Senate by a temporary appointment.

DEPARTMENT OF JUSTICE,
June 25, 1884.

SIR: In reply to your inquiry, I have the honor to state that the provisions of section 1769, Revised Statutes, for filling vacancies during recess of Senate, are limited to those that happen by reason of *death* or *resignation* or *expiration of term* of office, and do not apply to *original vacancies—i. e.*, vacancies existing in newly created offices, where the offices have never been filled.

The provisions of the tenure of office act of March 3, 1867, for filling vacancies during recess of Senate, were even more restrictive; they extending only to such vacancies as happen by *death* or *resignation.* Yet in an opinion dated August 17, 1868 (12 Opin., 455), while that act was in force, Attorney-General Evarts held that where an office is created by a law taking effect during a session of the Senate and no nomination is made thereto, the original vacancy thus existing in the office may be filled by the President during the recess of the Senate. The case considered by Mr. Evarts was that of the collectorship of customs for Alaska, an office then recently created, but to which no nomination had been made prior to the adjournment of the Congress creating it. His opinion concludes with the remark: "I do not find this case embraced within the operation of the tenure of civil office act, and, under the accepted construction of the constitutional authority of the President, I have no doubt of his power to grant a commission to a collector of customs for Alaska which shall expire at the end of the next session of the Senate."

In the above view of the constitutional authority of the

President to fill an *original vacancy* during the recess of the Senate, which existed while the Senate was in session, I concur.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

VACANCIES IN OFFICE.

The power of the President to fill vacancies in office by temporary appointment, derived under section 2, Article II, of the Constitution, comprehends all vacancies that may happen to exist in a recess of the Senate, irrespective of the time when such vacancies first occur.

DEPARTMENT OF JUSTICE,

June 25, 1884.

SIR: The provision in the Constitution (Art. II, sec. 2), giving the President "power to fill up all vacancies that may happen during the recess of the Senate," etc., as construed by Attorney-General Wirt, in an opinion given to President Monroe in 1823 (1 Opin., 631), comprehends all vacancies that may happen to exist in a recess of the Senate, irrespective of the time when such vacancies first occurred; and this construction has been reaffirmed by later Attorneys-General, among whom may be named Attorney-General Taney, Legaré, Mason, Cushing, Bates, Stanbery, Evarts, Williams, and Devens. Moreover, the practice of the Executive has, as it appears, uniformly accorded with this view.

The whole subject is elaborately reviewed in an opinion of Attorney-General Devens, dated June 18, 1880 (16 Opin., 523), given upon a question which then arose as to the authority of the President to fill, during a recess of the Senate, a vacancy in the office of collector of the port of Philadelphia caused by expiration of term while the Senate was in session. The opinion holds that the President had power to fill the vacancy by a temporary appointment; and General Hartranft was appointed to fill the vacancy, his commission to expire at the next session of the Senate.

The considerations which support the construction mentioned are so fully presented in that opinion, that I deem it

unnecessary to undertake to restate them here. I will merely add that I am impressed with their weight, and am entirely satisfied as to the soundness of that construction.

I have the honor to be, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

ASSISTANT INSPECTOR OF STEAM-VESSELS.

The provision for assistant inspectors in section 4414, Revised Statutes, is not controlled by the details of section 4415, as to either the method of their appointment or the professional qualifications which may be required by the appointing power.

Should an inspection of life-preservers be found necessary, and in order to effect this some assistant to the local board must needs be appointed, the appointment of such assistant would be warranted by law.

DEPARTMENT OF JUSTICE,

July 3, 1884.

SIR: Yours of the 30th ultimo calls my attention to a recent recommendation to you by the Board of Supervising Inspectors of Steam-Vessels to appoint an "assistant inspector," under the provisions of section 4414, Revised Statutes, whose duty it shall be personally to inspect life-preservers. Thereupon you ask:

First. Can the Secretary of the Treasury, under the statutes, appoint an additional inspector other than of hulls or of boilers?

Second. Can he appoint an additional inspector of hulls (or of boilers) and detail him to life-preserving work?

Third. Is he required in the appointment to conform to section 4415, so as that the appointee shall have the qualifications there named?

I observe that by section 4421 the local inspectors are required to inspect and give a certificate as to (amongst other matters) the "equipment" of steam-vessels, and that by section 4482 "good life-preservers, made of suitable material," are a part of such equipment. It may be taken for granted that such inspection, in order to be effective, should be made by experts. But section 4415, which gives a detailed state-

ment of the qualifications required for local inspectors, is silent in respect to those obviously needed here.

The provision for *assistant* inspectors in section 4414 is not controlled by the details of 4415 as to either the method of their appointment or the *professional* qualifications which the appointing power shall demand. All that is necessary for these is that they shall be qualified to *assist* their principals in official duties, and that they shall be "actually required." Therefore if experience has shown that an inspection of life-preservers is necessary, and that in order duly to effect it some *assistant* to the local board must be appointed, I am of opinion that Title LII of the Revised Statutes warrants such appointments.

I therefore submit the following answers to the questions which you put:

First. The person appointed by the Secretary will be *not* a member of the "local board", but merely an *assistant to the inspectors of hulls and boilers* in such of their official duties as the Secretary may designate.

Second. He will not be an "additional inspector"; and his assignment to duty will properly be made a matter of express designation, as suggested by you.

Third. He need not have the qualifications mentioned in section 4415.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

CHARWIN LAND GRANT.

An appeal does not lie to the President from a decision made by the Secretary of the Interior touching the correctness or validity of a re-survey of a private land claim.

DEPARTMENT OF JUSTICE,

July 10, 1884.

SIR: The communication addressed to you by Messrs. Ewing and others, representing the claimants under the "Charwin grant," dated the 4th of May, 1883, together with the papers accompanying the same and referred to me for

my opinion as to the action desired by the said claimants at your hands, has received my consideration.

On the 26th August, 1879, an order was issued by the Commissioner of the General Land Office for a resurvey of the "Charwin grant." This resurvey was made and returned to the Commissioner, who is at the same time acting surveyor-general of Missouri, the State in which lies the land alleged to be covered by the grant.

The Commissioner was of opinion to approve the resurvey made under the order of the 26th of August, 1879, but did not feel warranted to do so because a previous resurvey corresponding exactly with the one in question had been disapproved by a former Secretary of the Interior.

Impressed with the correctness of this resurvey, the Commissioner addressed a communication on the subject to the Secretary of the Interior, dated the 27th of September, 1880, a copy of which is among the papers transmitted to me.

In reply to that communication the then Secretary, the Hon. C. Schurz, went into an elaborate consideration of the validity or correctness of the resurvey in the light of certain alleged new evidence, and also considered the question whether the decision of his predecessor on a similar resurvey was a bar to action on his part touching this one, and arrived at the conclusion that on *both* grounds the resurvey should be rejected.

Application to you is now made to set aside this action of Secretary Schurz, on the ground that the case was before the latter only on the question whether the decision of his predecessor was a bar to action on his part and not on the alleged new evidence, and that therefore his act in passing on this evidence was an exercise of original jurisdiction, and for that reason void.

I am of opinion that an appeal to you does not lie in this matter. If an appeal lay in such a case, it is apparent that it would lie in every case and from all the Executive Departments, and soon you would be overwhelmed with the details of administration.

In the exercise of an admitted power Congress has committed the subject-matter involved in this case to the Commissioner of the General Land Office and the Secretary of

the Interior, but has not provided for an appeal to you from the action of those officers.

It has been repeatedly held that the observance of your constitutional duty of taking care that the laws be faithfully executed does not of itself warrant your taking part in the discharge of duties devolved by law upon an executive officer.

Upon a question so well settled I do not deem it necessary to do more than to refer to the opinion of Mr. Attorney General Bates on the Illinois case (11 Opin., p. 14), where will be found references to other opinions on the same point.

The delay in sending you this opinion is the result of my compliance with the request of the counsel prosecuting this appeal that action might be suspended to allow further discussion.

I am, sir, very respectfully your obedient servant,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

HOSPITAL PATIENTS.

Under a statutory provision making an appropriation "for the care, support, and medical treatment of seventy-five transient paupers, medical and surgical patients in the city of Washington, under a contract to be made with such institution as the Surgeon-General of the Army may select," etc., that officer may, within the limits of such appropriation, contract with one or more hospitals, as in his judgment will best fulfill its purposes.

DEPARTMENT OF JUSTICE,

July 12, 1884.

SIR: Your letter of the 11th instant directs my attention to the following provision in the act making appropriation for sundry civil expenses of the Government for the fiscal year ending June 30, 1885, and for other purposes, viz: "For the care, support, and medical treatment of seventy-five transient paupers, medical and surgical patients in the city of Washington, under a contract to be made with such institution as the Surgeon-General of the Army may select," etc., and also presents for my consideration the question "whether it would be competent for the Surgeon-General to make one contract for twenty-five patients with the Garfield

Memorial Hospital, and another contract for the remainder with some other hospital to be selected by him, if he shall be of opinion that such a division of the appropriation is for the public interest."

I have the honor to submit, in reply, that the provision referred to does not require the Surgeon-General, in exercising the authority thereby conferred, to select and contract with but one hospital for the care and treatment of patients. Under some circumstances (*e. g.*, where suitable accommodations could not be had in any one institution for the whole number) such requirement might partially defeat the charitable purposes of the statute; and a construction admitting this result under any circumstances must be rejected, unless it is imperatively demanded by the language of the law, which I do not find to be the case. The provision may well be construed to authorize the Surgeon-General, within the limits of the appropriation, to contract with one or more hospitals, as in his judgment may best fulfill its purposes, namely, "the care, support, and medical treatment of seventy-five transient paupers," etc.

I accordingly answer the question submitted by you in the affirmative.

I am, sir, with great respect,

BENJAMIN HARRIS BREWSTER.

Hon. ROBERT T. LINCOLN,
Secretary of War.

CHOCTAW AND CHICKASAW PERMIT LAWS.

In the absence of treaty or statutory provisions to the contrary, the Choctaw and Chickasaw Nations have power to regulate their own rights of *occupancy*, and to say who shall participate therein and upon what conditions; and hence may require *permits* to reside in the nation from citizens of the United States, and levy a pecuniary exaction therefor.

Treaties of 1855 and 1866, in so far as they relate to this subject, considered and construed.

DEPARTMENT OF JUSTICE,
July 19, 1884.

SIR: Yours of the 9th instant states a question as to the validity of the Choctaw and Chickasaw *permit* laws; and in

that connection asks whether, supposing these laws to be valid, the United States, through the proper Department, have power to revise them so as to secure reasonableness in the amount of the fees which they require from persons who apply for permits.

I observe your reference to the fact that an opinion in favor of the validity of these laws has already (July 25, 1881) been rendered in this Department; and that the present review thereof is asked in consequence of earnest protest against that opinion from among the people of the two nations concerned—the more because such protest is in accordance with the judgments of some members of Congress and other prominent gentlemen from States adjoining.

I have therefore carefully considered the matter so submitted.

I have before me no authenticated copy of the permit law in question. I assume that it is substantially that which is contained in Senate Report No. 698, Forty-fifth Congress, third session, and that it is admitted that such law has been duly adopted by the authorities of both nations.

The copy before me contains nine sections, substantially and in brief as follows:

(1) Citizens of the United States wishing to rent land, or to be otherwise employed in the nation, shall enter into contract with a citizen, who shall report the same to the clerk of the county where he resides.

(2) The citizen shall apply to the clerk for *permits* for male non-citizens over the age of eighteen years in his employ, and for each permit the non-citizen shall pay $25, which shall be paid into the national treasury.

(3) Foreigners coming into the nation in order to farm, or be employed, without authority of the United States, shall be *intruders* "by virtue of" Revised Statutes, section 2134.

(4) Licensed residents, teachers, and physicians (non-citizens) shall procure permits, and shall pay for such $25.

(5) Permits shall be annual; "and in case of violation of any law of this nation the offender shall be ordered out of its limits."

(6) If a non-citizen having a permit shall leave the employ

of the citizen without his consent, he shall forfeit the permit and be incapable of receiving another.

(7) Regulating number of cattle, etc., which a person having a permit may hold.

(8) Certain freedmen to procure permits.

(9) Conflicting acts repealed.

The general question, therefore, is whether the *nations* have the power to require *permits* to reside from citizens of the United States, and to levy a pecuniary exaction therefor; and, if so, whether that power is absolute, or is liable to revision by the United States.

That question may arise from the fundamental relations betwixt the United States and such nations, or because of the terms of some treaty or statute.

(1) In the absence of a treaty or statute, it seems that the power of the nation thus to regulate its own rights of *occupancy*, and to say who shall participate therein and upon what conditions, can not be doubted. The clear result of all the cases, as restated in 95 United States Reports, at page 526, is, "the right of the Indians to their occupancy is as sacred as that of the United States to the fee."

I add, that so far as the United States recognize political organizations amongst Indians the right of occupancy is a right *in the tribe or nation.* It is of course competent for the United States to disregard such organizations and treat Indians individually, but their policy has generally been otherwise. In such cases presumptively they remit all question of individual right to the definition of the nation, as being purely *domestic* in character. The practical importance here of this proposition is that in the absence of express contradictory provisions by treaty, or by statutes of the United States, the nation (and not a citizen) is to declare who shall come within the boundaries of its occupancy, and under what regulations and conditions.

What has thus been said will of course be understeod as having no application to cases in which the United States, in connection with their own paramount rights, authorize employés of their own to enter such boundaries. The present question concerns only such persons as have no employment within the nation upon behalf of the United States.

(2) I am now to consider the provisions of the statutes of the United States, and their treaties with the Choctaw and Chickasaw Nations.

My attention has not been called to any statutory provision by the United States which is thought to apply here, nor upon examining the United States statutes have I found such. I have therefore assumed that there is none.

The treaties of 1855 and 1866 show, of course, by their very existence, an intention by the United States to resort to the *national* organization of these Indians as a means of their civilization. In other words, the existence of these treaties indicates a general purpose by the United States to leave to these nations control of that class of questions which in ordinary diplomatic intercourse is styled *domestic*. In the absence of a contrary intent expressed or strongly implied from the "dependency" of Indians, questions of Choctaw and Chickasaw policy are domestic where they would have been so in case of a foreign nation.

I understand that such contrary intent is thought to be shown in article 7 of the treaty of 1855 and the corresponding provision in article 43 of the treaty of 1866, an intention to the same effect appearing also in article 47 of this latter treaty.

(*a*) Article 7 (1855) secures to the Choctaws and Chickasaws, amongst other things, "the unrestricted right of self-government and free jurisdiction over persons and property within their respective limits, excepting, however, all persons or their property who are not by birth, adoption, or otherwise citizens or members of either tribe," etc.

I submit that whatever this may mean it does not limit the right of these *tribes* to pass upon the question, who (of persons *indifferent to the United States*, *i. e.*, neither employés, nor objectionable) shall share their *occupancy* and upon what terms. That is a question which all private persons are allowed to decide for themselves; and even wild animals, not men, have a certain respect paid to the *instinct* which in this respect they share with man. The serious words "jurisdiction" and "self-government" are scarcely appropriate to the right of a hotel-keeper to prescribe rules and charges for persons who become his fellow *occupants*. It is therefore im-

probable that the above proposition in the treaty of 1855 has any relation to this plain natural right and natural instinct of an Indian nation.

(*b*) By article 43 (1866) the United States promise that no white person, except their officers, etc., shall be permitted to go into the territory of the two nations, unless formally incorporated and naturalized by the joint action of such nations; such promise, however, not to affect parties already adopted, or white persons temporarily employed as teachers, mechanics, or as skilled in agriculture, etc.

It is not necessary to say more about the meaning of this article than that it has no bearing upon the question whether the nations may not themselves, and at their own discretion, exclude from their boundaries persons whom the United States have not *promised* to exclude—so that these be not persons that the United States have licensed or otherwise authorized to enter. It is to be borne in mind that however true it may be that the United States recognize that residence among the Choctaws of *teachers*, etc., will be a benefit to them, they do not appear to intend that such residence shall be licensed by themselves without the consent of the nations, or that education and agriculture, etc., shall be furthered by white *residents* at the will of the United States and individual Indians without consent of the nation. Whilst the United States might have so provided, it seems that as yet they have not.

(*c*) Nor has the provision in article 47 (1866) any bearing upon the right of the nation to require the exaction in question. The condition that the President should approve of the tax there mentioned depends upon the circumstance that its levy was to have the effect of diverting from its original purpose a certain trust fund in his hands. That before paying that fund out, the President was to be satisfied of the propriety and efficiency of the tax whose proceeds were to be substituted to the public ends theretofore served by the fund, does not argue that such supervision is to be general, or that as respects other matters a right to tax does not belong to the nation. The presumption indeed is to the contrary.

In the same connection article 39 of the same treaty (1866) may be referred to. In that power is given to tax *traders*,

i. e., even persons licensed by the United States. And to the same effect is article 16 of the treaty of 1855. The peculiar ground of exemption in which *licensed* intercourse with Indian nations stands in this respect in general has been well understood, as I suppose, ever since the opinion of Attorney-General Wirt in 1824. (1 Opin., 645.)

As I have already said, there is not in these treaties—or, as I gather, anywhere else—action by the United States *licensing* the intercourse upon which the exaction in question has been imposed. All to that effect which appears is an exception of such intercourse from a *promise* that the United States will exclude certain white persons from the Indian Territory.

In conclusion I have to say, that my attention has not been called to any statute by which Congress has delegated to a Department or officer of the United States its power to control such taxation. I therefore conclude that no Department or officer has such power.

I believe that the above opinion substantially covers all that you have asked in relation to the *permit* laws or to the former opinion of this Department.

Seven papers transmitted by you are herewith returned.

With great respect, your obedient servant,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE INTERIOR.

WIDOW'S PENSION.

A pensioner, previous to his death, was in receipt of a pension of $72 per month under the provisions of the act of June 16, 1880, chapter 236, and after his death a pension certificate granting $30 per month was issued to his widow under section 4702, Revised Statutes; but the latter claims to be entitled under that section, as widow, to the same amount of pension which her husband was in receipt of, viz: $72 per month: *Held* that the widow's pension is limited to the amount given for "total disability" by section 4695, Revised Statutes.

DEPARTMENT OF JUSTICE,
July 26, 1884.

SIR: By your letter of the 23d inst. it appears that General Ward B. Burnett, at his death, was a pensioner, in re-

ceipt of $72 per month, under the provisions of the act of June 16, 1880, chapter 236, and that a pension certificate granting $30 per month has since been issued to Mrs. H. A. Burnett, as his widow, under the provisions of section 4702, Revised Statutes, but that Mrs. Burnett claims to be entitled under that section, as widow, to the same amount of pension which her husband was in receipt of, namely, $72 per month.

Section 4702 declares that the widow "shall be entitled to receive the same pension as the husband would have been entitled to had he been *totally disabled*," and the question suggested by the present case is, whether this provision is limited to the pension of "total disability" given by section 4695, Revised Statutes, or extends to pensions given for the class of disabilities mentioned in section 4698, and elsewhere described in the statute as "permanent specific disabilities."

I understand that, in the practice of your Department, the provision referred to has heretofore been construed to give the widow a pension for "total disability" as granted by section 4695, and no other, and that the pension certificate issued to Mrs. Burnett is based upon this construction.

Upon examination of the pension laws I perceive no grounds for adopting a different construction.

In section 4692, Revised Statutes, three distinct classes of disabilities are designated, namely: "total," "permanent specific," and "inferior," and for each of these classes separate rates of pension are provided. Going back to the act of July 14, 1862, chapter 166, we find but two classes of disabilities mentioned: "total disability" and "inferior disability"; the pension given for the latter being, of course, less in amount than that allowed for the former. The provision for the widow's pension in that act (sec. 2) was similar to the provision in 4702, Revised Statutes. It entitled her to "the same pension as the husband would have been entitled to had he been *totally disabled*"; and that was fixed by a provision in the same act (section 1) prescribing the rate of pension for "total disability." In other words, the *amount* of the widow's pension was to be ascertained by reference to the provision for a "total disability" pension.

Subsequent acts made separate provisions for particular

disabilities: as the loss of both feet, both hands, or both eyes (sec. 5, act of July 4, 1864, chap. 247), the loss of one foot and one hand (sec. 3, act of March 3, 1865, chap. 84. See, also, act of June 6, 1866, chap. 106, sec. 1; act of June 8, 1872, chap. 342; and secs. 3 and 4 of the act of March 3, 1873, chap. 234; secs. 4697 and 4698, Rev. Stat.; act of June 18, 1874, chap. 298; act of June 16, 1880, chap. 236.) This legislation, however, made no change in the law as regards the amount of the widow's pension. The particular disabilities described therein form a distinct class, termed "permanent specific." The widow's pension is not governed by the rate provided for a disability of that class, but by the rate provided for a "total disability," as distinguished in the statute from a "permanent specific disability" or an "inferior disability."

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE INTERIOR.

TRANSPORTATION OF INDIAN SUPPLIES.

The provision in the act of March 3, 1877, chapter 101, requiring certain contracts for the transportation of goods for Indian tribes, etc., to be let to the lowest bidder after advertisement, does not supersede or repeal the act of March 3, 1875, chapter 133, section 5260, Revised Statutes, touching payments to land-grant railroads for services to the Government.

Wherever it is practicable to obtain for the Government the benefit of the act of 1877, without yielding the benefits secured to it by the other legislation referred to, this should be done.

DEPARTMENT OF JUSTICE,
August 8, 1884.

SIR: Yours of the 29th ultimo calls attention to the statutes of March 3, 1877 (19 Stat., 291); March 3, 1875 (18 Stat., 453); and to Revised Statutes, section 5260, and asks whether the first named, by requiring certain contracts for the transportation of goods for Indian tribes, etc., to be let to the lowest bidder after advertisement *supersedes* or *repeals* the two latter, which to a certain extent prohibit payment to *land-grant* railroads for services to the Government; and whether contracts for transportation as above can be made

irrespective of any obligation to the Government upon the part of railroads which may or must be made use of by the contractor.

In reply I submit, in the first place, that that statute of 1877 neither repeals nor supersedes the others. Upon the face of the three statutes it does not appear that a *joint effect* may not well be derived from *all* for any cases that in one respect or another are affected by *all*, and where this can be done it should be done.

Again, wherever and so far as it is practicable to obtain for the Government the benefit of the statute of 1877 *without yielding that given by the others*, this is to be done. If transportation by a railroad which receives from the Government only 50 per cent. of its charges to the public is lower than a lowest "bid," the transportation should be made by the railroad. And whatever advantage in any case the element of such *privilege* of the Government provides is to be had if practicable. If the routine forms of contracts heretofore in use do not secure the benefits of this statutory economy, new forms are to be devised, and of course new details in the corresponding advertisements also.

How far, in the great variety of such cases that must occur, this rule may be practicable, I do not know, although probably not in all. This, however, does not forbid its application so far as may be. One or other or all of these statutes are to be made use of according as the interests of the public require. The necessary or probable use of a *land-grant* road may in one case constitute it *de facto* the lowest *statutory* bidder; in another may suggest the breaking up of the transportation into stages and separate contracts; and in a third may be so uncertain or so unsubstantial an element as in prudence properly to be disregarded.

These simple examples occur to me as proper to illustrate the above views.

The difficulty seems to be one of *administration*, rather than as to the meaning of the legislature.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE INTERIOR.

APPRAISEMENT OF VARNISH.

The subject of the proper appraisement of varnish imported into the United States from a bonded warehouse in Canada, wherein it had been manufactured—a component of such varnish of chief value being distilled spirits produced in the United States and exported thence into the said warehouse, where it was compounded into the varnish—considered.

DEPARTMENT OF JUSTICE,
August 18, 1884.

SIR: I have attentively read and considered yours of the 12th instant and its inclosures.

The question which you present concerns the proper *appraisement* of "varnish" that has been imported from a *bonded warehouse* in Canada, having been manufactured *therein*, a component part thereof *of chief value* being "distilled spirits" produced in the United States and exported thence into the warehouse, from which, after being compounded into *varnish*, it is now returned.

Three theories as to such appraisement have been heretofore presented:

(1) That the varnish is to be *taxed* as "a compound of distilled spirits."

(2) That, inasmuch as "varnish" is mentioned in the customs act and has a particular duty imposed upon it by that name, no attention can be paid to its character as a *compound;* but, following herein a well-known rule of statutory interpretation, *varnish duty* alone can be exacted.

(3) Inasmuch as *varnish duty* is in part an ad valorem duty, a secondary question arises as to the rule of appraisement; *i. e.*, does that rule refer to (*a*) values in the general markets of Canada, or (*b*) values in the *bond market*, it being shown that varnish made with distilled spirits is largely, if not generally, sold in Canada *in bond.*

The importers press the theory of a *bond-market valuation* for the article considered as "varnish."

For the Government it has been argued heretofore that the article should be treated with a reference to the "distilled spirits" which it contains. If that theory is untenable, then it is said that *appraisement* should be according to the general Canada market, and not under this or that special

condition to which the article in question may in fact have been subjected.

But for what has passed in court upon this matter, I should adhere without hesitation to the conclusion suggested to you by Attorney-General McVeagh in his letter of May 28, 1881; or, in other words, that in view of the very special revenue policy of the United States as to "distilled spirits," articles which come within the verge of that policy are to be regulated thereby, and that rules of construction otherwise applicable must give way. I see no reason why the principle upon which the Supreme Court has drawn special conclusions as regards the treatment of "cotton," because of the special war policy towards that article adopted by Congress (*Young's case*, 97 U. S., 58, etc.), does not apply to the effect above suggested as regards "distilled spirits." As a guide to statutory meaning, a clear public policy must be allowed to outweigh presumptions arising from the *usus loquendi* as to matters outside of such policy. (*De Forest v. Lawrence*, 13 How., 274). The well-known caution against *sticking in the bark* applies here.

The question is an interesting one, and with all deference to the learned court that has held otherwise it seems to me that it has not so far been satisfactorily adjusted.

In this connection I may add that my communication to yourself, under date of June 29, 1882, certifying that no writ of error would be taken from the judgment in Birmingham's case, which is the decision just alluded to, was based upon the view which generally governs such certificates, viz, that writs of error are not to be taken in cases with which the customs office and the district attorney do not express dissatisfaction.

In connection, however, with your recent note, I have looked into the question more at large, and ask your attention to the following considerations as specially confirming the conclusion above drawn in general from *policy*.

The definition of "distilled spirits," for tax purposes, under section 3248, includes all substances into which "ethyl alcohol," etc., is transferred, "either in the process of original production *or by any subsequent process*."

This definition governs through the whole "*act*," *i. e.*, as

appears by a reference to the first page of that book, *throughout the whole Revised Statutes.*

Therefore, if *varnish* could have been made with distilled spirits in a domestic warehouse, the product for revenue purposes would still be "distilled spirits." Can it make any difference that the place of manufacture is a Canadian warehouse? Would a court read this and the connected provision as giving *protection* to the *foreign* as against the *domestic* manufacturer?

And even if, as is not to be admitted, the word "act" in section 3248 is to be restrained to the meaning which it had whilst part of *the act of* 1868, it is to be considered that *merely as a context*, and as declaratory of an important policy which otherwise would be maimed, it indicates that the expression "compounds or preparations of which distilled spirits is a component part of chief value," in paragraph 3 of page 464, Revised Statutes, is in reason to be preferred to the name "varnish" in determining the duty upon that sort of varnish of which distilled spirits is such component. This conclusion goes upon the ground that whilst for customs purposes the paragraph just mentioned affects the definition of "distilled spirits" in section 3248, it does so only by excluding therefrom those *compounds* in which it is *not* a component part of chief value.

The *origin* of the above paragraph defining the rate of duty upon compounds of distilled spirits also shows that it is emphatic, and therefore to be excepted from the rule of interpretation applied in Birmingham's case. That paragraph is to be found first in the act of 1866, chapter 298 (14 Stat., 328), which is entitled "An act to protect the revenue, and for other purposes," and imposes duties upon only *cigars*, cigarettes, and cheroots, *cotton*, and *compounds* of which distilled spirits is a component part of chief value. It seems plain, therefore, that these provisions were inserted *ex industria*, and, as said in a late historical book of great intelligence (Mr. Blaine's), were required *in order to conform the customs law to the internal revenue statute*, which had been enacted only a few days before. In other words, an independent conclusion is to be drawn from its history that the above provision for *compounds* of distilled spirits is not of a merely

residuary character, as is the case generally with those clauses which come under the rule of interpretation above cited, but was intended to furnish an additional and supreme regulation applicable to all articles, however otherwise named, in which a certain proportion of distilled spirits should be found.

(2) If this be not so, or if there be good reasons for not renewing this contention, I submit that *values*, referred to in paragraph 3 of page 482, Revised Statutes, are to be *appraised* under section 2906 according to the market value in the *general* Canadian markets, and not in Canadian markets for articles *in bond*.

Additio probat minoritatem; i. e., if in section 2906 Congress had intended, in cases of questions raised between the principal *general* market values and other *special* market values in which the article in question had in fact been sold, to refer appraisements to the latter, some additional word would have been employed to show it. The value of spirits in the principal markets of the United States is not, no more being said, the value of spirits as exportable from bonded warehouses, even if more spirits should be *exported* than is *consumed*.

The question as to value refers to *Canada*, and not to any *limbo* within Canada.

I add that I am not informed of the grounds upon which the customs office has decided to refer the appraisement of *tea* and *malt* (as you say) to the value of these articles *in bond*, and therefore do not know whether some special reason may not control this action.

I may also say that *Jones's case* (103 U. S., 87), referred to on behalf of the importers, does not affect the argument here. That was a case of tax against a vendor upon the *amount of sales* by him. It was argued for the Government that upon sales *in bond* the true *amount* could be known only by adding the tax that would be exacted whenever the goods should be taken out of bond. But the court replied that "amount of sales" meant *actual* amount, or what had actually been received; and could not refer to what in addition the purchaser might have to pay to the Government before he could reduce the things into possession. *Obviously*, as I

think, this judgment does not bear upon a question as to the *market value* of an article so sold. For that phrase *prima facie* refers to prices the payment of which gives the purchaser a legal right to control the possession of the article *ad libitum;* which is not the case here, where the only right obtained was that of sending out of Canada an article that had never been mixed with the general property of that country, but had existed there only as *an ear-marked article in close public custody.*

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

DUTY ON PLATED SILVER CORDS, ETC.

DEPARTMENT OF JUSTICE,
August 21, 1884.

SIR: Accepting, as is my duty, the facts stated by you in yours of the 18th instant in regard to "certain plated silver cords and braids and plated embroideries" recently imported, I hereby submit an opinion that the same are dutiable at the rate of 25 per cent. ad valorem.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY.

Upon the facts stated: *Advised* that so much of the road of the St. Louis and San Francisco Railroad Company as lies between St. Louis and Pacific (a distance of about thirty-five miles) should not be treated as a land-grant road.

DEPARTMENT OF JUSTICE,
August 22, 1884.

SIR: In reply to yours of the 10th instant in regard to the claim of the St. Louis and San Francisco Railroad Company that its road shall not be treated as "*land grant*" be-

twixt St. Louis and Pacific—that is, for a distance of thirty-five miles—I beg to say: That as you make no statement of facts—but for these merely refer to a number of detached papers inclosed—inasmuch as it is no part of my duty to settle questions of *fact*, I shall assume that the circumstances of the case upon which advice is asked are those which appear, *without any special scrutiny* of these papers, as follows:

In 1852 a land grant was made by Congress in aid of a railroad which afterward was duly located and constructed from *St. Louis*, via *Pacific*, to *Seneca*; that subsequently, in the course of bona fide business transactions, the title to so much of the road as lay betwixt Pacific and Seneca was separated from that to the remainder thereof, and became vested in the company above mentioned, whose it is yet; that, still subsequently, this company constructed a road for itself, connecting its terminus at Pacific with the city of St. Louis; and that now United States freight, etc., from Seneca to St. Louis, and vice versa, is transported by the company over its road as thus defined, viz, betwixt Seneca and Pacific, over the purchased part, and betwixt Pacific and St. Louis, over the part recently constructed.

Under this state of facts, I advise you that the amount of *mileage* for which the company can be dealt with by the United States, upon a *land-grant* footing, is only that betwixt Seneca and Pacific.

The circumstance that, previously to the completion of its Pacific-St. Louis division, the company had, by arrangement or otherwise, transported Government freight between the points *Pacific* and *St. Louis* over the road which formerly had been united with that which as above it had purchased (the mileage of which at that time therefore, as a matter of course, had been reckoned in settlements with the Government) is a matter of no significance in the present state of dealing, which is that of the road aided only so much as runs west from Pacific is traversed by the freight, etc., in question.

Very respectfully.

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF WAR.

REGISTRY OF MAIL MATTER.

Under the second *proviso* of section 3 of the act of July 5, 1884, chapter 234, a departmental officer, in the discharge of his official duties, may register letters and packets elsewhere than in the post-office at Washington.

DEPARTMENT OF JUSTICE,
August 2, 1884.

SIR: Yours of yesterday, asking whether the second proviso to the third section of the act of July 5 last, "Making appropriations for the service of the Post-Office Department," etc., allows *Departments* to *register* "letters and packets" elsewhere than in the post-offices of this city, *the seat of Government*, has been received and considered.

I answer that question affirmatively.

Understanding a "Department" as not extending to certain officers of the Government—such, for instance, as are excluded specifically and by name in the opinion of the Attorney-General addressed to the Postmaster-General May 16, 1877—I advise you that a "Department" officer who, in the course of public business, is called temporarily to discharge his official duties at some place away from the seat of Government, during such absence and for such duties comes within the meaning of the words "Executive Department or bureaus thereof," as used in the proviso to which you call attention; and therefore, if required by such discharge to make use of the facilities of *registry*, may do so without the payment of any fee.

I have, in this connection, attentively observed that the opinion of the 16th of May, 1877, differs with this conclusion as to the rights of a Department to use official postal privileges *elsewhere than in this city*. Whilst it is to be admitted that the Departments are, as Blackstone might have said, somewhat *regardant* as to Washington, yet it seems that such quality is not absolute and for all purposes. It is not necessary, perhaps not possible, now to define its extent. It is, no doubt, for many purposes, substantial and important. Time will gradually establish the boundary of such exceptions thereto as are to be allowed. At present I need only say, that the exigencies of public business often require that officers strictly departmental shall pass to some other

part of the country for its transaction. Where such transaction is itself valid, it may be done with the aid of any help thereto that Congress has devised therefor, *in general terms*, as has been done here.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

PERFORMING DUTIES OF VACANT OFFICE.

Where the office of Sixth Auditor became vacant by the death of the incumbent, and the duties thereof devolved by operation of the statute upon the deputy auditor: *Advised* that the period during which such duties may be discharged by the deputy is limited by statute to ten days.

DEPARTMENT OF JUSTICE,
August 27, 1884.

SIR: Yours of this date, referring to the recent death of Mr. Ela, the Sixth Auditor, states that Mr. Crowell, the deputy, is now performing the duties of the office so vacated; and asks how long the latter can continue to discharge these duties by mere virtue of his place as deputy.

The statutory deputation created by the act of 1875, chapter 130, for, amongst other officers, Auditors, differs from that at common law, and as regards, for instance, the application of section 180, Revised Statutes, cannot be referred to for elucidation.

For instance, these *deputies* do not at any time represent their *principals;* and they are empowered to fill the offices in connection with which they are appointed even although such principals are dead.

The only question therefore as to the term of office of a deputy after the death of an Auditor is as to the meaning of the statute of 1868, chapter 227, now to be found, so far as important here, in sections 178 and 180 of the Revised Statutes.

The temporary term therein authorized either by the mere operation of the statute, or by the action of the President, is *for no longer period than ten days.*

The theory seems to be (and very properly) that in its normal equipment with *Auditors and deputy auditors* the Treasury has no more than a *sufficiency* of officers to transact the public business properly; and therefore that in case of death, etc., this normal equipment is to be restored within the brief period named.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

PRINTING PUBLIC DOCUMENTS.

The joint resolution of July 7, 1882, "to provide for the printing of public documents," etc., applies to all documents or reports ordered to be printed by Congress, whether by special act or otherwise, so that such legislation does not forbid the printing of the "usual number" of the document.

The "usual number," within the meaning of the resolution, indicated.

DEPARTMENT OF JUSTICE,
September 1, 1884.

SIR: You ask whether joint resolution No. 43, approved July 7, 1882, entitled "To provide for the printing of public documents," etc., includes such documents as are ordered by act or resolution *continuous in its authority* from year to year, or Congress to Congress, as well as those ordered by special act or resolution, the authority of which is exhausted by the publication of a single specific edition.

The resolution is in these words: "That whenever any document or report shall be ordered printed by Congress, there shall be printed, in addition to the number in each case stated, the "usual number" of copies for binding and distribution among those entitled to receive them; and this shall apply to all unexecuted orders now in the office of the Public Printer."

Upon a first reading this language appears to be very general and comprehensive.

Upon reference to the debates in Congress for information as to the occasion for its passage, I find that it was originally introduced into the House by the Committee on Printing,

and that, in reply to repeated questions, it was plainly and briefly stated that it had been drawn by the Clerk of the House and presented to the committee simply for the purpose of restoring a state of things which had existed from early times until a short time before, when inadvertently some legislation had changed it. There was no contradiction of this, the only question raised thereabout being whether the words of the resolution did not go further. In the Senate, the chairman of the like committee stated that its purpose was to provide for a defect caused by the circumstance that when documents were ordered to be printed in an appropriation bill, the distribution thereof being fixed by law (so many to each House and so many to the Departments), no provision arises for what is known as the "usual number," which "usual number" is distributable by law, one to each Senator and Representative, others to the libraries and document-rooms of each House, and others again to the Interior Department for transmission to public libraries.

At the time of the introduction of this resolution section 3792, Revised Statutes, provided that "1550 copies of any document ordered by Congress shall be printed, and that number shall be known as the usual number. No greater number shall be printed, unless ordered by either House or as hereinafter provided."

I understand that this *usual number* had an express, specific *destination*, as stated to the Senate.

If so, in case any other number were expressly ordered to be printed *for a different destination*, a reasonable construction would hold such other number to be additional to the "usual number," to wit, so many under the special order for one purpose, and so many more under the general provision of section 3792, or any amendment thereof, for another and *standing* purpose.

Reconciliation of the explanation given by the House committee, with that by the Senate committee as above, suggests that the occasion for the resolution of 1882 was, that the construction above suggested had previously prevailed, at least to a considerable extent, but that more recently it had been rejected, at least perhaps in the case of some document more than ordinarily desirable. By comparing what theretofore

had occured as to *some* documents with what more recently had occured as to *others*, the Clerk, and following him the committee in the House, may have concluded that a change had somehow or other been made affecting *all* documents. And therefore the occasion for legislation may have been so represented and so met.

Upon the whole, therefore, the words of the resolution are not restrained by the circumstances calling for its adoption, and they amount to a construction of section 3792, the present "usual number" being 1900.

The word "document" in the resolution therefore has a general application to everything that is a document, no matter by what kind of legislation ordered, so that such legislation do not actually forbid the printing of the "usual number" of the document upon which it operates.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE INTERIOR.

TONNAGE DUTIES.

Section 14 of the act of JUNE 26, 1884, chapter 121, does not subject the suspensions mentioned in its first *proviso* to the discretion of the President.

Meaning of the phrase "government of the foreign country," in the same section.

DEPARTMENT OF JUSTICE,
September 2, 1884.

SIR: In reply to yours of the 30th ultimo, relating to tonnage duties upon the "*Tinto*" from Trinidad:

(1) The shipping act of June 26, 1884, section 14, does not, as I understand it, subject the *suspensions* mentioned in its first proviso to the *discretion* of the President; and therefore I am of the opinion that a *right* thereto arises upon the happening of the condition therein mentioned, *i. e.*, the state of foreign law which in the opinion of the legislature warrants such suspensions.

(2) The phrase "government of the foreign country," in the same section, refers, as appears by the context, to the special government of such "country," as distinguished from

that of the *empire* or other ultimate sovereignty of which it may be a member.

And it seems to me also that the question in each case is as to the tonnage and light-house dues exacted by that government *at the particular port* from which the vessel arrives, irrespective of those exacted at other ports of the same "country."

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

REGISTRY OF OFFICIAL LETTERS OR PACKETS.

DEPARTMENT OF JUSTICE,
September 2, 1884.

SIR: I am of opinion that section 3 of the act of July 5, 1884, entitled "Making appropriations for the service of the Post-Office Department," etc., does *not* authorize Indian agents, or receivers and registers of land offices, to free registry of official letters and packets. Such letters and packets are not registered *by either a Department, or a bureau of a Department*, within the provisions of that act.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE INTERIOR.

SHIPPING COMMISSIONERS.

A shipping commissioner has no authority to ship seamen on "sail or steam vessels engaged in the coastwise trade," unless such vessels come within the exceptions of the act of June 9, 1874, chapter 260; nor will the consent of the master and seaman operate to give such authority.

He should not receive fees for shipping seamen on coasting vessels not within said exceptions.

Anything received by a shipping commissioner for such service is not required to be accounted for by the terms of section 27 of the act of June 26, 1884, chapter 121.

DEPARTMENT OF JUSTICE,
September 6, 1884.

SIR: I have the honor to acknowledge the receipt of your letter of August 29 ultimo, inclosing a letter from Shipping

Commissioner J. A. O'Brien, of Philadelphia, of date August 23 ultimo.

You say: "The question is submitted for your opinion, whether the shipping commissioners may ship such seamen when desired to do so by the master and the seamen; whether he may collect or accept a fee for the service; and whether such fee may be paid into the Treasury of the United States under section 27 of the act of June 26, 1884."

I have to reply as follows: The act of June 7, 1872, commonly known as the shipping act, provided, *inter alia*, for the appointment of certain officers to be known as "shipping commissioners," for their bonds, oaths, seals, clerks' offices, fees, duties, etc. The principal duties prescribed by the act for such an officer, and the only ones for which fees were provided therein, were those of engaging and discharging seamen and for apprenticing boys. For engaging a seaman in the manner and form prescribed by the act the commissioner was to receive a fee of $2. This was to be paid by the owner, master, etc., of the vessel or the ship engaging the seaman, and such owner or master might deduct from the seaman's wages 25 cents in part recoupment of this fee. The law further made it a penal offense for any shipping commissioner to "demand or receive any remuneration whatever, either directly or indirectly, for hiring or supplying any seamen for any merchant ships, excepting the lawful fees payable under this act."

The above are among the "provisions" of the act of June 7, 1872. These provisions were applicable to all vessels, whether engaged in the foreign or coasting trade. But it soon became evident that the operation of the law would become very onerous to those vessels of the latter class which made short voyages. So that on June 9, 1874, an act amendatory thereof was passed. The purpose of this act, as stated by Senator Buckingham, at the time of its passage by the Senate, was "to relieve men engaged in short voyages and in domestic trade from those requirements of the existing law," among which requirements was this of paying a fee of $2 for engaging seamen.

The legislative intent evidently was to permit masters, etc., engaged in the coasting trade to ship their own seamen

without the intervention of a shipping commissioner. The act recites that "*none* of the provisions of" the act of June 7, 1872, "shall apply to sail or steam vessels engaged in the coastwise trade," excepting certain classes of such vessels which are thereafter mentioned in the act.

From the above recital it will appear what my answer to your first question must be. A shipping commissioner has no authority under the law, as it now stands, to ship seamen on "sail or steam vessels engaged in the coastwise trade" unless such vessels come within the exceptions of the act of June 9, 1874. Nor will the consent of the master and seaman operate to give him such authority. The jurisdiction of the commissioner is exactly defined by the law. No consent of parties can operate to enlarge it.

The act of 1872 gave to this officer authority to ship seamen in all vessels engaged in the coastwise trade. The act of 1874 took it away again, except in certain stated cases. A shipping commissioner can do no more now, by virtue of his office, in respect of shipping sailors on unexcepted coasters, than he could have done in his private capacity prior to the act of 1872.

In regard to your second question, I am of opinion that shipping commissioners should not receive fees for shipping seamen on unexcepted coasters. While the act of 1874 has declared the penalty provision of the act of 1872 (sec. 7) not to apply to these cases, it has also declared the provisions in regard to fees to be equally inapplicable. While a shipping commissioner probably could not be prosecuted under section 7 of the act of 1872 for receiving a fee for shipping a sailor on an unexcepted coasting vessel, still, as he has now no authority in law for making such shipment, he certainly has no warrant for charging or accepting a fee for such service.

In answer to your third question, I am of opinion that anything received by a shipping commissioner for service of this sort is not required to be accounted for to the Secretary of the Treasury by the terms of section 27 of the act of June 26, 1884. This conclusion will naturally follow from what has gone before. As I am of the opinion that shipping commissioners have no authority to render such service by virtue of their office, anything received by them therefore would not

come under the head of receipts of the office, and it is only for such receipts that they are required to account by the act of 1864.

I have the honor to be, very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL.

Where a question is submitted by the Secretary of the Treasury to the Solicitor of the Treasury for the opinion of the latter thereon, the Attorney-General will not, at the request of the Solicitor, consider such opinion and express his views as to its conclusions.

DEPARTMENT OF JUSTICE,
September 10, 1884.

SIR: It is not the usual course for the Solicitor of the Treasury or for the Assistant Attorneys-General assigned to other Departments to transmit to the Attorney-General their opinions upon matters submitted to them therefor, in order that he shall consider and express his views upon their conclusions.

The "course of office" is that such opinions shall be returned to the Secretary in charge to govern his official action if he concurs; as otherwise he may submit the same question again to the Attorney-General, giving to the latter, if he so choose, the advantage of perusing any opinion already rendered as above supposed.

Section 369, Revised Statutes, cited by you in this connection, is treated as referring to the officers of this Department strictly so called, inasmuch as the legal gentlemen formally assigned as advisers, etc., of the Treasury, the Interior, and the Post-Office Department are assistant to the Secretaries and the Postmaster-General *without* an intervention by the Attorney-General.

I therefore herewith return the papers received in connection with yours of the 6th, being papers relating to Gris-

wold's case, in order that the routine in such matters shall be observed.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

HENRY S. NEAL, Esq.
Solicitor of the Treasury.

PERFORMING DUTIES OF VACANT OFFICE.

In the case of a vacancy in the office of Secretary of the Treasury, caused by the death of the incumbent: *Advised* that the duties of the office can not be performed by some other officer, under sections 177, 179, 180, and 181, Revised Statutes, for a longer period than ten days.

DEPARTMENT OF JUSTICE,
September 11, 1884.

SIR: I have examined the legislation which concerns the appointment of a Secretary of the Treasury. In general it appears not to have been changed since the year 1789. The statutes of that year made provision for the Departments of State, War, and Treasury only (1 Stat., pp. 28, 49, and 65). As to the method of appointing the respective "Secretaries" thereof nothing is said expressly. In each this matter is left to that bare provision of the Constitution, which vests such duties in the President; as follows:

"There shall be at the seat of Government an Executive Department to be known as the Department of, etc., and a Secretary of, etc., who shall be the head thereof." (Stat. of 1789 and Rev. Stat.)

"He shall nominate, and by and with the advice and consent of the Senate shall appoint, * * * all other officers of the United States whose appointments are not herein otherwise provided for," etc. (Constitution, Art. II, sec. 2.)

Upon consideration, therefore, of the question which has arisen upon the recent death of Secretary Folger, I have taken occasion to recur to the opinion which, upon the 31st of March, 1883, I submitted to you upon the death of Postmaster-General Howe, and I advise you that the conclusion in that case applies also in the present—that is, that under

sections 177, 179, 180, and 181 of the Revised Statutes no statutory succession or assignment of some other officer to the vacancy is valid for a longer period in all than ten days.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

ATTORNEY-GENERAL.

An opinion of the Attorney-General upon any question arising in the administration of the Treasury Department can only be had at the instance of the Secretary.

Where a question has been submitted by the Secretary to the Solicitor of the Treasury for advice thereon, the latter is not entitled, by virtue of section 361, Revised Statutes, to call upon the Attorney-General for his views on such question.

The Solicitor should, in such case, return his advice directly to the Secretary, who may, if he choose, require an opinion from the Attorney-General upon the same question.

DEPARTMENT OF JUSTICE,

September 15, 1884.

SIR: I observe that yours of the 12th instant, now before me, changes the form of your previous application in Griswold's case, and brings it within the practice to which you refer as having obtained in four cases entertained here between January and October in 1879, whilst Mr. Raynor held the responsible place now occupied by yourself. (16 Opin., 259, 385, 571 and 617.)

I think that such practice should be changed, and will state my reasons therefor.

The question as to Griswold which you state is, of course, one *arising* within section 356, Revised Statutes, *in the administration of the Treasury Department.*

I observe that the duty in that section imposed upon the Attorney-General to give an opinion in such case at the requirement of the Secretary of the Treasury implies that he is not to give such opinion at the requirement of any other officer thereof.

This conclusion is strengthened by a provision of the next section (366), which in the same connection makes an express distinction betwixt the War and Navy Departments and all others, and directs that all questions arising in the

administration of the two former, the cognizance of which is not given by statute to some other officer, shall be sent to the Attorney-General.

If it be granted that this allows questions in the War and Navy Departments to be sent to the Attorney-General by somebody else than the Secretaries, it is evident that it makes a distinction therein betwixt these Departments and all others, and that for a reason which upon its face it suggests. And if it be not granted that such questions can be transmitted otherwise than by the Secretary, then it follows that under even a more general provision officers of the War and Navy Departments, other than their heads, can not regularly ask for opinions by the Attorney-General.

Admitting this, it may however be replied that the Solicitor of the Treasury is himself expressly an officer of *the Department of Justice* (sec. 349), and therefore by virtue of section 361, which was cited in your former letter, is entitled to the *direction of the Attorney-General.*

Whatever this *direction* may include, I am of opinion that it does not extend to opinions asked and given in the course of a formal correspondence in writing.

If the Solicitor of the Treasury can authorize such correspondence as to matters which in due course come before him, why may not the Solicitor-General do the same? And, if the Secretary of the Treasury ask for an opinion by the Attorney-General, why may not the latter (under sec. 358) refer the question to be answered by the Solicitor of the Treasury?

My view is that section 358 does not apply in cases where, as in the Department of the Treasury, Interior, etc., the Secretary has a right to ask for an opinion from the subordinate *directly*; *i. e.*, without an intervention by the Attorney General; *i. e.*, in other words, where for the purposes of the particular matter the *formal* "subordinate" is *really* not so, but is *subordinate* to another "*head.*" So whenever, as by section 3469, a substantive duty is expressly imposed upon the "subordinate" in regard to some "head" of *another* Department, in my opinion such duty is not performed "under the direction of the Attorney-General" within the words of section 361. This section, originally enacted in 1870, was intended, in a quasi *residuary* character, to cover

cases not theretofore provided for, and therefore *not* a "*recommendation*" under section 3469; *i. e.*, originally an act of 1863.

Without undertaking to state the difference betwixt the "opinions," "directions," and "recommendations" mentioned in the statutes before me, I think it plainly intended that *opinions* by the Attorney-General upon questions like the present, arising in the administration of the Treasury Department, can be had only at the instance of the Secretary.

There is the same advantage to the Secretary in first obtaining a deliberate opinion of the Solicitor of the Treasury, and in *reserving to himself* a right of *afterwards*, by way of review, applying to the Attorney-General for another, that litigants have in *a series* of courts before which to contend for their rights. And it is the same sort of defeat of public policy for a Supreme Court to intervene in proceedings pending in a superior court, and for an Attorney-General to give an opinion to the Solicitor of the Treasury without requirement by the Secretary. If the Secretary have a right to the opinion of the Attorney-General in such cases by way of review, he has equally a right that the latter shall not previously *commit* his judgment thereupon.

This question was not considered in the cases to which you refer, and probably did not really occur. It seems to me that these cases make a breach of good form, and should not be followed. There is some account to be given of their passing so easily in that your able and experienced predecessor was known not to have practiced law for perhaps forty years, and therefore, if he chose to go outside of his own office for aid, to have unusual claim for indulgence upon merely technical questions. Now that the office is in the hands of a lawyer *tout temps prist*, the practice may better be recalled to its original course. (See 14 Opin., 21.)

I therefore return herewith the original papers inclosed with yours, and await any requirement that the Secretary may choose to make.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney General.

HENRY S. NEAL, Esq.,
Solicitor of the Treasury.

INTERNAL-REVENUE STAMPS.

The Commissioner of Internal Revenue is authorized, under certain conditions, to cause internal-revenue stamps, for the payment of tax upon tobacco, to be prepared elsewhere than in the Bureau of Engraving and Printing.

DEPARTMENT OF JUSTICE,
September 16, 1884.

SIR: In reply to yours of the 2d instant, asking whether the Commissioner of Internal Revenue is authorized, under the appropriate legislation for the present fiscal year, to cause certain internal-revenue stamps, for the payment of tax upon tobacco, to be prepared elsewhere than in the Bureau of Engraving and Printing, I have to say that I am of opinion that he is so authorized, provided that the United States are at no expense thereabout beyond that for the provisional payment of the salaries of one stamp agent and one counter, "to be reimbursed by the stamp manufacturers."

The sundry civil act of July 7 last prohibits *any expenditure* for stamps prepared elsewhere than at the bureau above named, but leaves the authority of the Commissioner thereabout in other respects untouched, whilst the provision in the act of the same date, providing for the *legislative*, etc., *expenses*, clearly contemplates a continuance of the practice of procuring stamps from ordinary manufacturers, who are there required to repay the salaries of officers whose appointment is rendered necessary by that practice.

Three original papers inclosed in yours are herewith returned.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

CUSTOMS LAWS.

The "Foxhall" gold and silver cup is free of duty under sections 2499 and 2502, title XXXIII, Rev. Stat., as enacted by the act of March 3, 1883, chapter 121.

DEPARTMENT OF JUSTICE,
September 19, 1884.

SIR: Yours of the 17th instant, referring to the "Foxhall" gold and silver cup won at Ascot, which was the subject of

my letter to you of the 2d instant, asks whether it may not properly be held to be an article having *similitude* in "material and quality and texture and the use to which it may be applied" to a "medal" made of those materials, and therefore whether it is not *free* under sections 2499 and 2502 of the customs act of 1883.

Upon consideration I answer this question in the affirmative.

As has been suggested, the purpose of the cup, like that of a medal, is to commemorate a particular event. Substantially it is a trophy, and has no other value, except in point of *material*, and that is free.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

REFUNDING FINE UNDER SHIPPING ACT.

Section 26 of the act of June 26, 1884, chapter 121, does not require that a protest shall have accompanied the payment of the fine, etc., a refunding of which by the Secretary of the Treasury is asked.

DEPARTMENT OF JUSTICE,
September 19, 1884.

SIR: In compliance with yours of the 13th instant, I have examined the question already presented in the case of the *Bessie May*, without regard to the special circumstances formerly (2d instant) stated in that connection.

That question is, whether section 26 of the shipping act of the 26th of June last requires that a *protest* shall have accompanied the payment of the fine, etc., a refunding of which is sought from the Secretary of the Treasury.

In my opinion it does not.

The section under consideration provides in substance that whenever any fine, etc., under laws relating to vessels and seamen, has been paid to any collector or consular officer, and application has been made within one year therefrom for its refunding, the Secretary of the Treasury, if he find that it

was illegally imposed, shall have power to refund so much thereof as he may think proper.

This is, therefore, not a case in which the United States define the circumstances under which they will submit themselves to coercion by a court in respect to money which some officer in the executive department may have adjudged to be justly due, as is the case in section 2931, Revised Statutes; but it is one in which the executive department is intrusted with the power of rejudging its own judgment, and of doing thereabout whatsoever it may think right, without control.

I am therefore of opinion that the omission in the provision before me to require a *protest* by the applicant as a foundation for the refund is deliberate.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

IMPROVEMENT OF NAVIGABLE WATERS.

Right of the United States to occupy and use soil within the bed of a river for the improvement of its navigation affirmed.

DEPARTMENT OF JUSTICE,
September 27, 1884.

SIR: I submit the following opinion in reply to yours of the 24th instant, relating to the improvement of the Falls of the Ohio, at Louisville, Ky., and asking whether the engineer officers of the United States in charge thereof, under the act of the 5th of July last, may enter upon certain premises, necessary to be occupied and used in the course of such improvement, without making preliminary compensation to the owners under the law of eminent domain.

It would have been better if the communication of the Chief of Engineers had stated the facts as to the site of the premises *directly*, so as to avoid all chance of error in considering the various papers which accompany that letter.

I gather, however, that the premises are within the bed of the Ohio at its average stage, and at that stage are covered

with water; or, at all events that, but for improvement works heretofore erected by the United States, they would be so covered.

In either case I am of the opinion that in the present connection they do not raise any question under the law of eminent domain, being held by their owners subject to the higher rights and duties of the United States in regard to navigation. The exercise of those *higher* rights is not attended by such obligations to the *lower* as on behalf of these are suggested. The latter, so far as concerns the degree to which at any time they may be enjoyed, are contingent upon and recede before the development of the former. There is consequently no collision betwixt the two.

If, during the progress of an improvement requiring years for its completion, and in consequence thereof a piece of land within the bed of a river becomes dry or more dry than before, I am of opinion that this circumstance does not impair the original right of the United States to deal therewith.

In exercising their important rights and duties in respect to navigable rivers, the United States may divert the current thereof—the deep water—to any portion of their beds; and, equally, they may use any other portion of those beds to secure such primary purpose, and both without being amenable for a violation of rights of private property.

The cases in 16 Opinions of Attorneys-General, cited in the papers inclosed by you, are in point for this conclusion; and so is the general course of the judgment of the Supreme Court in 99 United States Reports, 635. The whole bed of the river is a *road*, and may be *improved* or be made to contribute to an *improvement* of the rest.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF WAR.

POTOMAC FLATS.

The existence of certain claims of title to the "Potomac flats" is not an obstacle to the expenditure of the appropriation made by the act of July 5, 1884, chapter 229.

DEPARTMENT OF JUSTICE,
September 29, 1884.

SIR: In reply to your communication of the 20th September instant, asking whether the existence of certain undetermined claims of title to the Potomac flats is an obstacle to the expenditure of the appropriation of $500,000 under the act of the 5th of July, 1884, I submit that in the communication of the 2d of September, 1882, which you cite, the Attorney-General was of opinion that the claims in question were no obstacle to the expenditure of the appropriation then under consideration. In conformity therewith I now advise that they are no more an obstacle to the expenditure of the appropriation to which you now refer.

In addition to the probability of the former opinion of itself, the silence of Congress on this matter in the act of the 5th of July, 1884, may very properly be taken as a *confirmation* thereof.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF WAR.

INDIAN TERRITORY—INTERNAL REVENUE IN.

Internal revenue taxes on distilled spirits, fermented liquors, tobacco, etc., produced in the Indian Territory, and special taxes on the manufacture and sale of those articles in that Territory, may lawfully be collected within the same.

DEPARTMENT OF JUSTICE,
September 29, 1884.

SIR: I submit the following reply to yours of the 27th inst., which asks "Whether the Internal-Revenue taxes on distilled spirits, fermented liquors, tobacco, snuff, and cigars, produced in the Indian Territory, and the special taxes on the manufacture and sale of those articles in that Territory,

can be lawfully collected within said Territory from any person therein who manufactures or sells said articles, notwithstanding the provisions of article 10 of the treaty of August 11, 1866, with the Cherokees (14 Stat., 799), or of any other treaty or treaties now existing between the United States and any of the Indian tribes or nations resident in the said Territory."

In that connection I have carefully read the letter and inclosure from the Commissioner of Internal Revenue addressed to yourself, which you have done me the favor of transmitting.

I do not see that the authority of the *Cherokee tobacco case* (11 Wall., 616) has been done away with by anything authoritative which has since passed. I feel free to go that far, although all that is necessary practically here is for me to say that until that decision has formally been overruled it will be the duty of all the authorities of the United States to enforce it, and leave to the other side the part of questioning it by another writ of error.

The full strength of the case, however, is that the authority of that case for everybody (*excepting the court itself*, as is the meaning of Mr. Justice Field's remark in the *Forty-three gallon case*, 108 U. S., 491), so long as it stands, is final; and it is an official duty to enforce it.

For the rest, the judgment in 108 United States Reports, 491, does not touch the principle involved in the case whose authority over the public is now in question. Statutes imposing a tax upon *licenses* import nothing as to whether in any special case a license is otherwise *valid*. Therefore they do not conflict with previous police statutes which, operating upon their subject-matter from another point of view, render *licenses* in certain cases invalid. Where there is no *conflict* there can of course be no suggestion of an implied *repeal*.

Then as to the act of 1880, chapter 123 (21 Stat., 544), for the relief of Boudinot, which is cited as perhaps discrediting the principle of the decision in the Cherokee tobacco case now questioned, I submit that it expressly affirms it, alleging that the act *superseded* the treaty, and as expressly placing the relief which it gives upon a circumstance which it asserts that the court "was not called upon to decide and did

not decide;" *i. e.*, whether the United States officials "*had taken the necessary steps to make said one hundred and seventh section operative* in the Cherokee Nation *anterior to said seizure* of the property of said Elias C. Boudinot." It then proceeds to find that for that reason a wrong (*i. e.*, an act which *for want of the steps required* by the tax act was an infraction of the treaty) had been done to Boudinot, and gives relief accordingly.

If the legislature had regarded the principle in the decision of the Supreme Court improperly applied as between the Cherokee treaty and the subsequent internal-revenue act, it would have provided for all cases past and to come; but instead of that it not only makes a carefully detailed provision for one case, the exceptional features of which are stated, but accompanies that provision by an express legislative concurrence in the general doctrine of the judgment by which, on account of defective administrative action, Boudinot had suffered *wrong*.

I do not find that the specific question in the Cherokee tobacco case has been before the Supreme Court since; but that decision is quoted as an authoritative announcement of this principle by a unanimous court in *McRatney's case* (104 U. S., 621).

I believe that this will sufficiently indicate my opinion as to the question above stated.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

DUTY ON SAWED LUMBER.

Boards and other articles of sawed lumber of pine are dutiable at $2 per thousand feet under the act of March 3, 1883, chapter 121.

DEPARTMENT OF JUSTICE,
October 8, 1884.

SIR: The question submitted in your communication of the 18th ultimo is whether the duty on sawed boards, etc., of pine is $1 per thousand, as claimed by the importers, or $2, as assessed by the collectors.

The question arises upon the following provision in Schedule D, act of 3d March, 1883 (22 Stat., 501): "Sawed boards, plank, deals, and other lumber of hemlock, white-wood, sycamore, and bass-wood, one dollar per one thousand feet, board measure; all other articles of sawed lumber, two dollars per one thousand feet, board measure."

The tariff previously in force provided as follows: "Sawed boards, plank, deals, and other lumber of hemlock, white wood, sycamore, or bass-wood, one dollar per thousand feet, board measure. All other *varieties* of sawed lumber, two dollars per thousand feet, board measure." (Rev. Stat., Schedule K, p. 470.)

Your interpretation of the latter provision was that the duty of $1 applied only to sawed boards, plank, and deals manufactured out of hemlock and the other woods specified, and consequently that sawed boards, plank, and deals of pine wood were subject to a duty of $2 per thousand feet. You place the same interpretation on the similar provision in the new law.

I am of opinion that the difference in wording between the two acts (*i. e.*, the substitution of "articles" for "varieties"), so far as this bears upon the present question, is immaterial, and therefore concur in your ruling above stated.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

SEIZORS AND INFORMERS IN REVENUE CASES.

Where a claimant was both seizor and informer under the act of June 22, 1874, chapter 391, in the case of goods forfeited for violation of the customs laws, compensation may be allowed him by the Secretary of the Treasury in either capacity; and the fact that the claimant originally presented his claim as seizor does not estop him from subsequently changing its form and making claim as informer.

DEPARTMENT OF JUSTICE,
October 18, 1884.

SIR: Yours of the 11th instant, referring to the case of Egan and Smith, claimants for compensation upon a late

seizure of opium at San Francisco, and calling attention to section 4 of the act of June 22, 1874 (Rev. Stat., Supp., p. 77), asks the following question:

"If the facts in the case of seizure of goods for violation of the customs revenue laws show that the seizure was not made by a customs officer, but by 'other persons,' and that the goods were turned over by the seizors to the customs officers, who at the same time gave information of the smuggling to such officers, is the Secretary of the Treasury bound under the statute in question, in making an award, to treat them as seizors only, or may he at his option treat them as seizors or informers?"

It appears that the claimants, having had information or reason to suspect that a considerable quantity of opium was about to be smuggled into San Francisco, an *option* presented itself to them under the above-named statutes, viz, *either* to "inform" (under paragraph 2, Rev. Stat., Supp.) and thereupon apply for the $5,000 or less which the Secretary should conclude to be a fit compensation therefor, *or* to "seize" (under paragraph 1), and thereupon entitle themselves to perhaps one-half of the value of the opium.

They exercised their option in favor of the second alternative, and with reasonable prudence, too, inasmuch as the value turned out to be some $26,000.

By some unforeseen and unexplained circumstance, *i. e.*, in the language of the law by some *accident*, it subsequently turned out that the opium produced at public sale only some $7,000, which was not enough to pay the duty thereupon; and so, according to the statute, the claimants can get nothing for their services.

The question put by you above, when stated in technical form, is substantially, "whether Egan and Smith are thereupon equitably estopped from *going back*, as it were, and making claim as *informers*."

There is no appearance or suggestion that the United States have been put in any worse condition by the option which Egan and Smith exercised as above than if at first they had chosen to be informers. Their real merit is in bringing the 3,880 boxes *to justice*, so to say, and that this has been done in one way rather than another is matter of

form. If in any case a selection of such *form* has not prejudiced the Government in the result, no reason occurs why the Secretary, in his discretion, may not allow the claimants to change that.

In this connection it cannot be regarded as *prejudice* that under one form the Government will pay no *compensation*, whilst under the other it will. Congress has said in effect that *compensation* in these cases is for the public good. There is no adverse interest *in that respect* betwixt the claimants and the public. I think that the jurisdiction of the Secretary to allow a claim is not defeated by the circumstance that since it originated there has been a change in its form, no harm having come to the public because of the original selection or because of such change. The United States are to-day, as I understand, just where they would have been if Egan and Smith had by information procured a customs officer to seize the opium instead of seizing it themselves.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

MAIL TRANSPORTATION.

DEPARTMENT OF JUSTICE,
October 31, 1884.

SIR: I have considered your communication of the 22d instant, requesting to know whether the construction placed by the Post-Office Department on section 4002, subordinate section 2, prescribing the mode in which the average of the weight of mails transported on railroad routes shall be ascertained, is correct, and am of opinion that that construction is correct, and that a departure from it would defeat the intention of the law and cause no little embarrassment.

I have the honor to be, your obedient servant,

S. F. PHILLIPS,
Acting Attorney-General.

The POSTMASTER-GENERAL.

COMPROMISE OF CLAIMS.

Where judgment was recovered in the name of the United States against G. for damages and penalties, under sections 3490, 3491, 3492, and 3493, Revised Statutes, the action having been instituted and prosecuted by D.: *Advised* that the Secretary of the Treasury has power, by virtue of section 3469, Revised Statutes, to compromise such judgment, irrespective of the quasi interest which D. may have therein.

DEPARTMENT OF JUSTICE,
November 13, 1884.

SIR: Yours of the 4th ultimo states the following case:

"There has been transmitted to me for official action a proposition made by one W. C. Griswold to compromise a judgment recovered against him in the name of the United States in the district court of the United States for the district of Oregon.

"It appears that the original action was for damages and penalties provided for in sections 3490, 3491, 3492, and 3493, of the Revised Statutes, for acts committed by Mr. Griswold which are prohibited by some of the provisions of section 5438, Revised Statutes, and that one Dowell instituted the action and prosecuted the same to final judgment under the provisions of the first above cited sections."

Upon this statement you ask whether such judgment comes within the scope of section 3469, Revised Statutes, which authorizes you to compromise "any claim in favor of the United States," after report, etc., the only reason to the contrary arising out of the interest which Dowell claims therein.

It appears from the papers that after a large part of the judgment had been collected it became, and remains, a matter of doubt whether anything more can be made; and that the proposed compromise relates merely to this latter part.

Upon consideration, I advise that this question comes within the principle announced in *United States* v. *Morris* (10 Wheat., 246).

In that case a judgment of forfeiture had been entered against one Ogden; a judgment therefore which, as might have been thought, had conclusively ascertained all matters necessary to such forfeiture. The suit had been prosecuted

in the interest of certain officers who, under a statute, were entitled to one-half thereof. Nevertheless, the Secretary of the Treasury remitted such forfeiture. Thereupon it was argued that after judgment the Secretary had no such power as to the share of the officers. The court, however, held that he had, and this under a train of general reasoning which seems to be pertinent here.

It seems that the phrase, "*in favor of the United States*," in section 3469, includes judgments like that before you, under the reasoning in the case in Wheaton. Nor can the circumstance that in suits under sections 3490, etc., the prosecutor is liable for costs, make any important difference in point of principle between the case of Griswold and that of Morris.

I therefore advise that you have the power to compromise judgments in the situation of this one, where the only objection arises out of the quasi interest of the prosecutor therein.

Even if this conclusion were somewhat uncertain, I might still give the above advice, seeing that if it be mistaken the prosecutor may have relief by proceedings in court; whereas if the advice were to the contrary and mistaken, Griswold could have no means of so correcting it that occurs to me.

Very respectfully,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE TREASURY.

CLAIM OF MRS. WARD B. BURNETT.

The claim of Mrs. Burnett for a pension, as widow, considered in connection with the acts of June 18, 1874, chapter 298, and June 16, 1880, chapter 236: and *held* that those acts did not change or increase her rights, which are still governed, as to the amount of the pension to which she is entitled, by section 4695, Revised Statutes.

DEPARTMENT OF JUSTICE,
November 15, 1884.

SIR: In the matter of the pension certificate of Mrs. Ward B. Burnett I reply to your reference as follows:

Congress, by act of March 3, 1879 (20 Stat., 665), directed

the name of Ward B. Burnett to be placed upon the pension roll at the rate of $50 per month, and a certificate was issued to him accordingly. In July, 1882, he surrendered his certificate, relinquishing his claim under the special act and electing to receive a pension of $72 per month under the general act of June 16, 1880 (21 Stat. 281). On the 25th day of July, 1882, it was enacted that no person who is now receiving or who shall hereafter receive a pension under a special act shall be entitled to receive in addition thereto a pension under the general law, etc. His application for mandamus to compel the Secretary of the Interior to return the certificate issued under the special act was refused by the Supreme Court of the United States, on the ground that the act of 1882 forbade payment of a double pension, and therefore a judgment ordering that the certificate be returned to him would be futile. (107 U. S., 64.)

At the time of his death he held a certificate entitling him to a pension of $72 a month, but the certificate issued to his widow, there being no surviving children, is only for $30 per month.

Upon objection by Mrs. Burnett to this allowance the Secretary of the Interior requested the opinion of this Department. His action in fixing her pension at $30 per month received the approval of Acting Attorney-General Phillips, as appears by the following opinion.

[Here follows the opinion referred to, which is dated July 26, 1884, see page 39, *supra*.]

I submit also the following considerations:

Section 4702, Revised Statutes, under which the certificate has been issued to Mrs. Burnett, provides:

"If any person embraced within the provisions of sections 4692 and 4693 hereafter dies by reason of any wound * * * which under * * * said sections would have entitled him to an invalid pension had he been disabled, his widow * * * shall be entitled to receive the same pension as the husband * * * would have been entitled to had he been totally disabled," etc.

Section 4695 provides that—

"The pension for total disability shall be as follows: For lieutenant-colonel and all officers of higher rank in the mil-

itary service * * * thirty dollars per month," and for lower ranks the pension ranges from $20 down to $8.

Section 4697 and 4698 provide pensions for permanent specific disabilities irrespective of rank for persons who, if taking under section 4695, would, on account of their rank, receive less than the amounts provided in sections 4697 and 4698. None of the rates mentioned in these sections exceed the $30 per month which General Burnett could have taken under section 4695, except the allowance of $31.25 per month to persons so totally disabled as to require the regular personal aid and attendance of another person. To persons totally disabled, but not requiring personal aid and attendance, section 4698 gave but $24.

Since December 1, 1883, two statutes have been passed amending sections 4697 and 4698.

The act of June 18, 1874 (18 Stat., 78), gives a pension of $50 a month to pensioners so totally disabled as to require the regular personal aid and attendance of another person, and the act of June 16, 1880, gives to all soldiers and sailors receiving $50 per month under the act of June 18, 1874, $72 per month.

Mrs. Burnett claims that instead of receiving the $30 per month fixed by section 4695 for lieutenant-colonels and officers of higher rank, she should receive the $72 given by the act of 1880 to soldiers and sailors, irrespective of rank, who were so helpless as to require personal aid and attendance.

If the acts of 1874 and 1880 had been accompanied by a provision defining the rights of the surviving widow and children, saying either that the new legislation should not affect their pensions, or that the pension given them on the death of the husband or father should correspond to the amount received by him at his death, the case would be free from all doubt. But Congress has not done this, and we are left to ascertain from the language of the statutes whether Congress, in increasing in 1874 and 1880 the pensions for specific disability, meant to enlarge and increase the pension for the survivors. The key to the solution of this question seems to me to be found in that clause of the act of 1874 which confers the increase only upon those who have been so permanently and totally disabled as to require the regular

personal aid and attendance of another person. The certificate to General Burnett for a pension of $72 is sufficient evidence that he did require such personal aid and attendance; but if General Burnett had been so stricken as to be unable to assist in the least degree in the maintenance or support of his family, and yet did not require regular aid and attendance, his pension would have been limited to the $30 fixed by section 3695. There seems to be no hardship in giving to Mrs. Burnett only that sum which her husband would have received if he could have dispensed with personal attendance.

It is my opinion that if General Burnett had died prior to the passage of the act of 1874 his widow would have been entitled to the amount received by him for total disability as set forth in section 4695, and that the acts of 1874 and 1880 did not change or increase her rights, though passed in the life-time of her husband.

I have endeavored to answer your inquiry in full, but as Mrs. Burnett retains the letter of reference, declining to allow it to go upon the files of this Department, it is possible that I have omitted something. If such be the case I will be glad to make further answer.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

STATEN ISLAND RAPID TRANSIT RAILROAD.

A tunnel constructed in the manner proposed by the Staten Island Rapid Transit Railroad Company across a part of the light-house grounds at New Brighton, Staten Island, is within the provision of the act of February 9, 1881, chapter 41, granting right of way through said grounds.

DEPARTMENT OF JUSTICE,

November 15, 1884.

SIR: By letter of the 18th ultimo your predecessor in office called my attention to the act of February 9, 1881, chapter 41, which grants to the Staten Island Rapid Transit Railroad Company, for the purpose of constructing a railroad, "the right of way, by tunnel not exceeding 30 feet in width, through the lands of the United States now occupied by the United States Light-House Establishment in the village of

New Brighton," etc., and after stating that the above-named company desire "to make an open cut through at least a portion of the light-house grounds, to build a brick or masonry arch over this portion of their road, and to then restore the surface of the ground to its original level by filling in earth above the arch," requested my opinion upon the question "whether the method of building referred to should be considered a tunnel within the meaning of the act."

I perceive nothing in the terms of the act that forbids the construction of a tunnel in the manner proposed, which, I understand, meets with no objection from the Light-House Board. The substance of the grant is, the right to establish a railroad through the light-house grounds by means of a tunnel. Whether the tunnel shall be constructed by burrowing under the surface of the ground, or by making an open cut, turning an arch, and refilling, is not prescribed by the statute, but is left to depend upon the topography and nature of the ground and other circumstances connected with the location of the tunnel, which is placed under the control of the Secretary of the Treasury, being subject to his approval.

To the question submitted I accordingly reply, that in my opinion a tunnel built in the manner proposed by the above-named company may be considered a tunnel within the meaning of the act.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

DUTY OF ATTORNEY-GENERAL.

It is not the duty of the Attorney-General to give an opinion to the Secretary of the Treasury upon questions relating to the past action of the Board of Supervising Inspectors, which was had on a matter properly submitted to such board under the provisions of section 4491, Revised Statutes, and which is not reviewable by the Secretary.

DEPARTMENT OF JUSTICE,
November 19, 1884.

SIR: In a communication dated the 23d of September last the Hon. Charles E. Coon, then Acting Secretary of the Treasury, called my attention to a letter inclosed therewith,

addressed to your Department by J. Chandler, esq., containing an extract from the proceedings of the Board of Supervising Inspectors at its annual meeting held in January, 1884, in relation to the "Edson recording steam-gauge," which had been submitted for the approval of the board. By these proceedings it appears that that instrument was not approved, on the ground that it failed to meet all the requirements of the statute (secs. 4418 and 4419, Rev. Stat., especially the latter section) as understood by the board. Hereupon two questions (suggested by Mr. Chandler with reference to the view of the board as to the meaning of section 4419) are proposed for my opinion in the above-mentioned communication.

By statute, the duty of the Attorney-General to give official opinions to heads of Departments upon questions of law is limited to such questions as arise in the administration of their Departments (sec. 356, Rev. Stat.). The questions proposed to me as above do not seem to be of that character. They apparently relate to the past action of the Board of Supervising Inspectors, which was had upon a matter properly submitted thereto under the provisions of section 4491, Revised Statutes, and which is not reviewable by your Department. It is true that, under the provisions of the same section, the same matter (*i. e.*, the subject of the approval of the instrument aforesaid) may be submitted to the Secretary of the Treasury for his action, in which event, should similar questions arise, the opinion of the Attorney-General thereon might properly be invoked. But I do not understand this to be the case now.

While I shall, with great pleasure, respond to any call from your Department for an opinion upon questions of law arising in the administration thereof, I conceive that, for the reason already intimated, I have no authority to pass upon the particular questions above referred to, and therefore feel constrained to return the papers which accompanied the Acting Secretary's communication without expressing any opinion on those questions.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. HUGH MCCULLOCH,

Secretary of the Treasury.

PUBLIC BUILDING AT MINNEAPOLIS.

The first section of the act of April 11, 1882, chapter 75, authorized a public building to be erected at Minneapolis, Minn., limiting the cost of the building, inclusive of its site, to $175,000, and the second section of same act appropriated $60,000 for purchase of site and toward construction of building; by act of March 3, 1883, chapter 143, an appropriation of $60,000 was made for continuation of the building; and, by act of July 7, 1884, chapter 332, a further appropriation of $70,000 was made for extension of site and continuation of building—the whole of the appropriations aggregating $190,000: *Advised* that the limitation fixed by the act of 1882 as to cost of the building, etc., is not repealed by the subsequent appropriation acts, the only additional expenditure allowable being for an "extension of site."

DEPARTMENT OF JUSTICE,
November 21, 1884.

SIR: A note from your predecessor, some weeks since, submitted the general inquiry whether, under existing legislation upon the matter of erecting a public building at Minneapolis, the question before yourself as to plans, cost, etc., is *at large*, or lies within certain statutory limits, and, if so, what?

The answer to this inquiry depends upon the meaning of the statutes which define your duties therein. These are substantially to the following effect:

Section 3732. No contract for the erection of any public building shall bind the Government to pay a larger sum than the amount *appropriated* therefor.

Act of 1882, chapter 75, section 1: That the Secretary of the Treasury purchase a site and cause to be erected a building for post-office, etc., at Minneapolis, the site and building, when completed upon plans and specifications to be previously made and approved by the Secretary of the Treasury, not to exceed the cost of $175,000.

Section 2 appropriates $60,000 for purchase of site and towards construction of building.

Act of 1883, chapter 143 (22 Stat., 604), appropriates "For post-office, etc., at Minneapolis, Minn., for continuation, $60,000."

Act of 1884 (sundry civil, July 7), appropriates "For post-office at Minneapolis, Minn., for extension of site and continuation, $70,000."

Upon this it is suggested that inasmuch as regularly, if the limitation of the act of 1882 had been observed, the last enactment would have provided in terms for a "completion" instead of "continuation," and for an appropriation of only $55,000, it is to be concluded that Congress has done away with the previous *limitation entirely*, and left the question as to the total expenditure for the building *at large*, to be decided, as in former times, by the executive authority in charge upon its own judgment of what the public interests at the locality in question demand. This conclusion is thought to be made more clear by the significant express provision for *extending the site of the building*.

In discussing this matter it is to be considered that it would have been quite easy, and a matter of course, for Congress, by inserting a proviso of less than a dozen words, expressly to repeal the limitation in question; and that if it had done so it would probably have substituted some other limitation. That it did not, but has left the matter under the thoroughly familiar rules as to the extent to which a later statute operates upon a previous one merely by *inconsistency therewith*, is noticeable.

Besides this, the words which impose the limitation are plain, deliberate, and peremptory; whilst to these are opposed (in order to claim a *repeal*, I mean, for as to mere *modification* there is no dispute) arguments which at most are only probable. Of itself the word "continuation" does suggest that the appropriation is not to *finish* the building; but if previously a limitation had been placed upon the cost, and the appropriation for "continuation" had only *exhausted* such limited amount, I suppose that it would not (by reason of such word, I mean) be open to the executive to take fresh measure for *erection*, etc., without regard to the original inhibition.

And inasmuch as "site" does not mean so much ground only as is included by the foundation—as indeed is *expressly* provided here by the act first authorizing the erection—an appropriation for more than the remnant of the original estimate, when accompanied expressly by a provision "*for extension of site*," would throw no valuable light upon the point

whether Congress intended thereby that *the foundation* or *the superstructure* should be enlarged.

Besides, the *short-hand* language of the subsequent *appropriations* is to be read as incidental to the original act, so that their obscurities are to be cleared up by its fuller and more deliberate expressions, and not vice versa. Here, then, the "post-office," etc., appropriated for is no other than the one defined by the plans and specifications, which had been already made in accordance with the act of 1882. *It is the erection so planned and specified that is to be "continued."*

It may be that the original estimates for such buildings sometimes turn out to have been miscalculated; so that Congress, when the time arrives at which previously it had reason to anticipate that what would be needed would be only the remnant of the original estimate, finds itself under some *coercion* to go further.

Or it may happen that the Supervising Architect reports that certain changes in construction are demanded, and submits this to Congress, with estimates therefor.

In both of these cases, it being entirely competent for Congress to comply with the new situation, language like that in the appropriation item before me would have a significance which in their absence it does not have, except by a *straining*, which is wholly inadmissible.

Upon the whole, I submit that the words of the appropriation of "1884" naturally suggest that the only new item of expenditure allowable is an "extension of site"; there being, besides, a suggestion that the amount appropriated for the uses of the building itself—*the one*, I mean, *theretofore planned and specified*—may not be sufficient for its *completion*, in which case of course Congress expected to be applied to again.

Very respectfully,

S. F. PHILLIPS,
Solicitor-General.

I concur.

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

CUSTOMS LAWS.

A lot of rum was exported December 3, 1883, and reimported October 20, 1884, which had been manufactured within the United States from imported molasses whereon drawback was allowed upon the exportation of the rum: *Advised* that the rum is dutiable under section 2500, Revised Statutes, and not under the act of March 3, 1883, chapter 121; furthermore, that the importers are entitled to remove the same under section 3433, Rev. Stat.

DEPARTMENT OF JUSTICE,
November 29, 1884.

SIR: Yours of the 19th instant states a case of bona fide *exportation* (December 3, 1883), and *reimportation* (October 20, 1884), of rum originally manufactured within the United States, under section 3019, Revised Statutes, from imported molasses, which was allowed drawback upon the exportation of the rum.

It seems to me that such rum is dutiable under section 2500, Revised Statutes, and not under the act of March 3, 1883 (*i. e.*, "102 T. I," as the paragraph is designated in your letter). It is a *manufacture of the United States*, notwithstanding the foreign origin of its material.

I am also of opinion that the word *imported* in section 3433 is used *generally*, and includes *reimported*. Section 2500 forms a context for "102 T. I," and the like provisions, by which it is seen that reimportations of distilled spirits are not within those other provisions which impose duty upon such spirits when *imported*. But for that context those other provisions would include reimported spirits. I see no context, and no reason is suggested why the word "imported" in section 3433 (Revised Statutes, first sentence, beginning on page 377) does not include *reimported*.

I therefore answer the two questions which you have put:

(1) The importers are entitled to remove the rum in question under section 3433, Revised Statutes.

(2) That rum is dutiable according to section 2500, Revised Statutes.

Very respectfully,

S. F. PHILLIPS,
Solicitor-General.

I concur.

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

CIVIL SERVICE—ELIGIBILITY FOR APPOINTMENT.

Where a father and daughter held each an office in the classified service in one of the Departments, and another daughter, having passed the required examination, was proposed for appointment in another Department: *Held* that, by force of section 9 of the act of January 16, 1883, chapter 27, the last-mentioned daughter, so long as the above state of facts exists, is ineligible for appointment to any office or place in the classified service.

DEPARTMENT OF JUSTICE,
December 9, 1884.

SIR: Your letter of the 8th instant presents for my consideration the following case and question:

A father and one daughter are now employed as clerks in the Treasury Department, and the name of another daughter, who has passed the required examination for appointment in the classified civil service, has been sent to the Post-Office Department by the Civil Service Commission for appointment therein. Both daughters, though of age, live with their father and are members of his household. In view of these facts and of the provisions of section 9 of the act of January 16, 1883, chapter 27, you inquire whether the last-mentioned daughter is eligible for appointment in the Post-Office Department.

The section cited above declares: "That whenever there are already two or more members of a family in the public service in the grades covered by this act, no other member of such family shall be eligible to appointment to any of said grades."

This enactment applies to all offices, places, and employments in the public service which are *classified* within the meaning of the aforesaid act; the words "*grades* covered by this act," as employed in said section, manifestly signifying the several *classes* into which such offices, places, and employments are arranged. It virtually prohibits the appointment of an applicant to an office or place falling within either of these classes where two members of the same family to which the applicant belongs are already in the public service in any of the same classes; and this prohibition is not limited to offices or places in the same Department, but extends to all offices or places in the public service which are classified as above.

In the present case, then, assuming that the father and daughter, now employed in the Treasury Department, hold offices or places belonging to any of the classes referred to, I am of opinion that, so long as this state of facts exists, the other daughter is, by force of the provision above quoted, made ineligible for appointment to any office or place in the classified service of the Post-Office Department.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. JOHN SCHUYLER CROSBY,
Acting Postmaster-General.

ENFORCEMENT OF FOREIGN JUDGMENTS.

Consideration of certain propositions relating to the enforcement of judgments of foreign tribunals in civil and commercial matters, suggested by a resolution adopted at the Conference held at Milan in 1883 by the Association for the Reformation and Codification of International Law.

DEPARTMENT OF JUSTICE,
December 12, 1884.

SIR: I have examined the papers which accompanied your letter of the 25th ultimo, relative to a proposed international agreement on the subject of the enforcement of the judgments of foreign tribunals in civil and commercial matters. Among these papers is a resolution adopted at the Conference held at Milan, in 1883, by the Association for the Reformation and Codification of International Law, which proposes as the *bases* of such an agreement the following:

"(1) The decision must have been rendered by a competent judge, etc.

"(2) The parties must have been duly summoned.

"(3) In the case of a judgment by default, the party against whom it has been rendered must have had knowledge of the suit and have had an opportunity to defend himself.

"(4) The decision must contain nothing opposed to good morals or to the order or public law of the State in which it is to be executed.

"(5) The judge who is requested to execute the decision is not to examine the merits of the case, but simply to inquire whether the aforesaid legal conditions have been fulfilled.

"(6) A decision pronounced by a foreign court, and fulfilling these conditions, is to have the same effect as one pronounced by a home court, whether its execution be requested or it is to be used as a *res adjudicata*.

"(7) The forms and methods of execution are to be regulated by the law of the country in which the execution is requested."

In compliance with your request, I have now the honor to state my views upon the foregoing propositions.

The first three propositions quoted relate solely to the subject of the competency or *jurisdiction* of the foreign tribunal. I do not perceive that their adoption by this Government would effect any material change or lead to any improvement in the existing state of our law with respect to the enforcement of foreign judgments.

According to the general current of American authority, the judgment of a foreign tribunal having jurisdiction of the parties and of the subject matter of the controversy, where no fraud is shown, is recognized by the courts of this country as creating an obligation upon which an action can be maintained, and where an action is brought to enforce the obligation thus created such judgment is taken to be conclusive upon the merits. Among the several States of this Union the same doctrine applies to judgments rendered by the courts of sister States; so that these judgments practically stand on no higher or different footing than the judgments of foreign courts. The prevailing doctrine just indicated, both as regards State judgments and judgments of foreign countries, is believed to be as liberal as the interests of justice require.

In an action brought here on a foreign judgment, the defendant may show that the foreign court had no jurisdiction of the subject-matter of the suit, or that he was never summoned to answer, and had no opportunity of making his defense. These are facts which go to the question of the competency or the jurisdiction of the foreign court, and, if established, defeat the action. The result would be the same under the rules embodied in the three propositions above referred to.

The fourth proposition expresses nothing more than what

is already implied in our law as a necessary condition for the maintenance of an action upon a foreign judgment. It is a good defense to such an action that the judgment was obtained by the fraud of the party seeking to enforce it; and, moreover, no court will lend its aid to enforce a judgment opposed to good morals or to the public law of the State.

The fifth proposition, in substance, makes the foreign judgment conclusive upon the merits where the requirements of the preceding propositions are fulfilled. I have already stated the prevailing American doctrine on this subject.

The remaining propositions relate to the *mode of enforcing* and the *effect* of foreign judgments.

Under our law the mode of enforcing a foreign judgment (and the same mode exists among the several States of the Union with respect to the judgments of other States) is by the institution of a suit thereon; and a judgment obtained in the suit thus instituted has the same vigor and effect as other domestic judgments, and is executed in the same way. The foreign judgment has no effect of itself, other than to create an obligation upon which an action may be brought, or to constitute an *exceptio rei judicatæ* available in defense of an action.

I do not see that the propositions last referred to would, if adopted, call for any modification of our law as regards the effect and enforcement of foreign judgments.

The papers received with your letter are herewith returned.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. FREDERICK T. FRELINGHUYSEN,

Secretary of State.

DUTY OF ATTORNEY-GENERAL.

The Attorney-General is not authorized by law to give an official opinion to the House of Representatives in response to a resolution thereof.

DEPARTMENT OF JUSTICE,
December 17, 1884.

SIR: I have the honor to acknowledge the receipt of the following resolution, dated December 15, 1884:

"*Resolved*, That the Attorney-General of the United States be respectfully requested to report to this House, whether, in his opinion, the section 3738 of the Revised Statutes with reference to eight hours employment constituting a day's labor for all laborers, etc., employed on behalf of the United States applies to the letter-carriers of the United States."

To this I must reply that I can not furnish the legal opinion requested. The authority of the Attorney-General to give his official opinion is limited by the laws which create and define his office, and will not permit him to give advice at the call of either house of Congress, or of Congress itself, but only to the President or the head of an Executive Department. Early in the history of the Government this was established and suggested to the House of Representatives by Mr. Attorney-General Wirt (1 Opin., 335). When the Department of Justice was created the law in this respect was not changed.

This opinion has been invariably observed by many Attorneys-General, including Attorneys-General Taney, Crittenden, Bates, Evarts, Williams, and Devens. (2 Opin., 499; 5 Opin., 561; 10 Opin., 164; 12 Opin., 544; 14 Opin., 17; 14 Opin., 177; 15 Opin., 475.)

Of course it would be my wish to conform to any request that the House of Representatives might make, but such wish I could not comply with without reversing the law and the precedents hitherto established.

I have the honor to be, with great respect,

BENJAMIN HARRIS BREWSTER.

The SPEAKER OF THE HOUSE OF REPRESENTATIVES.

CONTRACT WITH SOUTH BOSTON IRON COMPANY.

The contract entered into by the Chief of Ordnance with the South Boston Iron Company in October, 1880, and subsequently transferred by that company to the South Boston Iron Works, may still be treated by the Government as obligatory upon the former company, notwithstanding such transfer.

Under the provisions of section 3737, Revised Statutes, such transfer operated to annul the contract so far as the United States are concerned; but these provisions were not made to enable a contractor to avoid his agreement with the Government and relieve himself from his obligations by a mere transfer.

DEPARTMENT OF JUSTICE,
December 20, 1884.

SIR: I return herewith the papers which accompanied your letter to me of the 27th of June last, relative to a certain contract with the South Boston Iron Company for the construction of a shop building and machinery for making cannon, etc., and have the honor to state my views upon the questions proposed.

From these papers it appears that in October, 1880, the said company entered into a contract with the Chief of Ordnance, by which it agreed to construct for the United States, upon the company's grounds at the South Boston Foundry, a shop building, with foundations for lathes, etc., and also to make and alter certain lathes, together with a traveling crane, etc., for all of which, upon completion thereof, the United States were to pay the company a stipulated amount; the payment, however, being subject to the following condition, namely, that the amount so paid "shall be reimbursed to the said United States by the said South Boston Iron Company when a reserve of 5 per centum from the price of all work for the United States subsequent to, and not including, the four 12-inch breech-loading rifles contracted for under the date aforesaid, which may be executed by the machines herein contracted for, should amount to a sum sufficient for that purpose, the said shop building, etc., lathes, traveling cranes, etc., to remain the property of the United States until the sums above specified shall be paid to the United States by the said company."

After the shop building, lathes, etc., had been constructed

by the said company and paid for by the United States the company leased its works to another company, called the South Boston Iron Works, and subsequently sold the latter company its property and rights under these existing contracts, including that entered into with the Chief of Ordnance above referred to. And this lease and sale have given rise to the following questions, on which my opinion is requested:

"Whether the contract entered into with the South Boston Iron Company, as stated above, is in force and can be enforced against the South Boston Iron Works, or whether a similar contract is to be entered into with the South Boston Iron Works covering the same thing, or what other action should best be taken to secure the interest of the United States."

Under the provisions of section 3737, Revised Statutes, which are expressly incorporated in the contract itself, the transfer of the latter by the South Boston Iron Company to the South Boston Iron Works was forbidden, such transfer by the terms of the same provisions operating to annul the contract so far as the United States are concerned. But those provisions were not meant to enable a contractor to avoid his agreement with the Government and relieve himself from his obligations thereunder by a mere transfer. (See 16 Opin., 278.) Hence, as against the South Boston Iron Company, the contract in question may still be treated by the Government as obligatory upon that company, notwithstanding the transfer. As against the South Boston Iron Works, the transferee, the case is different. Between this company and the United States no privity exists by reason of the transfer, and in the absence of any agreement between the company and the United States, importing an undertaking by the former to perform the contract referred to, such contract cannot be enforced against it by the latter.

Thus far I have considered and answered only such of the questions presented as relate to the contract with the South Boston Iron Company. The remaining questions appear to me to be *administrative*, rather than law questions. Whether it is expedient under the present circumstances to enter into a similar contract with the South Boston Iron

Works, or what other action the interest of the United States requires in the premises, are, I submit, subjects that do not properly come within the province of this Department to examine.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. ROBERT T. LINCOLN,
Secretary of War.

CHINESE EXCLUSION.

Where a sheriff in Washington Territory apprehended certain Chinamen and brought them before a United States commissioner, who, having found them to be in the country unlawfully, remanded them to the custody of the sheriff, to be sent out of the country: *Held* that the expenses incurred by the sheriff in the performance of such service are payable from the appropriation made by the act of July 7, 1884, chapter 332, to meet expenses incurred in executing the act relating to the Chinese, approved May 6, 1882.

DEPARTMENT OF JUSTICE,
December 22, 1884.

SIR: Your communication of the 28th October ultimo and the inclosures therewith sent present the following state of facts:

Certain Chinamen were apprehended in Washington Territory by the sheriff of Skagit County and taken before a United States commissioner, who, having found them to be in the country unlawfully, remanded them to the custody of the sheriff, to be delivered to the collector of customs, to be returned to British Columbia.

The sheriff who made the arrests and took the Chinamen before the commissioner and executed the latter's order has applied to the collector of customs of Port Townsend, Washington Territory, to be paid the costs and charges for said services which are authorized by the twelfth section of the act of May 6, 1882, as amended by the act of July 5, 1884, entitled, "An act to amend an act entitled 'An act to execute certain treaty stipulations relating to Chinese, approved May sixth, eighteen hundred and eighty-two,'" and the question submitted for opinion is, whether expenses of this kind are to

be paid out of the appropriation made by the act of July 7, 1884, "to meet such expenses as may be necessary to be incurred in carrying out the provision of the act to execute certain treaty stipulations relating to Chinese, approved May 6, 1882," or out of some one of the appropriations to defray the expenses of the United States courts.

Upon an examination of the appropriations to meet the expenses of the United States courts made by the act of July 7, 1884, I see no head under which an expenditure for the purpose in question could be made, and I am of opinion that the sheriff should be paid out of the appropriation made by the act of July 7, 1884, first above indicated.

I have the honor to be, yours, very respectfully,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

DRIVING STOCK ON INDIAN LANDS.

Sheep are "cattle" within the meaning of section 2117, Revised Statutes, which imposes a penalty for driving any stock, etc., to range and feed on Indian lands without the consent of the tribe.

DEPARTMENT OF JUSTICE,
December 22, 1884.

SIR: In reply to your communication asking an opinion as to whether sheep are embraced by section 2117, Revised Statutes, I beg to say that I am of the opinion they are.

Section 2117 reads thus: "Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock."

The standard lexicographers place sheep under the head of cattle, and it would seem to be in derogation of the manifest intention of Congress to take the word in a more confined sense.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF WAR.

DISTILLERY WAREHOUSE.

The Secretary of the Treasury has power to make a regulation under which distilled spirits may be permitted to remain in warehouse after the expiration of three years, upon the distiller or owner of the spirits filing a declaration of his purpose to export the same in good faith, and giving a bond to do so within a given period.

DEPARTMENT OF JUSTICE,
December 23, 1884.

SIR: Yours of the 15th instant asks the following question:

Whether the Treasury Department has the power to make a regulation by which distilled spirits can be permitted to remain in a distillery warehouse after the expiration of three years from the date of entry therein, upon the filing by the distiller or owner of the spirits of a declaration of his purpose to export the same in good faith, and the giving of a bond to do so within a given period.

Upon consideration, I submit that it has such power.

The exportation or transportation bond frees the spirits for the time being from any obligation for a domestic tax, and of course from the operation of the distillery warehouse bond. The giving of such first-named bond is one of the acts by the owner which go to constitute the complex transaction of exportation. Until exportation is perfected the spirits also remain subject to a tax lien on behalf of the Government. Therefore, whilst by the inception of the transaction of exportation the spirits are transformed into a different subject-matter from that upon which the distillery warehouse bond had operated, they nevertheless remain one upon which the United States have a specific contingent charge, in all respects perhaps, except that of contingency, the same as what it previously had. There is, therefore, no *statutory* reason why it may not for a period reasonably required in the process of exportation remain in the same custody as before, even after the three years. Manifestly upon the face of it a wide difference exists in this respect betwixt the condition towards the Government of such spirits and that of *tax-paid* spirits. This difference is recognized in the provision of section 3288, Revised Statutes.

I have spoken of *statutory* reasons, because it is this class only that affects the *power* of the Secretary of the Treasury

hereupon. The *regulatory* reasons, so to say, for this or that custody are for him to adjust. These latter reasons control the subject-matter of which you speak.

Very respectfully,

S. F. PHILLIPS,
Solicitor-General.

I concur in the above opinion.

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

UNIVERSAL POSTAL UNION CONGRESS.

The fund appropriated by the act of July 5, 1884, chapter 234, to defray the expenses of delegates to the Universal Postal Union Congress at Lisbon, Portugal, is subject to the restrictions, as to *advances*, contained in section 3648, Revised Statutes.

DEPARTMENT OF JUSTICE,
December 31, 1884.

SIR: I have considered your inquiry of yesterday, viz, whether, under the provisions made by the act of July 5, 1884, chapter 234, to pay the expenses of delegates to the Universal Postal Union Congress to be held at Lisbon, Portugal, you are authorized to make *advances* for that purpose, and submit the following in reply:

The money appropriated by that act to defray such expenses is to be "expended under the direction of the Postmaster-General." But the control of the fund thus given the Postmaster-General would seem to be subject to the restriction as to advances contained in section 3648, Revised Statutes. Adopting this view of the effect of that section, I am of the opinion that, to authorize advances out of the appropriation referred to for the purpose of meeting the expenses of the delegates, the previous direction of the President is necessary. By his direction the money may be lawfully advanced for that purpose to the Postmaster-General, under whose control its expenditure is placed, or to any agent designated or appointed by the latter to disburse it.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. FRANK HATTON,
Postmaster General.

SCHOOL MEETINGS IN UTAH.

The Utah Commission, appointed under the act of March 22, 1882, chapter 47, have no duties or powers as regards the school meetings in Utah Territory.

Voting at meetings of tax-payers called to fix the rate of taxation for school purposes is not voting at an "election" within the meaning of that act. Hence, polygamists may vote at such meetings, provided they are property-tax payers and residents of the school district in which the meeting is held.

DEPARTMENT OF JUSTICE,
January 5, 1885.

SIR: In compliance with a request made the 20th ultimo by the Hon. M. L. Joslyn, then Acting Secretary of the Interior, I have considered the following questions, proposed by the Hon. Alex. Ramsey, chairman of the Utah Commission, appointed under the act of March 22, 1882, chapter 47, in a communication addressed to you dated the 18th ultimo, namely:

"(1) Have we (*i. e.*, said Commission) any jurisdiction in regard to the school meetings of Utah?

"(2) If yea, by what *modus operandi* are we to proceed?

"(3) Can polygamists vote at the school meetings of tax-payers?"

The powers of the Commission or Board established by said act are defined in the ninth section thereof. That section, after declaring vacant "all the registration and election offices of every description in the Territory of Utah," provides that all duties "relating to the registration of voters, the conduct of elections, the receiving or rejection of votes, and the canvassing and returning of the same and the issuing of certificates or other evidence of election in said Territory, shall, until other provision be made, etc., be performed under the existing laws of the United States and of said Territory by proper persons, who shall be appointed to execute such offices and perform such duties by a board of five persons," etc. By this provision the Board or Commission is invested with power to appoint persons to execute *such offices* and perform *such duties* as are above described, and no other.

On examining the school laws of Utah Territory, to which attention is called in the communication referred to (viz,

chapter 19 of the Laws of 1880, chapter 47 of the Laws of 1882, and chapter 30 of the Laws of 1884), I find no registration or election offices created thereby, nor do I discover any duties there prescribed relating to the conduct of elections, etc., as above. Those laws provide for the establishment of school districts, and for the holding of school meetings annually in each district, at which school trustees are to be chosen by the registered voters of the district by ballot. Yet the organization of the meetings and the conduct of elections thereat are not made the subject of statutory regulation, but are left to be effectuated by such methods as the persons assembled on the spot may adopt. And in the absence of any statutory provision requiring the performance of specified duties at the school meetings relative to the conduct of elections, etc., or creating election offices therefor, it seems to me that, as regards such meetings, there is no room for the exercise of the aforesaid power conferred upon the Board or Commission by the act of March 22, 1882. That power, I think, can only be exerted where offices or duties of the character mentioned exist, and are to be executed or performed under the statutes in force within the Territory.

I am accordingly of the opinion that the first question should be answered in the negative, and so answer it. This disposes of the second question also.

The remaining question is whether polygamists can vote at school meetings called for the purpose of fixing the rate of taxation for school purposes. At these meetings, under the laws of the Territory, the property tax-payers residing in the district, and they alone, are entitled to vote. By the eighth section of the act of March 22, 1882, polygamists are disqualified from voting at any "election" held in the Territory. But to vote at the meetings of tax-payers called as above, on propositions to fix the rate of a school tax, is not voting at an *election* within the meaning of that act: the term "election," as there used, manifestly signifying only a proceeding to fill a public office or employment. Though not qualified to vote at any proceeding of this kind, or, in the language of the statute, "at any election" in the Territory, a polygamist may nevertheless, in my opinion,

vote at such meeting of tax-payers on propositions of the character above described, provided he is a property-tax payer and resident of the school district in which the meeting is held.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. H. M. TELLER,
Secretary of the Interior.

RETIRED LIST OF THE NAVY.

An officer retired on furlough pay under section 1454, Revised Statutes, cannot be transferred on the retired pay list under section 1594, Revised Statutes, with increase of pay; such increase is forbidden by the act of August 5, 1882, chapter 391.

Nor can an officer be simultaneously retired on furlough pay, and transferred to the retired pay list, so as to give him the pay of the latter.

DEPARTMENT OF JUSTICE,
January 5, 1885.

SIR: Yours of the 17th ultimo, after calling attention to the provisions upon the matter of pay, etc., for officers *retired* from the Navy by sections 1588, 1593, 1594, and the act of 1882, chapter 391 (22 Stat., 286), asks the following questions:

First. Can an officer who, not being amenable to the provision in the act of 1882 relating to discharges for misconduct, has been found incapacitated for active service, and under section 1454 retired on furlough pay, be transferred under sections 1594 to the retired pay list with the pay incident thereto?

If this question shall be answered in the negative, it becomes necessary to inquire:

Secondly. In the case of an officer found by the retiring board to be incapacitated for active service, such incapacity not being the result of misconduct on his part nor of any incident of the service, and in view of the considerations which lead to the President's determination to retire instead of discharging the officer, and the same considerations being regarded as sufficient to warrant the transfer of such officer from the furlough to the retired pay list, can the President,

by and with the consent of the Senate, make the retirement and transfer simultaneous by placing such officer at once on the retired pay list?

The provision in the act of 1882, which is important here, is as follows: "Hereafter there shall be no promotion or increase of pay in the retired list of the Navy, but the rank and pay of officers on the retired list shall be the same that they are when such officers shall be retired."

In my opinion that provision prevents either rank or pay of officers on the retired list from being increased *in any way* after such officers shall have been placed thereupon; and therefore that a transfer from the furlough pay list to the retired pay list under section 1594 can have no such effect. I am also of opinion that transfer immediately after retirement does not differ in this respect from transfer at the end of (say) a month or a year. The power of the President to make such *transfer* depends by the section upon the fact that the officer is already upon the retired list, whether he has been so for a minute or longer. Whatever time therefore may have elapsed since the officer has been put upon that list, has elapsed of course *after* that point of time which fixes the pay of all retired officers.

There can be here no *contemporaneous* occurrence of the act by which an officer is retired upon the furlough pay list, and of that by which he is transferred therefrom. The former precedes the latter necessarily; and so its effect in fixing pay precedes the existence of any question as to the effect of transfer thereupon. In other words, the transfer finds the pay already fixed by the act of 1882.

I therefore answer both of the above questions in the negative.

Very respectfully,

S. F. PHILLIPS,
Solicitor General.

I concur in the above.

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE NAVY.

ASSISTANT COLLECTOR AT NEW YORK.

The appointment of the assistant collector at the port of New York (who was formerly employed by the collector with the approval of the Secretary of the Treasury) should now be made by the President with the advice and consent of the Senate.

DEPARTMENT OF JUSTICE,
January 6, 1885.

SIR: I have considered the question which was referred to me by your direction on the 2d instant, namely, whether an appointment to the office of assistant collector at the port of New York should be made by the Secretary of the Treasury or by the President with the concurrence of the Senate, and I now have the honor to submit to you my views thereon.

The office of the assistant collector at New York was originally created by section 16 of the act of March 3, 1863, chapter 79, which provided that it should be filled "in the mode prescribed by law for the appointment of deputy collectors." These officers were then, as now (see sec. 7 of the act of March 3, 1817, chap. 109; sec. 2630, Rev. Stat.), employed by the collector with the approval of the Secretary of the Treasury. This mode of appointment is, in contemplation of law, an appointment by the Secretary (*United States* v. *Hartwell*, 6 Wall., 385). But in the Revision of the Statutes the provision above adverted to, directing in what mode the office of assistant collector should be filled, was omitted, and thus became repealed by the effect of section 5596, Revised Statutes. So that, as the law now stands (see sec. 2536, Rev. Stat.), that office remains established, but without any statutory provision on the subject of appointment thereto.

Such being the existing state of the law, the general rule which is deducible from Article II, section 2, of the Constitution becomes applicable to and controls the question under consideration, namely, that the appointment of all officers of the United States belongs to the President, by and with the advice and consent of the Senate, where the appointment thereof is not otherwise provided for in the Constitution itself or by legislative enactment. This rule has been laid down by several of my learned predecessors (see 6 Opin., 1; 15

Opin., 3, 449), and acted upon in the practice of the Government in cases like the present.

I am therefore of the opinion that, although previous to the Revision of the Statutes an appointment to the office of assistant collector at the port of New York was required to be made by the Secretary of the Treasury in the mode above indicated, yet that, in consequence of the modification of the law effected by the Revision, such appointment is now devolved upon the President by and with the advice and consent of the Senate.

I am, sir, very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

AMERICAN VESSELS UNDER ACT OF 1884.

DEPARTMENT OF JUSTICE,
January 6, 1885.

SIR: In reply to yours of the 30th ultimo, inclosing a dispatch of November 3 from the consul at Shanghai to yourself, I submit the opinion that the act of June 26, 1884, section 12, by the expression "American vessels," does not intend only "vessels of the United States" as defined by section 4131, Revised Statutes, but includes as well "foreign-built registered American vessels."

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF STATE.

AMERICAN AND MEXICAN CLAIMS COMMISSION.

Question considered as to whom payment should be made, under the circumstances stated, of an award of the American and Mexican Claims Commission in favor of a claimant, a resident of Mexico, who has deceased.

DEPARTMENT OF JUSTICE,
January 16, 1885.

SIR: By a letter of the 18th of November last, received from the Hon. John Davis, then Acting Secretary of State, which inclosed an authenticated copy of the proceedings in

the matter of the probate of the will of Jorge Hammeken y Mexia, deceased, before the judge of the first civil court of the City of Mexico, in Mexico, it is inquired "who the proper person is to whom payment should be made, under this will, of moneys coming into the hands of this [the State] Department on account of an award made by the late American and Mexican Claims Commission in favor of George L. Hammeken." To this inquiry I have now the honor to reply:

The papers which accompanied that letter, and which I return herewith, afford satisfactory evidence that the above-mentioned proceedings were had in the proper forum at the place of the domicile of the deceased, Jorge Hammeken y Mexia, and his will may be regarded as duly probated thereunder.

The testator, in his will, declares himself to be the legitimate son of George Lewis Hammeken and Adela Mexia, both deceased, and claims as his property, by inheritance, the right to the indemnity awarded in favor of his father by the Claims Commission. He leaves all his estate, in the proportions assigned by the law (excepting part of certain property in Texas and of certain concessions elsewhere, as to which other disposition is made), to his wife, Dolores Lebrisa de Hammeken, and their only son, Jorge Juan Hammeken y Lebrisa, and names the son (a minor) his executor, who, in the discharge of the executorship during minority, is to be represented according to provisions of the civil code of Mexico.

The testator's widow, Dolores Lebrisa de Hammeken, was in said proceedings appointed by the court to represent the executor, her son, during his minority, and letters testamentary have been issued to her. The appointment and issue of letters, which are properly authenticated, must be presumed to be regular and in conformity with the local law.

It thus appears that the testator's widow, by virtue of her appointment and letters testamentary as aforesaid, is clothed with ample authority to receive moneys due the testator's estate. And such authority being conferred by the *forum domicilii* of the testator, a voluntary payment made to her in

this country of a debt due his estate will be good and discharge the indebtedness, in the absence of any adverse claim based on a conflicting grant of administration here in the interest of domestic creditors. (See *Wilkins* v. *Ellett*, 9 Wall., 740.)

If, then, the award referred to in the present inquiry, though made in favor of the testator's father, now constitutes part of the assets belonging to the testator's estate and is to be dealt with as such, and if there be no adverse claim as above, I am of the opinion that payment of the award should be made to Mrs. Dolores Lebrisa de Hammeken, to whom the letters testamentary have been issued.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. FREDERICK T. FRELINGHUYSEN,
Secretary of State.

CONSTRUCTION OF THE NEW CRUISERS.

The Secretary of the Navy may assent to a modification of the contract for building the new cruisers where the interests of the Government will not be prejudiced or any statutory provision violated thereby.

DEPARTMENT OF JUSTICE,
January 20, 1885.

SIR: Referring to your letter of the 19th instant, relative to the subject of payment for the construction of the new cruisers, I have now the honor briefly to state my views upon the case and question there presented.

It is clearly competent to the Secretary of the Navy to assent to a modification of the contract for building these vessels, where the interests of the Government will not be prejudiced or any statutory provision violated thereby. In *United States* v. *Corliss Steam-Engine Company* (91 U. S., 321), the Supreme Court remark: "With the improvements constantly made in ship-building and steam machinery and in arms, some parts originally contracted for may have to be abandoned and other parts substituted, and it would be of serious detriment to the public service if the power of the head of the Navy Department did not extend to providing for all

such possible contingencies by modification or suspension of the contracts and settlement with the contractors."

Undoubtedly the Secretary has power in the present case to modify the contract in regard to the construction of the shafts, and since this will involve delay and bear heavily upon the contractor, he may, I think, in consideration of these circumstances, also modify the contract to such extent as to make the 10 per centum reserved upon each installment available to the contractor before the time originally stipulated. But payment *in full* for the vessel, in advance of its completion and acceptance, is forbidden by section 3648, Revised Statutes, and hence a modification of the contract to this extent would be beyond the power of the Secretary.

I may here add that the assent of the contractor's sureties should be obtained to any change in the contract which affects them before the same is consummated.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. WILLIAM E. CHANDLER,
Secretary of the Navy.

CLAIMS OF SUPERVISORS OF ELECTIONS.

Statutory provisions relating to the appointment and duties of supervisors of elections considered; and *held* that when they have served any given number of days not exceeding ten, and it is so duly made to appear, they are entitled to be paid a per diem therefor, and that it is not for the Attorney-General to determine whether their period of service is reasonable or unreasonable.

DEPARTMENT OF JUSTICE,
January 21, 1885.

SIR: Having had my attention directed by you to the subject of the payment of supervisors of elections, under the act of February 28, 1871, and the action of the Department of Justice upon the number of days of their employment and their payment, I have examined the subject, and I have learned that, soon after the enactment of the law, the Attorney-General was requested by the Treasury Department to take charge of the accounts that were rendered by the marshals, in which were included the sums that were to be paid for supervisors. The Attorney-General declined at one

time to entertain jurisdiction over the payment of the supervisors, or to have anything to do with auditing the claims for their payment, because, as was said, the law nowhere directly puts that duty upon him or gives him any authority to act in the premises.

After this, at the urgent instance of the Treasury Department, the Department of Justice did take charge of the claims of supervisors, presented by marshals, in connection with their accounts; and this was done, no doubt, because it was considered inexpedient to separate the accounts, to wit, the accounts for supervisors and those rendered by the marshals for special deputies, who were created by the same statute, and because the Treasury Department stated that it had no special disbursing offier for such a fund, and that the marshal, who is a disbursing officer of the Department of Justice and gives bonds for moneys that are committed to him for disbursement, would be a suitable and responsible person to pay this money to. In this way the Department of Justice assumed jurisdiction; and these two claims for allowance—those rendered by the marshals for special deputies and the claims for these supervisors—became blended; and the rule adopted by the Department of Justice to restrain and control the expenditures for special deputy marshals came to be considered as the proper rule to apply to supervisors.

To avoid an abuse of the law such as was charged would and did take place, "it seems that a firm hand was from the first held upon both of these allowances, and this policy was not improper, as it was for the protection of the public Treasury. However, in doing this the Department has apparently exceeded its jurisdiction, and has given an interpretation of the law as it relates to these supervisors which, if persisted in, might result in frustrating the very purposes of the statute. The object of the law was to prevent the perpetration of frauds at the elections; and to that end it was intended, as it appears, to give the supervisors the fullest opportunity for investigation and oversight of the elections in all that related to them, and not to limit them for any length of time less than ten days in the discharge of their duties.

The circuit court of each judicial district is required to choose from the commissioners of that district an officer known as the chief supervisor, whose duties are prescribed, requiring him to prepare and furnish books, etc., and instructions for the supervisors, and to receive applications from all parties for appointments to such positions. He shall present such applications to the judge, and furnish information to him in respect to the appointment by the court of such supervisors; and he shall require of the supervisors, when necessary, lists of the persons who may register and vote, etc., and cause the names of those upon any such lists, whose right to register or vote is honestly doubted, to be verified by proper inquiry and examination at the respective places by them assigned as their residences. When the appointment of such supervisors is solicited as provided for in sections 2011, 2012, two citizens of different political parties are appointed and commissioned by the court for each election district or voting precinct; and these supervisors, so appointed, are required to perform various duties in connection with the registration of voters, and the casting, counting, and certifying of their ballots, which are of vital importance to the preservation of the elective franchise of the citizen in Congressional elections. For their services they are to be paid $5 per diem, not exceeding ten days; and such appointments with such pay are restricted to cities and towns not under 20,000 inhabitants.

Thus it appears that the purpose of the law is to secure the appointment, at least ten days before the registration, if necessary, of supervisors, who, being thus appointed, are authorized and required to scrutinize that registration and to verify it, for the purposes of registration and election, so that no fraud can be committed, and their authority continues and their duties are continued down to the very last moment of counting the votes, provided the time for which they are to be paid shall not exceed ten days. To undertake, therefore, by an arbitrary rule, to restrict or limit their payment within any period less than the ten days allowed by the law would be to cripple or perhaps to utterly destroy the purpose of their creation and the object of the law.

The court creates them upon the call of citizens; they

are selected from both parties; they are subject to the control of a chief supervisor; they are all under the eye and control of the court from the moment of their appointment to the last minute of their employment; and when a call was made upon this Department for the allowance of a sum to provide for their payment, the Department can not say how many days these supervisors shall be limited to for payment within the ten days allowed by law. In fact it has been denied that the Department has jurisdiction over the subject, and in my judgment it is to be doubted, except to exercise the duty, when called upon, of interpreting the law, so as to guide others as to the proper rule in paying them.

And it is my opinion, after having thus examined the law, that when they have served any given number of days not exceeding ten, and it is so duly made to appear, they are entitled to payment therefor, and that the Attorney-General can not determine whether their time of service is reasonable or unreasonable. The only question for him is, Did they serve under the control of the supervisor, being duly appointed by the court? and if they did, they ought to be paid according to the number of days claimed, provided they do not exceed ten days.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

CONTRACTS FOR THE NEW CRUISERS.

Section 3648, Revised Statutes, does not preclude a payment in any case where the money has been actually earned and the Government has received an equivalent therefor; its object is to prevent payment being made to contractors in advance of the performance of their contracts, whether for services or supplies.

DEPARTMENT OF JUSTICE,

January 22, 1885.

SIR: Your letter of yesterday presents the following additional circumstances in connection with the subject upon which I had the honor to communicate to you my views on the 20th instant:

"In the case now under consideration, the tenth payment (*i. e.*, instalment) on the ship wholly finished has been earned,

but by reason of the fracture of the shaft the full trial trip and formal acceptance provided for by the contract cannot take place. The United States has, however, a lien upon the ship for all payments made; a named sum is to be reserved for three months, and the contractor and his sureties guaranty full completion and good workmanship."

You inquire if, under these circumstances, should your Department deem it safe and advisable to pay the tenth instalment, less the named sum referred to, such payment would fall within the prohibition of section 3648, Revised Statutes.

To this inquiry I reply: The object of that section is not to preclude a payment in any case where the money has been actually earned and the Government has received an equivalent therefor, but to prevent payments being made to contractors in advance of the performance of their contracts, whether for services or the supply of articles of any kind. Agreeably to this view of the statute, I observed in my opinion of the 20th instant that payment *in full* for the vessel, in advance of its completion, is forbidden thereby. The circumstances of the case now under consideration, however, are essentially different from those there contemplated; and consistently with the same view of the law, with which I remain satisfied, I am of the opinion that, the tenth installment having been already earned, payment thereof, less the named sum reserved as above, would not be forbidden by section 3648.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. WILLIAM E. CHANDLER,
Secretary of the Navy.

CUSTOMS LAWS.

"Alizarine assistant," an article used in dyeing, is dutiable, as a chemical compound, at 25 per centum ad valorem.

DEPARTMENT OF JUSTICE,
January 30, 1885.

SIR: Yours of the 19th ultimo states that "Alizarine assistant," an article used in dyeing, is a "chemical com-

pound," in which castor oil is a large element. A question thereupon has risen whether upon importation it is to be assessed for duty as a "chemical compound," at the duty expressly imposed upon articles so called (viz, 25 per cent. ad valorem), or under the *similitude* clause (sec. 2499, Rev. Stat.), by which, from its connection with castor oil, it would pay $1 per gallon. As I conceive it, that question is, in substance, whether "chemical compounds," the highest assessed material in which pays a rate other than 25 per cent., are for that reason (under section 2499) to be charged *otherwise than at 25 per cent.*

I think it plain that the operation of the *similitude* provision upon this article can be ascertained only *after* that of the "chemical compound" clause has been fixed. The meaning of the latter gets no light from that of the former, but vice versa. *Sussfield's case* (96 U. S., 128) is in point.

I advise you that 25 per cent. is the true duty; and that any decision in your Department to the contrary should be changed.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

DUTY OF ATTORNEY-GENERAL.

Where a call for an opinion from the Attorney-General was made by the head of a Department, in compliance with a resolution of the House of Representatives, for the information of the latter, and without reference to any question of law arising in the administration of such Department: *Advised* that the Attorney-General is without authority to give an official opinion in such case.

DEPARTMENT OF JUSTICE,

January 30, 1885.

SIR: Your letter of the 19th instant informs me of the receipt by you of a copy of a resolution recently passed by the House of Representatives of the following tenor: "That the Postmaster-General ask the Attorney-General for his opinion whether section 3738 of the Revised Statutes with reference to eight hours' employment constituting a day's labor for all laborers and so forth, employed on behalf of the

United States, applies to letter-carriers of the United States," and you request me to furnish you an opinion "in accordance with the above resolution."

In response to this request I now have the honor to reply:

It is the duty of the Attorney-General to give an official opinion at the call of the head of any Department only upon "questions of law arising in the administration of such Department" (sec. 356, Rev. Stat.), and as the present call does not appear to be made with reference to any question of that character, but solely in compliance with the resolution and for the information of the House, I am not satisfied that it is my duty or that I have the authority to furnish the opinion requested. I therefore feel constrained to decline giving an opinion.

I may add that a similar request for an opinion upon the same matter was made by a previous resolution of the House, and I felt compelled, from want of authority, to decline compliance therewith, in a communication to the Speaker dated December 17, 1884. There the request came directly from the House. Here the request, though coming from the head of a Department, is to all intents and purposes an application by the House; and accordingly, with respect to complying with it, the same want of authority exists. In this connection I beg to refer you to an opinion of one of my predecessors in 14 Opin., 177.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. FRANK HATTON,
Postmaster-General.

BOARDS OF IMMIGRATION.

It is not the duty of a United States attorney to advise or defend boards of immigration; but the Secretary of the Treasury is empowered by the act of August 3, 1882, chapter 376, to employ, and pay out of the immigrant fund, counsel for those purposes.

DEPARTMENT OF JUSTICE,
February 4, 1885.

SIR: In reply to your communication asking my opinion as to the employment of United States Attorneys by boards

of immigration, acting under the statute of August 3, 1882 (22 Stat., 214), I have the honor to submit that the duties of United States attorneys are prescribed by law (Rev. Stat., sec. 771), and that among those duties are not those of advising or defending such boards of immigration.

By the first section of the said act of August 3, 1882, the Secretary of the Treasury is empowered to pay out of the immigrant fund "the expense of regulating immigration" under the act, of taking care of immigrants and relieving such as are in distress, and what may be required "*for the general purposes and expenses of carrying this act into effect.*" It is in this section that we find the power to employ and pay counsel for the purposes above mentioned.

I have the honor to be, your obedient servant,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

DUTY UPON SHELLAC VARNISH.

Reconsideration of former opinion (see *ante*, p. 43) in regard to the duty upon certain shellac varnish imported from Canada; and *advised* that the warehouse value in Canada is to be taken as a basis for computing the duty thereon.

DEPARTMENT OF JUSTICE,

February 4, 1885.

SIR: Referring to your communication of 12th of August last about duty upon *shellac varnish* imported from Canada, the reply thereto of August 18, and the subsequent communications upon the same subject, including your note of October 15 last, I have to say that at his convenience, as was agreed, Edwin B. Smith, as attorney for the importers, submitted a a brief upon the question upon the 20th of last month.

I have considered this brief, and have reconsidered the general question presented by you, as above, last August.

Whilst I am entirely satisfied with the general views expressed in the reply of August 18, above mentioned, the reargument has directed my attention more particularly to the matter of the *pertinency* of those principles to the very question by you first as above put.

It is argued that the "construction" given in Birming-

ham's case in connection with the administrative "acquiescence" therein operates, under the statute of March 3, 1875, so as to prevent you from subsequently questioning that decision in the course of another suit. I do not agree to this proposition. Whilst it would no doubt be inadmissible to act capriciously in enforcing any statute, especially one which concerns the interests of many, I am of opinion that if, upon consideration, a Secretary should conclude that a circuit court decision had been unadvisedly acquiesced in by himself and the Attorney General, it would be not so much merely *competent* as *his duty* to raise the question before the courts again. This certainly might become his duty even as to a decision of the Supreme Court itself, much more than in the case supposed.

However, after reviewing your letter of August 12, I find that the reply was inadvertent in concluding you to be disposed to raise again, whether directly or indirectly, the question underlying Birmingham's case. This may be due to the circumstance that that case was founded upon statutory provisions *since superseded*, so that it might be better to forbear further litigation than to disturb the small remnant of transactions to which that decision applies.

This being so, I advise that if the composition of the varnish can not be inquired into (see Birmingham's case) at one stage of the question as to the rate of duty, neither can it be at another; if not *directly*, so neither *indirectly*. If the article was nothing but "varnish" at the point of importation, so also for tariff purposes it was nothing else in the Canadian warehouse. And, in conclusion, inasmuch as you state that there was *no market* for this "varnish" in Canada except so far as there was such inside of the warehouse, I see no reason why your former decisions upon "tea" and "malt" are not applicable, viz: that the warehouse value is to be taken as a basis for calculating duties.

Very respectfully,

S. F. PHILLIPS,
Solicitor-General.

I concur.

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

FOREIGN-BUILT VESSELS.

Foreign-built vessels owned by citizens of the United States are not exempted by the act of June 26, 1884, chapter 121, from the payment of fees for services of consuls.

DEPARTMENT OF JUSTICE,
February 5, 1885.

SIR: In reply to yours of the 2d instant, let me say that by turning to the "dispatch" transmitted in yours of the 30th ultimo, to which I was then referred for the question upon which an opinion was asked, you will find that the question was by its words confined to "foreign-built registered American vessels." It was upon that account that the reply was limited to that class.

A like question is now asked as to foreign-built vessels purchased and owned by citizens of the United States, viz, whether the act of 1884, chapter 121 (June 26, 1884), includes these amongst those vessels for services to which consuls are not to charge fees.

Inasmuch as in the same connection in which that statute provides for the fees in question it expressly refers to and operates upon the "consular regulations" issued by the President, and as the term "American vessels" is one employed *passim* in such regulations, I am of opinion that it has the same meaning in the statute (sec. 12) as in the regulations.

Upon a perusal of these regulations I do not find that the term in question is applied by them to designate foreign built vessels purchased and owned by citizens of the United States. It seems rather, so far as I can determine, to be employed synonymously with that other term so usual with us in both statutes and regulations, viz, "vessels of the United States" (see *ex. gr.*, Reg. 111, 128, and 219). I do not know whether there has been in your Department any long-continued practical administration of these regulations to the effect that the term "American vessel" therein contained includes in any case as well foreign-built vessels owned by citizens of the United States. Such practice would of course be entitled to great respect. Otherwise, however, I conclude as above, and consequently that the act of 1884 does not

exempt such foreign-built ships owned by citizens from the fees in question.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF STATE.

CONTRACTS FOR CARRYING THE MAIL.

Contracts entered into by the Post-Office Department for carrying the mail should be in the name of the United States as directed by statute. (See sec. 3949, Revised Stat.; also sec. 403, *ibid.*)

The express condition mentioned in section 3741, Revised Statutes, need not be inserted in those contracts made with railroad corporations.

DEPARTMENT OF JUSTICE,
February 10, 1885.

SIR: In your letter of the 3d instant my attention is called to section 3942, Revised Statutes, and you inquire "whether a contract entered into under said section is legal, so far as the naming of the parties thereto is concerned, if made as follows: Between the Post-Office Department of the United States of America (acting in this behalf by the Postmaster-General) and the Connecticut and East Valley Railroad Company," etc. You also inquire "whether, in contracting with railroad companies for carrying the mails, it is essential that such contracts contain a reference to the subject-matter of sections 3739, 3740, and 3741 of the Revised Statutes."

In reply to your first inquiry I have the honor to state that by express provision of statute all contracts entered into by the Post-Office Department for carrying the mail are to be in the name of the United States (see sec. 3949, Rev. Stat.; also sec. 403, *ibid.*), and that the contract mentioned, in "so far as the naming of the parties thereto is concerned," does not appear to conform strictly to such provision. Yet the provision itself is, I think, to be regarded as *directory* only to the officer authorized to contract; it deals with matter of form rather than of substance. Formerly mail contracts were made in the name of the Postmaster-General, and suits thereon brought in his name. But by the

thirteenth section of the act of July 3, 1836, chapter 276, bonds and contracts of mail contractors were directed thereafter to be made to and with the United States of America, and suits thereon instituted in the name of the United States of America. This direction has been in force ever since, and its observance is obligatory upon the Post-Office Department as a duty. In the absence, however, of any declaration in the statute to the contrary, the non-observance thereof would not, in my opinion, invalidate an agreement made for and in behalf of the United States which is otherwise unobjectionable.

Assuming your second inquiry to refer to mail contracts made with incorporate companies for the general benefit thereof, and to have especial regard to the requirements of section 3741, I answer that the express condition mentioned in that section need not be inserted in these contracts. By section 3740 such contracts are excepted from the operation of the law (sec. 3739) forbidding members of Congress to be admitted to any share in or benefit arising upon contracts with the Government; and the insertion of the said condition in a contract thus excepted is obviously not contemplated by section 3741.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. FRANK HATTON,
Postmaster-General.

CASE OF GENERAL SWAIM.

Review of the finding of the court-martial in the case of Judge-Advocate-General David G. Swaim.

DEPARTMENT OF JUSTICE,
February 10, 1885.

SIR: Section 923 of the Regulations of the Army of the United States, under the title "Courts-Martial," provides that—

"When a court-martial appears to have erred in any respect, the reviewing authority may reconvene the court for a reconsideration of its action, with suggestions for its guidance. The court may thereupon, should it concur in the views sub-

mitted, proceed to remedy the errors pointed out, and may modify or completely change its findings. The object of reconvening the court in such a case is to afford it an opportunity to reconsider the record, for the purpose of correcting or modifying any conclusions thereupon, and also to make any amendments of the record necessary to perfect it."

The record of the court-martial, including the finding and sentence of the court, in the case of Brig. Gen. David G. Swaim, Judge-Advocate-General, U. S. Army., has been transmitted to the President for his action thereon, as provided by law.

General Swaim was tried upon two charges:

(1) "Conduct unbecoming an officer and a gentleman, in violation of the sixty-first article of war."

(2) "Neglect of duty, in violation of the sixty-second article of war."

Of the second charge the court has found the accused not guilty.

The first charge is accompanied by four specifications. The second of these specifications was ruled out by demurrer, and of the offences set out in the fourth specification the court has found the accused not guilty. Of the offenses set out in the first and third specifications the court has (omitting certain phrases in the third, which were ruled out on demurrer) found the accused guilty except as to certain words, phrases, and paragraphs, which are stricken out, and with the substitution of other words and phrases intended to restrict and qualify the finding; and, in lieu of the charge "Conduct unbecoming an officer and a gentleman, in violation of the sixty-first article of war," which these specifications were intended to support, the court has inserted the following: "Conduct to the prejudice of good order and military discipline, in violation of the sixty-second article of war."

That the court had the *legal right* to make such a finding is, I think, not open to doubt. (13 Opin., 460; Digest Opinions Judge-Advocate-General, 264, 266; De Hart's Courts-Martial, 180, 185; Ives' Military Law, 155; Benét's Military Law and Courts-Martial, 130, 132; Harwood's Naval Courts-Martial, 123, 124.)

But whether, in view of the specific facts actually found by the court, it acted *advisedly* in thus refusing to find the defendant guilty of "conduct unbecoming an officer and a gentleman," and in substituting therefor the words "conduct to the prejudice of good order and military discipline," seems to admit of very serious doubt.

The first specification of charge 1 contains a substantial allegation of an attempted fraud by the accused upon the banking firm of Bateman & Co., in the transfer by Swaim to a third party, for the purpose of a suit, of a certain memorandum of deposit given by Bateman & Co. to Swaim on the 15th of July, 1882, said transfer being made after Swaim had, in the course of his business, withdrawn nearly the entire sum covered by the memorandum of deposit from the said banking house, "thus attempting to committ a fraud upon said Bateman & Co." The court has found all the material facts as alleged in this specification, but in the clause last quoted has substituted the word "wrong" for "fraud," so that in the findings of the court the clause reads: "thus attempting to commit a *wrong* upon said Bateman & Co."; and the finding further states in substance that what the accused did in this respect he did "knowingly."

If, as the court thus finds, the defendant did deliberately and with a knowledge of the facts seek in the manner described to perpetrate a "wrong" upon Bateman & Co., the line of distinction between the "wrong" which the court finds he sought to commit, and the "fraud" which he was charged with seeking to commit, is an exceedingly narrow one. Such a "wrong," deliberately planned and perpetrated, would involve the same moral turpitude whether it were designated as a fraud or as a wrong, and in either event the offense would seem to fall much more naturally and appropriately under the classification of "conduct unbecoming an officer and a gentleman" than in the category of "conduct to the prejudice of good order and military discipline." The evidence adduced upon this point may or may not satisfy the court of the immorality or dishonest intent of the accused in the particular acts described in this specification. If the court has reached the latter conclusion, then the accused is entitled to such a finding or a verdict upon the specification

as will indicate the absence of immoral or dishonest purposes, which the present finding does not. But, on the other hand, if the court is satisfied of such immoral or dishonest purpose, then it is difficult to understand why the facts should be glossed over by the use of the ambiguous word "wrong," or why the original charge of "conduct unbecoming an officer and a gentleman" should not be sustained.

The third specification charges the accused in substance with having prepared and forwarded to his official superior, the Secretary of War, a written statement relative to the transactions referred to in the first specification in regard to certain facts set out in two letters from A. E. Bateman to the Secretary of War, which statement by the said Swaim is charged to have been "evasive, uncandid, and false, and calculated and intended to deceive the Secretary of War." Then follows an enumeration of seven particulars wherein the said statement was false, evasive, and intended to deceive.

Of the substance of this specification the court has also found the accused guilty. After reciting at length the letters of Bateman, their reference by the Secretary of War to Swaim, and the official indorsement thereon of the latter, the finding further proceeds: "Which said indorsement by the said Swaim was evasive, uncandid, and calculated and intended to deceive the Secretary of War especially in the following particulars."

In the succeeding enumeration of those particulars one has been found by the court exactly as charged, three having been found substantially as charged, and as to the remainder the accused has been found not guilty.

In the first branch of the finding upon the third specification above quoted, it will be observed that the words "and false," as contained in the original specifications, are stricken out. In the enumeration of particulars, however, certain of the statements made by the accused in the indorsement in controversy are expressly found to have been false, as he, Swaim, "well knew;" so that there is apparently no ground to assume that in striking out the words "and false" the court intended to acquit the accused of having made a false indorsement. The only inference I can derive from this action is that by striking out these words as applied to the in-

dorsement as a whole, and yet finding in terms certain specific falsehoods contained in said indorsement, the court simply meant to negative the implication that the indorsement was false in every particular, while at the same time indicating that, being a mixture of truth and falsehood, it was as a whole "calculated and intended to deceive the Secretary of War."

However this may be, the court has in fact found the accused guilty of having presented to the Secretary of War a written indorsement containing certain specific statements which the accused knew to be false, and having made such statements for the purpose and with the intention of deceiving the Secretary of War.

The finding of the court upon the specifications plainly shows this. Yet, at the same time, taken as a whole, in connection with the finding upon the charge, it would seem to indicate that in the opinion of the members of the court the offense thus established is not one which can properly be classified as "unbecoming an officer and a gentleman."

I find it difficult to reconcile this conclusion with any recognized standard of either officerlike or gentlemanlike conduct, and it can only be so reconciled by annexing to the words "conduct unbecoming an officer and a gentleman" a narrow and very limited significance, in my judgment wholly incommensurate with the proper and reasonable import of those words.

It is not improbable that the argument upon this point of the learned and able counsel for the accused may have produced more than an ordinary impression upon the minds of the court. That argument was apparently intended to support the proposition that the charge of "conduct unbecoming an officer and a gentleman," under the sixty-first article of war, properly embraced only offenses of the grossest and basest character, of such a nature as to render the guilty party a moral and social outlaw. While it may be true that the position of the learned counsel has not been without some countenance, I do not think it should receive the official sanction of the President of the United States. It should not be necessary to prove that an individual is a moral monstrosity in order to demonstrate his unfitness to be a trusted officer of the Army.

Undoubtedly charges of mere indecorum should not be (and I believe they never are) made the basis of prosecutions under the sixty-first article of war. The punishment annexed to a conviction under that article clearly indicates that prosecutions under it should be limited to the more serious class of offenses. But between the grossest offenses of which an officer may be guilty and which are not specially enumerated in the Articles of War, and those of a character simply prejudicial to "good order and military discipline," such as are apparently contemplated by the sixty-second article of war, there are intervening grades of offenses, many of which are in every proper sense of the words "unbecoming an officer and a gentleman," and the commission of which by any person is a sure indication that he is unfitted to hold an office of trust and honor in the military service.

The objection to the finding of the court in General Swaim's case is therefore based upon the obvious inconsistency between the findings of fact as contained in the modifications and the gradation of the offense in the substituted charge. The action of the court as a whole seems to involve a serious lowering of that high standard of honor which from the earliest days has been the pride and the glory of our military service, and which was expressed on a memorable occasion by the great Commander-in-chief of our Revolutionary armies, when reluctantly compelled to reprimand a brother officer, in these words: "Our profession is the chastest of all; even the shadow of a fault tarnishes the luster of our finest achievements."

The court in the present case has found the accused guilty of making certain false statements to the Secretary of War for the purpose of deceiving that officer. The President, as Commander-in-Chief of the Army, should not concede that this offense is one either trivial in its nature or against good order and military discipline alone, nor as (in any sense of the words) other than an offense "unbecoming an officer and a gentleman." If the evidence before the court-martial does not establish the facts in question beyond a reasonable doubt (upon which no opinion is here intended to be expressed), then General Swaim is clearly entitled to be acquitted upon

this branch of the case. If, on the other hand, the evidence does establish these facts, then he is clearly shown to have committed an offense "unbecoming an officer and a gentleman."

In 1881 Bvt. Brig. Gen. George Talcott, at the head of the Ordnance Bureau in the War Department, was tried by a court-martial upon three charges, the third being a charge of "conduct unbecoming an officer and a gentleman." Under this charge the specifications set forth, *inter alia*, the fact that the accused had made a written report and also verbal statements to the Secretary of War in regard to a certain transaction which "were false in fact and intent, and were made with design to deceive the said Secretary of War." This was the burden of the charge. The accused was found guilty, sentenced to be dismissed the service, and was dismissed. I recall the case merely to indicate the fact that untruthful statements made by a high military officer to the official head of the War Department have not been regarded in the past—as I think they should not be regarded in the future—as any less of an offense than one "unbecoming an officer and a gentleman."

I think the record in the case of Bvt. Brig. Gen. David G. Swaim, U. S. Army, may with propriety be referred back to the court-martial, with suggestions in the line above indicated, for further consideration and revision.

I have not undertaken to criticise in detail the great mass of testimony presented by the record in this case, nor the propriety of the conclusions of the court as to the specifications established by it. Indeed it would be impracticable to do so intelligently without devoting many weeks' time to the examination of more than thirty volumes of the manuscript record. Moreover, the court which heard the witnesses was best qualified to scrutinize and balance their testimony, possessing, as it did, the advantage of personal contact and observation, so essential in reaching a just conclusion from lengthy and conflicting statements. After the deliberate consideration given to the case by the court it is not unreasonable to assume that the specific facts found represent the truth of the case so far as it is ascertainable.

If the President should decide to approve the findings and

sentence of the court as they now stand, I see no objection to the mere form of the sentence. Article 101 of section 1342 of the Revised Statutes refers in express terms to suspension of pay, and it is apparently well settled that such suspension for a given period signifies its absolute forfeiture, and not simply the temporary withholding thereof.

I am, sir, with great respect,

BENJAMIN HARRIS BREWSTER.

The PRESIDENT.

IMMEDIATE TRANSPORTATION OF DUTIABLE GOODS.

New legislation is not required by the *proviso* in section 7 of the act of June 10, 1880, chapter 190, in order to give the privilege of immediate transportation to any of the places named in that section which at the time of the passage of that act was without the "necessary officers" therein referred to, but which thereafter has such officers assigned thereto.

DEPARTMENT OF JUSTICE,

February 13, 1885.

SIR: Yours of the 11th instant refers to the seventh section of the act of 1880, chapter 190 (Rev. Stat., Supp., p. 546), and asks in effect whether, in order to communicate the privilege thereby given, *fresh legislation* is required by the *proviso* whenever any one of the places mentioned in the body of the section, and *which at the time of the passage of that act was without the "necessary officers" therein spoken of*, thereafter has such officers assigned to it.

I think not. For, in the first place, such construction would render the body of the section so far superfluous, inasmuch as the *secondary* legislation supposed would be quite as competent in its absence. Again, the careful *naming* of the places in the body of the section indicates that the general question of the policy of communicating the intended privilege to each had been decided by the legislature. The reference in the proviso to a consideration merely *practical* is one that should affect the *operation* of such policy. Such operation is to be determined by the Executive Department, as I think, *toties quoties* such necessary officers *are* or *are not* at any of the places named.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

MILEAGE.

An officer of the Revenue Cutter Service is not entitled to *mileage* for travel on duty, but may be allowed actual traveling expenses.

DEPARTMENT OF JUSTICE,
February 19, 1885.

SIR: I herewith submit a reply to the note of the Acting Secretary of February 17, in regard to a claim by Philip Littig, late second assistant engineer in the Revenue Cutter Service, for mileage upon travel done in July, 1872, and May, 1874, betwixt Baltimore and San Francisco and Port Townsend. Littig has received his actual expenses, but claims the balance betwixt that and the 10 *cents a mile* which formerly the Secretary assumed a right to allow by *assimilation*, as I suppose. The claimant refers to *Graham's case* (110 U. S., 219.)

As Littig is not a naval officer, it does not appear that Graham's case, or the act therein contained, has any application to his case. I am not referred to any statute, other than the ordinary appropriation acts providing for "traveling expenses" of officers of "the Revenue Cutter Service" (17 Stat., 347 and 511), that concerns this claim; and as I know of none such, I advise that Littig has no right to the mileage for which he asks.

Very respectfully,
BENJAMIN HARRIS BREWSTER.

The SECRETARY OF THE TREASURY.

FEES OF DISTRICT ATTORNEYS.

Certain fees claimed by a United States attorney for special services held to be "compensation allowed by law" within the meaning of the third section of the act of June 20, 1874, chapter 328, and therefore not precluded by that section from being paid.

DEPARTMENT OF JUSTICE,
February 19, 1885.

SIR: Yours of the 11th states a claim by the United States attorney for southern New York for two fees, and asks

whether the act of 1874, chapter 328, section 3, has any and what operation in preventing their payment.

1. The first fee is for $2,500, allowed by court for defending the Secretary of the Treasury in a suit brought in 1873 by one Lamar because of cotton seized by order of the Secretary, such suit being ended in November, 1884, by judgment in favor of the defendant.

This fee therefore comes within Revised Statutes, section 827 (the Secretary being an "officer of the revenue" within that phrase there employed), and consequently it is excluded from the operation of Revised Statutes, sections 770, 833, (834) and 835. When duly allowed by the court it therefore became strictly compensation allowed by law within the meaning of those words in the body of section 3 first above mentioned.

2. The second fee is one for defending Postmaster James (of New York) in the *Yale Lock* suits.

I have considered this case with great care, having approached it with serious doubts as to the proper answer. After scrutinizing the statutory provisions, however, I see no reason to hold that compensation to district attorneys for special services duly allowed to them under a statute which authorized their employment is not, as well as that in cases under Revised Statutes, section 827, "compensation allowed by law."

The act of 1874 therefore does not apply *at all*, and the proviso herein was added *ex abundanti cautela*. I had at first thought this might *sub modo* be otherwise; it is not necessary now to say why.

Upon the whole I see no reason why the fees should not be paid.

Very respectfully,

BENJAMIN HARRIS BREWSTER

The SECRETARY OF THE TREASURY.

EMOLUMENT RETURNS OF MARSHALS.

Allowances for travel by United States marshals, provided by section 829, Revised Statutes, are "fees" within the meaning of section 833 Revised Statutes, and should be included in the emolument returns required by the latter section to be made by those officers.

DEPARTMENT OF JUSTICE,
February 20, 1885.

SIR: By letter of the 14th instant, the then Acting Secretary of the Treasury, Mr. Coon, at the request of the Solicitor of the Treasury, submitted to me, for an opinion thereon, the following question, which has arisen in a matter now before the latter officer: "Does the mileage received by United States marshals under section 829, Revised Statutes, form a part of the emoluments and fees, returns of which are required to be made to the Attorney-General by section 833, Revised Statutes?"

Having considered this question with much care, I am now prepared to state my opinion thereon.

The last-mentioned section requires the marshal to make, semi-annually, a written return of "all the fees and emoluments of his office, of every name and character," etc. This language is very broad and comprehensive; it undoubtedly includes any and every allowance to which the marshal is entitled, and which may properly be denominated a fee or emolument of his office.

Section 829 provides that the marshal shall receive certain allowances and among others the following: "For traveling from his residence to the place of holding court, etc., 10 cents a mile for going only." "For travel, in going only, to serve any process, warrant, etc., six cents a mile, to be computed from the place where the process is returned to the place of service," etc. Allowances of this description to the officers of courts are commonly called the traveling fees of such officers; and they have received this designation in the legislation of Congress regulating the compensation of the marshal. Thus in section 3 of the act of May 8, 1792, chapter 36, which prescribes the compensation of the marshal for the service of process, it is declared that "the fee for travel," where only one person is named in the writ, shall not exceed a certain sum, etc. That section was repealed by the act of February

29, 1799, chapter 19; yet it is *in pari materia* with all the subsequent legislation regulating the compensation of marshals; and according to a familiar rule of interpretation, it may be referred to for the purpose of explaining the scope and import of terms employed in such subsequent legislation.

Regarding the allowances for travel provided by section 829, adverted to above, as *fees* within the meaning of section 833, there is no escape from the conclusion that all such allowances should be included in the written return which, by the latter section, the marshal is required to make semi-annually; and I am of the opinion that they must be so regarded. This view is fortified by the practice which I understand has hitherto uniformly prevailed from the passage of the fee-bill of 1853 (from which the above-mentioned provision in section 833 is taken) down to the present time, namely, to require marshals to include in their emolument returns the amounts received by them for mileage. Such practical construction of the statute for so long a period is itself entitled to very great weight.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

PAYMENT OF ATTORNEY FEES.

An attorney was employed by the War Department in 1868 to defend certain parties against whom suits were brought, in the result of which the Government was interested. The suits were not determined until some time after the passage of the act of June 22, 1870, chapter 150, up to which time the attorney was continued therein: *Advised* that the authority under which the attorney was originally employed was sufficient, and that the Secretary of War is authorized to pay for his servibes out of any fund under his control which may be available for that purpose.

DEPARTMENT OF JUSTICE,
February 24, 1885.

SIR: In your letter of the 12th instant, transmitting an account of George P. Strong, esq., for professional services rendered by him in the defense of certain suits brought by

William G. Clark v. *Robert and William Mitchell*, and *Same* v. *Robert H. Franklin*, you inquire "whether it is competent for the Secretary of War to pay for the services, in view of section 365 of the Revised Statutes."

It appears by the paper accompanying the account that both of these suits, and one other, were instituted in 1868 by the plaintiff, Clark, to recover from the defendants certain rents which they had paid over to the military authorities of the United States during the rebellion under the compulsion of an order issued by the latter; and that the War Department, deeming the United States to be interested in the result of this legislation, Mr. Strong was then employed by that Department to appear in behalf of the defendants.

Under the law in force at that time (act of February 26, 1853, chap. 80) the head of any Department was authorized, in his discretion, to employ special counsel in behalf of the Government where its interests were concerned, the compensation of counsel so employed being defrayed from funds under the control of such Department. This authority was taken away by section 17 of the act of June 22, 1870, chapter 150, which is embodied in sections 189, 365, and 366, Revised Statutes; but the provisions of that act have been construed to not apply to a case in which the employment of counsel occurred prior to its passage, notwithstanding the services were in part rendered subsequent thereto. (13 Opin., 580.)

In the suits mentioned, Mr. Strong was employed by competent authority before the said act of 1870, and, he having become thoroughly prepared for them, considerations of economy, as well as of expediency, required his continuance therein after the passage of that act, as his previous preparation enabled him to conduct the defense at less expense, and perhaps with less hazard, than any one else. For the purpose of such continuance, as also for the purpose of allowing compensation for his services, the authority under which he was originally employed was sufficient, the provisions of the act of 1870, according to the construction above adverted to, not applying to the case.

The suits were ably and successfully defended by Mr. Strong; the controversy, after having been tried in the in-

ferior court and heard in the supreme court of the State, and thence brought before the Supreme Court of the United States, being finally determined by the latter in favor of the defendants. In my opinion you are authorized to pay for his services out of any fund under your control which is available for that purpose.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

The SECRETARY OF WAR.

COMPENSATION OF DISTRICT ATTORNEYS.

Section 838 Revised Statutes does not authorize an allowance to be made by the Secretary of the Treasury to a district attorney for services in internal-revenue cases reported to the latter wherein no judicial proceedings have been instituted.

DEPARTMENT OF JUSTICE,

March 2, 1885.

SIR: Your letter of the 28th ultimo, and accompanying papers, relative to an account submitted by the United States attorney for the eastern district of Missouri, under section 838, Revised Statutes, presents this inquiry: Whether that section authorizes an allowance to be made to a district attorney for his services in internal-revenue cases reported to him, wherein, upon inquiry and examination, he has decided that the ends of justice do not require that judicial proceedings should be instituted and no such proceedings have been instituted.

This, upon inquiry, appears to be prompted by the circumstance that the district judge of the aforesaid district has, in a recent case, placed a construction upon that section which differs from the one given it by your predecessors in office. As construed by the latter, the section does not authorize compensation to be allowed in cases not "tried or disposed of" before a judge; while by the former it is held that compensation may be allowed in such cases.

Upon consideration, I am of opinion that the construction hitherto adopted and acted upon by your Department is correct. This conclusion is reached after having taken into view, in connection with section 838, Revised Statutes, the

seventh section of the act of July 18, 1866, chapter 201, the act of March 3, 1873, chapter 244, and sections 3084, 3085, and 3164, Revised Statutes.

By section 7 of the act of 1866 it was made the duty of the district attorney, upon the report of the collector of customs thereby required, to "cause suit and prosecution to be commenced and prosecuted without delay for the fines and personal penalties by law in such cases provided, unless upon inquiry and examination he shall decide that a conviction cannot probably be obtained, or that the ends of public justice do not require that a suit or prosecution should be instituted, in which case he shall report the facts to the Secretary of the Treasury for his direction; and for expenses incurred and services rendered in prosecutions for such fines and personal penalties the district attorney shall receive such allowance as the Secretary shall deem just and reasonable, upon the certificate of the judge before whom such prosecution was had," etc. Here it is very clear that no allowance is authorized for the services of the district attorney, excepting in cases in which suits or prosecutions have been instituted. Nothing is allowed for the preliminary "inquiry and examinination" and report of facts to the Secretary in cases not prosecuted.

That section was wholly superseded by the amendatory act of 1873, which re-enacted the same provisions substantially, and extended them to internal-revenue cases. This act made it the duty of the district attorney, on the report of the collector of customs or of the collector of internal revenue, as the case may be, to "cause the proper proceedings to be commenced and prosecuted without delay for the fines, penalties, and forfeitures by law in such cases provided, unless upon inquiry and examination he shall decide that such proceedings cannot probably be sustained, or that the ends of justice do not require that proceedings should be instituted, in which case he shall report the facts in customs cases to the Secretary of the Treasury, and in internal-revenue cases to the Commissioner of Internal Revenue, for their direction; and for the expenses incurred and services rendered in all such cases the district attorney shall receive and be paid from the Treasury such sum as the Secretary of the

Treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of." The object of this enactment was to put internal-revenue cases upon the same footing with customs cases (respecting fines, penalties, and forfeitures), both as regards the institution of judicial proceedings therein and the allowance of compensation to district attorneys for their services, etc., therein. Under the act of 1866 such allowance was limited to "expenses incurred and services rendered" in customs cases. The act of 1873 authorized a similar allowance to be made in internal-revenue cases as well as customs cases. The words "expenses incurred and services rendered *in all such cases*," as used in the latter act, were meant to include both customs cases and internal-revenue cases; and that they were not meant to include cases (whether internal revenue or customs) in which no judicial proceedings have been instituted is shown by the context. Thus, the Secretary of the Treasury is authorized to make an allowance for such expenses and services only "upon the certificate of the judge before whom such cases are tried or disposed of." This language shows that, in enlarging the provisions of the act of 1866 so as to cover internal-revenue cases, the act of 1873 intended to retain the restrictions theretofore existing as to the cases in which allowances to the district attorney should be made. The former act required a "certificate of the judge before whom such prosecution was had;" the latter act calls for a "certificate of the judge before whom such cases are tried or disposed of." The phraseology thus employed, which also occurs in sections 838 and 3085, Revised Statutes, is of the same import.

The sections of the Revised Statutes hereinbefore mentioned have made no change in the law as it stood under the act of 1873, respecting allowances by the Secretary of the Treasury to district attorneys in customs and internal-revenue cases.

Accordingly, in answer to the inquiry presented, I have the honor to reply that in my opinion section 838, Revised Statutes, does not authorize an allowance to be made by the Secretary of the Treasury to a district attorney for expenses

incurred and services rendered in cases wherein no judicial proceedings have been instituted.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. HUGH MCCULLOCH,
Secretary of the Treasury.

CLAIM OF LAKE SUPERIOR AND MISSISSIPPI RAILROAD COMPANY.

Upon the facts presented in this case: *Advised* that it is not incumbent upon the Postmaster-General to have an account for mail transportation performed in July, 1876, audited in favor of the Lake Superior and Mississippi Railroad Company, until satisfactory evidence is presented that the company has maintained its existence and that there are proper officers to receive and receipt for the money.

DEPARTMENT OF JUSTICE,
March 2, 1885.

SIR: I have the honor to acknowledge your communication of the 20th of February ultimo and to reply as follows:

On the 12th of June, 1877, a decree of the circuit court of the United States for the district of Minnesota, foreclosing a mortgage dated January 1, 1869, transferred all the mortgaged premises to the St. Paul and Duluth Railroad Company. The mortgage had been given by the Lake Superior and Mississippi Railroad Company, and included, with the real and personal property, all corporate franchises, *including the franchise to be a corporation.* At the time of the sale and decree there was due from the United States to the Lake Superior and Mississippi Railroad Company $3,685.76 for transportation of the mails from July, 1876. A suit instituted by the St. Paul and Duluth Railroad Company to recover this sum has been decided in favor of the United States by the Supreme Court, it being held that no terms of description sufficient to pass the interest of the original company therein are to be found in the mortgage or decree of sale, and, further, that the transfer of such a claim is forbidden by section 3477, Revised Statutes, which provides that every assignment of a claim against the United States made before issue of a warrant is absolutely void. (112 U. S, 733.)

Claim of Lake Superior and Mississippi Railroad Company.

J. F. Farnsworth, claiming to be the attorney of the Lake Superior and Mississippi Railroad Company and of the St. Paul and Duluth Railroad Company, now asks that this claim be audited, promising that when that is done he will present satisfactory evidence of the rights of the party claiming the warrant. You ask my advice as to whether it is your duty to cause the claim in question to be audited by the proper officers of the Department.

It does not seem to me incumbent upon you to have this account audited until evidence has been presented sufficient to satisfy you that the Lake Superior and Mississippi Railroad Company has maintained its existence, and that there are proper officers to receive and receipt for the money. The Supreme Court having decided that the St. Paul and Duluth Railroad Company is not entitled to the money, it follows that the officers of that corporation have no right, and that no assignee can make claim. You may, if you see fit, have the account stated in favor of the Lake Superior and Mississippi Railroad Company, withholding the warrant until General Farnsworth produces the evidence promised; but in view of the mortgage and foreclosure of the *franchise to be a corporation*, and of the sale in 1877 of all and every right of the company, the presumption that the corporation still exists is overthrown, and the burden of proving its existence is upon the claimant. It is for you to determine whether you will audit without the promised evidence, or insist on the production of the evidence before taking any steps. Without more facts I cannot advise as to the present status of the Lake Superior and Mississippi Railroad Company.

Very respectfully,

BENJAMIN HARRIS BREWSTER.

The POSTMASTER-GENERAL.

CANCELLATION OF POSTAGE-STAMPS.

The Postmaster-General is authorized by the act of June 20, 1878, chapter 359, to substitute, for the black printing inks and writing fluids used under section 721, Postal Regulations, any canceling ink which is uniform and which actual experiment and test have shown to his satisfaction to be best calculated to guard against fraud, and to order its use in all post-offices where stamps are canceled.

DEPARTMENT OF JUSTICE,
March 3, 1885.

SIR: Your letter of the 20th ultimo presents for my consideration the following case and question:

"Section 3921, Revised Statutes, 1878, requires that 'postage-stamps affixed to all mail matter, or the stamped envelopes in which the same is inclosed, shall, when deposited for mailing or delivery, be defaced by the postmaster at the mailing office in such manner as the Postmaster-General shall direct.'

"Under this statute the Postmaster-General, by regulation (sec. 721, P. L. and R.), requires that, 'the cancellation must be effected by the use of black printing ink, whenever that material can be obtained; where it cannot, the operation shall be performed by making several heavy crosses or parallel lines upon each stamp with a pen dipped in good black writing ink.'

"In practice, however, it was found that the use of these canceling materials invited frauds upon the revenues of the Department by the washing and reuse of stamps.

"Accordingly, on April 29, 1875, the then Postmaster-General issued a circular invitation to the public to submit methods (inks and appliances for the more effectual cancellation of stamps), under which many inks and appliances were examined by the Department.

"In the sundry civil bill approved June 20, 1878, appears the following enactment:

"'That the Postmaster-General be and he is hereby authorized to adopt a uniform canceling ink or other appliance for canceling stamps which experiments and tests have proved to be the most practicable and the best calculated to protect the revenues of the Department from the frauds prac-

ticed upon it, to be used in all the post-offices where stamps are canceled, and he is hereby authorized to distribute said canceling ink or other appliance in the same manner as other supplies are now distributed in the different post-offices in the United States, and to this end the Postmaster-General is hereby authorized to use any funds of said Department heretofore applicable: *Provided*, The same shall not increase the expenditures of said Department for the purposes named in this section.'

"In view of the laws above quoted, I have the honor to request your opinion upon the question whether, assuming the Postmaster-General is able to find a practically indelible canceling ink, he will be authorized, under said laws, to substitute it for the black printing inks and writing fluids now used under Postal Regulations, section 721, and to order its use in all post-offices where stamps are canceled."

Upon consideration, I am of the opinion that the question propounded by you should be answered in the affirmative. Under the authority conferred by the act of June 20, 1878, cited above, the Postmaster-General has power to adopt, and to substitute for the inks now in use, any canceling ink which is uniform and which actual experiment and test have shown to his satisfaction to be best calculated to guard against fraud upon the revenues of the postal service, and he has power to require such canceling ink to be used in all post-offices where stamps are canceled; subject, however, to the restriction that the expenses of the Department are not thereby increased.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER.

Hon. FRANK HATTON,
Postmaster-General.

OPINIONS

OF

HON. AUGUSTUS H. GARLAND, OF ARKANSAS.

APPOINTED MARCH 6, 1885.

BRIDGE ACROSS THE MISSISSIPPI AT ST. PAUL.

The provision in the act of July 5, 1884, chapter 215, fixing the width of the water-way between the spans of the proposed bridge across the Mississippi River at St. Paul, Minn., extends to the entire structure over so much of the river as is ordinarily navigable at some seasons of the year for either boats or rafts.

DEPARTMENT OF JUSTICE,
March 20, 1885.

SIR: I have considered the question presented in your letter of the 17th instant, relative to the bridge which the City of St. Paul proposes to construct across the Mississippi River under the act of July 5, 1884, chapter 215, namely: "Whether the provision in that act as to the length of spans should be held to extend to the entire structure over the stream from bank to bank, or confined to such portion of the river as is navigable."

The provision here referred to is in the second section of that act, and reads as follows: "*Provided*, That if said bridge or bridges shall be made with unbroken and continuous spans, it shall not be of less elevation in any case than fifty-five and one-half feet above extreme high-water mark over the main channel of said river, as understood at the point of location, to the bottom chord of the bridge, nor shall the spans of said bridge or bridges give a clear width of water-way of less than two hundred and fifty feet, and the piers of said bridge or bridges shall be parallel with the current of said river, and the main span shall be over the main channel of the river, and give a clear width of water-way of not less than three hundred feet."

It appears by the drawings which accompanied your letter, exhibiting the plan and location of the proposed bridge, that the main span is to be over the main channel of the river and will give a clear width of water-way of 348 feet, but that each of the other spans (of which there are five) will give a width of less than 250 feet, two of them, nearest the main span, giving but 200 feet, and the remainder still less.

In regard to these spans (other than the main one), Major Mackenzie, of the United States Engineer Corps, reports that they are not over a navigable part of the river. The provision prescribing the width of the water-way to be given by the main and other spans is made in the interest of navigation, and if the river at this point were not, at any and all times, navigable for "boats, vessels, rafts, and other water-craft," the requirements of such provision might well be deemed to be inapplicable thereto. But the drawings indicate that between low and high water mark a very considerable depth of water must exist there during certain seasons of the year, which, it may reasonably be assumed, is available for the navigation of rafts and like water-craft; and, in fixing the width of the water-way between piers to be erected in that part of the river which does not embrace the main channel, Congress probably had in view more especially the needs of such navigation. This is indicated by the second proviso in said section, where it is provided that the spans there required to give a water-way of not less than 250 feet may be not less than 10 feet above extreme high-water mark.

Accordingly, in answer to your inquiry, I have the honor to state that in my opinion the provision in question extends to the entire structure over so much of the river as is ordinarily navigable at some seasons of the year for either boats or rafts.

I am, sir, very respectfully,

A. H. GARLAND.

Hon. WILLIAM C. ENDICOTT,
Secretary of War.

HEAD TAX.

The duty imposed by the act of 1882, chapter 376, upon passengers, other than citizens, coming to any port within the United States, is to be exacted of convicts, lunatics, etc., although by the terms of the statute they are not to be permitted to land and are required to be returned to whence they came.

DEPARTMENT OF JUSTICE,
March 20, 1885.

SIR: Yours of the 18th instant refers to the duty of 50 cents imposed by the act of 1882, chapter 376, upon passengers, other than citizens, who shall come, etc., to any port within the United States; and asks whether such duty is to be exacted of convicts, lunatics, etc., amongst such passengers that by the terms of the statute are not to be permitted to land, but are to be returned to whence they came.

I advise you that it is to be so exacted. Amongst other reasons for this opinion I observe that the statute is imperative as to the time within which (*twenty-four hours after the entry of the vessel*) such duty is to be paid; whilst nothing is said as to that within which the existence of *convicts*, *lunatics*, etc., is to be ascertained. This is a technical reason, it is true, but it seems supported also by the policy of this act—a matter which need not be developed here.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

NAVAL COURT-MARTIAL.

Special counsel may be employed by the Attorney-General, at the request of the Secretary of the Navy, to assist the judge-advocate in a trial by court-martial; the compensation of such counsel (in the absence of other provision) to be paid from the appropriation for the contingent expenses of the Navy.

Such counsel should be commissioned by the Attorney-General under section 366, Revised Statutes.

DEPARTMENT OF JUSTICE,
March 21, 1885.

SIR: Yours of the 18th instant calls my attention to correspondence betwixt the Secretary of the Navy and the Attorney-General in January and February last which re-

sulted in an appointment of Mr. Cragin to assist a naval judge-advocate in the court-martial called to try the late Surgeon-General. Mr. Cragin was selected, and his fee was arranged by the Secretary with the assent of the Attorney-General. He has taken an oath which has been forwarded to this Department, but he has not been commissioned. The trial will begin upon the 14th proximo.

After making a statement substantially as above, you ask:

(1) Whether special counsel can be employed to assist a judge-advocate, *i. e.*, "counsel" other than some officer of the Department of Justice?

(2) If he can, should he not be commissioned under section 366, Revised Statutes; and also, can his compensation be paid out of the appropriation for the contingent expenses of the Navy, which includes "expenses of courts-martial;" such appropriation being (sec. 3676, Rev. Stat.) under the direction of the Secretary of the Navy?

(3) Referring to sections 3676 and 3681, Revised Statutes, can the Secretary of the Navy, in his discretion and without applying to the Attorney-General, employ special counsel in connection with cases before naval courts martial?

1. The only difficulty in the way of the employment by the Attorney-General of special attorneys on behalf of the United States seems to be involved in the question of the existence of an appropriation for their payment.

The act of 1870, chapter 150, which created the Department of Justice, seems to have intended that all lawyers who should be employed, whether statedly or casually, upon behalf of the United States should have connection with that Department. They were not all to be "officers" thereof, but there was to be subordination betwixt them and the Attorney-General. In particular it was provided (sec. 17) that such special counsel as might be from time to time required by any Department should be appointed by the Attorney-General only, and should formally and really be assimilated, in point of office, oath, and commission, to the ordinary legal officers of the Government, the amount of their compensation to be stipulated for by him. These provisions are to be found in sections 189, 362, 365, and 366, Revised Statutes.

If, therefore, there be an appropriation for the Navy De-

partment that may be applied to the compensation of Mr. Cragin upon his being duly qualified, I see no reason why he may not entitle himself to be paid.

I do not know that you make objection to the manner in which the Attorney-General informally delegated, as it were, his functions as regards selection, etc., to the Secretary. In a proper case this might deserve consideration.

Upon the whole, as to your first question, I agree in the opinion given to the Secretary of the Navy by Attorney-General Akerman, under date of August 25, 1871 (13 Opin., 515). The circumstance that in the mean time (June 19, 1878) the office of "naval solicitor" has been abolished (20 Stat., 105), does not affect that conclusion.

2. I think that Mr. Cragin should be commissioned under section 366, as you suggest.

When so commissioned, I see no reason why he may not be compensated out of the fund for "expenses of courts-martial," to which you refer.

3. A judge-advocate need not be a professional person. His qualifications must of course be *of the sort* required by members of the bar, but there is no law limiting choice of judge-advocates, or of their assistants when needed, to that class. Although there is no statutory provision in regard to *naval* judge-advocates, like that for those of the *Army*, to the effect that they shall belong to the *Navy*, yet in fact I take it that this is generally the case. So *assistants* for judge-advocates might be detailed from the same branch of service, or indeed specially intelligent persons might be selected from any line of civil life.

However, after considering the provisions in the Revised Statutes taken from the act of 1870, I am of opinion that if it be thought best in any case to employ regular counsel to assist a naval judge-advocate, he should be selected and commissioned by the Attorney-General. Such service would substantially be professional "service," to which the Attorney-General might under section 367 assign any lawyer in the Department of Justice; and therefore it is probable that Congress intended the statutory provisions for compensating persons employed *in lieu* of these "officers" (sec. 365) to cover like service; and so such professional persons as are

required to perform it should be selected etc., by the Attorney-General alone. If such service be *professional* in the one point of view, so also in the other.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE NAVY.

JURISDICTION OVER TRIBAL INDIANS.

Where an Apache Indian, charged with murdering another Indian of the same tribe on an Indian reservation in Arizona, was in custody of the Territorial authorities: *Advised* that the accused should be delivered up for trial and punishment to the authorities of his tribe.

DEPARTMENT OF JUSTICE,
March 24, 1885.

SIR: I have considered the papers inclosed in yours of the 20th instant, stating the case of Eschilla, an Apache-Yuma Indian, charged with murdering an Apache Indian scout in August last within the White Mountain Indian Reservation in Arizona.

The question you ask is whether for trial and punishment this criminal is to be delivered up to the Territorial authorities or to the authorities of his tribe.

I gather from the papers in the case that Eschilla and his victim are tribal Indians, belonging to the same tribe.

The case therefore comes within the rule of the *Crow Dog case* (109 U. S., 556), *i. e.*, whilst as between the Territory and the United States the latter would have jurisdiction, *they* have relinquished such jurisdiction to the tribe.

The case therefore is to be remitted to the authorities of the tribe.

I herewith return the papers inclosed as above.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE IETERIOR.

ALASKA.

The fourteenth section of the act of May 17, 1884, chapter 53, which prohibits the importation of "intoxicating liquors" into the Territory of Alaska, does not apply to wines imported for sacramental use.

DEPARTMENT OF JUSTICE,
March 24, 1885.

SIR: Yours of the 21st instant refers to an application to ship to Alaska wines for sacramental use in the various Greeco-Russian churches there; and in effect asks whether the fourteenth section of the act of 1884, chapter 53, which prohibits the importation into that Territory of "intoxicating liquors," except for medicinal, mechanical, and scientific purposes," operates upon such application.

Granting that, as appears probable from its context in Revised Statutes, section 1955, the word "importation" in the above provision includes shipments from other portions of the United States, and that wine is an "intoxicating *liquor*" within the words there employed, I am still of opinion that such provision does not apply to exclude wines intended for sacramental uses. Such use of wines is a religious rite equally solemn and venerable. Its "free exercise" is therefore protected by the first amendment to the Constitution. In the light of that guaranty, I am satisfied that, by the provision referred to, Congress had no more intention than it had power to interfere with the shipment of the wines in question.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

CUSTOMS LAWS.

Where meat of American production, cured with foreign salt, was exported to Europe (the duty upon the salt being refunded), and subsequently brought back to this country: *Advised* that, on the duties upon the salt being re-refunded, the meat may be admitted duty free under the act of March 3, 1883, chapter 121.

DEPARTMENT OF JUSTICE,
March 24, 1885.

SIR: Yours of the 20th instant calls my attention to a case under the customs laws in which certain meats of Ameri-

can production, cured with foreign salt, were exported to Europe, the duty upon the salt being thereupon refunded (tariff act of March 3, 1883, Treasury ed., par. 483), and have since been reimported. Thereupon a question was raised before your predecessor, 25th ultimo, whether upon such reimportation the meats after re-refunding duties on the salt were not free; and he decided that under existing law the meats could not be distinguished from meats of foreign production, and therefore should be subjected to duty accordingly.

Replying to the questions thereupon asked by you, I advise—

(1) That under section 2 of the act of 1875, chapter 136 (March 3), you cannot of yourself alone reverse that decision for the purpose of holding the meats upon such re-refunding to be free; and,

(2) A proper construction of the free list in the tariff act of 1883 (Treasury ed., par. 649) designates these meats as free, at least upon such re-refunding of the duty upon the salt.

For customs purposes the salted meats at exportation were regarded as "salt" *and* "meat." Upon their importation it is consistent to keep up that treatment. The only serious question thereabouts seems to be that which you mention as having been raised by Judge Sawyer, viz: Whether the words of paragraph 649 may not avail to pass the whole importation *free*, as being a "*manufactured article of the United States*" returned in the same condition as exported.

I advise therefore that you accept the refunded duty upon the salt, and thereupon admit the meats *free*.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

OLD WINNEBAGO AND CROW CREEK RESERVATION.

The contiguous tracts of land lying on the east bank of the Missouri River in the Territory of Dakota, known as the Old Winnebago and Crow Creek Reservations, are protected by the provisions of the treaty of April 29, 1868, with the Sioux Indians; and the executive order of February 27, 1885, restoring portions of such tracts to the public domain, is in violation of that treaty, and consequently inoperative and void.

DEPARTMENT OF JUSTICE,
March 29, 1885.

SIR: Your communication of the 17th March instant requests my opinion as to whether those contiguous tracts of land lying on the east bank of the Missouri River, in the Territory of Dakota, and designated the Old Winnebago and Crow Creek Reservation—and sometimes going by the last name only—are embraced by "the treaty concluded with various" bands of the Sioux Indians on the 29th April, 1868 (15 Stat., 635), and whether the executive order of the 27th February, 1885, restored the lands in question to the public domain.

In replying to the first question, as to whether the lands referred to come within the treaty of 1868, it will be necessary to give particular attention to their condition prior to and at the time of the conclusion of the treaty.

By an act passed on the 21st February, 1863 (12 Stat., 858), the President was authorized to remove the Winnebago Indians from the State of Minnesota and settle them upon such unoccupied lands, beyond the limit of any State, as he might assign and set apart for them in conformity to the law.

On the 3d March 1863 (12 Stat., 819), a similar law was passed, authorizing and directing the President to assign and set apart for the Sisseton, Wahpeton, Medawakanton, and Walpakoota bands of Sioux Indians a tract of unoccupied land outside the limits of any State, in the manner required by the law.

In furtherance of these acts Clark W. Thompson, a superintendant of the Indian service, proceeded, by direction of the Commissioner of Indian Affairs, to lay off two adjoining tracts or reservations of the public domain on the east bank of the Missouri River, in the Territory of Dakota, and on the

1st July, 1863, he reported to the Commissioner that he had completed the surveys, and transmitted the plats and field notes with his report.

The Winnebagoes were settled on the upper tract or reservation and the Sioux on the lower, but no executive order was made setting the lands apart for the use and occupation of these Indians.

The Winnebagoes remained on their reservation until 1865, when by a treaty dated the 8th March of that year (14 Stat., 671) they ceded, sold, and conveyed to the United States "all their right, title, and interest in and to their present reservation in the Territory of Dakota, at Usher's Landing, on the Missouri River, the metes and bounds thereof being on file in the Indian Department." After this treaty the Winnebagoes removed to their new reservation in Nebraska.

In 1866 the Sioux were also removed to their new reservation in Nebraska set apart for them by an executive order dated the 27th February, 1866, and founded on the act of 3d March, 1863 (*supra*), but without any cession or formal relinquishment.

After the removal of the Winnebagoes and Sioux, wandering bands of Sioux belonging to the Yanctonias, Two Kettle, and Brulé tribes entered and took possession of the abandoned reservations and have remained on them up to the present time, although their original entry was without the sanction of Government. Nevertheless, the two reservations have not to this day, as matter of fact, become merged in the public domain, but have been continuously known, since the removal of the Indians for whom they were set apart, as the Old Winnebago and Crow Creek *Reservations*, or simply as the Crow Creek Reservation. This will be at once apparent by reference to the maps prepared from time to time under the direction of the Commissioner of Indian Affairs and by the reports of that officer. They are so laid down on the map accompanying the Commissioner's report for the year 1884, entitled "Map showing the location of the Indian reservations within the limits of the United States and Territories, compiled from official and other authentic sources under the direction of the Hon. Hiram Price, Commissioner of Indian

Affairs." Indeed this is conceded in all the discussions of the subject that have been brought to my attention.

In this condition of things the United States and various tribes of the Sioux Nation came together and concluded a treaty on the 29th April, 1868. By the second article of this treaty "the United States agrees that the following district of country, to wit, viz, commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; *and, in addition thereto, all existing reservations on the east bank of said river shall be, and the same is (sic) hereby, set apart for the absolute and undisturbed use and occupation of the Indians herein named and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them.*" * * * (15 Stat., 635.)

A reference to the treaty will show that the tribes or bands to which the Indians belonged or had belonged who entered and occupied the abandoned reservations were parties to the treaty, and it may have been, and very probably was, the case that the occupants of these reservations were represented in the negotiations, if they were not parties to the treaty, otherwise than by the chiefs of the tribes from which they had wandered. But whether that be the case or not, they have certainly remained where they are with the consent of the United States and the tribes of the Sioux with whom the treaty was made.

The questions submitted for opinion turn upon the interpretation of these words of the second article of treaty, that is to say, "and in addition thereto *all existing reservations on the east bank of the river* shall be, and the same is [sic], set apart for the absolute and undisturbed use of the Indians herein named." * * *

Old Winnebago and Crow Creek Reservation.

If the lands known as the Old Winnebago and Crow Creek Reservations answered to the description of "existing reservations on the east bank of the river" at the time the treaty was entered into, they are protected by it, and the executive order of the 27th February, 1885, restoring certain portions thereof to the public domain, is wholly inoperative and void, being in violation of the treaty.

But it is urged in support of the order restoring the lands in question to the public domain, that they were not originally set apart and dedicated as reservations by an executive order in the customary way, and, therefore, that at the time the treaty of 1868 was made they did not answer to the description of reservations in the legal technical sense, and consequently did not come under the protection of the treaty.

I shall not stop to consider whether the laying off of these two bodies of land by direction of the Commissioner of Indian Affairs and the removal of the Indians to them were equivalent to a formal executive order, because I find that by the third and fourth articles of the treaty between the United States and the Sisseton and Wahpeton bands of the Sioux Indians of the 19th February, 1867 (15 Stat., 505), reservations are set apart for certain members of the said bands "*who were not sent to the Crow Creek Reservation.*" In proclaiming this treaty, thus excepting from its operation members of the tribes who were parties to it, on the ground that they *had been already provided with a settlement on the Crow Creek Reservation*, the Executive necessarily recognized and adopted all that has been done towards establishing the reservations now in question, which it may be proper to say are, since the removal from them of the Indians for whom they were originally laid off, sometimes regarded as *one* reservation, and called simply the Crow Creek Reservation, there being no longer any reason for keeping up the old division. Whatever, therefore, was needed to complete the dedication attempted under the acts of 1863 would seem to have been supplied by the Executive in concluding and proclaiming this treaty.

It will be observed that this action of the Executive was subsequent to the removal of the Winnebagoes and Sioux, and the cession of the former, by treaty, of their interest in

the lands, which, it is argued, had the effect of restoring them to the national domain.

At the time of the treaty, then, the lands in question had been validly appropriated as Indian reservations, and being on the east bank of the Missouri River fell within the treaty and were protected by it from the power of the Executive to throw open lands to entry.

But supposing I am wrong in this view, and that the lands had never been legally appropriated as reservations at the time of the treaty of 1868, I am still of opinion that they are covered by the treaty. It must be regarded as a well-settled principle in interpreting statutes that, if possible, "no clause, sentence, or word shall be superfluous, void, or insignificant," and I see no reason why this principle is not as applicable to treaties as statutes.

Now, if the argument in support of the executive order of February, 1885, is sound, the treaty of 1868, in so far as it professes to secure lands to the Sioux on the east bank of the Missouri, is made to have no effect or operation whatever, because there is no land so situated which answers to the description used in the treaty, and the eminent and intelligent gentlemen who represented the Government in concluding the treaty are placed in the somewhat embarrassing position of having offered to the Indians reservations on the east bank of the river when there were none there; for it is a fact that if the lands in question were not reservations, there was no reservation on the east bank of the river except the Yankton Reservation, which, however, could not possibly have been in contemplation, because it was established by a previous treaty made in 1859 with the Yanktons, who were not parties to the treaty of 1868, and could not therefore be affected by it.

If, then, it be true that these lands were not technical reservations at the time of the treaty of 1868, it is obvious the contracting parties must have used the term reservation in some secondary sense, and when we see that there has been an uninterrupted practical appropriation of the lands as Indian reservations from 1863 down to the promulgation of the executive order of February, 1885, and that, as already said, they are so described in the map of Indian reservations accompanying the Indian Commissioner's Report submitted

to the last Congress by the Secretary of the Interior, we cannot for a moment be at a loss as to what that sense was.

Nothing would seem to be better established in reason or authority than that when the expounder of a statute or other instrument is satisfied that a term occurring in it is not to be taken in its normal or technical acceptation, but in some other, it becomes his duty to give it the sense in which it appears to have been used. So, here, if the lands in question are found not to be reservations in a strict legal sense, but to have been understood to be such generally, and even by the Government itself, surely the grant, which would otherwise fail in this particular, must be held to refer to such lands as were reputed to be reservations.

The words of description used in the treaty are, when so interpreted, amply sufficient to point out the portion of the public domain intended to be ceded, and the competency of the treaty making power to make the cession is not open to discussion; so that we have all the conditions necessary to a public grant.

To these considerations may be added that Indian treaties are not construed strictly, but liberally in favor of the Indians. (2 Opin., 465; *The Kansas Indians*, 5 Wall., 737.)

In conclusion, I am of opinion that the lands in question are covered by the treaty of the 29th April, 1868, and, consequently, that the executive order of the 27th February, 1885, is inoperative.

I have the honor to be, sir, yours, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

WORLD'S INDUSTRIAL AND COTTON CENTENNIAL EXPOSITION.

The appropriation made by the act of March 3, 1885, chapter 360, in aid of the World's Industrial and Cotton Centennial Exposition, held in New Orleans, La., is not applicable to any objects other than those specifically enumerated in the act.

DEPARTMENT OF JUSTICE,

April 2, 1885.

SIR: Your communication of the 30th of March, 1885, requests my opinion as to whether the appropriation in the

sundry civil appropriation act of 3d March, 1885, for "final aid to the World's Industrial and Cotton Centennial Exposition, now being held in New Orleans," will be available for the payment of debts due by the Exposition to persons, firms, or corporations residing or having their places of business in Louisiana, as to any surplus which may exist after all the disbursements specifically provided for in the act have been made.

I do not think such residuum would be available for the purpose mentioned.

The enumeration of the objects to which the appropriation is to be applied must, I think, be regarded as manifesting a purpose to exclude all other objects, according to a well-known canon of interpretation.

That such was the intention of Congress would seem to follow, also, from the requirement of the act that the Secretary of the Treasury shall prescribe the mode of proving "*such indebtedness*," that is to say, the *previously mentioned* indebtedness "to persons, firms, or corporations living and doing business outside of the State of Louisiana." The use of the adjective "*such*," in restriction of the meaning of the word "indebtedness," would hardly have occurred if the legislature had had in view the possibility of a use of the appropriation to pay debts not specified. Again, the law provides that no part of the "*foregoing* sums" shall be paid until the Secretary of the Treasury shall be satisfied as to all expenditures under the act of 21st May, 1884, and it cannot be doubted that Congress intended to embrace every disbursement under the act by the words "foregoing sums," which, however, could refer only to the sums *previously mentioned.*

This view would seem to be strengthened by the consideration that Congress in appropriating a sum "*not to exceed* the sum of three hundred and thirty-five thousand dollars," which is the language of the provision, appears to evince a purpose to appropriate only so much of the sum named as may be required for the demands specified, after the payment of which, if this reading is correct, there *can be no surplus*, for the appropriation will then have been *exhausted*,

although the amount disbursed fall short of the sum named in the law.

Furthermore, the particularity of Congress in this provision is hardly consistent with the probability that it has left to implication the application of any part of this appropriation.

I have the honor to be, sir, yours, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

DUTY ON SILVER ORE.

Silver ore, ground, is not dutiable under the tariff act of March 3, 1883.

DEPARTMENT OF JUSTICE,
April 11, 1885.

SIR: Replying to yours of the 9th instant, which presents a question as to the duty upon silver ore somewhat *advanced* from a state of nature, as regards extraction of the bullion, by grinding, etc., you state that on the 30th of September last the Treasury Department decided that this article is subject to a duty of 10 per cent., as being a *non-dutiable crude mineral refined*, etc., *in value by grinding*, etc. (See tariff act of 1883, par. 95, Treasury edition.)

The soundness of this decision is questioned by the collector at San Francisco in a letter addressed to the Secretary, dated February 12, mainly for the reason that paragraph 95 cannot mean to include gold and silver ores so refined, etc., inasmuch as "bullion," which is a product from such ores, *still further refined*, etc., is free. (Par. 666.)

For that and other reasons I entirely agree in the conclusion which the collector suggests, viz, that the silver ore in question is free.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

PARDON—LAWTON'S CASE.

L., having been commissioned a lieutenant in the United States Army, and taken an oath as such officer to support the Constitution of the United States, afterwards bore arms against the United States in the war of the rebellion, but on the 6th of February, 1867, received a full pardon from the President for the part he had taken therein: *Held*, that the fourteenth amendment of the Constitution (section 3), which did not take effect until more than a year after such pardon was granted, does not operate to exclude L. from holding office under the United States.

DEPARTMENT OF JUSTICE,
April 14, 1885.

SIR: My opinion is requested on the following case: Alexander R. Lawton, who had been a cadet at West Point and held a commission as lieutenant in the United States Army, and, in one or both of those characters, had taken an oath which, it is contended, and which I am to assume, as a part of the case submitted, bound him to support the Constitution, afterwards bore arms against the United States in the war of the rebellion.

On the 6th of February, 1867, he received a full pardon and amnesty for the part he had taken in the rebellion, and the question is whether he can hold a civil office under the United States notwithstanding the third section of the fourteenth amendment of the Constitution, which took effect on the 20th of July, 1868, and is in the following words:

"SEC. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath, as a member of Congress, or as any officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability."

The question presented will be disposed of upon the legal intent and meaning of this amendment.

Prior to the adoption of the amendment, the Executive, in

the exercise of an unquestionable power, had granted pardons to the person whose case is now under consideration and others standing in the same predicament of guilt.

The power to pardon vested in the Executive by the Constitution was not given to be exercised capriciously, but when resorted to in cases like the present it should be in furtherance of the peace of society and in the interest of the Government.

Such being the theory, it must be presumed that every exertion of that power in such cases by the Executive Department of the Government was in furtherance of the objects for which the power was granted; for nothing is better established than that a want of fidelity to its constitutional duties is never to be imputed to any one of the three great coordinate Departments of the Government if it be possible to avoid it.

At the time the fourteenth amendment went into operation, Mr. Lawton and the other persons referred to had been restored, by the pardons previously granted, to all their rights as citizens, and had become, by virtue of those pardons, as innocent as if they had never committed the offenses forgiven. (*Ex parte Garland*, 4 Wall., 380; *United States* v. *Padelford*, 9 Wall., 531; *United States* v. *Klein*, 13 Wall., 128; *Armstrong* v. *United States*, *ib.*, 154; *Pargoud* v. *United States*, 156; *Carlisle* v. *United States*, 16 Wall., 148.)

The question, then, for my opinion is whether it was the intention of the fourteenth amendment to take away rights which previous pardons had restored; or, in other words, whether it was the purpose of that amendment to cast a reproach upon the Executive Department of the Government by repudiating, as unworthy of credit, its acts of unquestionable validity, by destroying rights which had undoubtedly vested under those acts, and by violating the national faith, solemnly pledged.

It can not be denied that the amendment is as comprehensive as language could make it, but, at the same time, it must be remembered that the words of every law are to be taken in subordination to its intent, and that where they are general their sense will be restricted if necessary to prevent an unjust and absurd consequence, which it must be pre-

sumed the legislature could not have contemplated. It was upon this principle that the Supreme Court of the United States held that an individual pardoned for taking part in the rebellion was not debarred from suing in the Court of Claims by a law providing that in order to recover the proceeds of captured or abandoned property the claimant must prove "that he has never given any aid or comfort to the present rebellion." The court say: "It is not to be supposed that Congress intended by the general language of the act to encroach upon any of the prerogatives of the President, and especially that benign prerogative of mercy which lies in the pardoning power. It is more reasonable to conclude that claimants restored to their rights of property, by the power of the President, were not in contemplation of Congress in passing the act and were not intended to be embraced by the requirement in question. All general terms in statutes should be limited in their application, so as not to lead to injustice, oppression, or any unconstitutional operation, if that be possible. It will be presumed that exceptions were intended which would avoid results of that nature." (*Carlisle* v. *United States*, 16 Wall., 153.) In a very important case recently decided the same court restricted the general language of a statute in order to avoid giving it a sense that would have involved Congress in a violation of a treaty obligation. (*Chew Heong* v. *United States*, 112 U. S., 555.) The same doctrine is forcibly presented in *United States* v. *Kirby* (7 Wall., 483).

That this principle is applicable to the interpretation of constitutions as to statutes was conclusively established by the Supreme Court in the *Slaughter House Cases* (16 Wall., 77), where the court refused to adopt the full meaning of certain general words in the first section of the fourteenth amendment in order to avoid an interpretation that would have involved "so great a departure from the structure and spirit of our institutions" as, in the absence of explicit language, could not be presumed to have been intended.

Applying, then, this sound rule of interpretation to the third section of the fourteenth amendment, I am of opinion that the consequences of allowing its general words of exclusion to operate without a limitation in favor of persons in

the situation of Mr. Lawton would be productive of an injustice and a disregard of the public faith which nothing short of the most explicit and controlling language should authorize.

If the conclusion I have reached is not well founded, then it follows that if the people of the United States should amend the third section of the fourteenth amendment in the single particular of requiring a unanimous instead of a two-thirds vote of both Houses to remove the disability imposed, all persons whose disabilities had been theretofore removed by a two-thirds vote would find themselves again under the necessity of applying to Congress, a result which would not be a whit less at war with justice than what would occur if Mr. Lawton and others in his situation were held to have been degraded by the amendment to the condition of disability from which their pardons had raised them.

I am also of opinion that Mr. Lawton is not affected by the amendment, because at the time it was ordained the offenses on which the disability imposed is based could not have been imputed to him, for the reason that he had by virtue of his pardon become "a new man," endowed with "a new credit and capacity," his guilt had been "blotted out," and he had become "as innocent as if he had never committed the offense." Whatever was his connection with the rebellion the effect of the pardon was to close the eyes of the law to a perception of it.

These positions have been laid down upon the greatest considerations by the Supreme Court of the United States in cases already cited, which make it entirely clear that to have accused Mr. Lawton of any of the above named offenses at the time the amendment was adopted would have been a defamation for which an action might have lain.

Two years before the amendment became law the Supreme Court laid down, in a case already cited, that a pardon had the cleansing, renovating effect I have described, and it almost seems like imputing to the framers of the third section of the amendment either ignorance of the law or the purpose to set a snare to say that they intended to include persons already pardoned without specially referring to them.

I am of opinion, therefore, that Mr. Lawton is qualified to hold a civil office under the Government of the United States.

I have the honor to be, yours, very respectfully,

A. H. GARLAND.

The PRESIDENT.

WORLD'S INDUSTRIAL AND COTTON CENTENNIAL EXPOSITION.

Opinion of April 2, 1885 (*ante*, p. 146), relative to the appropriation for the World's Industrial and Cotton Centennial Exposition at New Orleans, La., reaffirmed.

DEPARTMENT OF JUSTICE,
April 16, 1885.

SIR: On the 13th instant I addressed you a letter, stating that I had examined the matter of the appropriation for the World's Industrial and Cotton Centennial Exposition again, upon brief and documents furnished by Mr. Merrick, "counsel for the Exposition," and that I saw no cause to change the opinion that I had rendered you in the same matter on the 2d of this month. After my letter of the 13th had been sent, Mr. Merrick appeared in person, and requested the privilege of being heard on the matter orally, in addition to the brief that he had filed before you. I acceded to his request, and at the same time asked for a return of the papers by you, which you accordingly sent me.

On last Tuesday Mr. Merrick appeared as "counsel for the Exposition," and argued the matter before me, with the brief already alluded to. I have given the matter close and careful consideration, and I am still of the opinion that I expressed in my communication to you of the 2d instant, and see no reason to change the same.

I herewith return the brief, with the documents, and also my letter of April 13.

Very respectfully,

A. H. GARLAND.

Hon. C. S. FAIRCHILD,
Acting Secretary of the Treasury.

EXTIRPATION OF PLEURO-PNEUMONIA.

The provision in the act of May 29, 1884, chapter 60, giving the Commissioner of Agriculture power to expend money in such disinfection and quarantine measures as may be necessary to prevent the spread of pleuro-pneumonia from one State or Territory into another, does not authorize him to purchase animals infected with that disease for the purpose of slaughter.

DEPARTMENT OF JUSTICE,
April 21, 1885.

SIR: Yours of the 18th instant calls attention to the act of 1884, chapter 60, entitled "*to provide means for the suppression and extirpation of pleuro-pneumonia*," and, referring particularly to words giving you power to expend money "in such disinfection and quarantine measures as may be necessary to prevent the spread of disease from one State or Territory into another," asks whether by these words you are not "authorized to purchase diseased and infected animals for the purpose of slaughter, *i. e.*, *disinfection*."

At the same time you state that the destruction of animals infected with pleuro-pneumonia is recognized by experts as the only way of putting a stop to the spread of that disease.

Conceding that this opinion exists, and is well-founded, I nevertheless think that the statute in question does not confer power to purchase and slaughter such animals.

You will observe that the statute makes distinction betwixt the District of Columbia and other parts of the country, as regards the duties which it assigns to United States officials. In the former case only are such officials expressly directed "to require the destruction of infected animals." The officials so empowered are not, even in that case, such as belong to the Department of Agriculture. They are *Commissioners of the District*, or in other words the local authorities such as answer here to the executive authorities *of the States*. For the destruction of infected animals within this District therefore a co-operation is provided between its legislature (viz, Congress, the statute in question affording such *co-operation*) and the local executive. My understanding is, that the same *co-operation* is intended also where such animals are to be destroyed elsewhere. And I add that inasmuch as Congress has not provided for "purchase" of

these animals within the District, I presume the more that it does not intend the appropriation contained in the act so to be applied anywhere. The diseased animal, as in ordinary cases, *perit suo domino;* the *hastening* of such event upon public grounds being, to all appearance, supposed by Congress to afford no ground for setting up a market for such animal, wherein the public is to be purchaser.

The act in question being, as probably was anticipated, the first of a series upon that *subject*, is consequently somewhat general and merely tentative in its provisions; as, for instance, was the case in analogous recent legislation establishing a *National Board of Health.* As the results of experience and observation are accumulated upon the topic of which you speak, no doubt more definite legisiation is intended.

Section 3, to which you refer, authorizes regulations by the Commissioner of Agriculture, and supposes that these may be adopted by State executive authorities, or, as an alternative, supposes regulations by State executive authorities which in turn it empowers the Commissioner to adopt. In either case, of course, such State executive action is to be authorized by competent State legislation. The section then proceeds to suppose a time for action to arrive, and to be *notified* by some proper State authority to the Commissioner. And thereupon the Commissioner is authorized, as you quote, to spend money for the quarantine action required by the particular exigency.

There is, however, as I repeat, no provision for purchasing the diseased animals. The question, at whose loss any necessary destruction of these may be, is not a question of quarantine, and the powers of the Commissioner are incident to quarantine only; it being important, of course, that for the purpose of executing these he shall have acquired information and come to conclusions in the way indicated by section 2.

Very respectfully,

A. H. GARLAND.

The COMMISSIONER OF AGRICULTURE.

PAYMASTER OF THE FLEET.

No designation other than that made by the President entitles a naval paymaster to the place and perquisites of paymaster of the fleet.

DEPARTMENT OF JUSTICE,
April 21, 1885.

SIR: I have considered yours of the 18th instant, relating to the case of Naval Paymaster Whitehouse, who, in October, 1883, being on duty upon the Asiatic Station, was designated "paymaster of the fleet" by Admiral Crosby, then in command there, such designation being made expressly "subject to the approval of the President;" such approval (virtually, at least) having been given on the 14th of November, 1884. The question is whether he became entitled from the date of his designation to pay as "paymaster of the fleet," or remained entitled as "paymaster" only.

In that connection I have considered sections 1378, 1381, 1382, 1475, and 1556 (fifth and seventh paragraphs from top of page 266), Revised Statutes.

I am of opinion that no designation other than that by the President entitles a paymaster to the place and perquisites in question. The powers conferred by sections 1381 and 1382, respectively, are quite distinct. I am not referred to any legislation which changes the state of the case as constituted by these sections.

Nor do I think that there is any *relation* by the subsequent approval to the *time* of the designation by the Admiral. The latter act has no significance in point of law, no more than has any other *recommendation* made to an appointing power.

I notice that there is nothing in your communication to explain to me the bearing upon this question of the date "June 5, 1884," therein mentioned. I take for granted, however, that this reply, which ignores that date, will meet your purposes.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

COMPENSATION OF CONSULAR OFFICERS.

W. was appointed minister resident and consul-general to Hayti, and took the oath of office, but failing to execute a bond as required by section 1697, Revised Statutes, his commission was not delivered to him: *Held* that by the provisions of that section he never became qualified to receive the commission or to enter upon the duties of the office, and that he is not entitled to pay as an incumbent of such office.

DEPARTMENT OF JUSTICE,
April 22, 1885.

SIR: Your communication of the 20th April instant asks my opinion upon this case: Mr. George W. Williams was appointed by President Arthur minister resident and consul-general to Hayti, with the advice and consent of the Senate. On the 4th of March, 1885, Mr. Williams took the oath of office at the Department of State, and was there furnished with a blank form of the official bond, which consuls-general are required by law to execute. Mr. Williams has not executed any bond, and the President has determined not to deliver his commission to him.

The question submitted is whether Mr. Williams is entitled to any pay.

I am of opinion that he is not entitled to pay as an incumbent of the office mentioned.

The commission of Mr. Williams has been held by the Secretary of State in escrow, and its delivery depended upon the condition prescribed by section 1697 of the Revised Statutes, which provides that "every consul-general, consul, and commercial agent *before he receives his commission or enters upon the duties of his office, shall give a bond to the United States with sureties.*"

It will be observed that Congress manifests a plain intention that no right of any kind shall accrue from appointment to the offices named until the bond shall have been given; so that if Mr. Williams had been permitted to enter upon the duties of the office in question he could not have received compensation for his services. This exceptional stringency was no doubt employed for the better protection of the public interests in foreign countries.

As Mr. Williams had not given the required bond, it follows that he has never become entitled even to demand his

commission, let alone to enter upon the duties of the office, from which it follows, necessarily, that he cannot claim any of its emoluments.

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF STATE.

LIEUTENANT ROBERTSON'S CASE.

Leave of absence was granted Lieutenant R., of the Army, for one year from August 1, 1881, during part of which period, namely, from August 1 to November 1, 1881, he was entitled to cumulative leave with full pay. On March 16, 1882, the order granting said leave of absence was revoked, and a new order was issued by direction of the Secretary of War placing Lieutenant R. "on a status of waiting orders for one year from August 1, 1881." He has drawn full pay (not only from August 1 to November 1, 1881, to which he was entitled, but) from November 1, 1881, to March 16, 1882, when, for this period, he was only entitled to half pay: *Held*, that the difference between full pay and half pay for the last-mentioned period cannot be withheld in the adjustment of another and subsequent pay account presented by Lieutenant R.

DEPARTMENT OF JUSTICE,

April 22, 1885.

SIR: The letter of the Second Comptroller, accompanying your communication of the 14th instant, presents the following case:

Lieut. S. C. Robertson, of the Army, was granted leave of absence for one year from 1st August, 1881, with permission to go beyond sea. He proceeded at once to Saumur in France, for the purpose of obtaining military instruction.

On the 16th March, 1882, the orders granting the leave of absence were revoked, and on the same day an order was issued by the Adjutant-General, by direction of the Secretary of War, placing Lieutenant Robertson "on a status of waiting orders for one year, from August 1, 1881," the date he left his post on leave. This order, which is in the form of a letter to Robertson, refers in complimentary terms to his "conduct and progress at the cavalry school at Saumur," and was no doubt induced by the Secretary's desire that this officer should be made thereby better able to meet his expenses while abroad.

It seems that at the time the leave of absence was granted

Lieutenant Robertson's Case.

Lieutenant Robertson was entitled to cumulative leave with full pay until the 1st of November, 1881, and the question as presented by the Comptroller is whether he "*was entitled*" to full pay from the 1st of November, 1881, to the 16th of March, 1882, or "is to be regarded as on leave and entitled to half pay during that period."

I do not understand that Lieutenant Robertson has not drawn his pay for the period mentioned, for the question submitted is whether he "*was entitled*" to full pay for that time. It is moreover stated by the Comptroller that the question "is now pending in this office in an account presented by Lieutenant Robertson." It being hardly supposable that this officer failed to draw his pay between November 1, 1881, and March 16, 1882, it would have been better, perhaps, if there had been a full statement as to how the case arises upon the account. Still, I am inclined to think there is enough stated to justify me in giving an opinion.

Besides, as the pay of officers of the Army is fixed by law for every status (Rev. Stat., sec. 1265), it was doubtless not the intention of the Comptroller to ask my opinion upon the point whether the Secretary of War could by any *retroactive* order make what had been the status of leave of absence one of waiting orders, that is to say, whether the Secretary could by an order dated the 16th of March, 1882, completely change the status of Lieutenant Robertson from that time *back* to the 1st of November, 1881. I have no hesitation in saying that the Secretary had no such power.

But this officer has evidently received waiting orders pay for the period named when he was only entitled to half pay, and consequently the question arising upon the presentation of his account against the Government must be whether the latter is entitled to withhold from the amount due on the account the difference between waiting orders and leave of absence pay for the period mentioned; in other words, whether the Government can in that way compel this officer to refund the excess.

In my opinion this cannot be done. The case in hand falls directly within the principle laid down in the case of Col. Wager Swayne by Attorney-General Brewster. Colonel Swayne was entitled to a certain percentage increase on his retired

pay. It happened that on the 28th July, 1866, he, being a major-general of volunteers, was appointed colonel of the Forty-fifth United States Infantry, and on the 10th of September, 1866, accepted the appointment and took the oath of office. From the time of his appointment as colonel until he was mustered out of the service as major-general of volunteers, he continued to draw the pay of a major-general, and it was contended at the Treasury that the Government was entitled for percentage increase an amount representing the difference between the pay of major-general and colonel from the time he was appointed colonel until he was mustered out of the service as major-general. It is not necessary to do more than quote what is laid down in the opinion referred to.

"I am of opinion that upon principles of administrative policy which ought to be considered firmly established, the settlements between Colonel Swayne and the accounting officers in the matter of his pay as a major-general of volunteers are conclusive upon the executive department of the Government, and cannot be re-opened in the way indicated.

"In *Hedrick's case* (16 C. Cls. R., 88), it was held that settlements with a supervisor of internal revenue, crediting him with clerk hire paid to a person who was at the same time a gauger, and who therefore could not legally receive compensation as clerk, were conclusive on the judicial department of the Government, and that the Government could no more recover back money paid under a mistake of law than an individual. That case and Colonel Swayne's seem to be identical in principle, assuming, *argumenti gratia*, that the allowance of a major-general's pay to Colonel Swayne after his appointment as colonel was mistaken. But in disposing of this case it is not necessary that I should go farther than to hold that the settlements with Colonel Swayne are conclusive upon the executive department of the Government." (August 29, 1882.)

As the Supreme Court say, in *McKnight* v. *United States* (98 U. S., 186), there is not in such cases one law for the Government and another for the citizen.

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

CLAIMS AGAINST THE UNITED STATES.

Semble that an assistant attorney of the District of Columbia is not within the prohibitions of sections 1782 and 5498, Revised Statutes.

DEPARTMENT OF JUSTICE,
April 24, 1885.

SIR: Yours of the 16th (received on the 22d) asks whether an *assistant attorney for the District of Columbia* is within the prohibitions of sections 1782 and 5498, Revised Statutes, or either of them.

Section 1782 prohibits and renders highly penal the reception, or agreeing to receive, by officers or clerks in the employ of the Government, compensation for services to any person in relation to any matter or thing before any Department, court-martial, bureau officer, or any civil, military, or naval commission whatever.

Section 5498 prohibits under like penalty "every officer of the United States or person holding any place of trust or profit or discharging any official function under or in connection with any Executive Department of the Government of the United States or under the Senate or House of Representatives" from acting as an agent or attorney for prosecuting any claim against the United States, etc.

In these statements I have used only so much of the language of the sections as is pertinent to the question now presented.

The District of Columbia is a corporate agent, through which the United States administer certain executive functions over the locality which includes the national capital. The chief executive authority is vested in three commissioners, and the assistant attorney in question is an officer under and appointed by them.

It is plain, then, that under *Germaine's case* (99 U. S., 508) such attorney is excluded from the description "officer of the United States" in section 5498; and inasmuch as the other words of that section which describe parties prohibited refers to places and offices under *Executive Departments* or *the two Houses of Congress*, it follows that this section in no part affects an assistant attorney of the District of Columbia.

The same is true of section 1782, unless a substantial distinction can be drawn betwixt the expressions "officer of the United States" and "officer in the employment of the Government," which is at least doubtful, especially in a highly penal statute.

Whilst I am much inclined to advise that the present case is not in terms provided for by statute, I concur in the view which I find intimated here and there in the papers which you have transmitted, viz, that the principle which underlies such legislation makes employments like that here under consideration, viz, by Indians [or of course others] to prosecute a claim against the United States before their courts or Departments at this place inconsistent with those relations of ready confidence, entire unreserve, and liberty in coming and going, which ought to exist betwixt officials of the United States in every Department and attorneys whose engagements with the Government at this locality are marked by "tenure, duration, emoluments, and duties," no matter what technical name may designate that engagement. I need not enlarge upon this suggestion. It is one pertinent apparently to the "approvals" required by the Revised Statute's, section 2103, paragraph "Second."

I may add that the gentleman whose interests are here involved seems to have acted with candor, and, as I have said, probably also in accordance with law. Pursuing a suggestion offered by him (amongst the papers sent by you), I add that no doubt his resignation as assistant attorney for the District of Columbia will place his right, in every sense, to be employed by the Six Nations, beyond all question.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

CUSTOMS DUTIES—WORKS OF ART.

An artist of foreign birth, but who has resided in the United States for fourteen years and has declared his intention to become a citizen thereof, may properly be treated as an American artist within the meaning of the provision in the act of March 3, 1883, chapter 121, declaring free of duty "works of art, painting, etc., the production of American artists."

DEPARTMENT OF JUSTICE,
April 25, 1885.

SIR: Yours of the 23d instant asks whether certain water-color sketches by an artist who is by birth a British subject, but who has resided in the United States for the last fourteen years (making occasional visits abroad), and who has declared (June 13, 1883) an intention to become a citizen, are *free* from duty under paragraph 819 (Treasury edition) of the tariff act of 1883, which declares free "Works of arts, painting, statuary, fountains, and other works of art, the production of American artists."

Such a person is of course not a citizen, but he is nevertheless recognized as having inchoate qualities as such which entitle him when abroad to protection by the United States. American art, as I apprehend, is not confined to such art only as is produced by *native* or *naturalized* artists. The clause quoted above might easily have ended with the word "citizen," if the notion of citizenship had been as prominent before Congress there as it is for instance in sections 2505 and 2506 of the same statute. I suppose that the language of paragraph 819, like that of sections 2508 and 2509, was dictated by interest in the progress of art in this country. It is more easy than satisfactory to define the term "an American artist" by limiting it to *citizens*, and upon the whole, without attempting a definition, I advise that it will be proper to treat artists of the class now in question as being American artists within the scope of the above tariff provision.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

RAILROAD BRIDGE AT ST. PAUL, MINN.

The power of Congress to regulate bridges over navigable waters is paramount, and where it comes in conflict with that of a State the latter necessarily becomes ineffective.

Yet, until Congress acts, and by appropriate legislation assumes control of the subject, the power of a State over bridges across navigable streams within its limits is plenary.

Accordingly, where a railroad company was authorized by the laws of Minnesota to construct a bridge across the Mississippi River within the limits of that State: *Held* that, if such authority is unaffected by any law of Congress, the company may act thereunder, though in so doing it will subject itself to the risk of future Congressional interference.

DEPARTMENT OF JUSTICE,
May 1, 1885.

SIR: Your communication of April 15, 1885, with accompanying papers, relative to the matter of the railroad bridge across the Mississippi River at St. Paul, Minn., has been received, and I beg leave to reply as follows:

It seems a railroad bridge is being constructed by the Minnesota and Northwestern Railroad Company across the Mississippi River at St. Paul, with a pivot draw over the main channel, under the authority of an act of the Territory of Minnesota, entitled "An act to incorporate the Minnesota and Northwestern Railroad Company," and acts amendatory thereof, and also under the alleged authority of the general laws of the State of Minnesota.

By the act of Congress of July 5, 1884, chapter 215, power is given to the *common council of St. Paul* to erect or to authorize the erection of "one or more foot and carriage or railroad bridge or bridges across the Mississippi River, extending from such point or points to be selected as lie between the easterly and westerly boundaries of said city to a point or points on the opposite side of said river, now known as the Sixth ward of said city," etc. The act further provides that any bridge or bridges built thereunder may, by direction of said common council, be built as a draw-bridge, with a pivot or other form of draw, and, if built as a draw-bridge, that the draw shall be over the main channel of the river at an accessible and the best navigable point, with spans giving a clear width of water-way of not less than 160 *feet* on each side of the central or pivot pier of the draw, etc.

The bridge in course of construction by said company is located within the limits described in the last-mentioned act, and while the spans of its draw give a narrower water-way than is required by that act (it being but 150 *feet* on each side of the pivot pier) this bridge in other respects fails to meet the requirements of the same act.

Such is substantially the case presented by the papers, and you submit for my determination the question "as to what action shall be taken to enforce the rights of the Government and give effect to the duty resting upon it to protect the navigation of the Mississippi River."

As the Mississippi River above, at, and for some distance below the city of St. Paul, is wholly within the State of Minnesota, the principle enunciated by the Supreme Court of the United States in *Wilson* v. *The Blackbird Creek Marsh Company* (2 Pet., 250), *Gilman* v. *Philadelphia* (3 Wall., 713), *Pound* v. *Turck* (95 U. S., 459), and *Escanaba Company* v. *Chicago* (107 U. S., 678) applies to this case, namely, that until Congress acts, and by appropriate legislation assumes control of the subject, *the power of a State over bridges across navigable streams within its limits is plenary;* but that when this power is exercised so as to unnecessarily obstruct navigation, Congress may interfere and remove the obstruction. The power of Congress to regulate bridges over navigable waters is paramount, and where it comes in conflict with that of the State the latter necessarily becomes ineffective. Yet in the case last above cited, the court observes that "to render the action of the State invalid in constructing or authorizing the construction of bridges over one of its navigable streams, the General Government must directly interfere so as to supersede its authority and annul what it has done in the matter;" and this doctrine is announced and recognized in *Bridge Company* v. *United States* (105 U. S., 470) and *Miller* v. *The Mayor, etc.* (109 U. S., 385), and especially by a decision rendered at the present term of the Supreme Court of the United States, in *Gloucester Ferry Company* v. *Pennsylvania* (114 U. S., 196).

Assuming, then, that the construction of the railroad bridge referred to is authorized by the laws of the State of Minnesota, this would seem to be sufficient for the purpose, unless the

authority imparted by those laws is in conflict with, or has been superseded or invalidated by, Congressional legislation. If such authority is unaffected by any existing law of Congress, the railroad company above named may undoubtedly act thereunder; and, in so doing, it will only subject itself to the risk of *future Congressional interference.*

Congress has passed no general law regulating the erection of bridges across the Mississippi. Numerous acts have been passed by it authorizing the erection of such bridges at particular localities, the provisions whereof are similar to those contained in the aforesaid act of July 5, 1884. That act does not expressly prohibit the building of any bridge at the locality therein described, other than such as is authorized thereby, and whether it does so by implication is a question of construction. It declares that "any bridge or bridges constructed *under this act*, and according to its provisions and conditions, shall be a lawful structure or structures." If this affirmative declaration may be construed to include the negative one, *viz*, that "any bridge not constructed under this act, etc., shall be an *unlawful* structure," which is, at least, doubtful, it would in effect annul any authority derived under the State to erect a bridge of *any sort* in that locality.

But suppose the act has that effect, and the bridge now being erected by the railroad company is not a lawful structure, what action, if any, are the officers of the General Government authorized to take in the premises? There is no law of Congress under which criminal proceedings can be instituted by them; and without the authority of Congress it is questionable whether of their own motion, and simply in vindication of the general public right of navigation, they can institute any civil proceedings on behalf of the United States—such as an information to enjoin the erection of the bridge, or to abate it *as a nuisance.* (See 15 Opin., 526.) Where, however, the interests of the United States are directly concerned—as, for example, if the structure should threaten injury to or interfere with any work of the General Government for the improvement of the river—a civil proceeding to protect such work may be instituted in its behalf in the proper circuit court. (*United States* v. *Duluth*, 1 Dill., 469.) But as regards the right of navigation, the public law of the

United States appears to leave the vindication of this right wholly to those who sustain injury thereto from unlawful obstructions or otherwise, through the institution *by them* of appropriate civil proceedings for relief.

I am accordingly inclined to the conclusion that in the existing state of the law, the facts of the present case (as they appear in the accompanying papers) afford no ground for a judicial proceeding *on behalf of the United States* against the railroad company; and that until Congress makes some adequate provision upon the subject the officers of the United States can in this case take no action "to enforce the rights of the Government and give effect to the duty resting upon it to protect the navigation of the Mississippi River."

Very respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

SALE OF INDIAN TRUST LANDS.

The claims of Ely Moore, J. W. Whitfield, and Daniel Woodson, as special agents and receivers, for additional compensation for the sale of the trust lands of the Delaware, Kaskaskia, Piankeshaw, Peoria, and Wea Indians, considered.

DEPARTMENT OF JUSTICE,

May 5, 1885.

SIR: I have the honor to acknowledge receipt of your communication of the 2d instant, inclosing papers in the matter of the claims of Ely Moore and others, late special agents and receivers, for amounts claimed for compensation for sale of the trust lands of the Delaware, Wea, etc., Indian tribes.

The general nature of your communication compels me to resort to the inclosures, and as I may not form correct conclusions as to the weight and effect of those papers, I beg you to regard this opinion as based upon the case stated by me and not upon the actual facts.

The claims presented to you are those of the administrator of Ely Moore deceased, of J. W. Whitfield, and of Daniel Woodson; and consist of a demand for 1 per cent. commission, together with a per diem compensation. On both of these items interest is claimed at 6 per cent. per annum.

Ely Moore was not duly appointed special *receiver* and

superintendent to assist the special commissioner to dispose of the trust lands of the Delaware, Kaskaskia, Piankeshaw, Peoria, and Wea Indians, but as special register and superintendent aided William Brindle, who was so appointed.

Daniel Woodson as such special *receiver* and *superintendent* sold some Delaware lands which were not sold by Brindle, and was aided by J. W. Whitfield, special register and superintendent.

I am not clear as to the precise relation of Moore to Brindle and of Whitfield to Woodson, but I shall assume that all rendered valuable services in the sale at public auction of the lands ceded in the treaties of May 6, 1854 (10 Stat., 1048), and May 30, 1854 (10 Stat., 1082).

These treaties simply provided (art. 3, p. 1049; art. 4, p. 1083) that the United States shall pay to the Indians all the moneys arising from the sale of such lands as were offered for sale after deducting therefrom the actual cost of surveying, managing, and selling the same. The Supreme Court (110 U. S., 693) says: "This clearly implied the payment of a reasonable compensation for the services of those employed in carrying the trust into effect."

I fail to find anything in the treaties fixing or suggesting what shall be a reasonable compensation for either surveying, managing, or selling; and between private parties, in the absence of an agreement as to what that compensation should be, or an acceptance without protest of a sum fixed, it would become a question of *quantum meruit* for the courts.

Your letter of the 2d instant says:

"At the time the sales of these lands were made the claims for services, etc., of the parties were allowed by this Department at rates considered fair and reasonable."

Whether the rates thus considered by the Department fair and reasonable were paid, and, if so, were accepted without objection, I am not informed, except as the expression in your letter, "that the other claimants whose accounts had been closed at the Treasury should seek their remedy in the proper courts or before Congress," leads me to infer that they received without protest the amounts so fixed. If this be so, I am of opinion that the powers of your Department in the premises have been fully exercised and are exhausted.

It is urged by the agent for the claimants that the Supreme Court has decided what is a fair and reasonable compensation for the services of Mr. Brindle in the sale of these lands, and that the rate fixed by the court must be adopted as to similar officers engaged in said sale.

I do not so read the opinion. I find in it nothing on the subject except that fair and reasonable compensation should be paid. It appears, however, that the jury sitting in Philadelphia did find that a fair and reasonable compensation to Brindle for his labor and risk in making sales of Indian trust lands was 1 per cent. commission, together with some *per diem* compensation. There is a vast difference between the annunciation by the court of last resort of legal principles of general application or applicable to a class of cases and a verdict rendered by a jury on a question of fact at issue between the United States and an individual. The former, if not absolutely binding upon an officer of the executive department, is of such authority that nothing short of conscientious objections would warrant such officer in disregarding it. From the latter the officer may differ at his pleasure; indeed, to make it of any weight the person invoking it should show that the circumstances of the two cases were identical, that the witnesses were credible, and that the verdict was not unreasonable; in short, he should substantially prove his case *de novo*. The officer must exercise *his own discretion* on such a subject and he is at liberty to attach as much or as little importance to the verdict as seems to him proper.

In conclusion, I will confine my opinion to four propositions.

(1) The claims now presented apparently differ from that of Brindle in that the claimants received their pay at the time and acquiesced in the allowance of what was fair and reasonable.

(2) Such acquiescence as much precludes them as the United States from requesting a re-opening of the matter.

(3) The case is not affected in principle by the decision of the Supreme Court in the Brindle case.

(4) That the conclusion of the jury in Philadelphia as to what was fair and reasonable compensation for Brindle differs from that previously fixed by the Interior Department

as fair and reasonable for Moore and others is not a matter requiring special consideration at your hands.

Should you decide to re-open the cases and desire my opinion on the question of interest and other questions suggested, I will be glad to comply with a request to that effect. As the case is now presented to me, they do not seem to me matters of importance.

I return all inclosures.

Very respectfully, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

CASH INDEMNITY FOR SWAMP LANDS SOLD.

The Secretary of the Interior is warranted in approving certain statements of account between the United States and the State of Ohio, made by the Commissioner of the General Land Office, for cash indemnity for swamp lands sold during the period intervening between the passage of the swamp-land act of September 28, 1850, and March 3, 1857.

DEPARTMENT OF JUSTICE,

May 6, 1885.

SIR: I return herewith the two statements of account between the United States and the State of Ohio, which accompanied your letter of the 21st ultimo, showing amounts found due that State by the Commissioner of the General Land Office as cash indemnity for swamp lands sold during the period intervening between the passage of the swamp-land act of September 28, 1850, and March 3, 1857; and in reply to your inquiry whether the case presented in these statements authorizes your approval of the accounts, I have the honor to state that in my opinion such approval is fully warranted thereby.

Two points only seem to call for consideration in connection with these accounts, one of which relates to the period of the sales, the other to the proof relied upon to determine the character of the lands sold.

In regard to the latter point, it appears that the field notes of the public surveys on file in the General Land Office were resorted to and deemed sufficient. The evidence afforded by such notes, in this class of cases, was early regarded and

accepted by the Land Department as satisfactory, and it is, perhaps, the most satisfactory of any now obtainable for the purpose of determining whether lands were swampy at the passage of the swamp-land act of 1850 and covered by the grant thereby made.

The former point involves the question whether, in view of section 2482, Revised Statutes, sales of swamp lands made subsequent to March 2, 1856, and prior to March 3, 1857, are (as they were under the law in force previous to the revision) authorized to be included in the account. Respecting this question, I beg to refer to an opinion of one of my predecessors, dated July 25, 1877 (15 Opin., 340), which covers the same subject, and in the conclusions of which I concur.

I am, sir, very respectfully,

A. H. GARLAND.

Hon. L. Q. C. LAMAR,
Secretary of the Interior.

INVENTIONS INTERNATIONAL EXPOSITION.

The President can not appoint an honorary commissioner to the "Inventions International Exposition" at London, such office not existing by virtue of any law of the United States.

DEPARTMENT OF JUSTICE,
May 6, 1885.

SIR: Your communication asking my opinion as to the the power of the President to appoint honorary commissioners to the "Inventions International Exposition" at London has received my consideration.

By the Constitution the President is empowered to "commission all the officers of the United States." An officer of the United States presupposes an office duly created by law; and the offices to which the President is authorized under the Constitution to appoint are only those established or recognized by the Constitution or by act of Congress (*United States* v. *Maurice*, 2 Brock., 104; 5 Opin., 88, 754; 7 *ib.*, 249), but there is no office of the description referred to existing by virtue of any law. As the President cannot create an office, I am of opinion he cannot appoint honorary commissioners to the "Inventions International Exposition" at London.

As the matter of sending commissioners to this exposition was somewhat urgently brought to the notice of the last Congress by the Executive without effect, it may almost be inferred that it was the sense of Congress that there was no sufficient reason for this Government's being represented there.

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF STATE.

SPECIAL EXAMINERS OF THE PENSION BUREAU.

Special examiners of the Pension Bureau authorized to be appointed by the act of July 7, 1884, chapter 331, and by the act of March 3, 1885, chapter 343, come within the purview of the civil service act of January 16, 1883, chapter 27; and in appointing such officers the latter act and rules thereunder should be observed.

The office of special examiner is newly created by the said act of 1885, as it was by the said act of 1884; the term under each act being for one year only.

DEPARTMENT OF JUSTICE,
May 7, 1885.

SIR: The communication of the Commissioner of Pensions to you and by you referred to me for an opinion has received my careful consideration.

The twelfth section of the act of July 14, 1862, creating the office of special agent for the detection and prosecution of frauds against the pension laws (12 Stat., 569) was repealed by the act of July 4, 1864 (13 Stat., 387), which authorized the Secretary of the Interior to detail clerks in his office from time to time for the discharge of the same duty, and this statute has been followed by several others, the effect of which has been to continue the act of July, 1864, until the present time, with various modifications touching allowances to clerks detailed in addition to their regular salaries.

In this state of legislation Congress, by the act of July 7, 1884, making appropriations for the fiscal year ending June 30, 1885, enacted, *inter alia*,

"For an additional force of one hundred and fifty special examiners, *for one year*, at a salary of one thousand six hundred dollars each, two hundred and forty thousand dollars; and no person so appointed shall be employed in the State

from which he is appointed: *Provided*, That all of said appointments *shall be temporary and on probation.*

"For per diem in lieu of subsistence for one hundred and fifty additional special examiners above provided for, while traveling on duty, at a rate to be fixed by the Secretary of the Interior, not exceeding three dollars per day, and for actual necessary expenses for transportation and assistance, two hundred and twenty thousand dollars."

And by the act of March 3, 1885, making appropriations for the fiscal year ending June 30, 1886, it was enacted *inter alia.*

"For an additional force of one hundred and fifty special examiners, for one year, at a salary of one thousand four hundred dollars each, two hundred and ten thousand dollars; and no person so appointed shall be employed in the State from which he is appointed; and any of those now employed in the Pension Office or as special examiners may be reappointed if they are found to be qualified.

"For per diem in lieu of subsistence for one hundred and fifty additional special examiners above provided for, while traveling on duty, at a rate to be fixed by the Secretary of the Interior, not exceeding three dollars per day, and for actual necessary expenses for transportation and subsistance, two hundred and twenty thousand dollars."

The first question submitted, as arising upon this legislation, is whether special examiners of the Pension Bureau must be appointed "from the working force and the Civil Service Commission eligibles, or whether they may be appointed from outsiders, at the risk of the Secretary."

The second question submitted is, whether special examiners must be reappointed after 30th June, 1885.

It seems clear that no *detail* from the clerical force of the bureau can be made to fill the place of special examiner, which is a new office, with a fixed salary attached.

It seems equally clear that the office of special examiner comes within the purview of the act of 16th January, 1883, entitled "An act to regulate and improve the civil service of the United States" (22 Stat., 403), and is not within any of the exceptions in Rule XIX of the amended Civil Service Rules. It might indeed be thought that the office of special examiner came within the exception in favor of persons em-

ployed exclusively in the secret service of the Government; but it must be remembered that to constitute secret service the *employment as well as the service* must be concealed. (*Totten v. United States*, 92 U. S., 106.)

The third clause of the sixth section of the act in question made it the duty of the Secretary of the Interior to throw into classification the officers designated special examiners, and Special Civil Service Rule No. 3, approved 22d July, 1884, shows that the President thought the officers in question would fall within the civil service legislation.

I am of opinion, therefore, that in appointing special examiners the civil service law and rules must be observed.

In answer to the second question, I am of opinion that the term of service to which a special examiner is appointed is one year. The office is as new a creation by the act of 3d March, 1885, as it was by the act of 7th July, 1884.

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

SITE FOR PUBLIC BUILDING AT LA CROSSE, WIS.

The provision in the act of March 3, 1883, chapter 143, authorizing the Secretary of the Treasury "to acquire by private purchase or condemnation the necessary lands for public buildings and light-houses to be constructed, and for which money is appropriated, including all public building sites authorized to be acquired under any of the acts of the first session of the Forty-seventh Congress," does not empower him to acquire by condemnation the site for the proposed public building authorized to be erected at La Crosse, Wis., by the act of February 28, 1885, chapter 260.

That provision is limited to lands for public buildings for which money is *then* (*i. e.*, by said act of March 3, 1883) appropriated, including building sites authorized to be acquired under acts of the previous session, and does not extend to other cases.

DEPARTMENT OF JUSTICE,

May 9, 1885.

SIR: By your letter of the 29th ultimo, respecting the site selected for a public building authorized to be erected at La Crosse, Wis., by the act of February 28, 1885, it appears that a proposal for the sale of part of the premises, made by Gertrude A. and E. W. Hayden, was accepted by your Department on the 25th of same month, and that on the 27th

a letter was received at the Department from their attorneys inclosing a notice of the withdrawal of the proposal.

In connection with these facts you call attention to a provision in the sundry civil appropriation act of March 3, 1883, chapter 143, and inquire whether, "if the Department cannot enforce the performance of the contract of sale," title to the premises may be acquired, under that provision, by condemnation.

This inquiry presents two questions. One is as to enforcing a specific performance of the "contract of sale," and hereupon I remark that, without fuller and more definite information, I am unable to form a satisfactory opinion upon the subject. To enable me to do this it would require, among other things proper to be taken into view, an examination of the terms of the contract as expressed in the proposal and acceptance, neither of which is before me. The other question is whether the provision in the act of 1883, above referred to, extends to building sites for which money is at any time *thereafter* appropriated.

By that provision the Secretary of the Treasury "is authorized to acquire by private purchase or condemnation the necessary lands for public buildings and light-houses to be constructed, and for which money is appropriated, including all public building sites authorized to be acquired under any of the acts of the first session of the Forty-seventh Congress," etc. To make it applicable to sites for which appropriations are thereafter made, the words "for which money is appropriated," as employed therein, must be taken to import the same as if they read "whensoever an appropriation exists therefor;" and, if they are to be understood in this sense, the provision would, simply by force of those terms, embrace not only sites for which appropriations are thereafter made, but those for which appropriations were made theretofore and still remain available. But the express inclusion, by a separate clause, of sites authorized to be acquired under the legislation of the preceding session, shows pretty clearly that the words adverted to are not used in so broad a sense as that above indicated; otherwise such clause would be needless. I think the discretionary authority either to purchase or condemn, with which the provision in-

vests the Secretary, must be deemed to be limited to "lands for public buildings and light-houses" for which money is *then* (*i. e.*, by said act of March 3, 1883) appropriated, including building sites authorized to be acquired under the acts of the previous session, and not to extend to other cases. The fact that a similar provision is found in the sundry civil appropriation act of March 3, 1885, though applicable to a particular site, is a circumstance which strongly favors this construction.

Besides this, it is a well-settled rule—in view of the constitutional provision, "No money shall be drawn from the Treasury but in consequence of appropriations made by law" (art. I, sec. 9, par. 7)—that a statute should not be construed as making an appropriation, or authorizing the expenditure of money, unless the language is sufficiently explicit to clearly justify it; authority for the use of the public money cannot arise by inference without very clear terms requiring it.

I am accordingly of opinion that the above-mentioned provision in the act of 1883 confers upon the Secretary of the Treasury no authority to acquire, by condemnation, the building site in question.

I may add that, upon receipt of your letter aforesaid, the United States attorney for the western district of Wisconsin was requested to take no steps in the matter of the examination of the title to the premises until further instructed.

I am, sir, very respectfully,

A. H. GARLAND.

Hon. D. MANNING,
Secretary of the Treasury.

NAVAL COURT-MARTIAL.

The Chief of the Bureau of Medicine and Surgery in the Navy Department is amenable to the jurisdiction of a naval court-martial upon charges and specifications preferred against him for acts done as such chief.

DEPARTMENT OF JUSTICE,
May 13, 1885.

SIR: Your communication of the 11th May instant, and the inclosures therein referred to, have received my careful consideration.

The question presented for opinion is whether the court-

martial, now assembled for the trial of Medical Director Philip S. Wales, has jurisdiction to entertain the charges and specifications upon which that officer has been brought before them, he having formally objected to the jurisdiction, and the court, after hearing argument, having referred the question of jurisdiction to you for your opinion.

The charges are brought under the articles for the better government of the Navy, and the various offenses specified are laid as having been committed by the accused as Chief of the Bureau of Medicine and Surgery.

The objection to the court's jurisdiction is founded on the contention that the office of Chief of the Bureau of Medicine and Surgery belongs to the civil branch of the executive department of the Government, and that the incumbent of it is for that reason not amenable to the articles for the government of the Navy touching an offense which affects him only as an officer belonging to the civil administration of the Government, and, as seems to be conceded, and therefore may be assumed, cannot be said to reflect on him generally as an officer of the Navy.

This brings me to the consideration of the law creating the Bureau of Medicine and Surgery, upon the meaning of which the question submitted necessarily turns.

By Title X of the Revised Statutes (p. 70) it is provided that there shall be "an Executive Department, to be known as the Department of the Navy, and a Secretary of the Navy, who shall be the head thereof."

It is furthermore provided (sec. 419) that the business of this Department shall be distributed in such wise as the Secretary may deem proper, amongst eight bureaus, one of which is the "Bureau of Medicine and Surgery," and that the chiefs of all of these bureaus shall be appointed for the term of four years by the President, by and with the advice and consent of the Senate, from certain classes of officers of the Navy specially named, and, as to the Bureau of Medicine and Surgery, "*from the list of the surgeons of the Navy.*"

By section 1471, Revised Statutes, it is declared that the chief of this bureau "shall have the relative rank of commodore whilst holding said position, and shall have * * * the title of Surgeon-General."

It is also provided (sec. 418) that the Secretary of the Navy shall have the custody and charge of all the books, records, and other property now remaining in and appertaining to the Department of the Navy, or hereafter acquired by it; and (sec. 420) that "the several bureaus shall retain the charge and custody of the books of records and accounts pertaining to their respective duties; and all of the duties of the bureaus shall be performed under the authority of the Secretary of the Navy, and their orders shall be considered as emanating from him, and shall have full force and effect as such."

It is contended, as already mentioned, that the effect of this legislation is to make these chiefs of bureaux civil officers for the term of their appointment, without, however, impairing their rights, in any way, as officers of the Navy.

It is very clear that the office of Secretary of the Navy is a civil office. Congress has not attempted to confine the appointing power to any class or profession in choosing the incumbent for that position. But this cannot be said of the several bureaus of the Navy Department, the chiefs of which, we have seen, must be appointed from certain classes of officers of the Navy. When, therefore, it is said that these officers are civil, it must be shown satisfactorily why it was that Congress denied the appointing power the same range of selection in filling them as in filling the office of Secretary of the Navy and civil offices generally. If it was the purpose of Congress to make these offices purely civil, it was not to be expected that the same restriction would be put on the Executive in filling them as is usual in appointments purely military and naval; a restriction which, although in derogation of the appointing power, is imposed by virtue of the constitutional authority "to make rules for the government and regulation of the land and naval forces." (14 Opin., 172.)

To me it is far from clear that Congress could, in creating a purely civil office, constitutionally require that it should be filled from a certain class of persons, when it is apparent, as in the case now before me, that the restriction imposed has much less relation to qualification than to military economy; for it seems hardly to admit of question that it would be easy to find in civil life any number of medical

men entirely competent to take charge of the Bureau of Medicine and Surgery.

It is quite clear to me that if Congress had intended to make the several bureaus of the Navy Department civil offices it would have provided for the appointment of civilians to fill them, and not frustrated its purpose to secure the benefits of a civil administration by declaring that these offices should be filled by naval officers exclusively. It is difficult to see what advantage it could be to the service to impress its officers with a civil *status* when called to the performance of duties purely naval and professional, as chiefs of bureaus, and before such an intention can be attributed to Congress it must be shown that some practical end was to be answered by the introduction of so eccentric and anomalous an innovation as a naval officer performing naval duties, and yet not amenable to the articles for the government of the Navy.

The view I have taken is much strengthened in the case in hand by the consideration that the Chief of the Bureau of Medicine and Surgery, by the very fact of being so, enjoys "the relative rank of commodore while holding that position," together with an increase of pay corresponding to that rank, and the right to be retired as of that same rank if it should fall to him to be transferred from the active list of the Navy while chief of bureau. If, now, his office is civil, why this accession of rank, with its attendant privileges and emoluments, which it would hardly strengthen the argument to enumerate?

Would it not be deemed incongruous to give the Secretary of the Navy or the Secretary of War "relative rank" of any kind, *as incidental to a purely civil status?*

So far, indeed, from there being any reason why the chief of this bureau should have this additional rank if Congress had intended him to be a civil officer, I should have supposed that it would be more suitable to a civil status to deny him *all rank whatever* in virtue of his position.

I am, therefore, of opinion that the court-martial has jurisdiction.

I am, with great respect, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE NAVY.

CASE OF JAMES S. MORGAN.

Effect of the President's proclamations of amnesty of September 7, 1867, and December 25, 1868, considered in connection with the case of James S. Morgan as submitted.

DEPARTMENT OF JUSTICE,
May 19, 1885.

SIR: In reply to your communication asking an opinion as to the capacity of Mr. James S. Morgan to hold a civil office under the Government of the United States, I have to say that while Mr. Morgan represents (and his statement alone is the evidence on which I am requested to act) that he took no oath to support the Constitution of the United States on entering the Naval Academy, it may nevertheless be that he did then take an oath of some kind, and, therefore, that his statement is mere inference as to the legal effect of such oath.

If he took no oath at all, or none binding him to support the Constitution, the President's proclamation of the 25th December, 1868, which was unconditional and embraced all cases not within the third section of the fourteenth amendment, necessarily restored him to his lost civil rights, it being well settled that a general pardon or amnesty is as efficacious for that purpose as one by deed (*Armstrong* v. *United States*, 13 Wall., 155, and *Knote* v. *United States*, 95 U.S., 153); and as to the effect of a pardon of the latter kind I need do no more than refer to my opinion in the case of General Lawton.

If, on the other hand, he did take an oath, in effect, although not in terms, to support the Constitution, he may have been entirely rehabilitated by the President's proclamation of the 7th September, 1867; in which case the rights thus restored would continue in full force notwithstanding the fourteenth amendment, subsequently adopted, according to my opinion in General Lawton's case.

It is true it does not appear in the somewhat imperfect statement furnished you that Mr. Morgan was not within the exceptions of this proclamation, or that he took the oath prescribed therein, but the probabilities that he was not within the excepted classes and that he took the required

oath are so great that I hardly deem it necessary to go into the question whether the oath and a year's services in the Naval Academy, without being graduated, made Mr. Morgan an officer of the United States, unless it should appear that he did not embrace the offer of the proclamation in question, and, as a consequence, comes under the ban of the fourteenth amendment.

A fuller presentation of the facts of Mr. Morgan's case than has been furnished you will show whether any other questions require discussion.

I am, with the highest respect, your obedient servant,

A. H. GARLAND.

The SECRETARY OF STATE.

APPOINTMENT OF AN INDIAN AS POSTMASTER.

An Indian residing in the Indian Territory, who is a member of one of the tribes there, and subject to tribal jurisdiction, is not eligible to appointment as a postmaster; he being incompetent, in contemplation of law, to take the required oath of office.

DEPARTMENT OF JUSTICE,
May 21, 1885.

SIR: Your letter of the 29th ultimo presents for my consideration the following question:

"Whether an Indian in the Indian Territory, possessing otherwise the requisite attainments, but a member of one of the tribes there, and not a citizen of the United States, can be lawfully appointed and qualify as postmaster of any of the several classes."

This question involves the inquiry whether an Indian, under the circumstances therein stated, is eligible to the office mentioned.

Excepting as regards the offices of President and Vice-President, and membership of either House of Congress—for which certain qualifications (embracing citizenship, age, etc.) are required—the Constitution is silent on the subject of eligibility to office under the General Government. Disqualification to hold office is declared in special cases (Art. I, sec. 6) and under particular circumstances (14th amend., sec. 3); but, excepting as above, it contains

no requirement in order to be eligible to office, other than such as is implied in the provision for an oath to support the Constitution (Art. VI), namely, that the individual possesses the legal capacity to take that oath. Beyond this the Constitution appears to leave the whole subject to the regulation of Congress; and the only legislation of Congress, applicable to the office of postmaster, which contains anything in the nature of a qualification for such office, is that prescribing an oath of office and requiring an official bond. Hence, whether an Indian is eligible to the said office depends upon whether his *status*, civil and political, is at the time such that he can give the required bond and take the prescribed oath.

By the act of May 13, 1884, chapter 46, it is declared that thereafter the oath to be taken by any person elected or appointed to any office of honor or profit, either in the civil, military, or naval service, except the President of the United States, shall be as prescribed in section 1757, Revised Statutes; and it is further declared that this "shall not affect the oaths prescribed by existing statutes in relation to the performance of duties in special or particular subordinate offices and employments." Thus, while postmasters, in common with all other officers of the United States except the President, are now required to take the oath of office prescribed in section 1757, Revised Statutes, they are not exempted from taking the oath prescribed by the act of March 5, 1874, chapter 46, relative to the performance of duties in the postal service, but must take this also. It is unnecessary, however, to consider here any other oath than the one in section 1757, which is as follows: "I, A. B., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: so help me God."

There is nothing in this oath which precludes a foreign-born resident of the United States, who has not yet been naturalized, from taking it. Want of citizenship is not of itself an

obstacle. But the condition of an Indian who is a member of a tribe, and especially one who dwells within the territory and jurisdiction of his tribe, is peculiar. He is regarded and treated by our Government as belonging to a separate though dependent political community, the members of which owe immediate allegiance thereto, and are not ordinarily dealt with by the Government *individually*, so long as their tribal relation is preserved. The obligation imposed by the oath does not seem to be consistent with the duty of obedience to tribal authority which springs from such relation, and the existence of which is distinctly recognized by our Government, and its effect would obviously be to greatly weaken if not destroy that relation. Unless clearly warranted by the provisions of some treaty or statute, an act which thus interferes with the tribal relation, and is productive of consequences so discordant and in such direct conflict with the authority of the tribe over its members and their allegiance thereto, must be deemed to have no sanction in our laws. I therefore think that an Indian, while a member of a tribe and subject to tribal jurisdiction, is not in legal contemplation competent to take the oath referred to.

As to the competency of an Indian in the Indian Territory, under those circumstances, to give the required official bond I entertain strong doubt. In general, contracts with Indians, not citizens of the United States, can only be made under certain statutory restrictions and regulations (see secs. 2103 to 2106, Rev. Stat.), which, however, are designed for the protection of such Indians in their dealings with other persons, and appear to have no application to transactions with the Government. Yet one against whom the bond can not be enforced in the ordinary way (*i. e.*, by suit in a United States court), may well be considered as being, in contemplation of the statute requiring it to be given, incapable of becoming a party thereto; and such seems to be the condition of an Indian in the Indian Territory belonging to a tribe there. Whilst in that Territory certainly he would not be liable to suit on his bond in any court of the United States, as the jurisdiction necessary to entertain the suit is not conferred by existing laws.

In an opinion of one of my predecessors, dated April 12, 1869

(13 Opin., 27), it was held that General E. S. Parker, an Indian, was not disqualified from holding the office of chief of a bureau in the Interior Department, and he was subsequently appointed to and filled the office of Commissioner of Indian Affairs. The opinion is very brief and does not state the facts in the case. But on examining the files of this Department I find that the facts presented were these: General Parker was a Seneca Indian, born in the United States, and had been separated from his tribe twenty-four years, living during that time among the whites. He had been an engineer upon the New York State canals; was subsequently chief assistant engineer of the Chesapeake and Albemarle Ship Canal in Virginia, and also constructing engineer of lighthouses under General W. F. Smith, on the upper lakes. He had been appointed superintendent of construction, under the Treasury Department, of the custom-house and marine hospital at Galena, Ill., and afterwards of the custom-house at Dubuque, Iowa. In 1863 he was appointed by President Lincoln a captain and assistant adjutant-general, and served on General Grant's staff, and at the date of the opinion was still holding a commission in the Army. He had paid taxes on real estate for over twelve years and been a voter in New York.

It may be added that General Parker was, perhaps, regarded as having already become clothed with citizenship by force of the first section of the act of April 9, 1866, chapter 31. But aside from that, the circumstances of his case differ very materially from the one under consideration, in this: that in the latter case the Indian (being a resident of and member of a tribe in the Indian Territory) still sustains the tribal relation and is still subject to tribal jurisdiction, while in the other such relation and jurisdiction had long before ceased to exist. The circumstances of the present case to which I have just adverted are those which, in my view, render the Indian incompetent to take the prescribed official oath and give the required official bond, and therefore ineligible to the office.

It is true the statutes touching the *diplomatic and consular officers* in several instances provide for certain officers *although not citizens*. Thus, in section 1678, Revised Statutes, the lan-

guage employed is, "notwithstanding he may not be a citizen." But there is no statute regulating in any respect this matter as far as Indians are concerned, and the very mentioning of these cases in this particular service would, by implication, exclude the idea as applicable to Indians. (Sedgwick Const., 2d ed., p. 31, note.)

Therefore, in answer to the question proposed by you, I have the honor to reply that, in my opinion, an Indian, under the circumstances stated, cannot lawfully be appointed and qualify as postmaster of any of the several classes.

I am, sir, very respectfully,

A. H. GARLAND.

Hon. W. F. VILAS,
Postmaster-General.

HEAD-MONEY TAX.

The tax of 50 cents imposed by the act of August 3, 1882, chapter 376, is applicable to all passengers, not citizens of the United States, who shall come by steamer or sail vessel from a foreign port to any port within the United States, whether as immigrants or merely as touriste.

DEPARTMENT OF JUSTICE,
May 22, 1885.

SIR: Your communication of the 18th of May, instant, with the inclosures therein referred to, has received my careful consideration.

The question presented for opinion is, whether the head money tax of 50 cents, levied by the act of the 3d August, 1882 (22 Stat. 214), entitled "An act to regulate immigration," is demandable for passengers coming into our ports *not as immigrants* but transiently *as tourists.*

The first section provides "that there shall be levied, collected, and paid a duty of fifty cents for each and every passenger not a citizen of the United States who shall come by steam or sail vessel from a foreign port to any port within the United States."

Was it the intention of Congress that the term "passengers," as thus used, should be taken in its most extended acceptation, or in the restricted sense of immigrants, or persons coming into the country for the purpose of permanent abode?

This is a question that must be resolved by a careful examination of the act itself.

The object of the duty imposed is, as the act declares (sec. 1), to raise a fund to be called the immigrant fund, which it enacts shall be paid into the United States Treasury and be used under the direction of the Secretary of the Treasury "to defray the expenses of regulating immigration under this act, and for the care of *immigrants* arriving in the United States, for the relief of such as are in distress, and for the general purposes and expenses of carrying this act into effect."

That Congress had power to lay an impost of this kind for the purposes mentioned has been recently decided by the Supreme Court in a case that arose under this very act (Head Money cases, 112 U. S., 580). But this case involved only the constitutionality and not the interpretation of the act.

As we have seen, the statute sets out with imposing a duty of "fifty cents for each and every *passenger*." The same section contains the provision already quoted, that the money thus collected shall be used for the care and relief of "*immigrants*," and to meet the expenses of enforcing the law. It then goes on to declare that the duty shall be a lien on the vessels bringing "*such passengers*" into the country.

The second section directs what measures the Secretary of the Treasury shall take "to provide for the support and relief of such *immigrants* therein landing as may fall into distress or need public aid." It then goes on to make provision for examination "into the condition of *passengers* arriving," etc., and if there shall be found "among such passengers any convict, lunatic, idiot, or any person unable to take care of himself," such person shall not be permitted to land.

The third section authorizes the Secretary of the Treasury, *inter alia*, to make rules and regulations "to protect the United States and *immigrants* into the United States from fraud."

It will be observed, on this survey of the statute, that whenever Congress refers to the persons entitled to its benefit, whether as partakers of its bounty or objects of its protection, it invariably describes them as "immigrants" and not as "*passengers*." On the other hand, when the statute would provide a protection against the introduction of con-

victs, lunatics, idiots, and paupers, it declares that there shall be an examination into the condition of "*passengers*" arriving at the ports, etc., thus plainly manifesting a purpose to use a term embracing immigrants and *all other itinerant persons*. So when the act declares (sec. 1) that the duty laid shall be a lien on the vessels bringing "such passengers," it can hardly mean immigrants, for in that case the most natural expression would have been "such immigrants," as the term immigrants occurs in the sentence next preceding, and would, in all probability, have been present to the draughtsman's mind as the antecedent to which he was referring.

The first duty of the expounder of a writing is to give each word its ordinary sense unless there be some satisfactory indication that it was employed in some other sense; but as I am far from seeing anything in this statute that leads me to suppose that the word "passengers" was intended to be taken in the restricted sense of "immigrants," I am of opinion it should have its ordinary sense of comprehending all itinerent persons, not citizens of the United States, coming to our ports in steam or sail vessels.

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

CIVIL SERVICE.

The officers in the Pension Bureau described as medical referee, assistant medical referee, medical examiners, and law clerk, being "exclusively professional," do not fall within the operation of the civil service law; they are excepted therefrom by Rule XIX.

Those described as principal examiners for review board are not excepted and in appointing them the civil service law and regulations should be observed.

DEPARTMENT OF JUSTICE,

May 28, 1885.

SIR: Your communication asking my opinion upon the question submitted to you in the letter of the Commissioner of Pensions, which you inclose to me, has received my consideration.

The question is whether officers in the Pension Office,

answering the description of medical referee, assistant medical referee, medical examiners, qualified surgeons, law clerk, and principal examiners for review board, fall within the civil service law and the rules made pursuant thereto.

It seems to me that as the duties of the medical officers and the law clerk are "exclusively professional," those officers are expressly excepted from the law by Rule XIX. There is hardly room for question, therefore, that these officers do not fall within the operation of the civil service law as restricted by the rule just mentioned.

As to the "principal examiners for review board," I do not understand that they come within any of the exceptions of Rule XIX, and therefore I am of opinion that in appointing them the civil service law and regulations must be observed.

It is proper to add that I have carefully reconsidered my opinion of the 7th of May, 1885, in the light of some additional views submitted for the purpose of influencing my judgment, but I see no reason for receding from any position taken in that opinion, which is herewith returned.

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

WORKS FOR IMPROVEMENT OF NAVIGATION.

The indefinite appropriation made by the fourth section of the act of July 5, 1884, chapter 229, is not applicable to river and harbor improvements generally, but only to a particular class of public works, such as canals, locks, etc., in the use of which both operating expenses and expenses for repairs are necessarily incurred.

DEPARTMENT OF JUSTICE,

May 28, 1885.

SIR: Your letter of the 12th instant, inclosing a communication from the Chief of Engineers of the 8th, and other papers, relative to the indefinite appropriation provided in section 4 of the river and harbor act of July 5, 1884, chapter 229, calls attention to the points presented in these papers and requests my opinion as to the construction which should be placed on the provision referred to.

The section above-mentioned reads as follows: "That no tolls or operating charges whatsoever shall be levied or collected upon any vessel or vessels, dredges, or other passing water craft through any canal or other work for the improvement of navigation belonging to the United States; and for the purpose of preserving and continuing the use and navigation of said canals, rivers, and other public works without interruption, the Secretary of War, upon application of the chief engineer in charge of said works, is hereby authorized to draw his warrant or requisition from time to time upon the Secretary of the Treasury to pay the actual expenses of operating and keeping said works in repair, which warrants or requisitions shall be paid by the Secretary of the Treasury out of any money in the Treasury not otherwise appropriated: *Provided, however*, That an itemized statement of said expenses shall accompany the annual report of the Chief of Engineers."

Soon after the enactment of this provision it appears to have become a question whether the indefinite appropriation thereby made, besides being (as it was deemed by the War Department to be) applicable to defray the expenses of operating and keeping in repair the locks, dams, canals, etc., of certain public works, is available for "restoring any improved harbor channel to its previous condition when such channel has been obstructed by the action of storms, freshets, or other causes, repairing or rebuilding harbor piers or revetments which have been injured by ice, storms, freshets, or natural decay, refilling piers with stone or other material when such material has settled or has been displaced by the action of the elements," and, more recently, whether it is also available for removing snags and scraping bars in certain rivers, etc.

By the terms of the section the appropriation is to meet "the actual expenses of operating and keeping said works in repair," and the difficulty seems to be in determining whether "*said works*," as used therein, refers to the various public works for the improvement of navigation mentioned in the preceding parts of the act, including harbors and rivers generally, or only to a particular class of works, such as canals, locks, etc., the operation and use of which ordinarily involve the incurring of certain expenses by the Govern-

ment. An examination of previous legislation may throw some light on this point.

The act of May 18, 1880, chapter 96, which abolished all tolls on the Louisville and Portland Canal after July 1, 1880, authorized the Secretary of War "to draw his warrant from time to time upon the Secretary of the Treasury to pay the actual expenses of operating and keeping said canal in repair." Before the passage of that act this canal was, by section 3 of the act of May 11, 1874, chapter 165, made "free of all tolls and charges except such as are necessary to pay the current expenses of said canal and to keep the same in repair."

The river and harbor act of June 14, 1880, chap. 211, in providing for an acceptance of a transfer of the St. Mary's Falls Canal from the State of Michigan, declared that after such transfer said canal should be free for public use, and authorized the Secretary of War "to draw from time to time his warrant on the Secretary of the Treasury to pay the actual expenses of operating and keeping said canal in repair."

By a clause in the river and harbor act of March 3, 1881, chapter 136, it was provided that thereafter, "for the purpose of operating and keeping in repair the Des Moines Rapids Canal, and St. Mary's Falls Canal, and St. Clair Flats Canal, and the Louisville and Portland Canal, the Secretary of War is authorized to draw his requisition on the Secretary of the Treasury from time to time, which requisition shall be paid out of any money in the Treasury not otherwise appropriated." The expense of operating and repairing the Des Moines Rapids Canal and the St. Clair Flats Canal had theretofore been met by definite appropriations for those objects (see as to the former work 20 Stat., 159, 367; 21 Stat., 188; and as to the latter 20 Stat., 269; 21 Stat., 189), and on neither of these canals had tolls been collected by the Government.

Lastly, by a provision in the river and harbor act of August 2, 1882, chapter 375, it was declared "that no tolls or operating charges whatsoever shall be levied or collected upon any vessels, boats, dredges, craft, or other water craft passing through any canal or other work for the improve-

ment of navigation belonging to the United States." The effect of this enactment was to abolish the tolls theretofore levied by the Government upon vessels passing through the works of the Fox and Wisconsin Rivers improvement from which the current expenses of operating and keeping these works in repair were paid (see sec. 4, act of July 7, 1870, chap. 210; section 5249, Rev. Stat.) No other provision was then made for defraying those expenses; they were left to be provided for by future legislation.

Recurring now to section 4 of the act of July 5, 1884, quoted above, it will be observed that the first clause of this section re-enacts the provision in the act of August 2, 1882, just adverted to, and that in immediate juxtaposition therewith follows the clause containing the indefinite appropriation under consideration. The latter clause is "and for the purpose of preserving and continuing the use and navigation of said canals, rivers, and other public works without interruption, the Secretary of War * * * is hereby authorized to draw his warrant or requisition from time to time upon the Secretary of the Treasury, to pay the actual expenses of operating and keeping said works in repair," etc. This language is broad, but I do not think the words "said canals, rivers, and other public works," and "said works" were meant to include all those public works which are described in the preceding parts of the same act. The language employed in that clause must be viewed in connection, not only with the first clause in the same section, but with the previous legislation to which reference is above made, and which contains provisions of the same character. Regarded from this point of view, the more reasonable construction is that it embraces only public works of the kind described in that legislation, and obviously referred to in said first clause.

Such, indeed, seems to be the meaning given it by the Committee on Rivers and Harbors of the House, in their report which accompanied the bill. Referring to the provision wherein it occurs, the committee say, "Another provision prohibits tolls or operating charges from being levied or collected upon vessels passing through any canal or other work for the improvement of navigation belonging to the United States. Operating charges, under proper restrictions, are to

be paid by requisition upon the Secretary of the Treasury. This is the existing law as to Des Moines, Portland, and St. Mary's Canals, and there seems to be no good reason for not putting all *similar* Government works upon the same footing."

A necessity existed for making some provision to meet the current expenses of operating and keeping in repair the works of the Fox and Wisconsin Rivers improvement, since the abolishment of tolls thereon; and while there can be no doubt that the indefinite appropriation provided by section 4 of the act of 1884 was meant to apply to those works, there is also strong ground for the inference that it was intended to be limited to *works of that class*, in whose use both operating expenses and expenses for repairs are necessarily incurred (the object being, as the statute itself declares, to prevent interruption to their use and to the navigation thereof for want of funds to pay such expenses), and not to extend to river and harbor improvements generally.

In my opinion the provision in question should be construed to cover only works of the class above referred to.

I am, sir, very respectfully,

A. H. GARLAND.

Hon. WILLIAM C. ENDICOTT,
Secretary of War.

DISTRICT ATTORNEY AT NEW YORK.

Compensation of the United States attorney for the southern district of New York, under sections 770, 836, and 827, Revised Statutes, considered.

DEPARTMENT OF JUSTICE,
June 5, 1885.

SIR: Your letter of the 2d instant contains two inquiries, bearing upon the compensation of Elihu Root, United States attorney for the southern district of New York, under sections 770, 836, and 827, Revised Statutes.

(*a*) Section 770, fixing the salary of the attorney, and section 836, providing for the expenses of his office, do not conflict with each other. Section 770, which provides a "salary for all his services," has been practically interpreted to mean all

official services required directly by statute, and his accounts have been adjusted under this view.

The statutes which fix the salary and fees for official services required by law do not regulate in any way the payment for unofficial services rendered. Of this character are the services rendered by virtue of section 827, which allows to the attorney a sum in addition to his salary.

(*b*) The employment of clerks in the district attorney's office for services not directed by the judiciary act, as far as the amount of payment is concerned, is a matter within the discretion of the Secretary of the Treasury. Whether, in addition to the salary mentioned, the Secretary of the Treasury approves an account taxed in favor of the attorney by the court in the sum of $4 or $6, is not a question of legality. Under section 824 he has a legal right to increase the pay by $4,000, and again by $2,000, and the extent to which he shall exercise that right is a matter of discretion alone.

Very respectfully,

A. H. GARLAND.

Hon. DANIEL MANNING,
Secretary of the Treasury.

TERRITORIAL OFFICERS IN UTAH.

The superintendent of district schools, auditor of public accounts, and treasurer of Utah Territory should, in conformity to the organic law of the Territory, be appointed by the governor, with the advice and consent of the legislative council. The Territorial statutes, in so far as they require such officers to be *elected*, are in conflict with the organic law and void.

The commissioners to locate university lands, created by the Territorial legislature under the powers given by the act of Congress of February 21, 1855, chap. 117, should be elected in the manner prescribed by the Territorial statute.

DEPARTMENT OF JUSTICE,
June 5, 1885.

SIR: At the instance of the Utah Commission, the Hon. H. L. Muldrow, Acting Secretary of the Interior, in a letter dated the 22d ultimo, requested my opinion upon the following question: "Whether certain Territorial officers in Utah,

namely, superintendent of district schools, auditor of public accounts, treasurer, and commissioners to locate university lands, should be appointed by the governor, with the assent of the legislative council, or chosen by the people at their general elections."

For convenience, so much of the question as relates to the commissioners will be considered separately, as the appointment or election of those officers appears to be controlled by a provision not applicable to the others.

Upon examination of the statutes enacted by the Territorial legislature, it appears that the superintendent, auditor, and treasurer are thereby required to be elected biennially, at the general election, by the qualified voters of the Territory (see Comp. Laws of Utah, 1876, p. 247; act of Feb. 22, 1878, chap. 11, Laws of twenty-third session, p. 27).

The organic law, however (see sec. 7 of the act of Congress of Sept. 9, 1850, chap. 51), declares that "the governor shall nominate and, by and with the advice and consent of the legislative council, appoint all officers not herein otherwise provided for." And as the three Territorial officers last mentioned are not therein "otherwise provided for," a direct conflict manifestly exists between the statutes of the Territorial legislature above referred to and the organic law.

The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the Territorial authorities (*National Bank* v. *County of Yankton*, 101 U. S., 129.) Any act of the Territorial legislature inconsistent therewith must be held void (*Ferris* v. *Higley*, 20 Wall., 375.) Congress may undoubtedly make a void act of the Territorial legislature valid and a valid act void (101 U. S., *supra.*) But for the exercise of this power some *legislative act* on its part, having that effect, would be necessary. Certainly nothing can be *implied* in favor of the validity of a Territorial statute which conflicts with an express provision of the organic law of the Territory, from the mere fact that Congress has not disapproved it. It follows that the statutes of Utah, in so far as they require the superintendent of district schools, auditor of public accounts, and treasurer of the Territory to be *elected*, being contrary to the provision of the organic law hereinbefore

mentioned, are a nullity, and that those officers should be *appointed* in conformity to that provision.

A similar conclusion was reached by the supreme court of that Territory in regard to the Territorial marshal, who by an act of the legislature of the Territory was required to be elected by a joint vote of both houses thereof. The court held the act to be inconsistent with the provision of the organic law above adverted to, and therefore void. (See *Ex parte Duncan*, etc., 1 Utah Rep., 81.)

In regard to the commissioners, these officers are by the Territorial statute required to be elected annually by the qualified voters at the general election. (Comp. Laws of Utah, 1876, p. 241.) By the third section of the act of Congress of February 21, 1855, chapter 117, a certain quantity of land was reserved for the establishment of a university, "to be selected under the direction of the legislature," etc. The legislature of the Territory provided for the selection of this land by creating a board of commissioners, to consist of three men, elected as above, and devolving upon such board the duty of selecting the land. I am of the opinion that the Territorial legislature, by virtue of said act, was invested with full power over the selection of the land, including the establishment of the agency by which such selection was to be accomplished. It was at liberty to devolve the duty of electing on officers already created, or authorize the appointment of persons for that purpose by such officers or by the governor, or otherwise provide the instrumentality for carrying its will upon the subject into effect. The commissioners in question are not, therefore, to be regarded as within the operation of the above-mentioned provision of the organic law; and their election in the manner prescribed by the Territorial statute is proper.

I am, sir, very respectfully,

A. H. GARLAND.

Hon. L. Q. C. LAMAR,
Secretary of the Interior.

HEAD-MONEY TAX.

The duty of 50 cents a passenger, imposed by the act of August 3, 1882, chapter 376, should be exacted from itinerant persons, not citizens of the United States, *toties quoties* any such person enters one of our ports from a foreign port.

DEPARTMENT OF JUSTICE,
June 9, 1885.

SIR: Your communication of the 6th June instant, referring to my opinion of the 21st May, holding that the duty of 50 cents a passenger imposed by the act of August 3, 1882, is collectible on account of all itinerant persons, not citizens of the United States, coming to our ports in steam or sail vessels from foreign ports, asks whether such duty "should be collected on each successive return of any such person to the United States."

In my opinion the duty is demandable as often as any such person enters one of our ports. The statute makes no express provision for exemption from the duty, and I see no ground for implying one.

It is hardly to be supposed that Congress could have intended such an exemption and yet have failed to provide for it. When Congress, by the act of June 26, 1884 (Sess. Acts 1883-'84, p. 57), was imposing a tonnage tax on foreign vessels entering our ports, it remembered that the tax would fall heavily on such of them as were constantly plying between the United States and the ports of other nations, and therefore especially provided that vessels hailing from some ports should not be required to pay over 15 cents a ton in any one year, and that vessels from other ports should not pay more than 30 cents a ton per annum. The total omission of Congress to make any such provisian in the head-money law to meet the case of a passenger, not a citizen of the United States, repeatedly entering our ports from foreign ports, is, I think, conclusive that no such indulgence was in the mind of the legislature.

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

TONNAGE DUTY.

The right to a reduction of tonnage duty under the first *proviso* of section 14 of the act of June 26, 1884, chapter 121, takes effect from the proclamation of the President, and not before.

By virtue of the third section of the act of July 5, 1884, chapter 221, the decision of the Commissioner of Navigation on questions involving a refund of the tonnage tax is final. That section supersedes or repeals the previous law vesting the Secretary of the Treasury with appellate power in such cases.

DEPARTMENT OF JUSTICE,
June 12, 1885.

SIR: I have duly considered the questions submitted for opinion in your communication of May 23, 1885, and will now proceed to answer them in their order.

(1) The first question is in these words: "In the event of a right to an exemption from the tax of 3 cents per ton, or to a reduction thereof, attaching under the conditions specified in the first proviso of said section 14, when did such right inure to the owner of a vessel? Did it inure to him on the first tender of payment of tax after the passage of the act and prior to the proclamation of the President suspending its collection? Or did it inure on the first tender of payment of tax *after* the date of suspension of collection as fixed by the proclamation?"

I think the right to a reduction of tonnage duty under the first proviso of the fourteenth section of the act of June 26, 1884, takes effect from the proclamation of the President, and not before. Until the President has by proclamation suspended the operation of the statute, the rate of duty thereby prescribed must be demanded. The action of foreign governments in respect of diminishing or abolishing tonnage, or light-house, or other equivalent tax or taxes, can have no effect in this country except by the dispensing power of the Executive, as granted by the statute; and until that power is exerted the statute, or the last proclamation under the statute, as the case may be, must be the law as to whether any tonnage duty is demandable in certain cases, and, if any, how much.

If the right to exemption from or diminution of tonnage duty resulted directly from the act of the foreign government in

a given case, it is quite remarkable that Congress did not require that the proclamation of the President should state the time when the foreign law or regulation took effect. It is not reasonable to suppose that Congress would have left a matter so largely affecting the revenue to be determined by the collector at each port of entry, according to the light before him, with no small probability of occasional violations of the constitutional injunction of uniformity in duties, through conflicting decisions of the various collectors.

As, then, the ship *Antillas* was entered and the tonnage duty demanded as to her paid before the proclamation under which the refund is claimed went into operation, it follows that the duty collected was due and demandable.

(2) The second question is in these words: "Does the right to an exemption or a reduction of the tax entail a right to a refund thereof from the date when a partial or entire exemption accrued?"

This question I have answered already, if I apprehend it correctly.

(3) The third question is as follows: "In view of the language of the last clause of section 3 of the act of July 5, 1884, constituting a Bureau of Navigation in the Treasury Department, and of section 26 of the shipping act, when rights to exemption from tonnage tax accrue under treaty stipulations with foreign governments, or accrue under provisions of foreign law operating jointly with the provisions of section 14 to carry such exemption, are interpretations and decisions of the Commissioner of Navigation relating to the legal collection of tonnage tax in such sense final and conclusive as to preclude an authoritative appeal to the Department of State upon the interpretation of treaties or foreign law affecting the collection of said tax; or to preclude an appeal to the Secretary of the Treasury for a refund of tonnage tax by virtue of the provisions of section 26 of the act of June 26, 1884, when exemption from paying such tax may, in the Secretary's judgment, have accrued under the provisions of foreign law or treaty stipulation?"

I am of opinion that the decision of the Commissioner of Navigation is final by virtue of the third section of the act of July 5, 1884, entitled "An act to constitute a Bureau of

Navigation in the Treasury Department," as to all claims for refunds of the tonnage tax. This section provides "that the Commissioner of Navigation shall be charged with the supervision of the laws relating to the admeasurement of vessels, and the assignment of signal letters thereto, and of designating their official number, and on all questions of interpretation growing out of the execution of the laws relating to these subjects and relating to the collection of tonnage tax, and to the refund of such tax when collected erroneously or illegally, his decision shall be final;" and being as to questions involving the refund of the tonnage tax irreconcilable with section 2931 of the Revised Statutes authorizing appeals to the Secretary of the Treasury in cases of controversies about tonnage and other duties, it has, in my opinion, repealed that section in so far as appeals from the collector's decisions as to tonnage duties are concerned. In like manner the provisions of any treaty inconsistent with the law in question must be held to be annulled in so far forth as a rule of civil conduct in this country. (*Head Money Cases*, 112 U. S., 597, 598.) Indeed, I am persuaded that, in the absence of the explicit language of the statute, the mere fact of confiding questions about tonnage duties to the judgment and discretion of the Commissioner would, upon a settled principle, have made his decisions final. (Freeman on Judgments, 531; *Allen* v. *Blunt*, 3 Story C. C., 742; *Steel* v. *Smelting Co.*, 106 U. S., 447.)

In my opinion section 26 of the act of June 26, 1884, authorizing the Secretary of the Treasury to refund, in certain cases, "any fine, penalty, forfeiture, exaction, or charge arising under the laws relating to vessels or seamen," has no application to tonnage duties. The words "exaction and charge" in this section, which might in some circumstances be held to comprehend tonnage duties, must, from their association with the terms "fine, penalty, forfeiture," be taken in an acceptation akin to that of these latter words, upon the well known principle of interpretation that words associated together and admitting of a like sense take their color from each other, the more general being restricted to a sense analogous to the less general. (Maxwell Stat., p. 379, 2d ed., London, 1883.)

Besides, there was no necessity to include tonnage duties in this section, inasmuch as the Secretary of the Treasury already had the power under section 2931 of the Revised Statutes to refund such duties when illegally or improperly exacted.

If, however, section 26 does include tonnage duties, the power of the Secretary of the Treasury to refund such duties has been abrogated by the third section of the subsequent act of July 5, 1884, making final the decision of the Commissioner of Navigation as to "*all questions*" relating to the refund of the tonnage tax when erroneously or illegally collected. This provision seems repugnant to and to have supplanted the previous law investing the Secretary of the Treasury with appellate power in such cases.

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

OBSTRUCTION TO NAVIGATION.

In the case of the bridges of the Norfolk and Western Railroad Company across the Southern and Eastern Branches of Elizabeth River, the facts set forth are insufficient to authorize judicial proceedings against said company in behalf of the United States on the ground that such bridges are an obstruction to navigation

DEPARTMENT OF JUSTICE,

June 16, 1885.

SIR : I return herewith the papers which accompanied your letter of the 11th ultimo in relation to the bridges of the Norfolk and Western Railroad Company across the Southern and Eastern Branches of Elizabeth River, at Norfolk, Va.

It appears by these papers that, in view of officers of the Engineer Department, those bridges are already an obstruction to navigation, and that the work of strengthening them as proposed by said company will add to the obstruction. This matter is thought to be of sufficient importance to warrant action by the United States authorities, if such action can be legally taken.

Upon consideration, I am of opinion that the facts set forth in the papers are not in themselves sufficient to authorize a judicial proceeding against said company *in behalf of the*

United States, and that for this purpose authority from Congress is needed. In connection with this point, I beg to refer to my opinion of May 1, 1885, in the matter of the construction of a railroad bridge across the Mississippi at St. Paul, wherein the subject of authority of officers of the Government to institute proceedings in its behalf in cases like the present is fully examined.

I suggest that the proper course to take in the present case is indicated by the following provision in section 2 of the act of July 5, 1884, chapter 229. "He [the Secretary of War] shall also report [to Congress] whether any bridges, causeways, or structures, now erected or in process of erection, do or will interfere with free and safe navigation, and if they do or will so interfere, to report the best mode of altering or constructing such bridges or causeways so as to prevent any such obstruction."

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

EXTRA-DUTY PAY.

In the matter of the claims of Sergeant Robinson and Corporal Speddin, of the Signal Corps, for extra-duty pay for services performed by them from July 1, 1883, to December 20, 1884, it appearing that Congress has made no provision for extra-duty pay to signal service men in either of the appropriation acts of March 3, 1883, chapter 143, and July 7, 1884, chapter 332, for the fiscal years ending June 30, 1884, and June 30, 1885, respectively, or in any other appropriation act for the same fiscal years: *Held* that the claimants have no right to such pay for the period covered by their claims, unless the right is elsewhere conferred by statute, which does not appear.

The claimants being non-commissioned officers, and not employed on extra duty as overseers, their claims are not within section 1287, Revised Statutes.

DEPARTMENT OF JUSTICE,

June 26, 1885.

SIR: By letter of April 8, 1885, the Hon. A. S. Fairchild (then Acting Secretary of the Treasury), at the instance of the Second Comptroller, submitted to me for an opinion thereon the following question, which relates to certain claims before the Comptroller made by Sergeant Jesse H. Robinson and Corporal William C. Speddin, of the Signal

Corps, for extra-duty pay for services performed by them from July 1, 1883, to December 20, 1884, viz, "whether either or both of these claimants have a legal claim against the Government for extra-duty pay for services rendered within the period mentioned, notwithstanding no appropriation has been made by Congress."

These claims appear to be based upon the following facts:

The act of June 20, 1878, chapter 359, having provided that "Signal Service men shall not receive extra-duty pay unless specially directed by the Secretary of War," an order was subsequently issued from the War Department (Gen. Order No. 54, dated July 23, 1878) in terms as follows:

"By direction of the Secretary of War extra-duty pay at the rate of thirty-five cents a day will be allowed the following class of enlisted men in the Signal Service of the Army.

"(1) Corporals and privates in charge of stations or serving as operators and repair men in the United States telegraph lines carrying, or which may carry, commercial business.

"(2) Non-commissioned officers in charge of sections.

"(3) In such instances as they may be mustered by the Chief Signal Officer for extra-duty pay in pursuance of the special direction of the Secretary of War."

(See also Army Regulations of 1881, par. 406, 407.)

Sergeant Robinson was mustered for extra-duty pay by special direction of the Secretary of War, dated June 20, 1881, and served as a telegraph operator during the period above specified, and Corporal Spedden was duly assigned to duty, in pursuance of the first paragraph of said order, on September 1, 1881, as a telegraph operator on the United States telegraph lines, and served as such during the same period. The said order received no modification during that period and was not revoked until February 5, 1885.

The question proposed calls for an examination of the statutory provisions which relate to the subject of extra-duty pay.

The earliest legislation upon the subject is the act of March 2, 1819, chapter 45, which provided "that whenever it shall be found expedient to employ the Army at work on fortifications, in surveys, in cutting roads, and other constant labor, of not less than ten days, the non-commissioned officers,

musicians, and privates so employed shall be allowed fifteen cents and an extra gill of whisky or spirits each per day while so employed."

Attorney-General Butler held that under this statute a sergeant of the Army employed as an assistant clerk in one of the bureaus of the War Department was entitled to the additional compensation thereby allowed. He was of opinion that it included not only the particular kinds of duty mentioned therein, but all "other constant labor," and that in legal contemplation the service of a clerk in a bureau is "labor," and, if it be continuously and regularly performed, "constant labor." (2 Opin., 706.)

By the sixth section of the act of August 4, 1854, chapter 247, "the allowance to soldiers employed at work on fortifications," etc., authorized by the said act of 1819, was "increased to twenty-five cents per day for men employed as laborers and teamsters, and forty cents per day when employed as mechanics, at all stations east of the Rocky Mountains, and to thirty-five cents and fifty cents per day when the men are employed at stations west of those mountains.

Section 35 of the act of March 3, 1863, chapter 75, provided that "enlisted men, now or hereafter detailed to special service, shall not receive any extra pay for such services beyond that allowed to other enlisted men." But by section 2 of the act of April 1, 1864, chapter 45, it was declared that that section "shall not be deemed hereafter to prohibit the payment to enlisted men employed at the Military Academy of the extra-duty pay heretofore allowed by law to enlisted men when employed at constant labor for not less than ten days continuously."

The said section 35 was construed differently by Attorney-General Bates and Attorney-General Devens. (See 10 Opin., 472; 15 Opin., 362.) Its construction, however, is unimportant in connection with the present inquiry, as all legislation of a permanent character on the subject of extra-duty pay in the Army remaining in force was superseded by section 7 of the act of July 13, 1866, chapter 176, which provided as follows:

"That when it is necessary to employ soldiers in the construction of permanent military works, public roads, or other

constant labor of not less than ten days' duration in any case, they shall receive, in addition to their regular pay, the following additional compensation therefor: enlisted men working as artificers and non-commissioned officers employed as overseers of such work, not exceeding one overseer for every twenty men, thirty-five cents per day, and enlisted men employed as laborers, twenty cents per day; but such working parties shall only be authorized on the written order of a commanding officer. This allowance of extra pay is not to apply to the troops of the Engineer and Ordnance Departments."

Subsequently, by the act of February 1, 1873, chapter 88, the enlisted men of the Engineer Department were "placed on the same footing with respect to compensation for extra-duty service as the other enlisted men of the Army," and all laws in conflict therewith were repealed.

The above-mentioned provisions of the act of July 13, 1866, as modified by the act of February 1, 1873, are embodied (with some further modification, which will be hereinafter noticed) in sections 1235 and 1287 of the Revised Statutes, of which sections the latter only need be considered here.

Section 1287 reads: "When soldiers are detailed for employment as artificers or laborers in the construction of permanent military works, public roads, or other constant labor of not less than ten days' duration, they shall receive in addition to their regular pay the following compensation: Privates working as artificers, and non-commissioned officers employed as overseers of such work, not exceeding one overseer for twenty men, thirty-five cents per day, and privates employed as laborers, twenty cents per day. This allowance of extra pay shall not apply to the troops of the Ordnance Department."

Where the word "privates" occurs in this section, the words "enlisted men" were used in the corresponding provision of the act of 1866. The former term, in our military service, applies only to those soldiers who are below the grade of non-commissioned officers, while the latter term comprehends all soldiers who enter the service by *enlistment*, and consequently includes both non-commissioned officers and privates. The provision of the act of 1866 is therefore modified by section 1287 to the extent thus indicated.

Extra-Duty Pay.

The act of June 20, 1878, to which reference has already been made, declares that "Signal Service men shall not receive extra-duty pay unless specially directed by the Secretary of War."

I may here add that the act of July 5, 1884, chapter 217, provides that such extra-duty pay thereafter "shall be at the rate of fifty cents per day for mechanics, artisans, schoolteachers, and clerks at Army, division, and department headquarters, and thirty-five cents per day for other clerks, teamsters, laborers, and others."

It appears that prior to the fiscal year beginning July 1, 1883, the claimants, along with other extra duty men in the Signal Service, were allowed extra-duty pay out of the funds provided by the Army appropriation acts for extra pay to "soldiers employed on extra duty." But by a clause in the act of August 7, 1882, chapter 433, the Secretary of War was directed to submit to Congress for that fiscal year separate and distinct estimates for the Signal Service, which estimates were accordingly submitted; and Congress, in the act of March 3, 1883, chapter 143, made a separate appropriation for the Signal Service for the fiscal year ending June 30, 1884, and declared that "there shall not be expended from any moneys appropriated by the act entitled 'An act making appropriations for the support of the Army for the fiscal year ending June 30, 1884, and for other purposes,' approved March 3, 1883, any money for the support of the Signal Service Corps, except the pay of such commissioned officers as the Secretary of War may detail for service in that corps." A separate appropriation for the Signal Service was also made for the fiscal year ending June 30, 1885, with a similar prohibition against expending any moneys for that service out of the Army appropriations for the same fiscal year. (See act of July 7, 1884, chapter 332.) And, as Congress has made no provision for extra-duty pay to Signal Service men in either of the separate appropriations above mentioned, or in any other appropriation for the same fiscal years, it is very clear that the claimants have no right to such pay for the period covered by their claims (from July 1, 1883, to December 20, 1884), unless the right thereto is elsewhere conferred by statutes, which is the point now to be examined.

Extra-Duty Pay.

As already intimated, the only legislation in force at that period which relates to extra duty pay (exclusive of appropriations) is contained in section 1287, Revised Statutes, and in the acts of June 20, 1878, and July 5, 1884, the provisions whereof on that subject are hereinbefore set forth. It is unnecessary, for present purposes, to consider any of this legislation, excepting that which is found in section 1287. By that section it is declared that soldiers "shall receive, in addition to their regular pay," certain compensation when detailed for employment as there provided; and where a soldier is detailed for and performs extra duty service *in conformity thereto*, the question whether he thereby acquires a *legal right* to such additional compensation, and the Government incurs a corresponding *obligation* to pay the same to him, in the absence of any appropriation therefor, might well arise. But in the view I take of the case under consideration it does not present that question.

Assuming that the provision of the act of July 20, 1878, which requires the special direction of the Secretary of War, has been complied with in respect to extra duty performed by claimants, their claims, in order to come under section 1287, must be within its terms. The language thereby employed in fixing the extra compensation is "privates working as artificers, and non-commissioned officers employed as overseers of such work, not exceeding one overseer for twenty men, thirty-five cents per day, and privates employed as laborers, twenty cents per day." Both of the claimants were non-commissioned officers, and neither of them was employed as an overseer. In view of these facts, the section must be deemed to be inapplicable to their claims.

However meritorious these claims may be in themselves by reason of the nature of the service and the circumstances under which the same was rendered, yet it is essential to their legality that they be warranted by some statute. (See sec. 1765, Rev. Stat.) Therefore, as they are without statutory authorization, in my opinion they are not legal claims against the Government.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

DISPATCH BOAT DOLPHIN.

Examination of the contract entered into between Mr. John Roach and the Secretary of the Navy for the construction of the dispatch boat *Dolhpin*, and consideration of the rights and duties of the United States arising thereunder.

DEPARTMENT OF JUSTICE,
June 30, 1885.

SIR: Your communication of the 17th June instant requests my opinion as to the rights and duties of the United States touching the dispatch boat *Dolphin*, recently constructed by Mr. John Roach under a written contract entered into between him and your predecessor, the Hon. William E. Chandler.

This vessel, you inform me, has been found to be defective in three particulars, two of which are fundamental, that is to say: (1) she does not develop the power and speed which the contract calls for; (2) she is not staunch and stiff enough for the service expected of her; and (3) the general character of her workmanship does not come up to the requirements of the contract.

As to the defect in the article of speed: The act of Congress under which the vessel was built (22 Stat., 477) makes an appropriation for the construction of "one dispatch boat, as recommended by the Naval Advisory Board in its report of December twentieth, eighteen hundred and eighty-two." Upon reference to that report it will be found, as I am informed by you, that the board recommended the construction of "one dispatch vessel or clipper, to have a sea speed of fifteen knots," and I take it as very clear that the recommendation became, by force of this reference to it, as much a part of the statute as though it had been recited therein word for word.

The contract contains no express covenant as to the speed of the vessel—unless one is necessarily involved in the stipulation for a "collective indicated horse-power" of two thousand three hundred—but its very first covenant is to construct a dispatch boat "in conformity with the aforesaid plans and specifications hereto annexed, and *in accordance with the provisions of the acts of Congress approved August* 5 *and March* 3, 1883, respectively, before mentioned, and relating thereto,"

and I am of opinion that this covenant bound the contractor as effectively to make a ship "of the sea-speed of fifteen knots" as though he had agreed to do so in express words.

It may be said possibly that the covenant as to power and speed is not absolute, but qualified by the provision that, if upon the trial trip the engines should not develop the full power called for by the contract and the failure should not be due to "defective workmanship or materials," the ship should be accepted by the Government nevertheless.

This attempt to bind the Government to take from the contractor's hands a ship of less power and speed than what the act of Congress peremptorily requires is, in my opinion, utterly null and without effect. It was to the quality of speed more than any other that Congress was looking, as the terms "dispatch vessel or clipper," used in the report of the Advisory Board referred to in the law, plainly show. Congress deemed that the service required a swift vessel of a sea-speed of 15 knots, and it directed such a vessel to be contracted for and built.

The contractor cannot be heard to allege ignorance of the very law under which the contract was made. He was bound to know the source and extent of the authority of the official with whom he contracted. "Individuals as well as courts," say the Supreme Court, "must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act." (*Whiteside et al.* v. *The United States*, 93 U. S., 257; *Hawkins* v. *United States*, 96 U. S., 691; *The Floyd Acceptances*, 7 Wall., 666.)

With a full knowledge of the statute authorizing the construction of a dispatch boat of a designated speed and no other, and with the plans and specifications under which the work was to be done laid before him that he might bid with intelligence and safety, the contractor, if he had misgivings whether a vessel planned like the *Dolphin* would make the required speed, should have abstained from sending in proposals, knowing as he did, or ought to have done, that a ship defective in point of speed could not be accepted under the statute, whatever her merits might be in other respects.

Under any other view the most imperative requirements of Congress would be liable at all times to be evaded upon one pretext or another. I can not conceive how it could be seriously urged that the United States is bound under the law in question to accept from the contractor any other sort of vessel than the one ordered by Congress to be built, namely, a dispatch boat or clipper of a sea speed of 15 knots; and the *Dolphin* having been found not to be a vessel of that description, as I must assume, it would seem to follow that nothing short of an act of Congress could authorize her acceptance.

I come now to consider the next objection: that the vessel is wanting in the necessary strength and stiffness. If this defect exists, as I must assume, it is fatal, whether due to the plans upon which the vessel was built or not, because, by the ninth clause of the contract, the contractor and his sureties stipulate "that the vessel constructed under this contract *shall be sufficiently strong to carry the armament, equipment, coal, stores, and machinery* prescribed by the Naval Advisory Board, and indicated in the annexed drawings and specifications. * * *

Now, it is too plain for serious discussion that the contractor has, by this covenant, undertaken to make a ship for a specific purpose in accordance with given drawings and specifications, and has, to all intents and purposes, warranted that the ship so agreed to be built shall be "sufficiently strong" for that purpose. In a word, the contractor by this covenant makes the plans of the Advisory Board his own, and agrees to construct a vessel of sufficient strength according to those plans.

Manifestly, then, the *Dolphin*, which I am bound to assume, in view of the report accompanying your communication, is anything but "sufficiently strong," can not for this reason alone be accepted by you under the contract, the defect mentioned being fundamental in character.

The third objection, as to the general character of the workmanship of the vessel, I need not stop to consider, in view of your representation that, if the vessel is otherwise in accordance with the contract, this objection can be readily

dealt with by you, the contractor being ready and willing to make the vessel satisfactory in this respect also.

As to whether the Government has been in any wise estopped or compromitted by acts of acquiescence, approval, or acceptance by the Advisory Board or others, I am of opinion that the Government stands unaffected by any such acts. This must be the case necessarily if the law authorizing the building of a dispatch boat is to have effect. Its language is that "no such vessel shall be accepted unless completed in *strict conformity with the contract*, with the advice and assistance of the Naval Advisory Board * * * ," and consequently no acceptance of a vessel not built "*in strict conformity with the contract*" could bind the Government. Neither the Secretary of the Navy nor any officer under him had any dispensing power over this statute, the words of which, appearing as they do in a context displaying great solicitude for the protection of the public interests, can not be taken in any other sense than as mandatory, without a plain disregard of the legislative intention.

The power to accept a ship built under this law cannot be exercised unless the fact be that the ship was constructed in strict conformity with the contract, and the mere enunciation from any official quarter that the ship was so constructed, when in truth it was not, lends no validity whatever to a pretended act of acceptance. It was not the intention of Congress that the United States should be foreclosed or concluded in any such way, or that any departure from the contract, except as expressly provided for, should be condoned by the act or judgment of any official, and that it should be open at all times to show that a vessel alleged to have been built and accepted under the law was not so built and accepted. It was competent for Congress to create an extraordinary barrier of this kind against fraud and inefficiency, and it is the duty of those called upon to apply their language to do so in such a way as to make it effective.

The case of the Floyd acceptances, already referred to, shows how difficult it is to bind the Government by the acts of its officers in the matter of contracting for and disbursing its moneys, and before that case was decided an opinion by one of my predecessors was given sustaining the view that

was afterward adopted in that case (10 Opin., 288). After all, this is but an application of the general doctrine, that the Government of the United States, in transactions of this character, is not ordinarily bound by an estoppel. (*Fenemore* v. *United States*, 3 Dallas, 363; *Johnson* v. *United States*, 5 Mason, C. C., 425; *United States* v. *Collier*, 3 Blatch., C. C., 325; *Cook* v. *United States*, 12 Ib. 43, 61; Herman on Estoppel, sec. 219; 10 Opin. 231; 12 *ib.*, 43.) These references show the application of this doctrine in almost every conceivable shape; and also that in dealings with the Government, upon contracts, there is always a safeguard until the final acceptance by the proper officer and a disbursement of the money.

But, aside from this consideration, suppose it was a case as between individuals or private parties, I do not think that the party occupying the place of the Government would be estopped by the action of the Advisory Board, or any intermediate agent, by whatever name such agent might be known. In *Glacius* v. *Black* (50 N. Y., 145) the court of appeals of New York considered this question very elaborately, after very exhaustive argument, analyzing and applying many cases that were cited in argument, and by a unanimous opinion Church, chief-justice, speaking for the court, ruled as follows:

"Where by the terms of a contract for the repair of a building it is stipulated that the material shall be of the best quality and the work performed in the best manner, subject to the acceptance or rejection of an architect, all to be done in strict accordance with the plans and specifications, and to be paid for when done completely and accepted, the acceptance by the architect of a different class of work or of inferior materials will not bind the owner, and does not relieve the contractor from the agreement to perform according to the plans and specifications. The provision for acceptance is an additional safeguard against defects not discernible by an unskillful person."

This case, it is conceived, goes the full length to relieve the Government in this instance as against anything in the nature of an estoppel; and in this opinion (50 N. Y.) the court says: "*Fraud or mistake vitiates the certificate in those*

cases where a certificate is otherwise conclusive." So that, as upon a final inspection and trial of this vessel, it has been found that a certificate has been given, or an acceptance made, of work that did not comply with the requirements, and whether this was through fraud or mistake matters not, that action is not conclusive, and the Government is not bound thereby, as an individual would not be in a similar case.

In *Bird* v. *Smith* (64 E. C. L. R., 785) the contract was for the sale and delivery to the plaintiff of a quantity of iron rails, of certain weights, shapes, and dimensions, and to be inspected and certified as then agreed upon, and in quality equal to any rails made in Staffordshire. A plea that the rails were inspected, certified, and approved by an agent of the plaintiff, as provided in the contract, was held bad on demurrer, on the ground, among others, that each stipulation is in its terms distinct, and in its nature, as an absolute warranty for quality, may well be required in addition to a provision for inspection and approval, to guard against defects which inspection cannot discover.

It is not deemed necessary to say more upon this feature of the case.

All that has been said thus far is based upon the idea that there is a valid, subsisting contract; but it is proper at this point to say that the provisions of the contract binding the United States to accept the vessel on the approval of the Naval Advisory Board are in my opinion void and inoperative, as shifting a high trust and duty from the Secretary of the Navy to the board, in violation of the act under which the contract was made, which directs the Secretary of the Navy to invite proposals, which authorizes the Secretary of the Navy "to construct said vessels and procure their armament," which requires proposals for the work to be "subject to all such rules, regulations, superintendence, and provisions as to bonds and security for the due completion of the work as the Secretary of the Navy may prescribe," and which authorizes the Secretary of the Navy to use for the purposes of the act the balance of an appropriation made for another object. In the face of these explicit provisions it seems to me impossible to reach any other conclusion than that Con-

gress, after providing the Secretary of the Navy with abundant facilities for forming an intelligent judgment, intended that the full and ultimate responsibility of carrying out the law should be on him.

This, however, while proper to be mentioned, is perhaps not of much practical consequence, in view of the contractor's express covenant, already referred to, to do the work in accordance with the law authorizing it.

But beyond these questions there lies another of very great importance not referred to in your communication or the report accompanying it, and that is, whether there was *any valid contract at all* between Mr. Roach and the United States.

As we have seen, the Secretary of the Navy had no power to contract for a dispatch boat that would not make 15 knots at sea, or to accept any boat not built "in strict conformity with the contract" he was authorized to enter into.

But the ninth clause of the contract provides that, should the engines of the vessel contracted for fail to maintain successfully on the trial trip for six consecutive hours a power of two thousand three hundred horses, the vessel shall be accepted nevertheless, if it appear satisfactorily that the shortcoming was not owing either to defective workmanship or materials. In other words, it was to make no difference how much the engines should be wanting in power, and consequently how far short they should fall of propelling the ship at the speed required by the law—it being impossible to dissociate power from speed—if there was no defect in the workmanship or materials. The obvious intention of this was to relieve the contractor of all duty and responsibility as to the speed and power of the ship, and make it possible to force upon the United States a ship wanting in the prime quality of speed and fundamentally different from what Congress authorized and was desirous to secure. It needs no further discussion to show that what was thus attempted was wholly out of the question.

But the contract is an entirety and does not admit of being broken up into fragments, so as that what is good may be enforced and what is bad rejected. The stipulation which was intended to relieve the contractor of responsibility for the

power of the engines, and as a necessary consequence for the speed of the ship, forms a large and most important part of the consideration moving to him from the Government. It is impossible to say what was its bearing on the whole contract, nor is it material to do so, inasmuch as it and the other covenants of the Government constitute one entire and indivisible consideration, the invalidity or illegality of any element of which must necessarily vitiate the whole and abrogate the contract.

This is very well illustrated by the case of *Chater* v. *Becket* (7 T. R., 201), which is often referred to in illustration of the principle on which I rely. In that case a parol, and therefore invalid promise to answer for the debt of another, and a promise entirely valid and meritorious formed the consideration of the contract sued on, and in view of the defendant's contention that the consideration was void *in toto*, it was insisted on the part of the plaintiff that the defendant should be held answerable for so much of his contract as was valid; but it was said by the court in reply that the agreement was entire, and that there could be no recovery on one part the other part being illegal. As was said by Chief-Justice Gibson, "if any part of an *indivisible promise* or any part of an *indivisible consideration* for a promise is illegal, the whole is void." (*Filson* v. *Himes*, 5 Pa. St., 456.) In the latter case the consideration was, like that in the case before me, made up of several particulars, one of which was illegal, and the learned judge, referring to the illegal part, says "Who can say from this how far the office entered into the defendant's computation of what he was to get for his $500." I would refer also to the cases of *De Beerski* v. *Paige* (36 N. Y., 537); *Pettit* v. *Pettit* (32 Ala., 289); and *Doty* v. *Knox County Bank* (16 Ohio St., 134), as directly in point.

It follows then that no contract exists between Mr. Roach and the United States, and that the large sums of money which have been paid Mr. Roach have passed into his hands without authority of law, and are held by him as so much money had and received to the use of the United States, and may be recovered from him. And not only so, but the money thus paid him by officials holding a fiduciary relation to the Government having gone into the ship *Dolphin*, a

court of equity will follow it there, and for that purpose entertain a proceeding against the ship itself. In support of this position I need do no more than cite the recent decision of the Supreme Court of the United States in the case of the *National Bank* v. *Insurance Co.*, (104 U. S., 55).

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE NAVY.

POST-OFFICE LEASES.

Certain leases of post-offices, made by the Postmaster-General prior to the act of March 3, 1885, chapter 342, for terms of twenty years, *held* not to be obligatory upon the Government.

Where the tenancy of the Government is from year to year, it may be terminated by giving such notice as is required by the law of the State in which the property is situated.

DEPARTMENT OF JUSTICE,
July 1, 1885.

SIR: I am in receipt of your communication of 29th of June, inclosing leases of three post-offices, viz, at La Fayette, Ind., at Augusta, Me., and at Quincy, Ill., and requesting an opinion upon the question "whether a lease of a post-office by the Postmaster-General on behalf of the United States executed prior to the act of the Forty-eighth Congress, approved March 3, 1885, specially authorizing leases of post-offices for a term not exceeding five years, is of any binding obligation upon the Government; and whether, if of binding obligation only from year to year, it may be terminated upon notice by the Postmaster-General to the lessor, and if so, upon what notice."

The lease for post-office premises at La Fayette, Ind., was executed February 4, 1870, for a term of twenty years, commencing May 1, 1870.

The lease at Augusta, Me., was for a term of twenty years, commencing July 1, 1870, executed July 1, 1870.

The lease at Quincy, Ill., was for a term of twenty years, commencing April 1, 1873, executed May 2, 1873.

These leases were executed on the part of the Government by the Postmaster-General.

At the time of the execution of these leases the following provision of the act of Congress, approved March 2, 1861 (Rev. Stat., sec. 3732), was in force: "No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year."

And at the time of the execution of the lease for premises at Quincy, Ill., this further provision (see act of Congress, approved July 12, 1872; sec. 3679, Rev. Stat.) was in force: "No Department of the Government shall expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract for the future payment of money in excess of such appropriations."

Independent of these inhibitory provisions, the authority of the Postmaster-General to make these leases must be derived from an act of Congress. (*The Floyd Acceptances*, 7 Wall, 666; *United States* v. *Alexander*, 110 U. S., 325; *Moffatt* v. *United States*, 112 *ib.*, 24.)

There was no such express authorization at the time of their execution, and they are therefore valid only so far as they are under appropriations adequate to their fulfillment and not in excess of such appropriations. (*McCollum* v. *United States*, 17 C. Cls. R., 92.)

The act of Congress approved March 3, 1868, appropriated for the fiscal year ending June 30, 1869, miscellaneous payments, including allowances to postmasters for rent, light, and fuel, etc., $375,000. (15 Stat., 55.)

The act of Congress approved March 3, 1869, making appropriations for miscellaneous payments for the year ending June 30, 1870, made no reference to *rent*, etc. (15 Stat., 323.)

The act of Congress approved July 11, 1870, for appropriations for the year ending June 30, 1871, provided for payments for *rent*, etc. (16 Stat., 228.)

The act of Congress approved June 1, 1872, for appropriations for year ending June 30, 1873, provided for payments for *rent*. (17 Stat., 200.)

Post-Office Leases.

The act of Congress making appropriations for the year ending June 30, 1874, made provision for payments for *rent.* (17 Stat., 556.)

In none of these acts, nor in any acts, was authority given to the Postmaster-General to make leases for a term of years for premises to be occupied as post-offices until the act approved March 3, 1885, which authorized the Postmaster-General to make leases for a term not exceeding five years. This act also made appropriation for rent.

In the absence of express authority, the leases under consideration, as leases for terms of years, are invalid.

But it would appear from your communication that these several premises have been occupied by the Government for the purposes and under the terms expressed in the leases, and, presumably, that the rents have been paid therefor under appropriations available for that purpose, and that for the current year there is a proper appropriation. The Court of Claims, under a similar state of circumstances, decided that the effect of such a contract was "to give the Postmaster-General each fiscal year thereafter, when a new appropriation should be made, the option to adopt and ratify the contract for another year. This he might do by express notice to that effect, or by entry and occupation of the premises after the commencement of the year. If he should occupy the premises after the beginning of the new year, he might be held to have renewed the obligation on the part of the defendants for that one year. In other words, a lease for a term of years founded on an annual appropriation is binding on the Government only until the end of that year, with a future option from year to year till the end of the lease. Such is the effect of the contract and statutes taken together, to which the contracting parties must be held to have agreed." (*McCollum* vs. *U. S.*, *ut supra.*)

It appears that there is for the ensuing year an appropriation available for the payment of these rents.

The statutes and decisions of the courts in each of the States where these leases were to take effect determine the character of the tenancies.

In Indiana a holding over beyond the term creates a tenancy from year to year. (Stat. Ind., 1881, sec. 5508.) A ten-

ant by holding over after expiration of lease for one year without any new contract or agreement becomes tenant for another year upon same terms. (*Burbank* v. *Dyer*, 54 Ind., 392.)

In Illinois the tenant holding over may, at the election of the landlord, be treated as a trespasser or as a tenant for another year upon the same terms as in the original lease, and this though the tenant has no intention of holding over for a year or of paying the same rent. (*Clinton Wire Cloth Co.* v. *Gardner*, 99 Ill., 151.)

In Maine the rule appears to be somewhat different. By statute (Maine Rev. Stat., 1883, sec. 10, p. 604), it is provided: "No estate in lands greater than tenancy at will can be created without writing signed by grantor, maker, or his attorney."

The statutory provisions as to the notice requisite to terminate these tenancies are as follows:

In Illinois sixty days' notice in writing within the last four months of the year terminates a tenancy from year to year. (Dig. Stat. Ill., sec. 5, p. 1492.)

In Indiana a tenancy from year to year created by holding over is terminated by landlord by three months' notice before termination of the year. (Rev. Stat. Ind., 1881, sec. 5209.)

In Maine thirty days' notice in writing by either party terminates a tenancy at will. (Maine Rev. Stat., 1883, sec. 2, p. 286.) But the expiration of the thirty days' notice to terminate the lease at will must be coincident in point of time with a pay day. (*Wilson* v. *Prescott*, 62 Me., 115.)

All questions of the regulation of the tenure of real property within the limits of a State are to be determined by the laws of that State. The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority." (*United States* v. *Fox*, 94 U. S., 315.)

By the laws of Indiana and Illinois the tenancies of the United States of the post-office premises at La Fayette and Quincy are from year to year. By the laws of Maine the tenancy at Augusta is at will.

At Quincy, sixty days' notice in writing within the last four months of the year will terminate the tenancy.

At La Fayette, by the Indiana statute, the landlord can determine the tenancy by giving notice three months before the termination of the year. The obligation to give this notice should be reciprocal by a holding-over tenant.

At Augusta, thirty days' notice in writing before a usual pay day by the tenant will terminate the lease.

The original leases for a term of years being invalid, and no special agreement having been entered into between the lessors and the lessees relating to the tenancies for the ensuing year, the notice to terminate the leases will be such as the law of the State in which the property leased is situated requires.

Very truly, your obedient servant,

A. H. GARLAND.

The POSTMASTER-GENERAL.

CONSULAR JURISDICTION.

Where a citizen of the United States, trading in the island of Gnap, a barbarous or semi-civilized country, was charged with cruelly and inhumanly punishing a boy on said island: *Advised* that the case is cognizable by a consul or commercial agent under the provisions of section 4088, Revised Statutes, and that a special commercial agent might be sent to the island for the trial of the accused.

DEPARTMENT OF JUSTICE,
July 6, 1885.

SIR: The communication of Dr. Wharton (the examiner of claims in the Department of State), addressed to me, at your request, on the 3d instant, is received and has been carefully read. It contains a statement as to the conduct of C. P. Holcomb, a citizen of the United States, trading in the island of Gnap, a barbarous or semi-civilized country, in arresting a boy for stealing some of his goods, and punising him arbitrarily by the most cruel and inhuman tortures without any legal proceedings whatever; and I am asked what remedy there is for this; or, in other words, how can Holcomb be reached for his illegal and unjust acts in this regard?

Section 4088, Revised Statutes, gives jurisdiction to the consuls and commercial agents of the United States at islands

or in countries not inhabited by any civilized people, or recognized by any treaty with the United States, to hear and determine certain matters of civil rights and contentions, and then gives them jurisdiction over offenses or misdemeanors, as is conferred by sections 4086 and 4087. These two sections simply give consuls jurisdiction, civil and criminal, to be exercised in conformity with the laws of the United States, which are extended over all citizens of the United States in those countries (certain countries with which there are treaties), * * * and provided the way and manner of proceeding by these consuls; and in the two sections immediately following punishment for offenses is provided. The island of Gnap, from the statement before me, comes within the class of countries referred to in section 4088; and it would seem, under the several sections already named, considered together, that full power exists to arrest, try, and punish Holcomb.

The jurisdiction thus conferred is based upon the well-received doctrine of international law, that consuls in barbarous or semi-barbarous states are to be regarded as investing with extraterritoriality the place where their flag is planted, and if justice is to be administered at all, so far as concerns civilized foreigners visiting such states, it must be by tribunals such as are named in section 4088, Revised Statutes. Civilized powers will not surrender the control of the business relations or of the persons of their subjects to the sovereigns of uncivilized or semi-civilized states (Lawrence's Wheaton, 215, *et seq.*; *The William Harris*, 1 Ware's Reports, 367; 7 Opin., 342; 8 *ib.*, 380); and such doctrine is clearly inferable in *Consequa* v. *Fanning*, 3 Johns. Chancery, Rep. 587; *Daineses* v. *Hale*, 91 U. S., 13; and *Mahoney* v. *United States*, 10 Wallace, 62.

This being the case, there is no reason why a special commercial agent may not be sent to the island of Gnap, for the trial of Holcomb, and I see no other remedy, under the law, than this, which I think will be quite adequate.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF STATE.

NEW ORLEANS AND PACIFIC RAILWAY.

Under the circumstances and for the reasons stated: *Advised* that the suspension of the issue of land patents to the New Orleans and Pacific Railway Company, heretofore made, be continued until the proper tribunals, courts or Congress, definitely settle the rights of the parties in the premises.

DEPARTMENT OF JUSTICE,
July 6, 1885.

SIR: I am in receipt of a statement of facts submitted to you by E. B. Wheelock, esq., president of the New Orleans and Pacific Railway Company (which you have designated as a memorial), touching the claim of such company to certain lands therein referred to. There is no prayer or request in this statement for any definite action by you; indeed, no action is asked for, except that serious consideration be given to the matters therein contained; but I presume the ultimate object of the statement "(memorial)" was to have recalled your order of the 10th of March last, suspending the issuing of patents for such lands.

This statement, or memorial, is referred by you to me for my opinion. The matter as now presented I do not consider raises the question of strict right of the company to these lands, for I have nothing before me to enlighten me upon that subject, except this statement and some briefs and documents submitted by Mr. Wheelock and his counsel. I take it, that instead of a *legal question* upon the force and effect of the grant, as well as upon the claim set up by the railway company as having complied with the terms of the grant, and therefore being entitled to all of these lands—that, instead of this, a mere question of administrative practice, or of administrative policy, is submitted to me, and that more for an advisory opinion than for a judicial one, properly speaking.

It seems that this matter has been before Congress, and there have been various reports by majorities of committees and by minorities of committees upon the legal questions and the rights arising upon this grant, and it seems that the subject is one which is in great doubt in the Congressional mind. From the papers before me it would appear that the question is susceptible of much debate, and in view of this fact it

might not be proper for me to give an opinion affecting the rights of the parties interested before some final and definite action is taken by Congress or by the courts, as the case may be. I therefore refrain from expressing any view in the premises, except that in reference to the duties of your Department, as a branch of the executive power of the Government.

Courts, upon questions properly before them, and Congress, in the exercise of its legitimate power, may do certain things, for reasons which would not or could not influence the executive branch of the Government, and reasons might prompt the executive branch of the Government to a certain course, which might not operate, on the other hand, upon Congress or the courts. But in disposing of the public domain of the Government, and especially under a grant, or a supposed grant, by Congress, in case of doubt the Department should not part with the fee of the Government, but should withhold its action until the proper tribunal, whether courts or Congress, has disposed of the matter. (3 Opin., 102; 13 *ib.*, 430.)

So great is the doubt in this case that your Department, on the 10th of March last, arrested the proceedings under which patents were being issued and suspended all further action in that direction. No new light or information has been had upon this subject, so far as I am advised, since that time. The same doubt that existed then still exists, as I am assured by the very fact, if by nothing else, that, pending the suspension of proceedings, you ask my advice upon this proposition. That advice is, as I have already indicated, that you continue that suspension and do not isssue any more patents until the proper tribunals, courts or Congress, shall definitely settle the rights of parties in the premises.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

CLAIMS OF ELY MOORE AND OTHERS.

Where an account has once been duly adjusted, settled, and closed by the proper officers, upon a full knowledge of all the facts, and no errors of calculation have been made, it cannot be re-opened in the absence of statutory authority.

The provisions of the act of August 7, 1882, entitled "An act to authorize the auditing of certain unpaid claims against the Indian Bureau by the accounting officers of the Treasury," do not extend to the opening of settled accounts.

Upon the facts stated: *Advised* that no action whatever should be taken by the Executive Departments on the claim of Ely Moore and others for additional compensation for selling certain Indian trust lands, without legislation by Congress providing therefor.

DEPARTMENT OF JUSTICE,
July 7, 1885.

SIR: In a letter received from the Hon. H. L. Muldrow, Acting Secretary of the Interior, dated the 20th ultimo, relative to the matter of the claims of Ely Moore and others, as special registers and receivers, for additional compensation for selling certain Indian trust lands, my opinion is asked upon the following questions: "Whether these claims ought to be allowed by the Indian Office and passed to the accounting officers of the Treasury under the decision of the Supreme Court of the United States on March 3, 1884, together with interest on the amounts in dispute; whether they should be referred to the Court of Claims for decision; or whether any action whatever should be taken by the Executive Departments on these claims without further legislation by Congress providing therefor."

The Acting Secretary's letter was accompanied by a communication from the Commissioner of Indian Affairs (at whose request the above questions were submitted to me), dated the 19th ultimo, giving the history and facts of the cases as they are understood by his office, and also a number of other papers relating to the claims, all of which are returned herewith.

From these papers I gather the following facts in regard to the origin of the claims, the action hitherto had thereon, and their present condition.

By the treaty with the Delaware Indians of May 6, 1854, and also by the treaty with the Kaskaskia and Peoria, Piankeshaw and Wea Indians of May 30, 1854 (10 Stat., 1048, 1082), certain lands were ceded to the United States in trust, to survey, manage, and sell the same for the benefit of the Indians. The sale of these trust lands was to be conducted in the same manner as the sale of public lands, and the proceeds were to be paid to or invested for the Indians, after deducting therefrom the "cost of surveying, managing, and selling the same."

It appears that in October, 1856, Ely Moore was appointed by the Secretary of the Interior a special register and superintendent, and William Brindle a special receiver and superintendent, to assist in the sale of the *eastern* portion of the trust lands of the Delaware Indians under their said treaty; and that in May, 1857, the Secretary of the Interior appointed John W. Whitefield a special register and superintendent, and Daniel Woodson a special receiver and superintendent, to assist in the disposal of the *western* portion of the same trust lands under the same treaty. In May, 1857, the said Moore was also appointed by the Secretary of the Interior a special register and the said Brindle a special receiver and superintendent, to assist in the sale of the trust lands of the Kaskaskia and Peoria, Piankeshaw and Wea Indians under their treaty aforesaid.

Each of these special registers, at the time of his appointment, already held the office of register, and each of the special receivers, the office of receiver, in different land districts.

Whitfield, Woodson, and Brindle having claimed compensation for their services (the first as special register and the others as special receivers) in selling the trust lands aforesaid, the question arose, whether they were entitled to compensation for selling those lands in addition to the compensation received by them for the sale of public lands. This question, along with the accounts of Whitfield and Woodson, was submitted by the Commissioner of Indian Affairs to the Secretary of the Interior for his determination, and in a letter to the Commissioner dated May 8, 1861, the Secretary (citing *Converse* v. *United States*, 21 How., 464) decided that they

were entitled to additional compensation for the services mentioned; that, as no specific compensation was provided in the treaty, they were entitled to a reasonable one; and that the rate of compensation adopted by the Government for similar services furnished a fair rule to determine the amount which should be paid. He concluded by saying:

"I think the claimants should be allowed 1 per cent. commission upon the sales of the lands of each tribe, the maximum in any one year not to exceed $2,500, being the amount allowed by the United States. Their accounts will be adjusted accordingly, and the amount found to be due will be paid out of the respective Indian funds in proportion to the amount of the sales of each."

Subsequently the Commissioner of Indian Affairs submitted to the Secretary of the Interior the account of Ely Moore, then deceased, for compensation for his services as special register in selling the said trust lands. In a letter to the Commissioner dated June 6, 1862, the Secretary referred to his decision of May 8, 1861, in the cases of Whitfield and Woodson, and remarked that "if the account of Mr. Moore, now presented, involves the same principles as were settled by that decision, I see no objection to its allowance, and it is herewith returned to be paid accordingly."

The accounts of Moore, Whitfield, Woodson, and Brindle were adjusted and settled by the proper officers in conformity to the decision of the Secretary of the Interior above mentioned. In adjusting those of Moore, Whitfield, and Woodson, balances were found in favor of each of these persons, which were paid. In adjusting Brindle's account a balance was found to be due from him to the United States. In each account, it seems, a commission was claimed of 1 per centum upon the entire proceeds of the sale, and in the adjustment thereof the same commission was allowed, but not to exceed the sum of $2,500 in any one year, the excess being disallowed.

I understand that it is *the excess thus disallowed*, with interest thereon, which constitutes the subject-matter of the claims of Ely Moore and others, referred to in the questions proposed. And as the allowance of these claims would involve the *reopening of accounts* long since settled and closed,

the answer to those questions must necessarily depend upon whether sufficient ground exists to warrant such action.

The only ground relied upon is the decision of the Supreme Court in the case of *United States* v. *Brindle* (110 U. S. Rep., 688), the defendant in that case being one of the special receivers above named.

In May, 1877, suit was brought by the United States against Brindle in the United States district court for the eastern district of Pennsylvania, to recover certain balances (amounting in the aggregate to $9,251.68) claimed to be due from him as receiver of public moneys. Whilst this suit was pending in that court, Congress passed an act (dated June 10, 1878, chapter 179) providing that "in the trial of said cause the said court shall hear and determine all disputes and differences between the United States and the said William Brindle in reference to his various accounts as receiver and acting disbursing agent of public money in the Pawnee land district in Kansas, and also in relation to his accounts as special receiver of Indian trust moneys received and expended under the Indian treaties of May 6 and May 30, 1854, as well under said Indian treaties as under the laws of the United States; and the said William Brindle, in the trial of said cause, shall be permitted and be entitled to make defense and claim set off in his favor in said court, if said court shall determine him to be entitled thereto, with the same effect as if said suit were commenced by an individual against the said William Brindle, and said set-off shall not be barred by any statute of limitations. And should the said court, in the said trial, determine that there is a balance due to the said William Brindle upon said accounts, the court shall certify the amount so found to be due to him to the Secretary of the Treasury of the United States, for payment, out of any moneys in the Treasury not otherwise appropriated, reserving, nevertheless, the right of appeal to either party from the judgment of the said court."

The defendant, among other defenses, pleaded set-off, under which plea he claimed that a large sum was due to him from the United States as receiver of public moneys, and also that a further sum was due to him as special receiver of Indian trust moneys as aforesaid. At the trial the jury found a

special verdict, upon which the court entered judgment *pro forma* in favor of the defendant. The cause was then brought by writ of error before the United States circuit court for the district aforesaid, which affirmed the said judgment; whereupon it was carried by writ of error before the Supreme Court.

The judgment of the court below was for the largest sum awarded by the jury in their alternative findings, and embraced an allowance of "military land-warrant fees exceeding $2,500 per year, including commissions on cash sales of public lands," and also an allowance of "commissions on sales of Indian trust lands exceeding the sum of $2,500, for each sale of said lands."

The Supreme Court held that the defendant, as receiver of public moneys, was not entitled to the military bounty land fees received by him during his term of office, over and above the amount required, with his commissions on cash sales of public lands, to make up his annual salary of $2,500 per year; but that he was entitled to commissions on sales of Indian trust lands in addition to his compensation as such receiver of public moneys, that by express provisions in the treaties the expenses incurred by the United States in making the sales were to be paid from the proceeds, which clearly implied the payment of a reasonable compensation for the services of those employed to carry the trust into effect.

Among other *facts* found in the special verdict was the following: "That for the labor and risk of making sales of Indian trust lands 1 per cent. commissions on the amount of such sales is a fair compensation." Adopting this as the sole basis for computing defendant's compensation, the jury (in an alternative finding different from the one on which the judgment below was rendered) found a certain balance due him for that service.

The judgment of the court below was reversed, and the cause remanded with directions to enter another judgment in favor of the defendant for the balance so found.

In so far as the decision of the Supreme Court in the case of *United States* v. *Brindle* relates to the matter of compensation for making sales of Indian trust lands, there is no conflict whatever between it and the decision of the Secretary

of the Interior hereinbefore mentioned on any question of *law*. On a question of *fact* which was directly involved, namely, what is a fair compensation for such service, there is a difference between the determination of the Secretary and the finding of the jury. Yet, as it was not for the court to find the facts (nor did it assume to do so), but only to declare the law on the facts found by the jury, so its decision, being of necessity confined to the facts thus found, cannot properly be regarded as in itself conflicting with the determination of the Secretary just referred to. Therefore, if any ground exists in that case for re-opening the accounts of claimants, it is to be found in the special verdict of the jury, not in the decision of the court.

It has been held that when an account has once been duly adjusted, settled, and closed by the proper officers, upon a full knowledge of all the facts, and no errors of calculation have been made, such account can not be reopened in the absence of statutory authority (12 Opin., 386; see also 3 Opin., 148, 461), and administrative practice has accorded with that view. On this subject Attorney-General Grundy observed: "It is undoubtedly a good general principle of law, as well as of expediency, not to say absolute necessity, that the accounting officers, as well as all other responsible executive officers, should, as far as possible, refrain from disturbing, unsettling, or reversing any of the official determinations of their predecessors; and if in the observance and preservation of this wholesome general rule, injustice shall be done to any person, it will be far better for the aggrieved individual to seek redress at the hands of Congress, than to place the whole past transactions of the accounting officers in an unsettled condition. By which means, not only would great, and perhaps inextricable, confusion be introduced into the transactions of these officers, but in the resettlement of accounts might great injustice be done in many cases, to individuals as well as to the Government." (3 Opin., 462.) Indeed there is no rule more firmly and thoroughly settled in the administration of the Government than this. (*Ex parte Randolph*, 2 Brock., 473; *United States* v. *Bank*, etc., 15 Peters, 401; 9 Opin., 412; *Swift Company* v. *United States*, 105 U. S. 694, 695.)

From these considerations, it must follow that the mere

circumstance that the finding of the jury differs from the previous determination of the Secretary of the Interior, upon the question of what was a fair compensation for the service of selling the Indian trust lands, is not sufficient ground to authorize the reopening of an account settled in accordance with such determination, with a view to a readjustment of it in accordance with such finding; and no other ground is presented by the special verdict.

In this connection, I remark that there is no statute from which such authority can be derived. The provisions of the act of August 7, 1882, entitled "an act to authorize the auditing of certain unpaid claims against the Indian Bureau by the accounting officers of the Treasury," do not extend to the opening of settled accounts.

The result at which I arrive is that no valid ground exists for reopening the accounts of the claimants; in view of which I am of the opinion that no action whatever should be taken on their claims by the Executive Departments without legislation by Congress providing therefor. Agreeably to this opinion, the first and second of the questions submitted must be answered in the negative.

And I beg leave to say, that although there are additional papers before me touching this case, since I considered it on 5th May last, yet they do not in the least change the legal aspect of the matter, but they do rivet the conclusion I then reached, somewhat doubtingly, on the imperfect record presented.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

CASE OF LIEUT. S. C. ROBERTSON.

This case reconsidered in the light of new and material facts; and it appearing that there has been no such settlement of his account as was heretofore supposed: *Held*, that Lieutenant R. is bound to refund the sum which has been paid him without authority of law.

DEPARTMENT OF JUSTICE,
July 7, 1885.

SIR: I have reconsidered the case of Lieut. S. C. Robertson in the light of the new facts appearing in the letter to you

from the Second Comptroller of the 27th April, ultimo, and by your reference now before me.

My opinion of the 22d April, ultimo, proceeded on what turns out to have been a mistaken inference from the Second Comptroller's letter of the 10th April, ultimo, then before me, by your reference, that there had been a settlement between Lieutenant Robertson and the accounting officers of the Government, touching the alleged unauthorized payment to him of waiting-orders pay for a period when he was only entitled to leave-of-absence pay. It appearing that there has been no such settlement, the whole matter is at large, and Lieutenant Robertson is bound to refund the sum of $281.25, which has been paid him without authority of law.

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

SHEYENNE ISLAND, MISSOURI RIVER.

At the date of the Sioux treaty of April 29, 1868, Sheyenne Island was within the reservation thereby established, the east line of which was the east bank of the Missouri River at low-water mark. The island having since gradually become attached to the mainland on the east bank of the river, so that it is wholly surrounded by water only in seasons when the water is high, the low-water mark is now on the west side of the island instead of the east side as formerly: *Held* that the island is still a part of the reservation, notwithstanding the abandonment of its former channel on the east side of the same; whether the island now belongs to the reservation being determinable by the line of low-water mark on the east bank of the Missouri, not according to the present course of that river, but according to its course at the date of the treaty.

DEPARTMENT OF JUSTICE,
July 14, 1885.

SIR: I have considered the question proposed by the Hon. H. L. Muldrow, Acting Secretary of the Interior, in a letter to me dated the 27th ultimo, which has arisen upon the following case stated by the Commissioner of Indian Affairs in a communication dated the 25th ultimo:

"It appears that at the date of the Sioux treaty of April 29,

1868 (15 Stat. 635), a certain island in the Missouri River, situate about 3 miles south of the mouth of Sheyenne River, and known as Sheyenne Island, was within the boundary lines of the reservation thereby set apart for the absolute and undisturbed use and occupation of the Indians, parties to said treaty, and for such other Indians as they might be willing to admit amongst them. The east bank of the Missouri River *at low-water mark*, from the forty-sixth parallel of north latitude to a point opposite where the north line of Nebraska strikes the river, was, by the terms of the treaty, to constitute the east line of the reservation. At the date of the treaty, Sheyenne Island was, at all stages of the river, entirely surrounded by water, the low-water mark of the river being east of the island, and until quite recently it has never been disputed that the island belonged to the reservation. But it appears that the island has gradually become attached to the mainland on the east bank of the river, so that it is wholly surrounded by water only in seasons when the river is high. The low-water mark is now found to be on the west side of the island instead of the east side, as formerly."

The question proposed is, "whether the island is still a part of the reservation or whether it has become a part of the public domain."

In reply thereto I now have the honor to submit, that, as the island formed a part of the reservation at the time the boundaries of the latter were established, it must still be deemed to be a part thereof, notwithstanding the fact that subsequently the river has so far abandoned the channel on the east side of the island that its waters flow there "only in seasons when the river is high." In other words, whether the island now belongs to the reservation is determinable by the line of low-water mark on the east bank of the Missouri, not according to the present course of that river, but according to its course at the date of the treaty. The principle applicable here is the same that applies where a river, which has been made the boundary between two nations, afterwards abandons its bed and forms a new one in a different direction; in such case the old bed continues to serve as the boundary. (Bluntschli, Droit International, sec. 299; Hefftter, sec. 66.) This principle was adopted and applied by the

Supreme Court in the case of *Missouri* v. *Kentucky* (11 Wall., 395, 401), in deciding as to which of those States Wolf Island belonged.

If, instead of being included in the reservation, the island had been embraced by a grant to an individual, the boundaries whereof extended to low-water mark on the east bank of the Missouri, it would hardly be contended that his ownership of the island became extinguished, and that it became reunited to the public domain on the subsequent abandonment by the river of the channel between the island and said bank. Such a proposition is countenanced by no rule of law. Obviously the hypothetical case of the grant, as above, does not differ essentially from the actual case of the reservation.

Therefore, in my opinion, the island in question is still a part of the Sioux Reservation.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

SPECIAL AGENTS—INDEPENDENT TREASURY.

The appropriation for "contingent expenses, independent treasury," is not applicable to the payment of expenses of special agents of the Treasury employed to investigate the affairs of sub-treasurers.

DEPARTMENT OF JUSTICE,
July 14, 1885.

SIR: Your communication of the 10th instant, with a statement, has been received, and the matter has been duly considered. The question that you desire my opinion upon arises upon the following state of facts:

The Secretary of the Treasury found it necessary, in May and June, 1885, to send a party of experts to New Orleans to make an examination or investigation of the affairs of the sub treasury in that city. The examination was made necessary on account of the absconding of the redemption clerk of that office, and the default of a considerable amount. On their way back from New Orleans the experts stopped at St. Louis, Chicago, and Cincinnati and examined the sub-treasuries in those cities.

The expenses incurred in making these examinations amounted to several hundred dollars more than the balance remaining to the credit of the appropriation, "Salaries of special agents, independent treasury, 1885," from which such expenses are properly and usually paid. The only other available appropriation at all applicable, it would seem, is "Contingent expenses, independent treasury, 1885."

Question: Can the expenses be paid from the latter-named appropriation? The First Comptroller holds that they cannot.

The first appropriation is: "*Salaries of special agents, independent treasury.* Compensation of special agents to examine the books, accounts, and money on hand at the several sub-treasuries and depositaries, including national banks acting as depositaries, under the act of August 6, 1846."

The second appropriation is: "*Contingent Expenses Independent Treasury.* Contingent expenses under the act of August 6, 1846, for the collection, safe-keeping, transfer, and disbursement of the public money, and for transportation of notes, bonds, and other securities of the United States."

The expenses incurred about which inquiry is made were for examining books, accounts, etc., of "several sub-treasuries," and not for "collection, safe-keeping, transfer, and disbursement of the public money," nor for transportation of national securities.

The "salary" appropriation is for the examination of sub-treasuries, and the sum appropriated is all that Congress saw fit to give for that specific purpose, and this expression of their will excludes the inclusion of all other expenses.

It is not seen how the contingent appropriation is at all applicable or available.

The conclusion is that if services have been rendered under the salary appropriation beyond the amount appropriated for, unintentionally, it is a deficiency for which Congress may be asked to appropriate, and I do not see how otherwise, under the law, its payment can be provided for.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

AMERICAN SHIPPING.

Foreign-built vessels owned by citizens of the United States are not within the provisions of the act of June 26, 1884, chapter 121, forbidding the collection of fees by consular officers from American vessels.

DEPARTMENT OF JUSTICE,
July 20, 1885.

SIR: In answer to your letter of July 16, 1885, asking my attention to letters from the Department of State dated December 30, 1884, February 2 and 28, 1885, relative to the question of the collection of consular fees from foreign-built vessels owned by citizens of the United States, I beg leave to refer to the opinion of my predecessor, dated February 5, 1885.

Vessels not built in the United States owned by citizens of the United States are recognized by the statutes of the United States as a class of sea going vessels. They are the property of American citizens, entitled to bear the flag and receive the protection of the Government. (6 Opin., 638; 16 *ib.*, 533; Consular Reg. (1881), sec. 344.) But with the exceptions made in the statute they are not "vessels of the United States." (Rev. Stat., secs. 4132–4133.) Are they "American vessels" within the meaning of the twelfth section of the act, chapter 121, approved June 26, 1884?

A careful examination of the statutes convinces me that the expressions "vessel or ship of the United States," "American vessel of the United States," and "American vessels" are used synonymously and apply only to regularly documented vessels. And in the Revised Consular Regulations (1881), section 200, for the purpose of those regulations the terms "American vessel" and "vessel of the United States" are declared synonymous. In both statutes and regulations are many provisions relative to foreign-built ships owned by American citizens and the designation is in that distinctive language. In the statute, the twelfth section of which is under consideration, both terms, "vessel of the United States" and "American vessel" are used, and in view of the previous statutes and regulations must be considered, I think, as used interchangeably.

I conclude, therefore, that foreign-built vessels owned by citizens of the United States are not embraced in the provisions of the act of 1884, forbidding the collection of fees by consular officers from American vessels.

I have the honor to be, very respectfully,

A. H. GARLAND.

The SECRETARY OF STATE.

LEASE OF INDIAN LANDS FOR GRAZING PURPOSES.

There is no law empowering the Interior Department to authorize Indians to lease their lands for grazing purposes.

Neither the President nor the Secretary of the Interior has authority to make a lease, for such purposes, of any part of an Indian reservation; nor would their approval of any such lease made by Indians render it lawful and valid.

DEPARTMENT OF JUSTICE,
July 21, 1885.

SIR: By your letter of the 8th instant, inclosing a communication from the Commissioner of Indian Affairs of the 7th, the following questions are at his suggestion submitted to me with request for an opinion thereon:

"Whether there is any law empowering the Interior Department to authorize Indians to enter into contract with any parties for the lease of Indian lands for grazing purposes; and also whether the President or the Interior Department has any authority to make a lease for grazing purposes of any part of any Indian reservation, or whether the approval by the President or the Secretary of the Interior would render any such lease made by Indians with other parties lawful and valid."

These questions are propounded with reference to certain Indian reservations, namely:

(1) The Cherokee lands in the Indian Territory west of the ninety-sixth degree of longitude, except such parts thereof as have heretofore been appropriated for and conveyed to friendly tribes of Indians.

(2) The Cheyenne and Arapahoe reservation in the Indian Territory.

(3) The Kiowa and Comanche reservation in the Indian Territory.

Our Government has ever claimed the right, and from a very early period its settled policy has been, to regulate and control the alienation or other disposition by Indians, and especially by Indian nations or tribes, of their lands. This policy was originally adopted in view of their peculiar character and habits, which rendered them incapable of sustaining any other relation with the whites than that of dependence and pupilage. There was no other way of dealing with them than that of keeping them separate, subordinate, and dependent, with a guardian care thrown around them for their protection. (3 Kent Com., 381; *Beecher* v. *Wetherby*, 95 U. S., 517, where most of the cases on this subject are cited and discussed.)

Thus in 1783 the Congress of the Confederation, by a proclamation, prohibited "all persons from making settlements on lands inhabited or claimed by Indians, without the limits or jurisdiction of any particular State, and from purchasing or receiving any gift or cession of such lands or claims without the express authority and directions of the United States in Congress assembled," and declared "that every such purchase or settlement, gift, or cession, not having the authority aforesaid, is null and void, and that no right or title will accrue in consequence of any such purchase, gift, cession, or settlement." By section 4 of the act of July 22, 1790, chapter 33, the Congress of the United States enacted "that no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any State, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." A similar provision was again enacted in section 8 of the act of March 1, 1793, chapter 19, which by its terms included "any purchase or grant of lands, or of any title or claim thereto, from any Indians, or nation or tribe of Indians within the bounds of the United States." The provision was farther extended by section 12 of the act of May 19, 1796, chapter 30, so as to embrace any "purchase, grant, *lease*, or other conveyance of lands, or of

any title or claim thereto." As thus extended, it was re-enacted by the act of March 3, 1799, chapter 46, section 12, and also by the act of March 30, 1802, chapter 30, section 12.

In the above legislation, the provision in terms applied to purchases, grants, leases, etc., from individual Indians as well as from Indian tribes or nations; but by the twelfth section of the act of June 30, 1834, chapter 161, it was limited to such as emanate "from any Indian *nation* or *tribe* of Indians." And the provision of the act of 1834, just referred to, has been reproduced in section 2116, Revised Statutes, which is now in force.

The last-named section declares: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

This statutory provision is very general and comprehensive. Its operation does not depend upon the nature or extent of the title to the land which the tribe or nation may hold. Whether such title be a fee simple, or a right of occupancy merely, is not material; in either case the statute applies. It is not therefore deemed necessary or important, in connection with the subject under consideration, to inquire into the particular right or title to the above-mentioned reservations held by the Indian tribes or nations respectively which claim them. Whatever the right or title may be, each of these tribes or nations is precluded, by the force and effect of the statute, from either alienating or leasing any part of its reservation, or imparting any interest or claim in or to the same, without the consent of the Government of the United States. A lease of the land for grazing purposes is as clearly within the statute as a lease for any other or for general purposes, and the duration of the term is immaterial. One who enters with cattle or other live stock upon an Indian reservation under a lease of that description, made in violation of the statute, is an intruder, and may be removed therefrom as such, notwithstanding his entry is with consent of the tribe. Such consent may exempt him from the penalty imposed by section 2117, Revised Statutes, for taking his stock

there, but it can not validate the lease, or confer upon him any legal right whatsoever to remain upon the land; and to this extent and no further was the decision of Judge Brewer in *United States* v. *Hunter*, 21 Fed. Rep., 615.

But the present inquiry in substance is, (1) whether the Department of the Interior can authorize these Indians to make leases of their lands for grazing purposes, or whether the approval of such leases by the President or the Secretary of the Interior would make them lawful and valid; (2) whether the President or the Department of the Interior has authority to lease for such purposes any part of an Indian reservation.

I submit that the power of the Department to authorize such leases to be made, or that of the President or Secretary to approve or to make the same, if it exists at all, must rest upon some *law*, and therefore be derived from either a treaty or a statutory provision. I am not aware of any treaty provision applicable to the particular reservations in question that confers such powers. The Revised Statutes contain provisions regulating contracts or agreements with Indians and prescribing how they shall be executed and approved (see sec. 2103); but those provisions do not include contracts of the character described in section 2116, hereinbefore mentioned. No general power appears to be conferred by statute upon either the President or Secretary, or any other officer of the Government, to make, authorize, or approve leases of lands held by Indian tribes; and the absence of such power was doubtless one of the main considerations which led to the adoption of the act of February 19, 1875, chapter 90, "to authorize the Seneca Nation of New York Indians to lease lands within the Cattaraugus and Allegany Reservations and to confirm existing leases." The act just cited is moreover significant as showing that in the view of Congress Indian tribes cannot lease their reservations without the authority of some law of the United States.

In my opinion, therefore, each of the questions proposed in your letter should be answered in the negative, and I so answer them.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

IMMIGRANT ACT.

Where it appeared that an immigrant from a foreign State was convicted of an offense there, sentenced to imprisonment, and after having served a portion of his sentence was given an unconditional pardon: *Held* that section 4 of the act of August 3, 1882, chapter 376, and section 5 of the act of March 3, 1875, chapter 141, do not forbid his landing in the United States.

DEPARTMENT OF JUSTICE,
July 23, 1885.

SIR: Your letter of the 20th instant has been received, in which you inquire whether section 4 of the act approved August 3, 1882, and section 5 of the act approved March 3, 1875, relating to foreign immigration, forbids the landing in the United States of the immigrant F. A. H. Behncke, the circumstances attending whose arrival at New York City are detailed in the papers forwarded by you and which are herewith returned.

The facts disclose that he was guilty of embezzlement, sentenced to imprisonment, served a portion of the sentence, and was pardoned.

The turning point in the case is whether or not Behncke was pardoned upon condition of emigration. A doubt may arrise from his own statement. The officials at New York apparently do not entertain this doubt, but agree in the statement that his case does not fall within the clauses prohibiting immigration.

If his papers were examined and passed upon officially by the United States consul at Bremen, it is presumptive evidence that his pardon was unconditional, as he asserts, as the fact would be notorious. Such presumption is borne out by the additional supposition that the Government would not pardon a man whose offense was simply embezzlement in order to get him out of the country, such conditional pardons being usually granted in cases of a higher grade of criminals, whose presence in the country would be a menace to the constituted authorities.

The pardon for an offense committed here would relieve him of the act and its consequences—in fact, would, in legal contemplation, blot out the offense (*Knote* v. *United States*, 95 U. S., 153; *United States* v. *Padelford*, 9 Wall., 542; *Ex-*

parte Garland, 4 Wall., 333); and like effect must be given to the pardon by a foreign State of an offense within its jurisdiction. (Wharton Confl. Laws, sec. 831; Bar International Law, 684, 692–693.)

The recognition of a pardon pronounced abroad is founded upon consideration of the general security of intercourse, and would lead to a liberal application of the statute in this case. This view, if not in conflict with other evidence not yet presented, indicates that Mr. Behncke should be permitted to land.

The desire expressed by you to have a rule stated in this case which shall be a standard for application to similar cases is, perhaps, one that can not be met by general statement. Similar cases must be governed to a large extent by the circumstances attending them, and are matters for your official discretion.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

CONTRACT WITH JOHN ROACH.

Opinion of June 30, 1885, touching the contract with Mr. John Roach for building the *Dolphin* (*ante*, p. 207), reaffirmed.

DEPARTMENT OF JUSTICE,
July 28, 1885.

SIR: I have considered with much care the law and the contracts in reference to the building of certain vessels undertaken by Mr. John Roach, which you were kind enough to send me on last Saturday for my examination. Considering these matters in connection with the conversation we had respecting some settlement with Mr. Roach, I have this to say: that in the opinion I have already given you touching the *Dolphin* the principle is laid down that the law providing for the building of that and the other vessels is the basis, and the only basis, upon which the contract to build them could be rested. That is the chart by which these matters are to be examined and finally determined, both as to the Government and as to the contractor. If the contract is a bad one,

or an improvident one, or amounts to no contract in law, it is to be regretted, of course; but the consequences are not for this Department nor for the Navy Department to consider, unless, possibly, in interpreting a doubtful statute.

There was no doubt in my mind, nor is there now, as to the exposition I gave you in that opinion of the law and the supposed contract under it. With the consequences of that decision, of course, I was not concerned, and could not be, as a public official. There is nothing left, in my judgment, but a following of that law and a strict enforcement of it. Generally there is no power in a Department to compromise differences arising in the execution of contracts, and in the absence of a clear conferring of such power the Department could not exercise it. The law in this case leaves no margin, as I view it, for the exercise of any such power, or for the adjustment of these matters upon "business principles" as between individuals. Individuals, dealing with their own affairs, of course, can change their contracts and make them more or less elastic, to suit their convenience. In these particular matters Mr. Roach might yield certain advantages, but I do not see how the Navy Department, acting under a law for a specific purpose, can do anything of the sort to bind the Government. It would be a responsibility that your Department would assume which Congress might approve, but Congress failing to approve it would leave the Department in a very awkward attitude regarding these subjects.

Therefore I do not see that there is any room for a conference between yourself and Mr. Roach (or his assignees) looking to any adjustment of these matters, only as indicated by the opinion I have already given in the case of the *Dolphin*. The only remedy is the enforcement of the law as therein indicated. You might yourself see every propriety and every advantage to the Government, in recognizing any and all of these contracts, and in yielding certain things in them, if you had the power; but not having the power, whatever the advantage might be to the Government, you cannot well enter into an adjustment with Mr. Roach, or his assignees, outside of the course indicated by the opinion referred to. Of course that opinion is broad and far-reaching; but not more so than the inquiry and the subject matters of it justi-

fied; and if that be the state of the law, as I am persuaded it is, it is not your fault nor mine that Mr. Roach is injured, or that the Government is injured or embarrassed.

In this view of the subject, a conference between yourself, as Secretary of the Navy, and myself, as Attorney-General, and the assignees of Mr. Roach, would be unnecessary, as I could not give any opinion looking in the least to any deviation or relaxation of the law upon which these contracts are supposed to be based. Of course, if upon any point or points arising upon this law, or the supposed contracts under it, the Navy Department should desire an opinion from me, it would be most cheerfully and readily given; but it occurs to me that in the opinion I have heretofore rendered to you the question is pretty well settled, so far as the *Dolphin* is concerned, and also in regard to the other vessels, as far as the facts respecting them are the same with those in the *Dolphin* case.

I return with this the two books that you sent me.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE NAVY.

INDIAN CONTRACT.

Upon the facts of the case as presented: *Advised*, that the contract relating to certain coal mines at Savanna, Choctaw Nation, between Mrs. A. G. Ream and her husband and the Atoka Coal Mining Company, dated November 3, 1883, be considered as in full force for the period for which it was executed and approved by the Commissioner of Indian Affairs and Secretary of the Interior.

DEPARTMENT OF JUSTICE,
July 29, 1885.

SIR: Your communication to me of the 9th instant, through the Acting Secretary of the Interior, Hon. H. L. Muldrow, touching the matter of certain coal mines at Savanna, Choctaw Nation, Indian Territory, has been received and duly considered. The question propounded to me by such communication is: Ought the contract, executed November 8, 1883, between Mrs. A. G. Ream and Robert L. Ream, jr.,

her husband, and the Atoka Coal and Mining Company, to be considered as in full force for the period for which it was executed, and approved by the office of the Commissioner of Indian Affairs, notwithstanding the decision of the supreme court of the Choctaw Nation?

From the record before me it appears that a suit was pending between certain parties in reference to these coal mines, in the courts of the Choctaw Nation, through the years of 1881–'84, inclusive. During this time the contract referred to, in favor of Mrs. Ream (that is, the one dated November 8, 1883), was executed, and it was approved by the Commissioner of Indian Affairs and the Secretary of the Interior in due form of law. It does not appear that this agreement was before the court of the Choctaw Nation in any manner; in fact, the papers which I have are silent as to this fact.

It is a presumption universally indulged that the Executive Departments, in the transaction of business, act according to law; and this presumption is particularly strong when one Department is passing upon and considering the action of another Department. It is therefore to be concluded that the Department of the Interior, in ratifying and approving this contract of November 8, 1883, did what the law authorized to be done; and I have nothing before me to rebut that conclusion.

This contract was either before the court of the Choctaw Nation or it was not. If it was before that court, very strong and cogent reasons should be furnished why that court ignored or set it aside; and no reasons of any kind appear in the papers submitted to me. If it was not before that court, any action by that court, nullifying or avoiding it, would amount to nothing. So, in either view of the case, I find nothing to justify the Department in rejecting or canceling that agreement; and therefore the question propounded to me is answered in the affirmative.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

CONSTRUCTION OF VESSELS FOR THE NAVY.

Where a statute authorizes the building of vessels by the Navy Department, but makes no provision for procuring the necessary plans and specifications therefor, it is to be construed as impliedly authorizing the head of the Department to procure such plans and specifications in the mode and manner which he shall deem best.

DEPARTMENT OF JUSTICE,
July 30, 1885.

SIR: Touching the question which you submitted to the Cabinet the other day, and more particularly to myself, as to your power or authority to provide for and procure plans and specifications, in your own way, for the building of certain vessels by the Navy Department, I wish to say, that after full examination of it I am not able to find, in any of the laws as to these vessels, any provision for procuring plans and specifications, nor do I find in any of the laws prescribing the duties of different officers of your Department anything providing for the procuring of these plans and specifications.

Usually, as a general rule, such provision is made in the laws providing for the building of cruisers or vessels. In the absence of any provisions of this sort, the power delegated to you to build vessels would take with it the right to execute that power in the mode and manner you should deem best. Judge Curtis states the general proposition in these words: "When it comes to a question whether a power exists, the particular mode in which it may be exercised must be left to the will of the body (or person) that possesses it;" and he quotes from Chief-Justice Marshall to sustain this position. (2 Life and Writings of B. R. Curtis, 374.) Similar views, conveying the same idea, are to be found in 1 Story on the Constitution, by Cooley, pp. 430, 431; 2 *ib.*, 1211.

As plans and specifications are necessary to insure the building of vessels, to accomplish the purpose for which they are to be used, it would follow as a matter of course that the power to build these vessels, given you by the law, would carry, without any expressions to that effect, the authority to procure the plans and specifications, as you see proper.

The proposition could be stated in different ways, and

could be illustrated by many citations, but I deem it unnecessary; and conclude, that you have this authority, beyond any doubt.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE NAVY.

CIVIL SERVICE.

The act of January 16, 1883, chapter 27, to regulate and improve the civil service of the United States, repeals by implication section 164, Revised Statutes.

DEPARTMENT OF JUSTICE,
August 1, 1885.

SIR: Your communication of yesterday submits to me this question: Is section 164 of the Revised Statutes repealed or abrogated by the provisions of the act to regulate and improve the civil service of the United States, approved January 16, 1883 (chap. 27, Stat. L., vol. 22, p. 403.).

Section 164 of the Revised Statutes provides a certain manner for the examination and the appointment of clerks specified in section 163, which says that clerks in the Departments shall be arranged in four classes, distinguished as the first, second, third, and fourth classes. Hence it seems that section 164 has reference entirely to the clerks named in section 163. The act to regulate and improve the civil service of the United States, familiarly called "the civil service act," seems to deal with the entire subject that section 164 referred to. It is true there is no repeal, in so many words, of section 164, by the "civil service act;" but under that rule which recognizes that a statute that undertakes to provide for an entire subject-matter repeals all former laws or statutes upon that subject, it would seem that section 164 is repealed by the "civil service act." It was certainly the intention of Congress to make a new law upon this subject to embrace all that was intended under section 164, and to repeal all other laws on the subject. (*Murdock* v. *City of Memphis*, 20 Wallace, 617.)

Then another rule somewhat similar, but of a little wider scope, is this: When there are two acts of Congress on the

same subject, and the later embraces what is contained in the first, and also new provisions, the later act operates, without any repealing clause, as a repeal of the first. (*United States* v. *Tynen*, 11 Wall., 88, *et seq.*)

It can not be supposed that Congress intended these two different modes of procedure to be pursued, when it undertook, in the later act, to regulate this very subject as a part of the civil service. The two are entirely inconsistent, and both can not stand; and the later must prevail.

I must conclude, therefore, that section 164 is as completely repealed as if repealing words had been incorporated in the act of January 16, 1883.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

INTERNAL REVENUE.

Where the holders of distilled spirits, bonded for exportation, shall have failed within the seven months specified in the bond (given under the regulations of internal revenue circular No. 282) to withdraw such spirits in fact from the distillery warehouse, a forfeiture of the bond follows, and the spirits are not protected from the domestic tax.

Upon application of the principal and sureties on such bond, and for good cause shown, the Commissioner of Internal Revenue may, under existing regulations, extend the time named in the bond beyond seven months.

The spirits covered by an exportation bond, after the failure to withdraw them and after the forfeiture of the bond, are liable to distraint under the act of May 28, 1880, chapter 108.

The condition of the bond having been broken by the failure to withdraw the spirits, the Government may also proceed upon the bond.

DEPARTMENT OF JUSTICE,
August 5, 1885.

SIR: I make the following extract from your letter of the 28th ultimo:

"Under the provisions of section 3330, Revised Statutes, the act of June 9, 1874, amendatory thereof (18 Stat., 64), the holders of distilled spirits on which the tax has not been paid are allowed to export them in bond or transport them

in bond to a port of export for exportation;" and then you ask for an opinion on three questions.

Answer to the first question: In the event that holders or owners of such spirits shall have failed within the seven months specified in the bond (given under the regulations of the internal revenue circular No. 282) to withdraw them in fact from the distillery warehouse, a forfeiture of the bond follows, and the spirits are not protected thereafter from an obligation for a domestic tax. The effect of the bond while in force and before forfeiture is to free the spirits from such obligation, but this effect ceases upon the forfeiture of the bond. Any other construction, it is respectfully submitted, would be an evasion of the statute. (*Meredith* v. *United States*, 13 Peters, 486.)

The Commissioner of Internal Revenue, with the assent of the Secretary of the Treasury, by circular No. 282, above referred to, has already provided for the assessment of spirits, covered by transportation or exportation bond, when they have not been withdrawn from the warehouse within the time named in the bond for the delivery at the port from which they are to be exported, and I see no sufficient reason for disturbing this regulation.

Upon the application of the principal and sureties on such bond and for good cause shown, the Commissioner of Internal Revenue may, under existing regulations, extend the time named in the bond beyond seven months. If the bond should become forfeited, and the time should not be extended as above indicated, the presumption would arise that the intention to export had been abandoned, and the Government should assess the taxes due upon the spirits and take steps to collect the same with interest as provided by circular 282.

Second. I am of opinion that the spirits covered by exportation bond after the failure to withdraw them, and after the forfeiture of the bond, are liable to distraint, under provisions of section 4 of the act of May 28, 1880. (21 Stat., 145, 146.)

Third. I answer that the condition of the bond having been broken by the failure to withdraw the spirits from the warehouse, the right of the Government to proceed upon the bond is unquestioned. At the same time, of course, the tax can be collected by distraint, and as the latter mode is most

expeditious, it would be advisable to resort to it first. (16 Opin., 634, 635.)

It is to be said, as a general rule in matters of this kind, that the construction of these statutes must be such as is most favorable to their enforcement. There is no liberal interpretation in favor of the individual to be indulged in; but, as statutes for the accomplishment of great public purposes, they must be construed in a manner to reach those purposes, and to carry out the intention of the legislature in passing them. (*Taylor* v. *United States*, 3 Howard, 210; *Cliquot's Champagne*, 3 Wall., 114; *United States* v. *Hodson*, 10 Wall., 406; *Smythe* v. *Fiske*, 21 Wall., 380.) As a rule deducible from these decisions, the Government loses none of its remedies to collect its revenue or debt unless there is an express repeal or abrogation of some existing remedy. This is discussed in the opinion of my predecessor already referred to. (16 Opin., *supra*. See also *United States* v. *Herron*, 20 Wall., 251; *Dollar Savings Bank* v. *United States*, 19 *ib.*, 227; 13 Peters, *supra*.)

In view of these authorities, I feel that there is no doubt as to the correctness of the answers given above to your letter of the 28th ultimo.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

MAIL TRANSPORTATION.

The authority to make contracts for carrying the mail between ports of the United States and foreign ports, given by section 4007, Revised Statutes, is limited by section 4009, Revised Statutes, with respect to the amount of compensation; so that in such contracts under the former section no greater compensation can be allowed to American steam-ship lines than the sea and inland postage upon the mail transported.

DEPARTMENT OF JUSTICE,

August 7, 1885.

SIR: By your letter of the 1st instant my attention is called to sections 4007 and 4009, Revised Statutes, with a request for an opinion upon the question whether the author-

ity to make contracts under the former section is limited by the latter upon the point of compensation; in other words, whether in making contracts, after advertisement, under section 4007, you are at liberty to award to American steam ship lines a greater compensation than the sea and inland postage upon the mail transported.

In response to this request, I have the honor to state that, upon examination of those sections, I reach the conclusion that section 4009 was intended to limit, "upon the point of compensation," the authority conferred by section 4007. This view appears to me to be not only in harmony with the language employed in those sections, but to be greatly strengthened by a reference to the statutes on the subject of foreign mail transportation which were the subjects of revision.

Those sections embody provisions which originated with the acts of March 3, 1845, chapter 69, and June 14, 1858, chapter 164. The act of 1845 gave the Postmaster-General authority "to contract for the transportation of the United States mail between any of the ports of the United States and a port or ports of any foreign power whenever, in his opinion, the public interest will thereby be promoted." It prescribed no limitation in regard to the amount of compensation to be allowed for such transportation. The act of 1858, however, restricted the authority of the Postmaster-General in that regard (see sections 4 and 5). The fifth section of the last-mentioned act authorized him to allow for such transportation, if by an American vessel, the sea and United States inland postage, and if by a foreign vessel, the sea postage only on the mails conveyed. The provisions of this section were re-enacted by section 4 of the act of June 15, 1860, chapter 131, and extended so as to include transportation between ports of the United States, touching at a foreign port. By section 9 of the act of March 3, 1865, chapter 89, the fourth section of the act of 1860, just mentioned, was so modified that the compensation for transporting the mails between the United States and any foreign port, or between ports of the United States, touching at a foreign port, was limited to "any sum *not exceeding* the sea and United States inland postage," or "any sum *not exceeding* the sea postage,"

on the mails conveyed, according as the service should be performed by an American or by a foreign vessel.

This legislation, including the provision in the act of 1845, above referred to, was subsequently embodied without material alteration in sections 267 and 269 of the act of June 8, 1872, entitled "An act to revise, consolidate, and amend the statutes relating to the Post-Office Department;" and as the law now stood it is very clear that the Postmaster-General, in contracting with American steam-ship lines for the transportation of the mail between the United States and foreign ports, could not allow a greater compensation for such service than the sea and inland postage upon the mail transported.

Sections 267 and 269 of the act of 1872 were adopted without change in the Revised Statutes, becoming sections 4007 and 4009 thereof; so that no modification of the law was effected by the revision touching the subject of compensation for foreign mail transportation. On examining section 5 of the act of May 17, 1878, chapter 107, to which my attention is also called in connection with that subject, I perceive nothing therein which alters the law as contained in the sections of the Revised Statutes above mentioned upon that point.

I am therefore of the opinion that the authority to contract for such transportation, given the Postmaster-General by section 4007, is limited by section 4009 with respect to the matter of compensation, just as if section 4009 were a part of section 4007, and followed as such in immediate connection after the word *promoted*, as it might very well have done.

I add that, as the scope of your inquiry seems to be limited to the construction of those sections, I have in the foregoing confined myself to them, and not considered the effect of recent legislation upon the authority of the Postmaster-General to contract for the transportation of foreign mails. I refer here to a clause in the act of March 3, 1885, chapter 342.

I am, sir, very respectfully,

A. H. GARLAND.

The POSTMASTER-GENERAL.

FEES OF PENSION AGENTS.

The provision of section 4769 Revised Statutes authorizing pension agents to deduct from the fees of attorneys in each pension case 30 cents, in payment of the services of the former for forwarding the same, is repealed by the act of June 14, 1878, chapter 188.

DEPARTMENT OF JUSTICE,
August 10, 1885.

SIR: In compliance with your request of August 4, 1885, for an opinion in reference to the deduction of 30 cents by pension agents from the fees of attorneys in pension cases, I have the honor to submit the following:

By section 4769, Revised Statutes, the sum of 30 cents was deducted from the fees of the attorneys or agents prosecuting each pension case, by the pension agent, in payment of his services in forwarding the same.

By the act approved June 14, 1878, it is provided that from and after July 1, 1878, agents for the payment of pensions shall, in lieu of the percentage, fees, pay, and allowances now allowed by law, be allowed compensation for their services, postage, vouchers and checks sent the pensioners, and all the expense of their offices: first, a salary at the rate of $4,000 per annum; second, $15 for each hundred vouchers, or at that rate for a fraction of one hundred, prepared and paid by the agent in excess of 4,000 vouchers per annum; third, actual and necessary expenses for rent, fuel, and lights, and for postage on official matter directed to the Departments and Bureaus at Washington, to be approved by the Secretary of the Interior; and it is further provided that all acts and parts of acts inconsistent with this act are hereby repealed.

It will be remarked that in the latter quoted statute no reference is made to the fees allowed to attorneys or agents of pension claimants. The question presented to me is simplified by remembering that the portions of the Revised Statutes providing for the deduction of the 30 cents from the fees of the attorney is repealed as an allowance to the pension agent, the amount and the manner of the payment of the fees of the attorney or agent remaining the same. The whole

subject matter of the compensation of the pension agents was determined by this statute.

It is claimed, however, that by an act approved June 20, 1878, section 4769, Revised Statutes, is recognized as being in full force. It is only necessary to observe that this act of June 20, 1878, has no reference to the allowances to claim agents, which were fixed by the statute approved only six days previously, and which expressly repeals all provisions relating to that matter.

It is further claimed that section 4769, Revised Statutes, is recognized as being in force by the act approved July 4, 1884.

The provisions of the Revised Statutes giving the 30 cents in payment for services named were expressly repealed by the act of 1878. They could not be revived by the implied repeal of this latter act (Rev. Stat., sec. 12), nor can it be reasonably said that there was intended to be an express recognition of the right to this allowance or payment, because, as claimed in the two acts subsequent to the repealing act, section 4769 is referred to in express words; else there is no force in the words "in lieu of the percentage, fees, pay, and allowances now allowed by law."

There is no repugnancy in the provisions of these three statutes which would operate as a repeal or prevent them from being construed together. Effect can be given to all of them. (*United States* v. *Tynen*, 11 Wall., 92; *Henderson Tobacco*, 11 Wall., 652; *Wood* v. *United States*, 16 Peters, 342; *Daviess* v. *Fairbairn*, 3 Howard, 636.)

I am of the opinion that the conclusions arrived at by the Secretary of the Interior are correct, and that the pension agents can not deduct 30 cents from the attorneys' fees for the services named in the act, section 4769.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

ADVANCE WAGES TO SEAMEN.

The provisions of section 10 of the act of June 26, 1884, chapter 121, prohibiting the payment of advance wages to seamen hired in our ports, in so far as those provisions apply to foreign shipping, are not in conflict with the stipulations of article 8 of the consular convention with France of February 23, 1853.

Nor do such provisions come in conflict with any rights which, upon principles of international law, other nations are entitled to exercise within our ports as regards their merchant vessels.

DEPARTMENT OF JUSTICE,
August 19, 1885.

SIR: Agreeably to the request contained in your letter of the 6th instant, inclosing a copy of a note from the French minister in relation to a supposed conflict between certain provisions of the shipping act of June 26, 1884, and certain stipulations of the American-French consular convention of February 23, 1853, I have with much care and reflection considered the points suggested in that note touching those provisions and stipulations, and now have the honor to present to you my opinion thereon.

The provisions of said act and the stipulations of said convention specially involved are those contained in section 10 of the former and in article 8 of the latter, each of which, for convenience of reference, I here quote in full:

By section 10 it is provided: "That it shall be, and is hereby, made unlawful in any case to pay any seaman wages before leaving the port at which such seaman may be engaged in advance of the time when he had actually earned the same, or to pay such advance wages to any other person, or to pay any person, other than an officer authorized by act of Congress to collect fees for such service, any remuneration for such shipment of seamen. Any person paying such advance wages or such remuneration shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not less than four times the amount of the wages so advanced or remuneration so paid, and may be also imprisoned for a period not exceeding six months, at the discretion of the court. The payment of such advance wages or remuneration shall in no case, except as herein provided, absolve the vessel, or the master or owner thereof, from full

payment of wages after the same shall have been actually earned, and shall be no defense to a libel, suit, or action for the recovery of such wages: *Provided*, That this section shall not apply to whaling vessels: *And provided further*, That it shall be lawful for any seaman to stipulate in his shipping agreement for an allotment of any portion of the wages which he may earn to his wife, mother, or other relative, but to no other person or corporation. And any person who shall falsely claim such relationship to any seaman in order to obtain wages so allotted, shall, for every such offense, be punishable by a fine of not exceeding five hundred dollars, or imprisonment not exceeding six months, at the discretion of the court. This section shall apply as well to foreign vessels as to vessels of the United States; and any foreign vessel, the master, owner, consignee, or agent of which has violated this section, or induced or connived at its violation, shall be refused a clearance from any port of the United States."

By article 8 it is stipulated: "The respective consuls-general, consuls, vice-consuls, or consular agents, shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of differences which may arise, either at sea or in port, between the captain, officers, and crew, without exception, particularly in reference to the adjustment of wages and the execution of contracts. The local authorities shall not, on any pretext, interfere in these differences, but shall lend forcible aid to the consuls, when they may ask it, to arrest and imprison all persons composing the crew whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the consuls, addressed in writing to the local authority, and supported by an official extract from the register of the ship or the list of the crew, and shall be held, during the whole time of their stay in the port, at the disposal of the consuls. Their release shall be granted at the mere request of the consuls made in writing. The expenses of the arrest and detention of those persons shall be paid by the consuls."

In his note, the French minister, after referring to the provision in said section prohibiting the payment of advance

wages to seamen, under penalty of fine and imprisonment, suggests that this provision cannot be reconciled with the stipulations in said article. He further suggests that such provision "infringes upon the rights of the different nations to determine, according to their own legislation, the duties and obligations of their merchant captains towards their crews on the merchant vessels of their own nation." And while conceding the right of this Government to forbid American captains in home or foreign ports to make payment of advance wages to their crews, he asks whether such right can be "legally extended to French captains, who enlist French sailors in the ports of the United States." He views the subject as presenting a "question of the rights of French captains over French sailors, rights concerning which the very general terms of the final provision of section 10 might raise difficulties between the Federal authorities and the consuls."

Not only does the French minister apparently entertain too narrow a conception of the power of this Government to affect by its legislation foreign merchant ships when within its territorial jurisdiction, but I apprehend he has misconceived the scope and operation of the statutory provision prohibiting the payment of advance wages to seamen to which he refers.

That provision is, from its subject-matter, of the nature of a commercial regulation. Commerce in its simplest signification means an exchange of goods, but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation. (9 Wheat., 229.) The officers and crew of a merchant vessel are as much the instruments of commerce as the ship. (7 How., 408.)

The immediate purpose of the provision is to protect the interests and promote the welfare of merchant seamen while sojourning at our ports, persons whose occupation is indispensable to maritime commerce, and who are objects of great solicitude and care in the codes of all commercial nations. They are characterized as usually a heedless and ignorant, but most useful class of men, exposed to constant hardships,

perils, and oppression, and in port the ready victims of temptation and fraud (3 Kent Com., 176)—as notoriously and proverbially reckless and improvident, and on all accounts requiring protection, even against themselves (*The Minerva*, 1 Hagg., 355)—as credulous, complying, and easily overreached, and requiring to be treated, in reference to their bargains, as courts of equity treat young heirs in dealing with their expectancies, wards with their guardians, *cestuis que trusts* with their trustees (*Harden* v. *Gordon*, 2 Mason, 556). Legislation for their security and protection, when employed in our merchant service, was early adopted by Congress (act of July 20, 1790, chap. 29), and has been enacted from time to time down to the present, containing many wise and wholesome provisions directed to that end. (See Rev. Stat., Title LIII.)

The provision now under consideration deals with the subject of wages of those seamen *who are hired in our ports*, and those only. It is thereby made unlawful to pay "advance wages" to the seaman himself before he leaves *the port at which he is engaged*, or to pay the same (*i. e.*, advance wages of such seaman) to any other person; and this, by the express terms of the statute, applies to foreign as well as to American vessels. The power of Congress to regulate the employment or hire of merchant seamen within the ports of the United States cannot be questioned. There is no principle of international law which forbids the application of such legislation to foreign ships.

"The jurisdiction of the nation" (observes Marshall, C. J., in *The Exchange*, 7 Cr., 136) "within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source."

Hence a foreign merchant vessel going into the port of a foreign state subjects herself to the laws of that state, and is bound to conform to its commercial as well as its police and

other regulations during the period of her stay there. "She is as much a *subditus temporaneus*" (remarks Sir R. Phillimore with reference to such a case in *The Queen* v. *Keyn*, 2 Ex. D., 82) "as the individual who visits the interior of the country for the purposes of pleasure or business."

From this doctrine it follows that in extending the provision adverted to, so as to make it applicable as well to foreign merchant ships within our ports as to American vessels, Congress has not assumed to deal with any rights of such ships with which, on principles of international law, it is not entitled to interfere, nor has it exceeded the proper limits of its jurisdiction, having regard to the rights of other nations. Therefore, unless exempted from the operation of the provision by virtue of some treaty or statute having that effect, no nation has any valid ground to claim for its merchant shipping, in any case or under any circumstances, immunity from the observance thereof. Whether the seaman hired or engaged in one of our ports by a foreign ship is or is not of the same nationality as the vessel is wholly immaterial, the language of the provision being general and including (as it may properly do) all merchant seamen who are there hired or engaged by such ship, irrespective of their nationality.

In regard to the supposed conflict between the statutory provision and article 8, quoted above, I submit that the subject-matter of the one is entirely distinct from that of the other, and that no collision necessarily arises.

By the said article the respective consuls, etc., "shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of *differences* which may arise, either at sea or in port, *between the captain, officers, and crew*, without exception, particularly in reference to the *adjustment of wages and the execution of contracts*." The word "execution" is obviously used here in the sense of performance.

This provision accords to the consular officer: (1) A limited *police jurisdiction* over the merchant vessels of his nation, embracing only those acts which relate to the interior discipline of the vessel, and which do not disturb the peace and good order of the port. With respect to that jurisdiction, the scope of the provision is precisely determined by the

word "internal." (2) A limited cognizance of civil controversies between the officers and crews of such vessels, particularly those relating to the performance of contracts of service and the adjustment of wages thereunder.

It is very plain that a public law of the port, which prohibits the payment of advance wages to seamen hired thereat before the vessel sails, does not concern the "internal order" of such vessels, in contemplation of the above provision; and it is difficult to see wherein the law could become a subject of "difference" between the officers and crew of the vessel. In hiring a seaman at one of our ports, the master of a ship can make no valid agreement to pay advance wages before leaving the port, for the reason that such payment is prohibited by the public law of the place. Should he do so, and fail to pay the advances, this might give rise to a "difference" between him and the seaman, but it would be a difference manifestly involving no conflict between the law and the treaty. On the other hand, should the master pay the advance wages to the seaman, the enforcement of the law against the former could not in any point of view be deemed an interference in a "difference" between the two individuals.

As already intimated, the provisions of section 10 of the act of 1884 are designed to regulate dealings with seamen who are commorant in the ports of the United States, and with whom shipping agreements are there entered into. They do not apply to dealings with the seamen of a vessel under such agreements made elsewhere. Obligations arising out of the latter agreements are unaffected by the statute; the former can give rise to no obligation the performance of which involves an infraction of its provisions.

On the whole, I reach the following conclusions upon the points suggested as above:

(1) That the provisions of the said act respecting the payment of advance wages, in so far as they apply to foreign shipping, are not in conflict with the stipulations of article 8 of the said convention with France.

(2) That they infringe upon no rights which, upon principles of international law, other nations are entitled to exercise within our ports, as regards their merchant vessels.

(3) That therefore they *can* "legally extend to French captains who hire French sailors in the ports of the United States," and that, in extending (as they do) to them, they violate or prejudice no right of such captains in the premises.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF STATE.

CUSTOMS DUTIES.

Opinion of Attorney-General Devens, of October 4, 1878 (16 Opin., 158), that imported merchandise entered upon *pro forma* invoices, in the absence of regular invoices authenticated by United States consular officers, when advanced in value on appraisement more than 10 per cent., is not liable to the 20 per cent. ad valorem additional duty under section 2900, Revised Statutes, concurred in.

DEPARTMENT OF JUSTICE,
August 27, 1885.

SIR: I have the honor to acknowledge the receipt of your communication of the 25th instant, in reference to the opinion of Attorney-General Devens, forwarded to your Department on the 4th day of October, 1878, in which he took the ground that imported merchandise entered at the custom-house upon *pro forma* invoices, in the absence of regular invoices authenticated by United States consular officers, when advanced in value on appraisement more than 10 per cent., was not liable to the additional duty of 20 per cent. ad valorem prescribed by section 2900 of the Revised Statutes.

It is very much to be regretted that the abuses referred to have arisen, and that certain shippers and importers have used the opinion of a former Attorney-General as a loop-hole for the purpose of entering their goods at prices much below the proper dutiable values. This Department would cheerfully co-operate in applying the needed remedy, but after a careful examination of the opinion in question I am not prepared to say that it is erroneous. On the contrary, I think that section 2900 has been correctly interpreted. It is the well-settled practice of this Department not to disturb former rulings upon legal questions submitted to it unless they

appear to be plainly erroneous, and if the question were an original one I would feel constrained to hold that section 2900, Revised Statutes, does not apply to an entry made in the absence of a certified invoice, upon affidavit, under the provisions of sections 9 and 10 of the act of June 22, 1874, chapter 391.

In my opinion the words "original invoice" found in section 2900 were intended to refer only to the consular invoice.

Under existing legislation, it seems to me that the only remedy for the abuses complained of is to be found in a more rigid enforcement of the provisions of the twelfth section of the act of 1874 and section 2864 of the Revised Statutes.

The report of the board of United States appraisers is herewith returned.

Very respectfully,

JOHN GOODE,
Acting Attorney-General.

Hon. C. S. FAIRCHILD,
Acting Secretary of the Treasury.

TONNAGE DUTY.

The discrimination as to tonnage duty in favor of vessels sailing from the regions mentioned in the act of June 26, 1884, chapter 121, and entered in our ports, is purely geographical in character, inuring to the advantage of any vessel of any power that may choose to transport between this country and any port embraced by the fourteenth section of that act.

DEPARTMENT OF JUSTICE,
September 19, 1885.

SIR: Your communication of the 8th September, instant, with the inclosures therein referred to, has received my deliberate consideration, and I have the honor to submit, in reply, that I agree with you entirely in the interpretation you place on the fourteenth section of the act of Congress of the 26th June, 1884, entitled "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade, and for other purposes," and in your conclusion that the claims set up by the several powers mentioned by you are not founded.

The discrimination as to tonnage duty in favor of vessels

sailing from the regions mentioned in the act and entered in our ports is, I think, purely geographical in character, inuring to the advantage of *any* vessel of *any* power that may choose to fetch and carry between this country and any port embraced by the fourteenth section of the act.

I see no warrant, therefore, to claim that there is anything in "the most favored nation" clause of the treaty between this country and the powers mentioned that entitles them to have the privileges of the fourteenth section extended to their vessels sailing to this country from ports outside the limitation of the act.

Your able and comprehensive discussion of the subject renders it quite unnecessary for me to treat it at large.

I have the honor to be, your most obedient servant,

W. A. MAURY,
Acting Attorney-General.

The SECRETARY OF STATE.

CUSTOMS LAWS—COLLECTOR'S CERTIFICATE.

In the case of merchandise of domestic production shipped at ports on the Great Lakes to other ports in the United States, by routes through Canadian terrritory, the issue of a certificate by the collector of customs showing that the merchandise so shipped is of domestic production is not authorized by law.

DEPARTMENT OF JUSTICE,
October 3, 1885.

SIR: I have the honor to acknowledge the receipt of your communication bearing date September 30, 1885, requesting an opinion from this Department upon the question therein submitted.

The joint resolution of Congress approved March 3, 1883, providing for the termination of articles numbered 18 to 25, inclusive, and article numbered 30, of the treaty between the United States of America and her Britannic Majesty, concluded at Washington May 8, 1871, directs the President to give notice to the Government of Her Britannic Majesty that the provisions of each and every of the articles aforesaid will terminate and be of no force on the expiration of two years

next after the time of giving such notice. Article 30 of said treaty is as follows:

"It is agreed that, for the term of years mentioned in article 33 of this treaty, subjects of Her Britannic Majesty may carry in British vessels, without payment of duty, goods, wares, or merchandise from one port or place within the territory of the United States upon the St. Lawrence, the Great Lakes, and the rivers connecting the same, to another port or place within the territory of the United States, as aforesaid: *Provided*, That a portion of such transportation is made through the Dominion of Canada by land carriage, and in bond, under such rules or regulations as may be agreed upon between the Government of Her Britannic Majesty and the Government of the United States. Citizens of the United States may, for a like period, carry in United States vessels, without payment of duty, goods, wares, or merchandise from one port or place within the possession of Her Britannic Majesty in North America to another port or place within the said possessions: *Provided*, That a portion of such transportation is made through the territory of the United States by land carriage, and in bond, under such rules and regulations as may be agreed upon between the Government of the United States and the Government of Her Britannic Majesty. The Government of the United States further engages not to impose any export duties on goods, wares, or merchandise carried under this article through the territory of the United States, and Her Majesty's Government engages to urge the parliament of the Dominion of Canada and the legislatures of the other colonies not to impose any export duties on goods, wares, or merchandise carried under this article; and the Government of the United States may, in case such export duties are imposed by the Dominion of Canada, suspend during the period that such duties are imposed, the right of carrying granted under this article in favor of the subjects of Her Britanic Majesty."

It appears that notice was given, by proclamation of the President, of the abrogation of said article 30 of the treaty of Washington, and that it ceased to be in force from and after July 1, 1885.

Section 3006 of Revised Statutes provides that "imported

merchandise in bond or duty paid, and products or manufactures of the United States may, with the consent of the proper authorities of the British provinces, or Republic of Mexico, be transported from one port in the United States to any other port therein over the territory of such provinces or republic, by such routes, and under such rules, regulations, and conditions as the Secretary of the Treasury may prescribe; and the merchandise so transported shall, upon arrival in the United States from such provinces or republic, be treated in regard to the liability to or exemption from duty, or tax, as if the transportation had taken place entirely within the limits of the United States."

It appears from your communication that a practice obtains at certain ports on the great lakes of shipping merchandise of domestic production to other ports in the United States by routes, partly by water and partly by rail, through Canadian territory, and that foreign vessels are used in such transportation. It appears also that the goods are regularly exported to Canada from American ports, and at the time of shipment a certificate is obtained from the collector of customs showing that the merchandise so shipped is of domestic production, and upon this certificate free entry is made at the port in the United States when the goods arrive after transit.

Under section 2503 of the tariff act approved March 3, 1883, articles "the growth, produce, and manufacture of the United States, when returned in the same condition as exported," shall be exempt from duty. The object of that paragraph, as I understand it, is to enable the exporter of domestic products and manufactures to bring back the same to the United States free of cost, if from any cause he may desire to do so; but in order to entitle him to the benefit of that provision, the articles must be the growth, produce, or manufacture of the United States, and must be returned in the same condition as exported. It appears, however, in the cases referred to by you, that merchandise of domestic production is shipped from certain ports on the great lakes *to other ports in the United States.* The transportation is partly through Canadian territory, but the port of destination is in

the United States. In other words, it is not a bona fide exportation.

In view of the provisions of the joint resolution referred to, I am of opinion that the practice of issuing the certificates mentioned at the time of shipping the articles described in your letter is illegal.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

GRANT TO GARLAND COUNTY, ARKANSAS.

Under the circumstances existing in this case, and for reasons stated, the institution of proceedings on behalf of the United States to recover the title and possession of certain land (part of the Hot Springs Reservation) granted to the county of Garland, Arkansas, for the site of a public building, would not be warranted.

DEPARTMENT OF JUSTICE,

October 7, 1885.

SIR: By your letter of the 26th of August last my attention is called to the act of March 3, 1877, chapter 108, granting a piece of land (part of the Hot Springs Reservation) "to the county of Garland in the State of Arkansas as a site for the public building of said county," and also to the report of the Committee on Expenditures in the Interior Department, first session, Forty-eight Congress, and other documents, from which it appears that, after the location of the grant, the county authorities leased the land so granted for a period of ninety-nine years to private parties, by whom the same has been subdivided into lots and sublet to numerous persons, and that the land has never been devoted to the purpose for which it was donated by Congress.

In directing my attention to this subject, you request that "legal proceedings be instituted, with a view to recover to the Government the title and possession of the land," should the failure of the county authorities to carry out the purpose of Congress be regarded as operating to nullify the grant.

While it is very plain, from the language of the grant, that Congress intended to donate the land for the specific

purpose designated therein, namely, to be used "as a site for the public building of said county," yet, whether this annexes a *condition* to the grant, or creates a mere *trust*, is not so clear. If a condition, upon breach thereof the grant would be liable to forfeiture; if a trust, the same result would not follow upon a breach, but the aid of a court of equity might be invoked by proper parties to effectuate the trust. (See *Stanley* v. *Colt*, 5 Wall., 119.)

In the former case, I submit that, in the absence of any law of Congress declaring the forfeiture or directing the institution of proceedings to that end, no authority exists to bring a suit in behalf of the United States to recover the land on the ground of failure to perform the condition. In the latter case, it would seem to be unnecessary to consider the subject of proceedings to enforce the trust, as it appears by the accompanying letter of the superintendent of the Hot Springs Reservation, addressed to you, dated the 14th of August last, that a suit has recently been brought by the proper county authorities to annul the aforesaid lease and recover control of the property, that it may be devoted to the purpose for which it was donated.

These considerations lead me to think that, under the existing circumstances, I would not be warranted in instituting proceedings of any kind in behalf of the United States touching the premises.

I return herewith the documents which accompanied your letter.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

HOT SPRINGS RESERVATION, ARKANSAS.

The Secretary of the Interior has power, under the act of December 16, 1878, chapter 5, to lease sites upon the Hot Springs Reservation in Arkansas for the term of five years, and to relet the premises for the same term, from time to time, as the leases expire.

Upon the facts stated: *Advised* that the Secretary may accept a surrender of a lease of a bath-house site heretofore made to S., and cancel the same, and then enter into a new lease of the premises with the same party for the term of five years.

During the term of the lease, and while the tenant is in possession under the same, he may remove from the premises whatever improvements he has erected thereon for the purposes of trade, whether machinery or buildings; but if he leaves the premises without removing such improvements, and the Government should take possession, they would become the property of the latter.

DEPARTMENT OF JUSTICE,
October 12, 1885.

SIR: I have the honor to acknowledge the receipt of your communication of the 5th instant, forwarding the letter dated the 29th ultimo (with inclosures) from Hon. D. W. Voorhees, John Paul Jones, and J. L. Smithmeyer, requesting your Department "to surrender a lease of a bath-house site upon the Hot Springs Reservation, Arkansas, granted to Mr. Smithmeyer by the Secretary of the Interior January 15, 1884, and that a new lease may be entered into to run for five years from September 1, 1885."

Reference is made in your letter to the original lease, which is also forwarded, and the act of December 16, 1878 (20 Stat. 258).

You state that "the facts in relation to the granting of the lease and the extension of the time of the commencement of payment of water rent thereunder are set forth" in said letter of Hon. D. W. Voorhees and others, and that "there is no reason to doubt the statement that during a great portion of the time since the lease was made it has been entirely impracticable for the lessee to carry out the purposes for which the site was leased."

You further state that "the five years' term of lease to Mr. Smithmeyer commenced from the date of the lease, January 15, 1884, and consequently a renewal of the lease, as he desires, would extend the period beyond the whole term specified in the statute."

An opinion is requested, as follows, viz:

First. "As to whether there is any authority of law for complying with the request of Mr. Smithmeyer, as above set forth."

Second. "Generally, whether there is authority for renewing any of the leases which have expired."

Third. "And also, whether at the expiration of a lease the permanent improvements upon the site belong to the lessee or to the Government."

The clause of the act of December 16, 1878, authorizing the Secretary of the Interior to lease sites for the building of bath-houses at the Hot Springs Reservation, Arkansas, is as follows, viz:

"And he is further directed to lease the bath-houses of a permanent nature, now upon the Hot Springs Reservation, to the owners of the same, and lease to any person or persons, upon such terms as may be agreed on, sites for the building of other bath-houses for the term of five years, unless otherwise provided by law, under such rules and regulations as he may prescribe; and the tax imposed shall not exceed fifteen dollars per tub per annum, including 'ground rent.'"

The main question presented by the inquiries is, as to whether the authority of the Secretary of the Interior is limited to the granting of leases for only one term of five years, or as to whether he is directed to make leases of a term neither greater nor less than five years? In other words, does the limitation of five years apply to the period in which leasing is authorized, or as a limit to the length of the leases? If it is the true intent and meaning of the law that all leasehold estates, acquired under and by virtue of the said act, shall expire at the end of their respective terms of five years without any authority being vested in the Secretary of the Interior to renew the leases or relet the said sites for bath-houses, the obvious duty rests upon the Secretary at the end of such terms to repossess himself for the Government of the leasehold premises, and to hold them unused and unoccupied against all intruders. He has no authority, under such interpretation of the act, either to create or permit a tenancy at will or by sufferance.

Such an interpretation of the law would have the effect of

depriving the public of the use of such bath-houses where the leases have expired; to foster a monopoly such as it is the declared purpose of the said act of December 16, 1878, to avoid; to depreciate the value of the lots sold or leased by the Government on the "reservation" for hotel and building purposes; to interfere with the price and sale of other lots for such purposes by the Government, and, awaiting the action of Congress, defeat the purposes for which the "reservation" was established.

As such interpretation would be against public policy and should not be adopted unless it is required by either the words, the context, the effect, or the spirit and reason of the law, is such interpretation required? The Secretary of the Interior is directed by the act to lease two kinds of property, viz, first, bath houses of a permanent nature, at the time of the passage of the act, to the owners of the same; second, "sites for the building of bath-houses" to any person or persons. The maximum rental of $15 per tub is fixed; the rules and regulations are to be prescribed by the Secretary; the term of each lease is to be a period of five years "unless otherwise provided by law." There is no prohibition as to reletting. So long as the conditions precedent to leasing exist, the Secretary is directed to lease, and this without any limitation except in the words "unless otherwise provided by law."

By act of March 3, 1877 (Stat. 19, 377), when Congress first undertook to dispose of the "reservation" after the decision of the Hot Springs cases (92 U. S. 698,) such portion of the "reservation" as includes the hot or warm springs is reserved from sale. By that act the Secretary of the Interior is permitted to fix a special tax on water taken from said springs (sec. 4 of said act), but no authority is given him therein to either lease bath-houses or sites for bath-houses.

The words "unless otherwise provided by law" in the statute of 1878 had, therefore, no present meaning at the time of the passage of the act, and must either be regarded as surplusage, or the obvious interpretation be given, that so long as the conditions precedent to leasing exist, the authority to let or relet, in accordance with the terms of the act, is vested in the Secretary of the Interior, unless at the time of such

leasing it is otherwise provided by law. This interpretation is not only in accord with public policy and the presumed object of the "reservation," but a contrary interpretation, confining "the authority of the Secretary of the Interior to the granting of such leases for one term only of five years," is warranted neither by the said act of 1878, its words and context, nor by the general intent and meaning and declared object of the several acts of Congress relating to said "reservation."

This view as to interpretation of the act is in accord with an opinion of the Supreme Court delivered in an analogous case (*United States* v. *Gratiot*, 14 Peters, 537). In that case, referring to a clause in act of March 3, 1807 (2 Stat., 449), viz: "The President of the United States shall be and is hereby authorized to lease any lead mine which has been or may hereafter be discovered in Indiana Territory for a term not exceeding five years," Thompson, J., in delivering the opinion of the court, says: "The authority given to the President to lease the lead mines is limited to a term not exceeding five years; this limitation, however, is not to be construed as a prohibition to renew the leases from time to time, if he shall think proper so to do. The authority is limited to a short period so as not to interfere with the power of Congress to make other disposition of the mines, should they think proper so to do."

The site for bath houses leased to Mr. Smithmeyer, it is alleged, remains in the same condition as to improvements as it was at the time the original lease was made, in December, 1883. There has been no possession taken by the lessee by virtue of the lease. If the lease is annulled by the joint consent of lessor and lessee, the premises will still remain such a site for the building of a bath-house as the Secretary of the Interior is authorized by the act of 1878 to lease for a period of five years. By the terms of the lease to Mr. Smithmeyer he was entitled to the possession and enjoyment of the leasehold premises for the period of five years.

He has been ready at all times, if permitted the free use and enjoyment of his grant, to fulfill his contract. The Government in the making of improvements on the "reser-

vation" has interfered with him, for the time being, in the use and enjoyment of his grant. As up to this time he has been practically dispossessed by the Government, if he desires to surrender his lease the Secretary of the Interior has the authority to cancel it. The Government is not injured thereby. If the lease is surrendered and canceled a new lease may be made to Mr. Smithmeyer, or any person or persons, in accordance with the provisions of the act.

In reply to the inquiry as to the ownership of permanent improvements upon the bath-house site at the expiration of the lease, if the tenant should leave the premises without removing such permanent fixtures, and the Government should take possession, such improvements would become the property of the Government. During the term of the lease, however, or whilst the tenant is in the peaceable enjoyment of the leasehold premises, he may take away whatever he has erected for the purposes of trade, whether machinery or buildings. As to whether a building is erected for the purposes of trade does not depend upon the form or size of the building, or whether it is or is not attached to the realty by a permanent foundation. The sole question is whether the building was erected and was designed for the purposes of trade. The building may be used as a residence for a family, if such residence be merely an accessory for the more beneficial exercise of the trade (*Van Ness* v. *Pacard*, 2 Peters 137); bath-tubs, fixtures, and buildings should be regarded as improvements for the purposes of trade.

"If the tenant does not exercise his privilege before his interest expires he can not do it afterwards; because the right to possess the land and fixtures as a part of the realty vests immediately in the landlord." (Taylor's Landlord and Tenant, 433.)

The letter of Hon. D. W. Voorhees, John Paul Jones, and J. L. Smithmeyer to the Secretary of the Interior, dated September 29, 1885, with inclosures, and also the original lease to Mr. Smithmeyer, dated the 12th day of December, 1885, are herewith returned.

Respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

APPOINTMENT OF POSTMASTERS.

Where a post-office of either the first, second, or third class (all of which classes are filled by appointment by the President) is reduced to a post-office of the fourth class (which is filled by appointment by the Postmaster-General), the commission of the then incumbent, though he may not have served out the term for which he was appointed, expires, and a new appointment (by the Postmaster-General) becomes necessary.

DEPARTMENT OF JUSTICE,
October 14, 1885.

SIR: Yours of the 1st instant submits for answer the following question:

"When a post-office is reduced to a fourth-class office from one of the higher classes, is it necessary or proper that the Postmaster-General should make a new appointment, or does the postmaster appointed for a term hold for the residue of the term for which he was appointed?"

The fifth section of the act of July 12, 1876 (Stat. L., 19, 80), provides "that the postmasters shall be divided into four classes, as follows: The first class shall embrace all those whose annual salaries are three thousand dollars, or more than three thousand dollars; the second class shall embrace all those whose annual salaries are less than three thousand dollars, but not less than two thousand dollars; the third class shall embrace all those whose annual salaries are less than two thousand dollars, but not less than one thousand dollars; the fourth class shall embrace all postmasters whose annual compensation, exclusive of their commissions on the money-order business of their offices, amounts to less than one thousand dollars."

The first section of the act of March 3, 1883 (Stat., 22, 600), lays down the rules by which the Postmaster-General shall "ascertain and fix" the salaries of postmasters of the first, second, and third class.

The gross annual receipts of the office determine the compensation of the postmaster, and in that way the class to which the office belongs. The first three classes include all offices whose gross annual income amounts to or exceeds $1,000. All offices with a less gross annual income belong to the fourth class. Section 2 lays down the rules by which the

compensation of the fourth-class postmasters are to be ascertained.

The act further provides:

Section 3. "That the Postmaster-General shall make all orders relative to the salaries of postmasters, and any change made in such salaries shall not take effect until the first day of the quarter next following the order." * * *

Section 4. "That the salaries of the first, second, and third classes shall be re-adjusted by the Postmaster-General; the first adjustment (under this act) to take effect simultaneously with the reduction of the rates of postage, and thereafter at the beginning of each fiscal year." * * *

These statutes are homogeneous parts of a system devised for regulating the salaries and keeping the accounts of postmasters throughout the land.

The sixth section of the act of July 12, 1876, is as follows:

"Postmasters of the first, second, and third classes shall be appointed and may be removed by the President, by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law; and postmasters of the fourth class shall be appointed, and may be removed, by the Postmaster-General, by whom all appointments shall be notified to the Auditor for the Post-Office Department."

This section forms no part of the system for regulating the salaries and adjusting the accounts of our postmasters. The two classes into which it divides them are totally distinct.

The difference between a presidential office and a departmental office is the greatest that can exist between any offices known to the Constitution.

For the purpose of distinguishing the postmasters who belong to either class this section adopts the classification of section 5. As we have seen, this classification is made annually and based on the gross annual income of the respective post-offices. As the gross annual income of each post-office varies more or less, an office which one year is presidential may the next year be departmental, and vice versa.

It was patent that each annual adjustment would result in transferring some officers from one class to the other. In full view of the fact that each annual adjustment would re-

sult in such changes, the President is divested of and the Postmaster-General is invested with all authority to appoint and remove all fourth-class postmasters. There is no exception to this general and sweeping provision. At the beginning of the first quarter after the adjustment is made, each post-office takes its place in the class to which by the adjustment it was found to belong. It is then as fully and firmly established in the class to which it has been assigned as it ever can be.

In making the assignment you are required to look alone to the gross annual income of the office for the preceding year. Whether or not the incumbent of the office at the date of the adjustment has served out the term for which he was appointed is of no moment, and is not a matter which you have to consider in making the assignment. The effect of the assignment of a first, second, or third class office to the fourth class is to abolish a presidential office and create a departmental office. The President and Senate can not appoint, remove, or suspend the incumbent of a fourth-class post-office. An appointment by the President and Senate to a presidential office can not confer any title to a departmental office.

It is true that Congress might have enacted that the incumbent of a presidential post-office should continue to be postmaster until the expiration of his term, even though during the term the office was assigned to the fourth class.

If such had been the intention of Congress, the presumption under all the circumstances is of the very strongest character that an express provision to this effect would have been inserted in the law.

If, in a foreseen contingency, Congress intended that broad and general provisions should be disregarded, authority for such disregard would have been given in explicit terms and not left to inference or conjecture.

This view is strengthened by the twelfth section of the act of 1876, which is as follows: "* * * and no salary of any postmaster where the appointment is now presidential shall be reduced by the compensation herein established until the next re-adjustment below the sum of one thousand dollars."

Congress could have had but one purpose in thus enacting that a presidential office should not be reduced to a departmental office until the then "next re-adjustment." That purpose was to protect the tenure of office of presidential appointees until that date. An express provision to effect this was a recognition by Congress that as the law stood such appointee might lose his office before the date therein indicated; and since the protection was temporary and has never been extended, we must conclude that the legislative intent was, that a presidential appointee after the date fixed should lose his place if, under the law, his office should be assigned to the fourth class.

The fact that a presidential postmaster is appointed for a fixed term is not evidence of a legislative intent that such officer shall hold a departmental office, should his office expire before his term.

On the contrary, since the law provides that in a certain contingency the office to which he is appointed shall expire, without reference to the expiration of his term, such postmaster has accepted the office with full notice that his term was liable to be defeated by the abolition of the office.

From the foregoing statement of the law it follows that the first branch of your question should be answered in the affirmative and the last one in the negative.

Respectfully,

A. H. GARLAND.

The POSTMASTER-GENERAL.

BONDS OF ASSISTANT UNITED STATES TREASURERS.

The form of the bond required to be given by assistant treasurers of the United States under section 3600, Revised Statutes—whether the parties thereto are to be jointly and severally, or may be only jointly bound, and whether each surety is to bind himself for the full amount of the penalty, or may restrict his liability to a less amount—is not made the subject of statutory regulation, but is left to the determination of the officers by whom the bond is to be approved.

But the form ordinarily made use of in practice is that wherein the principal and sureties are jointly and severally bound for the full amount of the penalty.

Bonds of Assistant United States Treasurers.

This form being preferable to any other, and its use sanctioned by long practice, the adoption of a different form (though it might not be inconsistent with the terms of the statute so to do) would not be warranted unless the circumstances of the particular case were such that the public interests could not otherwise be served.

DEPARTMENT OF JUSTICE,
October 17, 1885.

SIR: Your letter of the 6th instant inquires: "Whether the bonds required to be given by assistant treasurers of the United States, under section 3600 of the Revised Statutes, should in all cases be joint and several, so that each surety is liable for the full amount of the bond; or whether a several bond can be lawfully given, in which each surety is made liable for a limited amount therein specified, and less than the amount of the penalty of the bond." To this inquiry I have now the honor to reply:

The section above mentioned provides that those officers "shall give bonds to the United States for the faithful discharge of the duties of their respective offices as assistant treasurers according to law, and for such amounts as shall be directed by the Secretary of the Treasury, with sureties to the satisfaction of the Solicitor of the Treasury;" and it further provides that they "shall, from time to time, renew, strengthen, and increase their official bonds as the Secretary of the Treasury may direct."

But the form of the bond to be given by them, whether the parties thereto are to be jointly and severally or may be only jointly bound, and whether each surety is to bind himself for the full amount of the penalty or may restrict his liability to a less amount, is not made the subject of statutory regulation. This appears to be left to the determination of the officers by whom the bond is to be approved.

I observe that in the case of collectors, naval officers, and surveyors, the form of the bond to be given by these officers is prescribed by statute (see sec. 2619, Rev. Stat., as amended by the act of February 27, 1877, chap. 69); the form thus prescribed being that of a joint and several bond in which the sureties bind themselves each for the full amount of the penalty. Also, by express statutory provision, the bond of a marshal is required to be given, "jointly and severally with two good and sufficient sureties," for a certain sum.

In the case of some other officers the form of the bond, by the express terms of the statute requiring it, is to be prescribed by or to be subject to the approval of the President, head of Department, or other officer named therein (see secs. 1697, 3144, as amended by the act of March 1, 1879, chaps. 125, 3153, 3614, 4459, and 4779, Rev. Stat).

In most cases, however, where official bonds are required the form thereof is (as in section 3600, Revised Statutes) tacitly or impliedly left by Congress to be regulated or fixed by the officers by whom the bonds are to be approved (see secs. 302, 479, 795, 1191, 1349, 1383, 1698, 2215, 3143, as amended by the act of March 1, 1879, chaps. 125, 3151, 3156, 3551, 3759, 3834, 3870, 4113, and 4950, Rev. Stat.).

So far as I am informed, the form of bond ordinarily made use of in practice, in all cases, corresponds with that prescribed by statute as above, *i. e.*, it is one wherein the principal and sureties are *jointly and severally* bound for the *full amount* of the penalty. This form is manifestly preferable to any other; and where its use is sanctioned by long practice, the adoption of a different form, though it might not, strictly speaking, be inconsistent with the terms of the statute, would not be warranted unless the circumstances of the particular case were such that the public interests could not otherwise be served.

The same form is commonly used in the States, though in some cases sureties are allowed, under statutory regulation, to become severally liable for amounts less than the penalty of the bond. Thus in California, while all official bonds are there required to be in form joint and several, when the penal sum of any bond exceeds $1,000 the sureties may become severally liable for portions of not less than $500 thereof, making in the aggregate at least two sureties for the whole penal sum (see Political Code, secs. 956, 958). Here the bond may contain a *joint and several* obligation, as regards the principal and each surety for that portion of the penalty to which the undertaking of the surety is limited; but as regards the sureties *inter sese* the obligation of each would be *several* only. A bond in this form where several sureties bind themselves each jointly and severally with the principal for a part of the penalty, making in the aggregate (say)

double the amount thereof, may be equivalent in point of security to a bond wherein two sureties with the principal bind themselves jointly and severally for the whole penalty, but this depends upon circumstances extrinsic to the bond, namely, the sufficiency and responsibility of individual sureties.

While there is nothing in section 3600 that forbids the giving and accepting of an official bond thereunder in the form just adverted to (which I understand is the one referred to in the latter clause of your inquiry), and while the form of the bond is thereby left to the determination of the approving officer, yet I think the discretion of such officer, in that regard, should be governed by the established practice, and that a departure from the latter would not be justified in any case unless required by public considerations.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

COMPROMISE OF CLAIMS.

Claims in favor of the Government, founded on judgments entered upon forfeited recognizances taken in the prosecution of offenses against the postal laws, may be compromised by the Secretary of the Treasury under the provisions and upon the considerations imposed by section 3496, Revised Statutes.

Such claims do not arise under the postal laws, within the meaning of the exception in that section.

DEPARTMENT OF JUSTICE,
October 22, 1885.

SIR: I have the honor to acknowledge the receipt of your letter of the 15th instant, inclosing the petition of John Cohberg *et al.* for my consideration and such action as I may deem proper.

It appears from the petition that each one of the petitioners forfeited a personal recognizance for his appearance as a witness on behalf of the Government, before the district court of the United States for the southern district of Illinois, in a criminal cause or proceeding pending therein. On these

forfeitures the court entered final judgments at the January term, 1885.

The petitioners ask for the remission of these judgments.

I have no authority to take any action in the premises.

You ask that I will, in the event this conclusion is reached, give an opinion as to "whether in view of the exception as to cases (claims) arising under the postal laws, in section 3496, Revised Statutes, these judgments can be settled by compromise thereunder."

Though these judgments were entered upon recognizances taken in the prosecution of a "postal crime," they are not within the exception. They are not claims arising under the postal laws, but under the laws regulating procedure in criminal cases; claims within this exception are those over which the Postmaster-General has jurisdiction by section 409, Revised Statutes.

I am therefore of opinion that balances due on these judgments belong to the class of claims which you have authority to compromise under the provisions of and upon the conditions imposed by section 3496, Revised Statutes.

Respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

WITNESSES BEFORE A COURT-MARTIAL.

Where a civilian witness is brought before a court-martial but refuses to testify, the court is not invested with any inherent power to punish the witness in such case, either summarily or otherwise, as for a contempt. Such power can only be exercised by it when given by the positive terms of some statute.

Section 1202 Revised Statutes arms the court with authority to compel the witness to appear and testify, so far as this can be done by *process*; but in securing his testimony the court is restricted to the means which it is thus authorized to employ. It can not inflict any punishment where the power to impose it is not clearly conferred by Congress.

DEPARTMENT OF JUSTICE,

October 23, 1885.

SIR: By your letter of the 16th instant and the papers transmitted to me therewith, it appears that at a trial before

Witnesses Before a Court-Martial.

a general court-martial recently convened at Fort Clarke, Tex., two civilians, who were summoned and appeared as witnesses, refused to testify, and stood mute when their testimony was sought to be elicited. The court adjuged one of them to be in contempt, and dismissed him from further attendance. The other the court was directed, by orders from the commanding general of the military department of Texas, to commit for contempt in case he persisted in his refusal to testify. But the court upon consideration held that it had no legal authority to imprison or otherwise punish a civilian witness for obstinately standing mute when called upon to give testimony.

Doubts being entertained by the judge-advocate of the court, and also by the commanding general, as to the correctness of this decision, the following question (suggested by the former) is proposed by you for my opinion thereon:

"What remedy has a court-martial in case a civilian witness is brought before it, and refuses positively to answer questions which the court decides are proper for him to answer?"

After careful examination of this question, I arrive at the conclusion that the court has no remedy—that it is not invested with power to punish the witness in such case, either summarily or otherwise, as for a contempt or other offense committed by him.

The main purpose of the creation of courts-martial is the maintenance of military discipline. Their jurisdiction and powers are based wholly upon the Articles of War and other statutory provisions constituting our military code, and, in general, extend to those persons only who are subject to military law. Formerly, a citizen not in the military service, even when summoned only as a witness by such court, was not bound to obey the summons (9 Opin., 311); and it would seem that if he appeared, he was not bound to testify. In the absence of any statute making him amenable to the authority of the court it was powerless to compel his appearance, and *a fortiori* to punish him for a refusal to testify. But by the twenty-fifth section of the act of March 3, 1863, chapter 79, the judge-advocate of a court-martial was authorized to issue process "to compel witnesses to appear

and testify." The same provision is reproduced in section 1202 Revised Statutes. This is the only statutory provision now in force that imparts to a court-martial power to enforce obedience to its summons by civilians when called as witnesses before it; and the inquiry here arises, whether a court-martial derives any authority thereunder to punish a witness who, after having appeared, refuses to testify.

In this connection I remark that such power has sometimes been expressly conferred upon courts-martial. Thus, by the Rules and Articles of War adopted by Congress September 20, 1776, for the government of the American armies, an article contained therein provided that "all persons called to give evidence in any cause before a court-martial, who shall refuse to give evidence, shall be punished for such refusal at the discretion of such court-martial." The terms of this article are broad enough to include civilian witnesses, and it was doubtless meant to apply to them. It was, however, along with some other articles relating to courts-martial, repealed May 31, 1786.

Another instance of the express grant of such power to courts-martial, applicable to civilian witnesses, is found in section 4 of the act of April 18, 1814, chapter 82, which act, by its terms, expired at the end of the then existing war. That section imposed a pecuniary forfeiture (to be recovered by bill, plaint, or information, in any civil court of competent jurisdiction) where the witness, after being duly summoned to attend the court-martial to testify before the same, failed to appear without reasonable excuse; and where he refused to testify before the court-martial, or behaved with contempt thereto, it empowered such court to punish him with imprisonment.

The inference to be drawn from these enactments is, that the power to punish a recusant civilian witness, as for a contempt, is not inherent in a court-martial, and that such power can only be exercised when authorized by the positive terms of some statute.

The same view has been adopted and acted upon in the British service. Prior to 1800, it seems, no power existed there to secure the attendance before courts-martial of civilians summoned as witnesses. To supply such power a clause

was introduced into the mutiny act of that year, providing "that all witnesses so duly summoned as aforesaid (*i. e.* by the judge-advocate or person officiating as such), who shall not attend such courts, shall be liable to be attached in the court of king's bench, etc., in like manner as if such witness had neglected to attend on a trial in any criminal proceeding in that court." Notwithstanding this provision authorized the issue of compulsory process by the courts therein designated to secure the attendance of witnesses before courts-martial, yet where the witness attended the court-martial and refused to be sworn or to testify, such court could not commit him for contempt or otherwise punish him for the refusal. (See Clode. Mil. Law, 1st ed., p. 126).

This was remedied in 1830 by a further amendment of the mutiny act, making the witness liable to attachment as above, where, having attended, he refused to be sworn, or being sworn, refused to give evidence or to answer all such questions as the court might legally demand of him.

Recurring now to section 1202 Revised Statutes, I am unable to discover in this section any grant of power to punish a recusant witness. The judge-advocate is thereby given "power to issue the *like process* to compel witnesses to appear and testify which courts of criminal jurisdiction * * * may lawfully issue." This does not enlarge the power of the court-martial to punish, or create or give it cognizance of any new offense. It arms the court with authority to compel the witness to appear and testify, so far as this can be done by *process*; but in securing his testimony the court is restricted to the means which it is thus authorized to employ. It can not, on grounds of supposed public expediency, or on the supposition that the interests of justice will thereby be promoted, assume to exercise any jurisdiction beyond what is plainly granted, or inflict any punishment where the power to impose it is not clearly conferred by the laws of Congress.

I may add that the general conclusion reached upon the question herein considered derives additional support from the provisions of the sixty-eighth article of war (Rev. Stat., sec. 1342). By this article Congress has given a court-martial power to punish for contempts; but the power is in terms restricted to cases of acts of menace in its presence or

of disorder by which its proceedings are disturbed. In thus limiting the grant of power to certain cases designated in the statute, by a familiar rule of interpretation it is to be implied that all others were meant to be excluded therefrom.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

FINES, PENALTIES, FORFEITURES, ETC.

The power conferred upon the Secretary of the Treasury by section 26 of the act of June 26, 1884, chapter 121, to refund "a fine, penalty, forfeiture, exaction, or charge arising under the laws relating to vessels or seamen," which has been paid to any collector of customs or consular officer, does not extend to the case of a fine, penalty, etc., exacted and paid prior to the date of that act, and of which an application for remission was made within a year from the date of payment.

Nor does the power of remitting fines, penalties, etc., so arising, given by the same section to the Secretary of the Treasury, extend to cases where a competent judicial tribunal shall have decided that such fines penalties, etc., were legally imposed.

DEPARTMENT OF JUSTICE,
October 30, 1885.

SIR: Your letter of the 24th ultimo presents for my consideration the following case and questions:

"In May, 1882, the British steamer *Glenelg* arrived at Astoria, Oregon, from Hong Kong, China, having on board an excess of passengers in violation of section 4253, Revised Statutes. The master was tried in the United States district court for Oregon, and condemned to pay a fine of $5,200, which sum was paid into the registry of the court, and has been regularly accounted for by the collector of customs in that port. Hing Kee & Co., owners or agents of the vessel, by their attorney, applied for a remission of the fine *within a year from the date of its collection;* but the money having been already covered into the Treasury by warrant, this Department took no action on the merits of the case, as it had no power to refund any part of the money, even should it decide that the penalty could be remitted. After the passage of the shipping act of June 26, 1884, chapter 121, the appli-

cation was renewed under the twenty-sixth section of that act."

Hereupon these questions are proposed:

"(1) Does the power to refund moneys, conferred on the Secretary of the Treasury by section 26 of said act of June 26, 1884, extend to moneys accruing from fines and penalties exacted and recovered prior to the passage of the act, when the application for a refund was made within a year from the date of payment thereof?

"(2) Is a power to remit vested in the Secretary by the same section, in cases where a competent tribunal shall have decided that such fines and penalties were legally imposed?"

The answer to the first of these questions depends upon whether the provisions of section 26 of the act therein mentioned have or have not a retrospective operation. It is a well settled rule that statutes are to be construed as prospective only, as intended to apply to those facts and cases only which come into existence after their enactment, unless the contrary very clearly appears either explicitly or by necessary implication from the language employed. In a recent case the Supreme Court of the United States quotes what was said by the same court in the case of the *United States* v. *Heth* (3 Cr., 413), namely, that "words in a statute ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied;" and it declares that such is the settled doctrine of that court (*Chew Heong* v. *United States*, 112 U. S., 559.)

The doctrine in the case of *Heth* v. *United States*, *supra*, was applied in construing a clause in the act of May 10, 1800, chapter 54, which provided "that in lieu of the commissions heretofore allowed by law, there shall, from and after the 30th of June next, be allowed to the collectors * * * two and a half per centum on all moneys which shall be collected and received by them * * * for and on account of the *duties arising on goods imported into the United States.*" The point was whether this provision included collections on account of goods imported before as well as after the 30th of June, or was restricted to collections on account of goods imported

after that date. It was construed to embrace the latter only. In commenting upon the terms of the provision, Patterson, J., observed: "The word 'arising' refers to the present time, or time to come, but cannot, with any propriety, relate to time past and embrace former transactions. As to the word 'imported,' it may comprehend the past, or future, or both, according to the subject-matter, and the words with which it is associated. Thus the word 'arising,' coupled with the words 'on goods imported,' shows that the whole clause has a future bearing and aspect, and will not justly admit of a retroactive construction."

The terms of the section now under consideration are somewhat similar. They are: "That whenever a fine, penalty, forfeiture, exaction, or charge arising under the laws relating to vessels or seamen has been paid to any collector of customs or consular officer, and application has been made within one year from such payment for the refunding or remission of the same," etc. Here the controlling words, descriptive of the cases contemplated, appear to be "whenever a fine, etc., arising," etc., which seem to have a prospective meaning, and to be significant of an intent to include only such fines, etc., as may thereafter arise. They cannot well be taken to comprehend such as had already arisen. The subsequent words, "has been paid," are necessarily limited to the payment of a fine, etc., *so arising;* and hence to a payment made after the date of the act. Agreeably to this construction, an application for refunding or remission, unless presented within one year from a payment so made, is not within the act. Furthermore, it cannot reasonably be inferred from the language employed that Congress intended to go back an indefinite period of time, and provide for refunding payments made during such period, where the application for remission happened to be filed within a year from the date of the payment, but not until after the money had been covered into the Treasury.

To the first question, I therefore reply, that in my opinion the power to refund, conferred upon the Secretary of the Treasury by section 26 of the act of June 26, 1884, does not extend to payments of fines and penalties exacted and recovered prior to the date of the act, and of which an application

for remission was made within a year from the date of payment.

The second question involves an examination of section 26 of the act of 1884 with reference to the circumstances under which, in the case of a fine or penalty arising as above, the power to refund may be exercised under its provisions. It declares that where the fine, etc., has been paid to any collector of customs or consular officer, etc., "the Secretary of the Treasury, if on investigation he finds that such fine, penalty, forfeiture, exaction or charge was *illegally, improperly, or excessively imposed*, shall have the power, either before or after the same has been covered into the Treasury, to refund so much of such fine, penalty, forfeiture, exaction or charge as he may think proper, from any moneys in the Treasury not otherwise appropriated."

This provision, in respect of the circumstances above referred to, differs very materially from the provisions for the remission of fines, penalties, and forfeitures contained in sections 5292 and 5293 Revised Statutes, and in the act of June 22, 1884, chapter 391. Under the latter, the power of the Secretary to remit may be exercised, when, in his opinion, the fine or penalty was incurred "without willful negligence or any intention of fraud in the person incurring the same." Generally, in the cases of such fines and penalties as come within the scope of these statutes, it is not necessary to establish either negligence or fraud on the part of the defendants, in order to recover in prosecutions therefor; and hence, notwithstanding the liability to the fine or penalty is judicially established, the question of negligence or fraud in the party liable remains an open one, and (as the statute provides) may still be the subject of investigation with a view to the exercise of the power of remission.

Where, however, a fine or penalty has been recovered by the judgment of a court of competent jurisdiction, the question whether it was or was not "illegally, improperly or excessively imposed," is one that goes to the very foundation of the judgment itself, and cannot well be determined except upon a review of the proceedings wherein such judgment was rendered. It may reasonably be assumed, in the absence of anything in the statute indicating the contrary,

that Congress did not intend to devolve upon the Secretary of the Treasury a duty of that character. The "investigation" to be made by him, as contemplated by the statute, is, I think, limited to cases of fines, penalties, etc., exacted by and directly paid to the customs and consular officers themselves, without the intervention of a court. In such cases fines and penalties may be and often are "illegally, improperly, or excessively imposed." But where the imposition of the fine or penalty is by the judgment of a competent court, the presumption is otherwise—one which, on general principles, must be regarded as conclusive of the question of the legality of the fine, etc., so long as the judgment stands unreversed.

Accordingly, in direct answer to the second question, I reply, that in my opinion the section under consideration does not give the Secretary of the Treasury a power of remission "in cases where a competent tribunal shall have decided that such fines and penalties were legally imposed."

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

MEMBER OF CONGRESS.

The provisions of sections 3739, 3740, and 3741, Revised Statutes, considered, and *held* that, upon a fair construction thereof, a member of Congress may be lawfully accepted as a surety on the bond of a contractor with the United States.

DEPARTMENT OF JUSTICE,
November 2, 1885.

SIR: In your communication of October 27, 1885, you submit for an opinion the following question:

"Whether a member of Congress can lawfully be accepted as a bondsman on a contract with the Government?"

This question must be determined by a construction of sections 3739, 3740, and 3741 of the Revised Statutes.

Section 3739 provides that "no Member of or Delegate to Congress shall, directly or indirectly, himself, or by any other person in trust for him, or for his use or benefit, or on his own account, undertake, execute, hold, or enjoy, in whole or

in part, any contract or agreement made or entered into in behalf of the United States?"

The penalty for violation of this statute is $3,000, and the contract rendered void.

Section 3740 construes the statute as to agreements with incorporated companies.

Section 3741 provides for an express condition in the contract that "no Member of (or Delegate to) Congress shall be admitted to any share or part of such contract or agreement, or to any benefit to arise thereupon."

Section 3742 makes it a misdemeanor for any officer of the United States to enter into any such contract or agreement with any Member of or Delegate to Congress, under penalty of $3,000.

An opinion was rendered upon substantially the same sections (2 U. S. Stat. L., 484) by Attorney-General Legare.

He says: "The act of 1808 is a singularly strict, searching, and comprehensive enactment, and one of my distinguished predecessors (Mr. Wirt) thought it ought to be so construed as to make it as remedial and efficacious as possible. Yet it is a highly penal law; and, besides, is in derogation of common right; on both accounts, therefore, if not to be interpreted strictly, at least not to be extended by any latitude of inference and construction. * * * The interest to disqualify a member from taking, or an officer from offering a contract, must, in my opinion, be an immediate (however indirect) personal interest in its benefits. That he may ultimately profit by the contract * * * is not enough." (4 Opin., 48, 49.)

The rule that penal statutes must be strictly construed is well established. How, then, can the above statute be so construed as to extend its prohibitory provisions to bondsmen and sureties? Signing a contractor's bond would not give the surety any immediate personal interest in its benefits. He is not a contractor with the Government nor does he, under any circumstances, become so under the statute.

The bondsman does not become an original contractor, nor is there any statute which subrogates him to the right of such original contractor, under any circumstances or contingencies whatever.

If the original contractor fails to perform his agreement, there is no statute that substitutes the bondsman or surety to the right to fulfill the same. If such right or privilege devolves on the bondsman, it is acquired by the terms of the contract, and not by the provisions of the statute.

I am of the opinion, therefore, that, upon a fair construction of the statute, a Member of or Delegate to Congress may be lawfully accepted as a bondsman on a contract with the Government in the case mentioned.

The inclosures are returned herewith as requested.

I have the honor to be, very respectfully, your obedient servant.

A. H. GARLAND.

The SECRETARY OF WAR.

CUSTOMS DUTIES.

The expense of brokerage, auctioneer's commissions, and packing, incurred at the place of exportation, are, by the act of March 3, 1883, chapter 121, not to be estimated in determining the dutiable value of imported merchandise.

DEPARTMENT OF JUSTICE,
November 3, 1885.

SIR: I have considered your communication of the 10th ultimo, inclosing papers relating to the cases of *Glanz* v. *Spalding*, recently decided in the United States circuit court for the northern district of Illinois.

These cases, as I gather from the papers submitted, involved the question whether, under the customs laws as modified by section 7 of the act of March 3, 1883, chapter 121, certain items of expense, hereinafter mentioned, formed part of the dutiable value of a lot of seal-skins which had been imported into the United States.

On the trial it appeared that, in the usual course of trade, the skins were bought undressed at auction in London by plaintiff's agent, who afterwards had them dyed and dressed there, and, when finished, packed and shipped to the place of importation. Besides the price paid for the undressed skins at auction, the cost of the goods to the plaintiff at the place of

exportation included the expense of dyeing, dressing, packing, etc., together with the auctioneer's commissions and the agent's brokerage, all of which items had been added by the customs officer in determining their dutiable value.

The plaintiff sought to recover back so much of the duties paid by him on the goods as covered the items of *brokerage*, *commissions*, and *packing*. The court found in his favor for the amount of these items, and judgments were rendered accordingly.

Upon examination of the statutes, I am unable to discover any ground for contesting the correctness of the judgments so rendered. Expenses such as those last above described are plainly forbidden by the act of 1883 to be estimated in determining the dutiable value of goods. Formerly, under sections 2907 and 2908, Revised Statutes, those and other like charges were required to be added to the actual wholesale price or general market value in the principal markets of the country of exportation in order to ascertain dutiable value. But that act expressly repealed these sections, and declared that thereafter "none of the charges imposed by said sections, or any other provisions of existing law, shall be estimated in ascertaining the value of goods to be imported," etc. I think the judgments are in perfect harmony with the customs laws as thus modified.

In my opinion, therefore, writs of error should not be prosecuted in the cases above referred to, and I hereby certify that no writs of error will be taken by the United States therein. The papers which accompanied your communication are herewith returned.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

TRAVELING EXPENSES OF UNITED STATES MARSHALS.

In the adjustment of a marshal's emolument account, he may be allowed credit for expenses of travel incurred by himself while serving process. So a deputy-marshal may be reimbursed for expenses incurred while serving process, and also be allowed three-fourths of the profits arising from his services.

DEPARTMENT OF JUSTICE,
November 3, 1885.

SIR: The communication to you from the First Comptroller, and by you submitted to me for opinion, presents the following questions:

(1) Whether in the adjustment of a marshal's return of fees and emoluments he can be allowed credit for expenses of travel incurred by himself while serving process.

(2) Whether a deputy-marshal can be reimbursed for expenses incurred while serving process, and also be paid three-fourths of the profits accruing from his services.

This subject is regulated by section 841, Revised Statutes, which provides that "no marshal shall be allowed by the Attorney-General, except as provided in the next section, to retain of the fees and emoluments which he is required to include in his semi-annual return, as aforesaid, for his personal compensation, over and above the necessary expenses of his office, including necessary clerk hire, to be audited and allowed by the proper accounting officers of the Treasury Department, and a proper allowance to his deputies, any sum exceeding six thousand dollars a year, or exceeding that rate for any time less than a year. The allowance to any deputy shall in no case exceed three-fourths of the fees and emoluments received or payable for the services rendered by him, and may be reduced below that rate by the Attorney-General whenever the returns show such rate to be unreasonable."

The general question that arises upon this section is whether it was the intention of Congress that, in estimating the personal compensation of marshals and deputy-marshals, no credits representing traveling expenses necessarily incurred by them in the discharge of official duties should be allowed; in short, whether it was the intention of Congress that these officers should defray their own expenses of that kind.

If this question is answered in the affirmative, it must follow that if the traveling expenses of a deputy marshal for a year should amount to the maximum sum he may receive for that period, as might well happen in some large judicial districts, he must be contented to have served the Government for his actual expenses merely. And what has been supposed of a deputy-marshal might be the case with a marshal. Manifestly such a reading of the law must be avoided if possible.

In my opinion the statute does not call for any such construction. It plainly requires that before the personal compensation of the marshal shall be determined "the necessary expenses of his office" together with "a proper allowance to his deputies" shall be first deducted, and it would be a rigorous interpretation, indeed, which rejected the cost of traveling in executing process from the category of "necessary expenses" of the marshal's office, or which recognized such items as proper credits for the marshal, but not for his deputies. Both offices stand on the same footing in this respect. The allowance of the marshal's "personal compensation" presupposes a reduction of all "necessary expenses of his office," as well those incurred by his deputies as by himself, and *superadded* to that the deduction of "a proper allowance to his deputies," thus showing that the compensation of both grades of officers was intended to come out of the emoluments or net earnings of the office.

And such has been the interpretation that the accounting officers of the Treasury have for many years given the law regulating not only the compensation of marshals and deputy-marshals, but that governing the compensation of district attorneys and the clerks of United States circuit and district courts, all which are regulated in this particular in precisely the same language, so that one principle must necessarily apply to all.

And the files of this Department show that this construction of the law was recognized by Assistant Secretary of the Interior Otto when the subject of marshals' compensation was under the control of that Department, and afterwards, more than once, by Mr. Attorney-General Devens.

Such being the case, it would violate a wise principle of

administration to overturn a reading of the law so long established and appealing so powerfully to the sense of right, and which may well be presumed to have received the acquiescence of Congress.

In a case where two constructions of a statute are admissible the Supreme Court has uniformly deferred to and generally treated as controlling that construction which has been adopted by the proper Department of the Government in applying the statute, particularly where it has been long established. (*Edwards* v. *Darby*, 12 Wh., 206; *Atkins* v. *Disintegrating Company*, 18 Wall., 301; *Smythe* v. *Fiske*, 23 Wall., 382; *United States* v. *Moore*, 95 U. S., 763; *United States* v. *Pugh*, 99 U. S., 269; *Swift* v. *United States*, 105 U. S., 695; *Hahn* v. *United States*, 107 U. S., 406; *United States* v. *Graham*, 110 U. S., 221; *Five Per Cent. Cases*, 110 U. S. 485.)

It follows that the questions propounded must be answered in the affirmative.

Very, respectfully, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

NAVAL ACADEMY—HAZING.

To constitute the offense of "hazing" at the Naval Academy, under the act of June 23, 1874, chapter 453, it is essential that the victim should be a new cadet of the fourth class. Hence, unless the charge against the accused alleges that the victim was a new cadet of the fourth class, a court-martial organized under the statute would have no jurisdiction over it. An allegation that the victim was a candidate for appointment or admission to the Academy is insufficient.

DEPARTMENT OF JUSTICE,
November 12, 1885.

SIR: I have the honor to acknowledge the receipt of your communication of the 10th instant, inclosing "a copy of all rules, regulations, and orders in force at the Naval Academy prior to and at the date of the act of June 23, 1874, defining prohibiting, or referring to the offense of hazing." This copy was requested in view of your communication of the 20th ultimo, in which you ask "my opinion as to the proper construction of the act of June 23, 1874, 'to prevent hazing,' with special reference to the question of jurisdiction

as affected by the fact that the person against whom the offense is committed, being a candidate for appointment, is not at the time a naval cadet."

This act provides: "That in all cases when it shall come to the knowledge of the Superintendent of the Naval Academy at Annapolis, that any cadet midshipman or cadet engineer has been guilty of the offense commonly known as hazing, it shall be the duty of said Superintendent to order a court-martial, * * * and any cadet midshipman or cadet engineer found guilty of said offense by said court shall upon recommendation of said court be dismissed, and such finding when approved by said Superintendent shall be final." * * *

The act does not define the offense against which the penalty is denounced. This is not unusual. Congress frequently affixes a penalty to a common law offense by name, without defining it. In such cases we must look to the common law to ascertain the ingredients of the offense. The statute under consideration is local to the Naval Academy at Annapolis, and the offense named is unknown either to the common or statutory law of the land. Again, the statute denounces an "offense," not a system or practice. Naval cadets could not be guilty of an "offense," unless there was some rule or regulation prescribed by competent authority to be offended.

It is evident, therefore, that we must go to the rules and regulations in force at the Naval Academy of Annapolis at the date of the passage of this act for a definition of the "offense commonly known as hazing." An examination of the copy of them which you have furnished shows that for many years prior to the passage of this act there existed at the Naval Academy a practice among the older naval cadets of maltreating the new cadets of the fourth class. This practice was forbidden by the orders of the Superintendent of the institution, and in those orders denominated as "hazing." Many cadets were dropped from the roll for the offense of *hazing*, and much official correspondence about the offense and its punishment took place between the Superintendent of the Academy and the Secretary of the Navy during the period from October, 1865, to May, 1874.

On October 6, 1865, a board was appointed by order of the Superintendent of the Academy "to investigate the late disgraceful proceeding that took place on the dock near the *Santee* and *Constitution*," in which it appears that Midshipman Wheeler was molested for the purpose of "horsing" (as they express it here). The term "horsing" was evidently used by mistake for "hazing." This is the first time in which the existence of any system or practice known as "horsing" or "hazing" is recognized in any order or regulation promulgated by those in authority at the Academy. Here the victim was a midshipman.

Referring to this order the Superintendent of the Academy writes the Secretary of the Navy, October 18, 1865, No. 27, that "the practice of teasing and tormenting new midshipmen, often to the endangering of life and limb, has been practiced here rather too freely." The Secretary of the Navy, in reply, says: "Your No. 27, reporting midshipmen (naming them) of the third class for taking unwarrantable liberties with members of the fourth class, who have just entered the Academy, has been received," etc.

The Secretary continuing, says that such conduct will not be tolerated.

October 20, 1868, order No. 44 was issued by the Superintendent of the Academy and read at the evening parade. This order was directed at the practice of *hazing*, and was evoked by some cruelties practiced by members of the senior classes upon new members of the fourth class. It recites that "orders have been issued in regard to the disreputable practice of hazing," and dismissed those midshipmen who were leaders in the *hazing* or maltreatment of the fourth-class midshipmen.

On September 28, 1871, order No. 105 was issued by the Superintendent. It is as follows:

"Order No. 105.] NAVAL ACADEMY,
"*Annapolis, Md., September* 28, 1871.

"The cruel and senseless practice which has prevailed to a greater or less degree amongst the senior classes of the cadet midshipmen in the Academy, of 'hazing' the members of the junior or fourth class, is hereby positively pro-

hibited. The cadet midshipmen are warned that those who persist in the violation of regulations, and of this order, and who are detected in this practice will be reported to the Navy Department and their dismissal from the Academy earnestly recommended by the Superintendent.

"JOHN L. WORDEN,

"*Commodore and Superintendent of Naval Academy.*

On October 6, 1871, Order No. 117 was issued. This order recites that "in open defiance of the regulations of the Academy and of the stringent order of the Superintendent of 28th September, some evil-disposed members of the second and third classes have carried the senseless practice of 'hazing' many of the fourth class to such an extent as to require the most stringent measures for its immediate suppression."

On September 28, 1872, Order No. 109, was issued, which is as follows:

"Order No. 109.] UNITED STATES NAVAL ACADEMY,

"*Annapolis, Md., September* 28, 1872.

"While the Superintendent does not believe that any of the cadet midshipmen will be so blind to their own interests, or so regardless of the reputation of the Academy, as to attempt to re-establish the exploded and senseless practice of 'hazing' junior classmen, he yet deems it advisable, in the event of his being mistaken in the gentlemanly instincts of the young gentlemen. to warn them, at the outset of the new academic year, that any violation of the regulations in that regard will meet with speedy punishment. For the information of all concerned, the following extracts from letters of the honorable Secretary of the Navy, dated October 14 and November 16, 1871, are published:

* * * * * * *

"Extract 1. 'The traditions and instincts of a naval officer call upon him to protect the weak, to be kind and courteous to strangers, to render the service of the country as acceptable to its members as its hardships and privations will permit.

"'The Department is determined to root out the recently exhibited tendency to treat the incoming cadets with violence and inhumanity, and will punish to the extent of its power

conduct so unworthy of officers and gentlemen as that just shown at Annapolis.'

* * * * * * *

"Extract 2. 'The Secretary of the Navy learns with regret that the order from the Department of the 14th of October, visiting upon certain cadet midshipmen at the Academy the proper punishment for their offenses against good order and discipline, has failed to entirely remove the evil against which the order was directed. The Superintendent of the Academy reports that the barbarous and ungentlemanly-like practice of 'hazing' has been renewed by certain members of the class which has just entered upon its second year at the Academy, and that not only the constant annoyance, but in some instances brutal treatment, to which certain of the newly-entered cadets had been subjected, still continues.

* * * * * * *

"Extract 3. 'Young gentlemen selected to be educated for the public service at the public expense must realize that the continuance of the national favor depends upon the spirit with which it is received, and that misconduct in their position, like misconduct in any other office, deserves and will inevitably be followed by removal.'

* * * * * * *

"Extract 4. 'In conclusion, let it be distinctly understood that the Academy will be purified of this disgraceful practice, and the defiant spirit which now invokes its action, by the dismissal, if necessary, of every cadet—to the very last—who refuses the fullest obedience to the regulations on this subject.'

* * * * * * *

"The prompt action taken by the Navy Department last year, in dismissing parties who were found guilty of "hazing," should be sufficient proof to others who may be tempted to commit like offenses, of the certain consequence which must result therefrom. Let this warning given in the interests of yourselves and of the Academy be sufficient to save you and your friends from the disgrace and mortification which a disregard to it will surely bring.

"JOHN L. WORDEN,

"*Commodore and Superintendent of Naval Academy.*"

No order, rule, or regulation has been found in which the maltreatment by a cadet of any one other than a new cadet of the fourth class is denominated as hazing or made a specific offense.

The statute under consideration is highly penal and must be strictly construed. The definition of the offense commonly known as "hazing" cannot be enlarged or its ingredients varied for the purpose of carrying out any line of policy, however wise, or effecting any purpose, however laudable. The offense commonly known as *hazing*, at the date of the passage of the act, was committed where an older cadet maltreated a new cadet of the fourth class.

I am confirmed in this opinion by the interpretation put upon this statute by the authorities of the Naval Academy.

In an official copy of the regulations of the United States Naval Academy, as approved by the Secretary of the Navy, of date January 1, 1876, I find the following:

Section 170 (page 32), under general head "Internal discipline," provides: "The practice of molesting, annoying, ridiculing, maltreating, or assuming unauthorized authority over the new cadets of the fourth class, known under the term hazing, running, etc., shall subject the older cadets to prompt dismissal from the Naval Academy, as prescribed by the act of Congress and the orders of the Secretary of the Navy."

I am of opinion, therefore, that to constitute the offense of *hazing* under the statute it is essential that the victim of the maltreatment should be a new cadet of the fourth class.

Unless the charge on which the cadet is arraigned alleges that the victim of the maltreatment or *hazing* was a new cadet of the fourth class, a court-martial organized under the statute would not have jurisdiction to try it. If the charge makes the allegation and the proof fails to maintain it the court-martial should acquit the accused. As a candidate for admission to the Academy is in no sense proper or popular "a new cadet midshipman or cadet engineer of the fourth class," a charge alleging that the victim of a cadet's maltreatment was a candidate for admission would not come within the jurisdiction of a court-martial organized under the

statute, nor would proof that the victim was a candidate authorize conviction on a charge properly drawn.

All papers and documents sent me in connection with this matter are herewith returned.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE NAVY.

COMMISSIONERS OF ALABAMA CLAIMS.

The officers composing the Court of Commissioners of Alabama Claims, re-established by the act of June 5, 1882, chapter 195, were appointed in conformity to the provisions of that act, but were not commissioned for any stated period. That act limited the duration of the court to two years from the time of its organization thereunder; but by the act of June 3, 1884, chapter 62, its existence was extended to December 31, 1885; and under the latter act the officers of the court continued to perform their duties after the expiration of the two years referred to, without any other appointment than that originally received: *Held* that the limitation upon the duration of the court prescribed by the act of 1882 was not a limitation upon the terms of the officers thereof, and that the court remained after the expiration of the two years limited by that act, by virtue of the act of 1884, a legally constituted body, notwithstanding the officers composing it received no other commissions than those originally given.

DEPARTMENT OF JUSTICE,

November 14, 1885.

SIR: Your letter of the 13th ultimo informs me that a question has arisen in the Treasury Department "as to the legality of the Court of Commissioners of Alabama Claims," upon which you desire my opinion. In compliance with your request I have now the honor to state my views upon this subject.

The officers composing that court were appointed under the act of June 5, 1882, chapter 195, re-establishing it. This act limited the existence of the court to two years from the time of its organization thereunder. By the act of June 3, 1884, chapter 62, its existence was continued and extended to December 31, 1885. Under the latter act each of the officers of the court has, from the expiration of the two years referred to down to the present time, continued to exercise the duties of the office to which he was appointed as above,

without any other commission than the one originally received. This has given rise to the question alluded to by you, which I understand to be: Whether the court has been since the expiration of the two years mentioned, and is now, a legally constituted body.

It is assumed that the doubt as to the legality of the court, which the suggestion of this question implies, proceeds from the view that the *term* of the incumbents, appointed as above, was apparently for a definite period (namely two years), and, if for a definite period, that Congress could not, by subsequently prolonging it, continue them in office after the expiration of the term fixed by the law in force when their appointments were made. Here, then, it becomes important in the first place to inquire whether the act of June 5, 1882, under which the appointments were made, prescribed a definite term for the appointees.

By the first section of the act of 1882 the Court of Commissioners of Alabama Claims, created by the act of June 23, 1874, chapter 459, was re-established in the manner and with the obligations, duties, and powers imposed and conferred by said chapter, except as changed and modified by this act." The second section of the same act provided "that the number of judges for said court, to be nominated and appointed in the mode directed by section 2 of said chapter, shall be three," etc. Section 3 provided "that the judges of the court hereby re-established shall convene and organize in the city of Washington as soon as practicable after their appointment, and the court so organized shall exist two years," etc.

It will be observed that the second section of the act of 1882 declares that the judges shall be nominated and appointed in the mode directed by section 2 of the act of 1874. The latter section contains nothing in regard to the appointment of the judges. Their appointment, under the last-mentioned act, is regulated by the *first* section thereof, and it is probable that Congress had in mind the provisions of this section when passing the act of 1882. The mode prescribed by the first section of the act of 1874 is, nomination by the President to the Senate and appointment by him with the advice and consent of that body, which is the mode whereby the judges were actually appointed under the act of 1882.

Had the latter act been silent or made no valid and effective provision on the subject, their appointment would have constitutionally devolved upon the President and Senate (6 Opin., 1; 11 Opin., 209; 15 Opin,. 3, 449); so that it is unimportant whether the clause in the second section thereof, quoted above, be taken to refer to the first section of the act of 1874, or be regarded as wholly inoperative, the appointments of the judges under the act of 1882 as actually made being in either case proper.

Neither the act of 1874, which originally created the court, nor the act of 1882, by which it was re-established, expressly limited or defined the terms of the officers thereby authorized to be appointed.

The act of 1874, in section 8, provided that "the *said court shall exist for one year* from the date of its first convening and organizing, and should it be found impracticable to complete the work of the said court before the expiration of the said one year, the President may, by proclamation, extend the time of the duration thereof to a period not more than six months beyond the expiration of the said one year; and in such case all the provisions of this act shall be taken and held to be the same as though the continuance of the said court had been originally fixed by this act at the limit to which it may be thus extended." The duration of the court was subsequently extended by proclamation of the President for a period of six months from July 22, 1875 (19 Stat., 661.) Afterwards, by act of December 24, 1875, chapter 1, its existence was continued and extended to July 22, 1876, when, by an act of the latter date (chapter 225), it was again continued and extended to January 1, 1877.

In similar terms the act of 1882, in the third section thereof, provided that "*the court * * * shall exist two years.*"

This legislation limits the duration of the *court*, and, incidentally, the term of each officer constituting it; as, when an office ceases to exist, the incumbent is *ipso facto* out of office. But it does not restrict such term otherwise than in this incidental way. The judges, etc., are not thereby required to be appointed for any definite period, but only to the *office;* and, in point of fact, they were not commissioned for any stated time. It is manifestly intended by the statute

that the term of the officer so appointed shall not be for a fixed period, but be co-extensive with the existence of the office itself, which depends solely on the will of Congress, and may be prolonged or shortened at the pleasure of that body. The effect of the limitation adverted to was nothing more than that the court should exist for two years only, unless Congress, in the meantime, should extend its duration for a longer time. And when the appointments were made to the office without any definite term being expressed therein (which, as already intimated, was in conformity with the statute authorizing them) it must be presumed that they were so made with the knowledge of the power of Congress to prolong the existence of the court, and also in contemplation of the possibility of Congress exercising this power and thereby continuing the appointees in office correspondingly.

Instances of this sort are found in earlier acts of Congress and in the practice of the appointing power thereunder. Thus, by the act of July 13, 1832, chapter 199, to carry into effect the convention between the United States and France of July 4, 1831, the President, with the concurrence of the Senate, was authorized to "appoint three commissioners, who shall form a board," whose duty it was to receive and examine all claims presented to them under that convention. The act further provided "that the board * * * within two years from the time of its meeting shall terminate its duties." Subsequently, by act of June 19, 1834, chapter 57, the duration of the commission was extended to three years from August 1, 1832, and again by act of March 3, 1835, chapter 43, it was extended to January 1, 1836. The commissioners appointed under the act of 1832 were not (nor did it require them to be) commissioned for a definite term, and they continued in office under their original appointment after the expiration of the two years limited by that act, and during the whole period for which the existence of the commission was extended by the subsequent acts mentioned.

So, in the case of the commission created by the act of March 2, 1833, chapter 96, to carry into effect the convention between the United States and the Two Sicilies of October 14, 1833. That act limited the duration of the commission to one year from the time of its first meeting. The act of

June 19, 1834, chapter 58, extended the time six months. The commissioners were not appointed for a definite term, and they remained in office under their original commissions during the extended period.

Very different, however, is the case where Congress prescribes a definite term for the *appointment*, and afterwards extends the duration of the office. Thus the act of March 3, 1871, chapter 116, which created the Southern Claims Commission, provided that the commissioners should be "commissioned for two years," and they were commissioned for two years from March 10, 1871. The provisions of that act, establishing the commission, were subsequently by the act of March 3, 1873, chapter 236, extended and continued in force for four years from March 10, 1873. But the commissioners, on the expiration of the term for which they were commissioned under the act of 1871, were re-appointed and thereafter served under new commissions. This case well illustrates the difference between a law which limits the duration of an *office* and one which limits the *term* of an incumbent thereof.

In addition to the instances above mentioned, showing the practice of the Government where offices, limited in duration, have been created by statute, and afterwards continued in existence by Congress, I may mention another, showing a similar practice where the office was established by treaty for a limited period and subsequently extended by treaty for a further period. The Mexican Claims Commission, created by the convention between the United States and Mexico, of July 4, 1868 (one of the commissioners being appointed by the President, with the advice and consent of the Senate), was originally limited in duration to two years and six months, but was subsequently extended from time to time by the conventions of April 19, 1871, November 27, 1872, and November 20, 1874. The commissioner who was appointed by the President under the convention of 1868 (and here the appointment was not for a definite term) continued to serve under his original appointment during the period for which the commission was subsequently extended as above.

The result arrived at is that the limitation upon the duration of the court prescribed by the law of 1882 is not to be

understood as a limitation upon the term of the officers thereof in such sense as to restrict the latter to a definite period of time beyond which it can not extend, or the incumbents continue in office without new appointments.

In response, then, to the general question submitted, I reply that in my opinion the Court of Commissioners of Alabama Claims, re-established by the act of June 5, 1882, has been since the expiration of the two years limited by that act, and is now, by virtue of the act of June 3, 1884, a legally constituted body, notwithstanding the judges, etc., composing it were appointed under the former and before the passage of the latter act, and have received no other commissions than those originally given.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

CASE OF DANIEL DONOVAN.

D., while a clerk in the office of the Auditor of the District of Columbia, was appointed a referee by the Court of Claims under the provisions of the act of June 16, 1880, chapter 243, and performed services as such; and in consideration of such services the court issued certificates to him fixing the amount of compensation allowed therefor: *Held* that D. is entitled to receive the amount thus allowed.

DEPARTMENT OF JUSTICE,
November 18, 1885.

SIR: I have the honor to acknowledge the receipt of five certificates of the Court of Claims allowing Daniel Donovan, a clerk in the office of the auditor of the District of Columbia, $930 for services as referee in certain suits against said District with a request for my opinion upon the question presented.

Inclosed therewith is a communication addressed to "The President," dated November 2, 1885, from J. B. Edmonds, president of Commissioners of the District, referring to said certificates of Court of Claims to said Donovan for services as referee under appointment of said court in accordance

with the act of June 16, 1880, and stating: "Inasmuch as his right to receive these awards has been challenged on account of his employment as clerk in the auditor's office, we have the honor to request that this question be referred to the honorable Attorney-General for his opinion."

By said act of June 16, 1880, it is provided (*inter alia*) to wit: "When the trial of any claim against the District of Columbia, prosecuted under the provisions of this act, involves the taking and stating of a long account, or the making of measurements or computations involving the services of engineers, said court shall have the power to award a reference to a competent referee to take and state such account, or to the engineer commissioner of the District to make and report such measurements and computations; and said referee or engineer shall report to the court the evidence taken by him for the information of said court, and any such referee shall be allowed such compensation for his services as the court may determine, not to exceed ten dollars per day for time actually employed, to be paid on the order of the court by the Secretary of the Treasury and charged to the account of the District of Columbia."

If Daniel Donovan is otherwise competent there is nothing in said act to prevent his acting as referee in accordance with its provisions and receiving proper compensation therefor whilst a clerk in the office of the auditor of the District.

Revised Statutes, section 1763, provides, viz: "No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall receive compensation for discharging the duties of any other office unless expressly authorized by law."

It does not appear from the papers presented whether or no the salary of Donovan amounts to the sum of $2,500. The offices referred to in said act are offices under the Government of the United States. It is questionable as to whether a clerk in the auditor's office of the District is embraced in its provisions. It is not necessary to consider that question, however, as a referee appointed by the Court of Claims under the provisions of said act of June 16, 1880, does not hold an office under the Government embraced in the provisions of

said section 1763 of the Revised Statutes. "An office is a public station or employment, conferred by the appointment of Government. The term embraces the idea of tenure, duration, emolument, and duties." (*United States* v. *Hartwell*, 6 Wall., 393.) A referee is appointed to perform a specific duty and as soon as that duty is performed the service ceases. It is a duty attached to the person selected under the said act of June 16, 1880. Should the referee die a new reference would have to be awarded. The referee is paid by the Government, but the District is charged with the amount. It is his duty to be disinterested in his action and to represent both claimant and defendant.

If the office of Donavan as clerk in the auditor's office of the District be assumed as embraced in section 1763 of Revised Statutes, then the payment of the certificates to Donovan as referee could only be disputed on the ground of their being for extra services. For such services, however, a compensation is fixed by law, and they have no connection with the duties of the office he holds, and should therefore be paid (*Converse* v. *United States*, 21 Howard, 463). In *United States* v. *Brindle* (110 U. S., 694) the case of *Converse* v. *The United States*, *supra*, is affirmed. It is there decided that when duties to be performed are of a different character and at a different place, whilst "the exact amount of compensation for the service is not fixed, it is clearly to be inferred that such compensation as the law implies where labor is performed by one at the request of another, that is to say, a reasonable compensation, would be paid."

Converse v. *The United States* and *The United States* v. *Brindle*, *supra*, relate to cases embraced within the provisions of the act of August 31, 1852 (Stat. L., 10, 100, sec. 18). Such section is substantially the same as Revised Statutes, section 1763, except that it is in terms absolutely prohibitory, whilst said section of the Revised Statutes assumes that a double office may be held and the salary of both paid, although the compensation of one may amount to $2,500, if "expressly provided by law."

My opinion is that Donovan is entitled to the compensation claimed, so far as the objection referred to is concerned.

I inclose herewith the certificates above referred to, with accompanying papers.

Very respectfully,

A. H. GARLAND.

The PRESIDENT.

IN THE MATTER OF CLARK MILLS.

DEPARTMENT OF JUSTICE,
December 10, 1885.

SIR: The question presented to me by the papers transmitted by you is, whether in the execution of the trust created by deed of Clark Mills under the provisions of the act of Congress approved March 3, 1883, any further duty in respect thereto devolved upon the President.

The complete condition of the trust appears in the accompanying letter of Hon. A. S. Worthington, United States attorney, District of Columbia, to whom the matter was referred last summer for information. Delay in this investigation has been inevitable on account of the long search that was necessary to be made to get at the facts. The money appropriated having been paid in accordance with the provisions of the statute, and the $10,000 properly invested and secured under the supervision of the President, as it appears, there is no other act which the President can or ought to perform. The conservation of the rights of the *cestui que trust* is now with the courts.

Very respectfully,

A. H. GARLAND.

The PRESIDENT.

LOTTERIES—NON-MAILABLE MATTER.

Letters and circulars *known* (not merely supposed or suspected) to concern lotteries are non-mailable, and may properly be excluded from the mails.

But letters addressed to lottery associations or lottery agents cannot, simply because they are thus addressed, be deemed to be letters concerning lotteries and as such excluded.

Newspapers or periodicals containing lottery advertisements are not thereby rendered non-mailable.

Lotteries—Non-Mailable Matter.

A postmaster cannot lawfully refuse to receive and forward registered packages addressed to lottery companies or persons described as agents, officers, or managers thereof; nor can he lawfully refuse to issue money-orders payable to such companies or to persons described in the orders as agents, officers, or managers thereof.

DEPARTMENT OF JUSTICE,
December 16, 1885.

SIR: The questions propounded for opinion in your communication of the 19th of November, ultimo, arise upon the following provisions of law:

By section 3894, Revised Statutes, it is provided: "No letter or circular concerning (illegal) lotteries, so-called gift concerts, or other similar enterprises, offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, shall be carried in the mail. Any person who shall knowingly deposit or send anything to be conveyed by mail in violation of this section shall be punishable by a fine of not more than five hundred dollars nor less than one hundred dollars, with costs of prosecution." (Rev. Stat., 758.)

This was amended by act of July 12, 1876 (Stat., 90), by striking out the word "illegal" where it occurs before the word "lotteries."

By section 3929, Revised Statutes, it is provided "the Postmaster-General, may, upon evidence satisfactory to him that any person is engaged in conducting any fraudulent lottery, gift enterprise, or scheme for the distribution of money or of any real or personal property by lot, chance, or drawing of any kind, or in conducting any other scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post-offices at which registered letters arrive directed to any such person, to return all such registered letters to the postmasters at the offices at which they were originally mailed, with the word 'fraudulent' plainly written or stamped upon the outside of such letters; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster-General may prescribe. But nothing contained in this title shall be so construed as to authorize any postmaster or other

person to open any letter not addressed to himself." (Rev. Stat., 763.)

By section 4041, Revised Statutes, it is provided: "The Postmaster-General may, upon evidence satisfactory to him that any person is engaged in conducting any fraudulent lottery, gift enterprise, or scheme for the distribution of money or any real or personal property, by lot, chance, or drawing of any kind, or in conducting any other scheme or device for obtaining money through the mails by means of false or fraudulent pretences, representations, or promises, forbid the payment, by any postmaster, to any such person of any postal money order drawn to his order or in his favor, and may provide by regulation for the return to the remitter of the sums named in such money-orders. But this shall not authorize any person to open any letter not addressed to himself." (Rev. Stat., 778.)

By the act of March 3, 1879 (20 Stat., 360, sec. 20), it is provided:

"That mailable matter of the fourth-class shall embrace all matter not embraced in the first, second, or third class, which is not in its form or nature liable to destroy, deface, or otherwise damage the contents of the mail-bag, or harm the person of any one engaged in the postal service, and is not above the weight provided by law, which is hereby declared to be not exceeding four pounds for each package thereof, except in case of single books weighing in excess of that amount, and except for books and documents published or circulated by order of Congress, or official matter emanating from any of the Departments of the Government, or from the Smithsonian Institution, or which is not declared non-mailable under the provision of section thirty-eight hundred and ninety-three of the Revised Statutes, as amended by the act of July twelfth, eighteen hundred and seventy-six, or matter appertaining to lotteries, gift concerts, or fraudulent schemes or devices."

The first question is as follows: Whether these several statutes render *non-mailable* letters and circulars concerning lotteries.

As section 3894 (*supra*) prohibits the carrying in the mail of any letter or circular concerning lotteries, and makes it

penal to send anything in violation of the said prohibition, it follows that letters and circulars *known*, and not merely *supposed* or *suspected*, to be concerning lotteries, are *non-mailable*.

The second question is as follows: Is it the duty of postmasters to withdraw from the mails such letters as *they know* to be concerning lotteries, and such circulars as they find upon examination to be concerning lotteries, etc.?

Unsealed circulars may, by inspection, be *known* to concern lotteries or not, and when they do may be properly withheld from the mails, as *prohibited* matter, and so may letters, if *known* to concern lotteries. It must, however, be in rare instances that the contents of letters can be *known*, as they are generally sealed and inviolable.

The third question is in these words: When letters are addressed to lotteries, lottery associations, or persons described in the address as the agents of lotteries, or of lottery or similar schemes, can postmasters lawfully withdraw them from the mails as letters concerning lotteries?

I think this must be answered in the negative. The statute does not warrant any such action touching letters of the kind mentioned. It does not follow that a letter addressed to a lottery association concerns a lottery.

The fourth question is as follows: Are newspapers and periodicals, otherwise entitled to pass in the mails as second-class matter, rendered non-mailable when they publish, in their regular columns, advertisements of lotteries, or similar schemes for distribution of money or property by lot or chance or offering prizes?

I do not think that a newspaper or periodical is rendered non-mailable by containing a lottery advertisement. This does not transform the newspaper into a "circular" within the purview of section 3894 (*supra*).

The fifth question is in the words following: Can postmasters lawfully refuse to receive and forward registered packages addressed to lottery companies or to persons described as agents, officers, or managers of lotteries or other similar enterprises offering prizes?

This should be answered in the negative. The law, section 3929 (*supra*), does not go so far. It authorizes the *return* of registered letters addressed to parties found and declared by

the Postmaster-General, upon satisfactory evidence, to be engaged in conducting a "*fraudulent* lottery." To reject such matter as non-mailable would be to violate the statute, which must be interpreted by its own words, and, furthermore, would be to assume an identity between a lottery and a fraudulent lottery, in the face of a seeming distinction between the two in the statute.

The sixth question is in these words: Can postmasters lawfully refuse to sell money-orders payable to lottery companies, or to persons described in the orders as agents or officers of such companies or concerns?

This question must be answered in the negative. Section 4041, *supra*, cannot be so extended by implication. Its words, which are plain, must have their ordinary sense and cannot be understood to warrant the denial of an application for a money-order to be made payable to a lottery dealer. The law goes no further than to authorize the Postmaster-General to order the refusal of payment of any money-order payable to a person who has been found, upon satisfactory evidence, by him, the Postmaster-General, to be engaged in conducting a "*fraudulent* lottery."

The seventh question is as follows: Has the Postmaster-General any legal authority, upon being satisfied that a concern or company is conducting a lottery, gift-enterprise, or scheme for the distribution of property by lot, chance, or drawing of any kind, to forbid postmasters generally from registering packages or selling money-orders made payable to such concerns, or to their known agents, on the ground that it is unlawful to convey in the mails any matter—that is, concerning lotteries?

If a letter is known to contain matter concerning a lottery it may be withheld from the mail. But it does not follow, necessarily, that a registered package addressed to a lottery dealer, or a money-order made payable to him, appertains to his business of lottery dealing. Such evidence certainly would not sustain a prosecution for sending by mail a letter concerning lotteries. I think, therefore, this question must be answered in the negative.

In answering these questions, I have proceeded on the principle that the legislation in question should not be extended

by construction. It is to some extent penal and very much in derogation of the general right to use the mails, and, upon a well-settled rule, nothing should be held to be within such laws that is not embraced by the very words of the legislature, or, to borrow the language of the Supreme Court of the United States, when speaking of the construction of penal statutes, "the words employed must be understood in the sense they were obviously used." (*United States* v. *Reese*, 92 U. S., 219; Sedg. Stat. and Con. Law, 250, 302, 329; Bishop on Written Laws, sec. 119.)

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The POSTMASTER GENERAL.

CASE OF ASSISTANT SURGEON POPE.

A discharge of an officer from the military service, under the act of July 15, 1870, chapter 294, in order to be valid, must, like a resignation, be founded on an offer on the one part and an acceptance on the other. Accordingly, where Assistant Surgeon P., in September, 1870, offered to take the benefit of that act, and in November following his offer was virtually rejected, an order subsequently (in December, 1870) issued discharging him from service is *held* to be invalid and his status in the service unaffected thereby.

DEPARTMENT OF JUSTICE,
December 19, 1885.

SIR: Your communication of the 30th October, 1885, has received my consideration.

The case presented by it is as follows: In September, 1870, Benjamin F. Pope, then an assistant surgeon in the United States Army, applied for a discharge, with a year's pay, under section 3 of the act of 15th July, 1870 (16 Stat., 317), which provides "that the President be, and he is hereby, authorized, at his discretion, honorably to discharge from the service of the United States officers of the Army who may apply therefor on or before the first of January next, and such officers so discharged under the provisions of this act shall be entitled to receive, in addition to the pay and allowances due them at the date of their discharge, one year's pay and allowances."

On the 2d November, 1870, he was informed that staff officers would not be discharged with the pay and allowances granted by the said act.

Afterwards it was decided to discharge staff officers at their own request under the law, and, accordingly, on the 31st December, 1870, an order was issued discharging Assistant Surgeon Pope on his original application.

But upon receipt of this order Pope represented that he no longer desired a discharge, and that on the rejection of his application he had made arrangements to continue in the service, and that, under the circumstances, the order was unjust to him.

As a consequence of this representation the order of discharge was revoked on the 17th June, 1871, since which time the officer has continued to render service and receive pay.

On the 16th September, 1885, a vacancy, with the rank of major, occurred in the Medical Department, and, as Assistant Surgeon Pope was at the head of the list of his grade for promotion, he was appointed to fill the vacancy, subject to the action of the Senate.

Upon this state of facts my opinion is asked as to the status of Pope.

A discharge under the act of the 15th of July, 1870, to be valid, must, like a resignation, be founded on an offer on the one part and an acceptance on the other. (14 Opin., 261.) There must, as in the case of an ordinary contract, be a meeting of the minds of the officer and the President upon the same identical proposition, or no valid discharge can be the result.

Applying these principles, then, to the case in hand, it is manifest that the order of the 31st December, 1870, discharging Assistant Surgeon Pope was inoperative and void for the want of a subsisting offer or proposal on that officer's part to take the benefit of the law. After the rejection of the offer of September, 1870, it cannot be regarded as continuing to be accepted afterwards whenever the President might see fit, but must be treated as at an end at the moment of its rejection. As was said by the vice-chancellor in the case of the *Sheffield Canal Co.* v. *Sheffield & Rotherham Railway Co.* (3 Railway and Canal Cases, 132), the party who has

rejected the offer cannot afterwards at his own option convert the same offer into an agreement by acceptance; for that purpose he must have the renewed consent of the party who made the offer. I am, therefore, of opinion that the status of Surgeon Pope has not been affected by the order made with a view to his discharge.

I am, with great respect, your obedient servant,

A. H. GARLAND.

The SECRETARY OF WAR.

DEDUCTION FROM PAY OF MAIL CONTRACTORS.

The power conferred upon the Postmaster-General by section 3962 Revised Statutes to make deductions from the pay of mail contractors in the cases therein mentioned is discretionary.

Where a deduction has been ordered by the Postmaster-General and he afterwards becomes satisfied that the order was made under a misapprehension of the facts, it is within his power either to directly rescind the order or to refer the matter to the Sixth Auditor under the provisions of section 409 Revised Statutes.

DEPARTMENT OF JUSTICE,

December 21, 1885.

SIR: I have the honor to acknowledge receipt of your communication of the 14th instant (with inclosures) requesting my opinion upon the proper construction of section 3962, Revised Statutes, which reads as follows:

"The Postmaster-General may make deductions from the pay of contractors for failure to perform service according to contract; and impose fines upon them for other delinquencies; he may deduct the price of the trip in all cases where the trip is not performed; and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier."

The case presented by you is that of "a deduction of the price of a trip recently made from the pay of the Chicago, Burlington and Quincy Railroad Company for failure to perform a round trip August 24, 1885, on the route of the company from Creston to Hopkins, Mo., 27007."

You say: "The company has now shown by satisfactory evidence that the failure was caused by the washing away of a bridge on the line of their road, and that it was impossible to have run their trains through on that date. The

mails thus delayed were carried by the company the next day. They apply for the remission of the deduction, and if such deduction were discretionary, in the first instance, or if it can be remitted after having been ordered, there is much force in the application of the company for such remission."

In construing the language of this statute the universal rule, of course, must be applied in presuming the ordinary meaning of words, unless that meaning would manifestly defeat the objects of the statute. The word "may" in a statute sometimes means "must" or "shall," but this is only the case when in giving it its ordinary meaning the object of the statute would be destroyed. When power is given to public officers, and when public or individual rights call for its exercise, language used, permissive in form, is in fact peremptory, but this is only so where it is necessary to give effect to the clear policy and intention of the legislature. (Sedgwick on Construction, 375–377; *Thompson* v. *Carroll*, 22 How., 434; Bishop on Written Law, sec. 112.)

The words used in the statute under consideration in their plain ordinary meaning permit the exercise of discretion on the part of the Postmaster-General.

The question presented is not that of performance or non-performance "according to the contract." A case might arise when both parties to the contract being innocent, the work not being performed, it should not be paid for, but this is not the only case which may occur under the statute. There may be performance, although not performance "according to the contract," yet if the contractor is innocent of fault and the public service does not suffer, a proper question arises for the discretion of the Postmaster-General. The public interests, it seems, would not suffer by the exercise of such discretion on the part of the Postmaster-General in the matter of the Chicago, Burlington and Quincy Railroad Company, presented in your letter. Where the contractor is in fault there can be no question but that under the terms of the statute the Postmaster-General has discretion. I fail to perceive that either the public interests or individual rights demand that language permissive in this statute should be regarded as in fact peremptory. A similar question was presented to one of my predecessors (14 Opin., 179), and I

concur in his conclusion that it is within your discretion to make deductions or not from the pay of contractors according to what may appear right and proper under the circumstances in each case.

A further question is presented. Can the deduction be remitted, having been ordered?

No such power is expressly conferred by the statute. A remission of a forfeiture under an act of Congress must be supported by the terms of the act, and it is a familiar rule that the acts of a public officer beyond the scope of his power are void. The deduction provided for in the act under consideration, however, is not, where the contractor is innocent of fault, in the technical sense either a forfeiture or penalty, but it is the withholding of money not earned. If the Postmaster-General becomes convinced the order was made under a misapprehension of the facts and the amount is in justice due to the contractor under his contract it is within the scope of the power of the Postmaster-General either to directly rescind his order or refer the matter to the Sixth Auditor under the provisions of section 409, Revised Statutes.

It does not appear from your communication whether the railroad company mentioned is an ordinary contractor, or whether it is merely performing what is called "recognized service." In either case, however, I think it is clear the railroad company can be regarded as a contractor, and is therefore within the terms of the statute. (*Railroad Company* v. *United States*, 101, U. S. p. 549.)

Very respectfully,

A. H. GARLAND.

The POSTMASTER-GENERAL.

CUSTOMS DUTIES.

Periodical publications bound in stiff covers in regular book form (each volume containing several numbers of any such publication) lose their character as periodicals and become dutiable as books under the act of March 3, 1883, chapter 121.

DEPARTMENT OF JUSTICE,
December 21, 1885.

SIR: I have the honor to acknowledge the receipt of your letter bearing date 18th instant as to the matter of

the dutiable character of certain books. It appears that there was recently imported at New York a number of bound volumes, in stiff covers, of the Statesman's Year Book, Portfolio Library of Art, Tour du Monde, Hugo Raconde, and Journal of the Royal Microscopical Society, all of which publications are issued in parts at regular stated periods, but in the present instance having been bound in stiff covers in regular book form, each volume containing several of the periodical numbers, they were classified as books under the provision of the tariff act of March 3, 1883, for "books, pamphlets," etc. (paragraph 384), and in accordance with the decision of the Treasury Department of April 3, 1884.

I am of opinion that the said publications, having been bound in stiff covers in regular book form, lost their character as periodicals and became books in the sense of the tariff act. Schedule M of the tariff act of 1883 imposes a duty of 25 per cent. ad valorem upon "books, pamphlets," etc. I concur with the Department that the provisions of the free list relating to periodicals refer to such as are forwarded in the usual manner, and not to pamphlets which have been bound into books before their importation into the United States. Therefore I am not prepared to advise any reversal or modification of the decision of April 3, 1884, series 6288.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

STATE OF KANSAS—ACT FOR RELIEF OF.

In construing the act of August 15, 1876, chapter 305, the preamble thereto may be resorted to for the purpose of ascertaining the meaning of the enacting clause.

In compliance with the provisions of that act, the State is entitled to a credit of $11,425 thereunder, and no more.

DEPARTMENT OF JUSTICE,
December 28, 1885.

SIR: Yours of December 23, instant, requesting an opinion as to the proper construction of the act of Congress approved August 15, 1876, entitled "An act relieving the State of Kan-

sas from charges on account of ordnance stores furnished to Kansas Territory" (19 Stat., chap. 305, p. 206), has been received.

If the preamble and enacting clause of this statute are to be construed together, the intention of Congress is easily ascertained. The preamble recites that—

"Whereas it appears from the books of the Ordnance Bureau of the War Department that the State of Kansas stands charged with eleven thousand four hundred and twenty-five dollars for arms issued to the Territory of Kansas." * * *

The enacting clause directs * * * "the State of Kansas to be credited on its ordnance account with the amounts now charged against it for arms and ordnance stores." * * *

The preamble states in unequivocal language the amount with which the State of Kansas was charged at the date of the passage of the act, and the enacting clause directs a credit for the amounts so charged. It is evident that it was the intention of Congress that the amount named should be the extent of the credit, and that the provisions of the act should be restrained to the recitals in the preamble.

What effect has the preamble upon the interpretation of this statute?

"It becomes important in ascertaining the general intent of the legislature."

It may explain an equivocal expression in the enacting clause, seldom extends it, and in doubtful cases may restrain it.

Lord Coke considered the rehearsal or preamble a key to open the understanding of the statute.

"Recitations in the preamble must be accepted as at least *prima facie* and perhaps conclusively correct. * * * When viewed as a key to the interpretation they should in reason be deemed conclusive of the recited facts, because, whether really true or not, they explain the legislative perspective in enacting the statute."

"And whether the words shall be restrained or not must depend on a fair exposition of the particular statute in each particular case, and not upon any universal rule of construction." (Bishop on the Written Law, secs. 49, 50, 51, and notes.)

"Parker, chief-justice, lays down the rule that it is right and proper to consider the whole of a statute and *preamble* and the probable intention of the legislature, in order to ascertain the meaning of any particular section, and that this mode of interpretation is justifiable, even where the words of the section may be unambiguous." (Smith's Commentaries, sec. 571, p. 707; 1 Pickering's Reports, 258.)

"But though the preamble can not control the enacting part of a statute which is expressed in clear and unambiguous terms, yet, if any doubt arise on the words of the enacting part, the preamble may be resorted to to explain it. In truth, it then resolves itself into a question of intention; or, in other words, recourse is had to the primary rules of interpretation." (Potter's Dwarris, p. 269.)

It is plain, therefore, from the above references that recourse may be had to the preamble in this case to ascertain the intention of Congress in the passage of the act, and also for a proper interpretation of the enacting clause.

I am of the opinion, therefore, that the preamble in the act under consideration should be resorted to for the purpose of interpreting the enacting clause, and that the State of Kansas, when it has complied with the provisions of such act, is entitled to a credit of $11,425 thereunder, and no more.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

SUSPENSION OF OFFICER.

Case of the suspension of Marshall B. Blake as collector of internal revenue for the second district of New York, and the designation of John A. Sullivan to perform the duties of that officer, considered.

The suspension of an officer involves a suspension of his bond; the bond required of the person designated to take the place of the former being substituted therefor while the person so designated is performing the duties of the office.

DEPARTMENT OF JUSTICE,
December 28, 1885.

SIR: I have the honor to acknowledge the receipt of the letter of Hon. Joseph S. Miller, Commissioner of Internal Rev-

enue, relating to the appointment of John A. Sullivan to succeed Marshall B. Blake as collector of internal revenue for the second district of New York, which has been referred by yourself to this Department with the request that immediate attention may be given to the same.

It appears from the statement of facts submitted that the commission of Mr. Sullivan and the order of the President suspending Mr. Blake from the office of collector, both being dated December 2, 1885, were sent by mail on the 3d day of December, 1885. On the 15th of December the bond of John A. Sullivan as collector of internal revenue for the second district of New York, dated December 10, 1885, was received and found to be correct.

On the same day Mr. Sullivan's commission was delivered to him in the office of the Commissioner of Internal Revenue with a letter of instructions advising him that the office of collector would be transferred to him December 31, 1885, and inclosing a letter addressed to Mr. Blake, directing him to turn over the office to his successor. A separate letter was mailed to Mr. Blake directly on December 15, 1885, advising him of the date fixed for the transfer.

Under section 2, Article II, of the Constitution, the President has power to nominate and, by and with the advice and consent of the Senate, to appoint all officers of the United States whose appointments are not therein otherwise provided for and which shall be established by law.

The office of collector of internal revenue was created by act of Congress, and belongs to a class which requires the concurrence of the Senate in the appointment of the incumbent. The tenure of the office is not fixed by law, and the Constitution, while providing for appointments, is silent as to the power of removal. On general principles it would seem that the power of appointment carries with it the power to remove as a necessary incident. (See 103 U. S., 227.)

Before entering upon his office the President is required to take an oath that he will faithfully execute it, and one of the obligations imposed upon him by section 3, Article II, of the Constitution, is to "take care that the laws be faithfully executed."

The appointment and suspension of the incumbents of such

offices as have been created to enable him to perform this duty is his especial function. It is also his prerogative to commission all the officers of the United States. The power of the President to remove an officer, whose appointment requires the approval of the Senate, without that approval, has been much discussed. Until the enactment of the tenure of office act of March 2, 1867 (14 Stat., 430) it seems to have been virtually conceded by Congress (Story on the Constitution, secs. 1537, 1545), and the Supreme Court has accepted the legislative action as amounting to a settled construction of the Constitution in favor of the power. (*Ex parte Hennen*, 13 Pet., 230.) In that case the court say:

"All offices the tenure of which is not fixed by the Constitution, or limited by law, must be held either during good behavior or (which is the same thing in contemplation of law) during the life of the incumbent, or must be held at the will and discretion of some Department of the Government and subject to removal at pleasure. It can not for a moment be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment. This power of removal from office was a subject of much dispute, and upon which a great diversity of opinion was entertained in the early history of this Government. This related, however, to the power of the President to remove officers appointed with the concurrence of the Senate; and the great question was, whether the removal was to be by the President alone or with the concurrence of the Senate, both constituting the appointing power. No one denied the power of the President and Senate jointly to remove where the tenure of office was not fixed by the Constitution; which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted as the practical construction of the Constitution that this power was vested in the President alone, and such

would appear to have been the legislative construction of the Constitution." (See also 103 U. S., 227.)

But in the determination of the question now submitted it is not necessary to discuss the power of the President to remove from office. This is not a case of removal but of suspension. Section 1768 of the Revised Statutes provides as follows:

"During any recess of the Senate the President is authorized, in his discretion, to suspend any civil officer appointed by and with the advice and consent of the Senate, except judges of the courts of the United States, until the end of the next session of the Senate, and to designate some suitable person, subject to be removed in his discretion by the designation of another, to perform the duties of such suspended office in the mean time; and the person so designated shall take the oath and give the bond required by law to be taken and given by the suspended officer, and shall, during the time he performs the duties of such officer be entitled to the salary and emoluments of the office, no part of which shall belong to the officer suspended. The President shall, within thirty days after the commencement of each session of the Senate, except for any office which in his opinion ought not to be filled, nominate persons to fill all vacancies in office which existed at the meeting of the Senate, whether temporarily filled or not, and also in the place of all officers suspended; and if the Senate during such session shall refuse to advise and consent to an appointment in the place of any suspended officer, then, and not otherwise, the President shall nominate another person as soon as practicable to the same session of the Senate for the office."

The Senate was in recess on the 2d of December, 1885, when the commission of Mr. Sullivan and the order suspending Mr. Blake were issued. When the President commissioned the one and suspended the other he exercised the discretionary authority which had been vested in him by an act of Congress, and which he had the undoubted right to exercise with or without cause. It is fair to presume that cause existed. At any rate the enactment of the law already quoted furnishes conclusive evidence that in the judgment of Congress the President can not properly perform his duty

under the Constitution during the recess of the Senate without the power to suspend and thereby dispense with the services of such officers as in his opinion the public interests may require.

Whatever effects might be considered to result from the act of suspension, it can not be seriously contended, I think, that the bond of the suspended officer remains in force after his suspension and while the person designated to fill the office in the mean time is performing its duties and receiving its emoluments. The suspension of the officer carries with it necessarily the suspension of his bond. The bond required of the person designated to take his place is substituted for the bond of the suspended officer while the person so designated is performing the duties of the office.

It appears that the order suspending Mr. Blake was sent to him on the 3d of December, 1885, and it is reasonable to suppose that he received it in due course of mail. The Senate was not in session until the 7th of December, 1885. The order of suspension took effect upon due notice thereof to Mr. Blake, unless by its terms it was to take effect at a stated time after notice. The receipt of the order by Mr. Blake was due notice. (15 Opin. 62.) In my opinion he can not properly or legally resist the transfer of the office to Mr. Sullivan.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

DUTIABLE VALUE OF IMPORTS.

The values of foreign coins, as annually estimated and proclaimed by the Secretary of the Treasury under the provision of section 3564, Revised Statutes, constitute the only lawful basis for computing the invoiced value of importations, and duties on the latter are necessarily required to be collected on the values of foreign coins so estimated and proclaimed.

DEPARTMENT OF JUSTICE,
December 29, 1885.

SIR: In your letter of the 26th instant you direct my attention to section 3564, Revised Statutes, which prescribes

the rule for determining the value of foreign coin as expressed in the money of account of the United States, and after observing that, in consequence of the decline in the price of silver, the values of different foreign silver coins, as annually proclaimed by the Secretary of the Treasury under the provisions thereof, have greatly declined, and that this has had the effect of reducing the duty exacted on merchandise invoiced in such currency, you inquire whether that section necessarily requires the duties upon imported merchandise to be collected on the values of the standard foreign coins as thus annually proclaimed. To this inquiry I have the honor to reply:

By section 2838 all invoices of imported goods subject to a duty ad valorem are required to be made out in the currency of the place or country whence imported, and in order to determine the *dutiable* value of such goods it is necessary to ascertain the value in United States money of the currency in which they are invoiced.

Prior to the passage of the act of March 3, 1873, chapter 268, a number of statutory provisions existed fixing the rates at which foreign coins were to be estimated in computations at the custom-house—some prescribing rates for estimating the value of particular coins only, others rates for estimating the value of the particular coins enumerated therein, and also a mode for estimating the value of such as were not therein enumerated. But in the case of *The Collector* v. *Richards* (23 Wall., 246) the Supreme Court declared that the provisions of that act abrogated all previous regulations on the subject, and it accordingly held that the value of the French franc, as estimated by the Director of the Mint and proclaimed by the Secretary of the Treasury on January 1, 1874, pursuant to the first section of the act, were applicable to goods invoiced in French francs and entered at the custom-house in March of that year, and that the invoiced value of such goods must be computed according to the valuation of the franc so proclaimed. This valuation exceeded by 7 mills the value of the franc as fixed by previous legislation, and the effect was in that case to increase the duty upon the goods.

In construing the first section of the act of 1873 (which was

the one involved in the case then under consideration) it was observed by the court that that section and the second section of the same act had substantially the same objects in view; that the object of the first section was to establish a method of computing the value of other foreign coins, similar to that employed in the second section in computing the value of the sovereign, and to apply such computation in the same cases and for the same purposes, amongst which is that of computing the value of invoices of imported goods. "Otherwise," remark the court, "there would exist two different methods of computing the values of foreign coins and two different rules for estimating the values of goods imported from different countries, giving a different value to goods imported from one country from that given to goods of the same cost imported from another country." And this case has been on two different occasions cited with approbation by the Supreme Court. (*Cramer* v. *Arthur*, 102 U. S., 612; *Hadden* v. *Merritt*, 115 U. S., 25.)

The provisions of the first and second sections of the act of 1873 are reproduced without change in sections 3564 and 3565, Revised Statutes—section 3564 containing those of the first section.

The construction put by the Supreme Court upon the first section of that act applies with all its authoritative force to section 3564. According to that construction the values of foreign coins, annually estimated and proclaimed as required by the latter section, must be regarded as being the only lawful basis for computing the invoiced value of importations.

In my opinion, therefore, that section necessarily requires the duties upon importal merchandise to be collected on the values of the standard foreign coins annually estimated and proclaimed as above.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

LOTTERIES.

Until the Postmaster-General has found, upon evidence satisfactory to himself, that any lottery, gift-enterprise, or scheme is a means of fraudulently obtaining money through the mails, he is not authorized to instruct postmasters to return registered letters or to forbid them to pay money-orders because the same are addressed or made payable to an individual conducting such lottery, gift-enterprise, or scheme.

DEPARTMENT OF JUSTICE,
January 7, 1886.

SIR: I have the honor to submit, in reply to your communication of the 21st December, ultimo, that in my opinion the Postmaster-General has no right to instruct postmasters to return registered letters or forbid them to pay money-orders because addressed or made payable to an individual conducting a lottery, gift-enterprise, or scheme for the distribution of money or property by lot, chance, or drawing of any kind, until he has found, "upon evidence satisfactory to him," that such lottery, gift-enterprise, or scheme is a means of obtaining money through the mails by falsehood and false pretense.

I think it beyond doubt that Congress, in section 3929, Revised Statutes, intended to draw a distinction between lotteries, etc., fairly, and lotteries, etc., dishonestly conducted.

I do not think that, because a lottery or gift-enterprise or scheme for the distribution of property may be illegal by the law of the State where it is carried on, it is, for that reason alone, fraudulent under section 3929 (*supra*), it being clearly the intention of Congress, as I have said already, that before the above-mentioned mail facilities can be denied to persons carrying on lotteries, etc., it must be shown that their business involves a use of those facilities for obtaining money fraudulently.

I have the honor to be, sir, yours, very respectfully,

A. H. GARLAND.

The POSTMASTER-GENERAL.

PERSONAL EFFECTS—FORFEITURE.

Where an importation of packages was entered at the custom-house as containing personal effects only and not subject to duty, but it turned out on examination that the packages contained dutiable merchandise of considerable value: *Held* that the entire packages were not forfeitable but only the dutiable merchandise; the case being governed by section 2802, Revised Statutes, which is unaffected by the provisions of section 12 of the act of June 22, 1874, chapter 391.

DEPARTMENT OF JUSTICE,
January 13, 1886.

SIR: Your communication of the 7th January, instant, has received my consideration.

The case submitted for opinion is this: One F. Abbes has entered in the custom-house at the port of San Francisco an importation of nine cases as containing personal effects, and therefore non-dutiable. It turns out, however, that only four of the cases contained goods entitled to free entry, and that the other five contained dutiable merchandise of considerable value. The questions presented on these facts are: Supposing the dutiable merchandise to be forfeitable, are the personal effects also liable to seizure under the provisions of section 12 of the act of the 22d June, 1874 (18 Stat., 186), or by virtue of any other statute, and "does a forfeiture attach to an entire package of imported merchandise when any portion of its contents is liable to forfeiture by a false entry or false statement in an invoice, or by omission from such invoice for the purpose of evading payment of duties."

In my opinion the personal effects referred to are not confiscable with the dutiable merchandise, should that be held liable to condemnation. Section 2802 of the Revised Statutes provides that when an article subject to duty, and not disclosed at the time of making entry, is discovered in the baggage of any person, *it* shall be forfeited and such person shall be liable to a penalty of treble the value of such article.

This section is still the law, and stands unaffected by the twelfth section of the act of the 22d June, 1874 (*supra*), which applies to frauds in connection with entries of merchandise acknowledged and avowed.

If Congress had intended by that act to subject to forfeit-

ure the personal effects found in the same case or package with dutiable goods fraudulently entered as free, it is hardly to be supposed that such intention would have been indicated by declaring that the forfeiture denounced should apply to the "whole of the *merchandise* in the case or package containing the particular article or articles of merchandise to which such fraud or alleged fraud relates." The term "merchandise" can not be by itself held to be convertible with "baggage" and "personal effects," which are the terms generally used by Congress in its revenue legislation when dealing with the things to which those terms customarily refer.

It is not at all probable either that if Congress had intended for the first time to make personal effects share the fate of confiscable property mingled with them, it would have omitted to refer specially to section 2802 and left its repeal or modification to implication merely.

The fact that the case presented is the first one of the kind that has arisen since the act of 1874 was passed, is perhaps due to the prevalence until a very late day of an interpretation of the 12th section of the act of June, 1874, accordant with this opinion.

In conclusion, it will be observed that I have answered the questions submitted with exclusive reference to the facts contained in your communication.

I have the honor to be, sir, yours, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

FORT BROWN RESERVATION, TEX.

The act of March 3, 1885, chapter 360, appropriated a large sum of money "to enable the Secretary of War to acquire good and valid title for the United States to the Fort Brown Reservation, Tex., and to pay and extinguish all claims for the use and occupation of said reservation by the United States;" with a proviso that no part of said sum shall be paid "until a complete title is vested in the United States," and that "the full amount of the price, including rent, shall be paid directly to the owners of the property."

Claims of ownership of the property, or some portion thereof, having been asserted by different parties, who propose to convey the same to

the Government, their titles respectively, at the request of the Secretary of War, examined and considered by the Attorney-General, who indicates in his opinion the persons by whom and points out the mode by which a good and valid title to the whole of the reservation can be conveyed to the United States and all claims for the use and occupancy thereof extinguished, as contemplated by the said act of 1885.

The provisions of that act do not authorize acquisition of title by condemnation under the eminent domain power of the United States.

DEPARTMENT OF JUSTICE,
January 16, 1886.

SIR: I have considered the questions presented in your letter of the 7th of November last relative to the property known as the Fort Brown Reservation, and, in compliance with your request, now have the honor to state my views thereon.

The act of March 3, 1885, chapter 360, appropriated the sum of $160,000 "to enable the Secretary of War to acquire good and valid title for the United States to the Fort Brown Reservation, Tex., and to pay and extinguish all claims for the use and occupancy of said reservation by the United States," with a proviso "that no part of this sum shall be paid until a complete title is vested in the United States, and the full amount of the price, including rent, shall be paid directly to the owners of the property."

Since the passage of that act several parties who claim ownership of the property, or some portion thereof, having filed in the War Department papers setting forth their titles, these papers were transmitted to me along with the above-mentioned letter, in which you ask advice as to whether they "show in whom of the claimants, or in what porportions, if any, a good and valid title to the property is vested, and what steps are necessary to vest the same in the United States, and whether, under the law, condemnation proceedings may be instituted in the courts of the United States in Texas."

It appears by the papers that Pedro G. Cavazos, a resident of the city of Matamoros, Mexico, and James Stillman, a resident of the city of New York, claim each the title to an undivided one-half of the premises—the latter under a deed dated March 25, 1875, from Mrs. Maria Josefa Cavazos

to Charles Stillman (both since deceased), and the former under her will dated April 21, 1877, which was probated in the probate court of Cameron County, Tex., in January, 1879. James Stillman also claims to have acquired title to the whole of the premises by virtue of certain tax deeds given him by the proper local authorities in 1878 at a sale of the same for unpaid taxes assessed thereon for the years 1873, 1874, and 1875. Both of these parties propose to unite in a deed of the entire property to the United States; and as (apart from the tax deeds referred to) they each deduce their respective interests in the premises from the before-mentioned deed and will of Mrs. Cavazos, it becomes important at the outset to ascertain precisely the nature and extent of her title.

The title held by Mrs. Maria Josefa Cavazos is deraigned from a Spanish grant made to one José Salvador de la Garza in the year 1781, which embraced a very large tract of land bordering on the Rio Grande, known as the Agostadero del Espiritu Santo, and included within its limits the premises. On the death of the grantee, which happened during the same year, his title under the grant passed to his heirs, consisting of two daughters and a son, in equal shares. No partition of the tract appears to have ever been made between these three co-heirs; yet by mutual consent one of them went into the exclusive occupancy of the upper or western portion, another of the middle portion, and another of the lower or eastern portion (these portions having equal or nearly equal frontage on the Rio Grande,) with the understanding that on a future partition of the tract the share of each should be assigned in conformity to that arrangement. The premises are situated within the middle portion of the tract, which was occupied by the son, Don Blas Maria de la Garza, who died in 1802 without issue, but leaving a widow, Senora Maria Francesca Cavazos, who under his will succeeded to all his estate except the fifth part thereof, which was left to her niece, the said Maria Josefa Cavazos. Senora Maria Francesca Cavazos took possession of and retained her husband's estate without division during her life-time. She died in 1835, also without issue, and by the disposition of her will all her right to the said tract became, with the

other property belonging to her estate, vested in Maria Ignacia Cavazos and Maria Josefa Cavazos. The interest thus derived by Maria Ignacia in the same tract was afterwards, on a partition of the whole property, relinquished to Maria Josefa.

At or soon after the close of the Mexican war title to the premises, and to other parts of the said tract lying within the middle portion thereof, was claimed by Charles Stillman and other parties, based upon *labor* grants issued by the ayuntamiento of Matamoros, and upon locations and surveys of head-right certificates, land warrants, donation warrants, etc., issued by the Republic and State of Texas. In January, 1849, a suit was commenced in the United States district court for the district of Texas on behalf of Maria Josefa Cavazos and others against the said Stillman and the other parties claiming title as above, the object of which was to establish and quiet the title of the complainants to the lands in controversy, which embraced the premises then and now occupied by the United States and land adjacent thereto. In that suit all who claimed title under the Spanish grant of 1781, through the heirs or assigns of the two daughters of the original grantee, were also made parties. In January, 1852, the court made a decree, declaring the title to the lands in controversy to be vested in Maria Josefa Cavazos as *tenant in common* with other persons named (parties to the suit) who were heirs or assigns of the two daughters aforesaid or who claimed thereunder, and also declaring void the adverse titles set up by the defendants Stillman and others, derived from the ayuntamiento of Matamoros or based upon locations and surveys made upon head-right certificates, land warrants, etc., issued by the Republic or State of Texas, etc. As there was no appeal from the judgment of the court in that suit, its decree became conclusive upon all the parties thereto.

Subsequently a suit was brought against Maria Josefa Cavazos and others by the city of Brownsville, which claimed title to the premises and other land adjacent as part of the former *ejidos* of Matamoros. This title, to establish which was the object of the suit, was asserted under an act of the Texas legislature, passed in 1850, granting to the city of Brownsville "all the right, title, and interest of the State of

Texas in and to all the land within the said tract (*i. e.*, the former *ejidos* of Matamoros) that was owned by the town of Matamoros on the 19th day of December, 1836," etc. The suit was tried in the United States circuit court for the eastern district of Texas in 1876, resulting in a judgment in favor of the defendants. This judgment was afterwards, on a writ of error, affirmed by the United States Supreme Court at its October term, 1879. (See *Brownsville* v. *Cavazos*, 100 U. S., 138.)

In the two suits above mentioned the title derived under the Spanish grant of 1781 prevailed over all adverse claims to the land in controversy (which included the premises) derived from the ayuntamiento of Matamoros or from the Republic or State of Texas, and the validity of that title thereby became fully and finally established. And since the above-mentioned decree of the United States district court, made in 1852, the right and interest of all those claiming as heirs or assigns of the two daughters of the original grantee, or under such heirs or assigns, in and to the land lying within the middle portion of the large tract embraced by that grant, appear to have been wholly extinguished, thus leaving the title of Maria Josefa Cavazos to the premises, so far at least as *they* are concerned, not that of a tenant in common, as declared in said decree, but that of a holder in severalty.

As already shown, Maria Josefa Cavazos derived her title partly under the will of Don Blas Maria de la Garza, who died in 1802, but mainly under the will of his widow, Senora Maria Francesca Cavazos, who died in 1835; and the title so derived is claimed by those deraigning title from Maria Josefa Cavazos to include the whole of the premises occupied by the United States. But to parts of the same premises title is asserted by other parties, based upon certain sales and conveyances alleged to have been made by Senora Maria Francesca Cavazos during her life-time in 1817 and 1833.

In the will of the latter it is declared that she has sold to Capt. Don José Miguel Paredes 10 sitios (square leagues) of the portion of the Espiritu Santo tract which she derived from her husband, and a copy of a conveyance is exhibited, purporting to have been made by her November 24, 1817, granting to Capt. Don Miguel Paredes 10 sitios of said tract,

which by the terms of the conveyance "are bounded on the east by the lands belonging to the heirs of her brother-in-law, the Capt. Don Pedro Lopez Prieto, and on the west by the remainder of the land already mentioned belonging to the grantor, on the south by the Rio Grande, and on the north by the Aroyo Colorado." This description locates the 10 leagues granted by such conveyance upon the eastern side of the middle portion of the Espiritu Santo tract, that portion being the one which was occupied by the husband of the grantor, as hereinbefore stated.

It is alleged that the grantee, Paredes, died in 1819, and title to the 10 leagues granted to him, as above, is claimed under two conveyances to James Grogan; one dated March 18, 1848, made by Clemencia Prieto, as devisee of the property under the will of the said Paredes, and the other dated March 7, 1854, made by certain persons as his heirs. From James Grogan, now deceased, there appears to be a regular chain of title thereto by mesne conveyances and otherwise down to the present claimants, namely, the heirs of Stephen Powers (for 6¼ leagues undivided) and the wife of C. S. Dana, *née* Marie Grogan (for 3¾ leagues undivided.)

Whilst the eastern boundary of these 10 leagues, according to the terms of the grant to Paredes, is identical and co extensive with the eastern boundary of the middle portion of the Espiritu Santo tract, the western boundary thereof does not appear to be as yet definitely established, but remains a subject of controversy. The parties asserting title to the 10 leagues, under the aforementioned conveyances to Grogan, claim that the western boundary takes in a large part of the Fort Brown property. On the other hand, those who claim ownership of the Fort Brown property through Maria Josefa Cavazos deny that the western boundary includes any part of it; they say that such boundary begins at the rancho Tomates, on the Rio Grande, some 200 or 300 yards below the Fort Brown property, and runs thence northward a considerable distance to the east of that property.

In the conveyance from Clemencia Prieto to Grogan the 10 leagues are described as situated "between the Tomates and Santa Rosalia, and extending back to the north for quantity (entre los Tomates y Santa Rosalia con su fondo al

norte)," both of which points are below the Fort Brown property on the Rio Grande. This description apparently favors the claim of those who assert ownership through Maria Josefa Cavazos. But the deed to Grogan from the heirs of Paredes conveys simply their right and title to the 10 square leagues of the Espiritu Santo tract formerly owned by Capt. José Miguel Paredes, without indicating the situation thereof. And in an action to try title, brought in the district court of Cameron County, Tex., in 1875, by Charles S. Dana and wife and Jacob Mussina, then holding the Grogan title to the 10 leagues, against Maria Josefa Cavazos and others, the plaintiffs in their declaration describe the land claimed by them as follows: Bounded "on the north by the Arroyo Colorado; on the east by lands lately held by Jose Antonio Prieto, one of the heirs at law of Pedro Lopez Prieto and Margarita de la Garza, his wife; and on the west by lands owned and claimed by the said Maria Josefa Cavazos, one of the defendants herein, being the same 10 square leagues sold by Maria Francesca Cavazos, about the year 1817, to José Miguel Paredes." Judgment by default was rendered in favor of plaintiffs for the recovery of the land, as above described; yet there the description does not precisely locate and determine the western boundary of the 10 leagues, but leaves it to be ascertained by lands "then owned and claimed" by Maria Josefa Cavazos.

Upon the whole that boundary must be regarded as still in dispute; and inasmuch as there is *uncertainty* whether it may or may not when finally established be found to include within the 10 leagues some portion of the Fort Brown property, the existence of the claim of the heirs of Stephen Powers and Mrs. C. S. Dana, as owners of the 10 leagues, to a part of that property, constitutes an objection to the title offered by those who assert ownership of the whole of the Fort Brown property through Maria Josefa Cavazos.

Title to a part of the same property is also claimed by the heirs of Stephen Powers and others, under a sale and conveyance alleged to have been made by Maria Francesca Cavazos to Maria de Jesus Escamilla, widow of Juan Estavan Gutierrez, on the 20th of September, 1833. This conveyance purports to grant the labor formerly rented by the said Gutier-

rez, "which is of the property of the grantor, and which is bounded by the lane of Luz Rendon to the principal watering place of the lake, it being understood that all now within the present fence is included in the said sale." It is alleged that this labor lies partly in Brownsville and partly within the limits of the military reservation, including about 23 acres of the latter, and that it was on the 30th of March, 1835, conveyed by the said Escamilla to Miguel Salinas, who by a deed dated December 29, 1849, conveyed the same to his son, Antonio Salinas. By deed dated March 18, 1862, Antonio Salinas, since deceased, conveyed an undivided one-half thereof to Stephen Powers, which is now claimed by the heirs of the latter. The remainder of the labor is now claimed by other parties as the heirs of Antonio Salinas or their assignees.

In 1851 a suit to try title was instituted in the United States district court for the district of Texas by Maria Josefa Cavazos and her husband against William Patterson, Antonio Salinas, and others, involving the ownership of lands in and about the city of Brownsville and the military reservation, *including that labor;* and this suit appears to be still pending. It is understood that all the defendants therein except Antonio Salinas claimed title to the lands in controversy under labor grants by the ayuntamiento of Matamoras, which have since been declared invalid by the Supreme Court, and must be so regarded. But the title of Salinas rests upon the grant from Maria Francesca Cavazos to Escamilla, mentioned above, and the question of its validity remains undetermined, and seems to be still a subject of controversy before the United States district or circuit court.

Under these circumstances, the above-mentioned claim of Powers's heirs and others to part of the Fort Brown property, based on the title just adverted to, may well be deemed to constitute an objection to the title offered by those claiming under Maria Josefa Cavazos.

Besides the claim of Powers's heirs and others, last referred to, an adverse title to the identical land covered by that claim is asserted by Mrs. Charlotte Miller under a sheriff's sale made April 6, 1856, on an execution issued upon a judgment rendered September 28, 1854, by the district court of

Nueces County, Tex., in favor of Elisha Bass *et al.*, and against Antonio Salinas. It appears that the suit in which the judgment was rendered was originally brought in 1851, in the district court of Cameron County, by Antonio Salinas against Bass and others, for the said labor of land, and was removed to Nueces County for trial. Judgment was given defendants for the land and also for $3,000 damages. Writ of error was subsequently sued out by plaintiff, but he gave no supersedeas bond, and execution was issued on the judgment for the damages and his interest in the land sold thereunder for the sum of $20. Afterwards the judgment was reversed by the supreme court of Texas on account of a fatal irregularity in the rendition of the verdict. (See 25 Tex., 12.) But where there has been a sale under execution, the title of a bona fide purchaser is not affected by the subsequent reversal of the judgment. (*Ibid.*, 740.) And as the sale in the present case does not appear to have ever been set aside or annulled, it may properly be considered to be a cloud upon the title not only of Powers's heirs, etc., but also of those claiming the same land under Maria Josefa Cavazos. It therefore constitutes an objection to the title offered by the latter.

It may here be added that a valid title to that part of the Fort Brown property which is used for a national cemetery, containing about 25 acres, has already been acquired by the United States, under a condemnation proceeding instituted in 1872 in the United States district court for the western district of Texas, pursuant to the act of Congress of February 22, 1867, chapter 61. In this proceeding the amount of the appraised value of the land taken ($5,000) was deposited in court subject to its order, and subsequently, in 1879, the court ordered the same to be paid over to Pedro G. Cavazos, who claimed it under the will of Maria Josefa Cavazos.

The result to which the foregoing facts lead is, that Maria *Josefa Cavazos held, at the date of her deed and will* hereinbefore referred to, a good and valid title in fee to the whole of the premises within the limits of the military reservation of Fort Brown, excepting the portion thereof (25 acres) then already acquired by the United States for the purpose of a national cemetery, subject, however, to the above-mentioned

claims of the heirs of Stephen Powers and other parties to parts of the same premises, which are controverted claims, the validity or invalidity whereof (from their nature) can only be satisfactorily determined in the courts.

Under the will of Maria Josefa Cavazos, her son, Pedro G. Cavazos, claims title to an undivided one-half of the entire premises, excepting only that portion already owned by the United States (the other undivided one-half having been conveyed to Charles Stillman by her deed above adverted to). The will is dated April 21, 1877, and in it the testator, after reciting that she was then negotiating for the sale of the Fort Brown property to the United States through her attorney and agent James R. Cox, of Auburn, N. Y., devises to her son Pedro the whole of that property "as at present occupied by the Government of the United States," and authorizes him to deed and convey the same to said Government, upon any terms approved by her said agent and attorney. The testator also bequeaths to her said son all of her right, claim, and demand for rent, use, and occupation of the said premises from the year 1848 up to the date of her decease, and authorizes him to collect and receive and receipt for the same, and the price of the sale aforesaid to be made, which shall be in full discharge of all her claims against said Government. After the above devise and bequest follows this clause: "In trust, nevertheless, as to the whole of said receipts, both for the price and the rent or use, for the uses and purposes which I may hereafter propose or provide by a further testament, then such avails of said property are to be by him accounted for and apportioned or divided among my heirs, according to law; but the said Government of the United States so purchasing or paying are not to be in any wise accountable or responsible for the investment or distribution of the proceeds or avails."

It will be observed that by this instrument the testator's interest in the Fort Brown property goes to the devisee, not absolutely, but only upon certain trusts, with power to convey the same to the Government "upon any terms approved by her said agent and attorney." The bequest of the claim for use and occupation is likewise made upon the same trusts,

with authority to receive the proceeds thereof and also the proceeds of the property.

On the petition of Pedro G. Cavazos the will was admitted to probate by the county court of Cameron County at a regular term thereof, in January, 1879, and he was thereby appointed "executor and testamentary trustee of the said last will and testament of the said Maria Josefa Cavazos, deceased," and directed to give a bond in the sum of $100,000, conditioned as by law required, and to take the oath as by law provided. But at a subsequent term, in November, 1882, it appearing that there had been a failure on his part to give the bond and take the oath as above directed, the court ordered and decreed "that the said Pedro G. Cavazos be, and he now hereby is, in all things removed from his said trust as such executor and the same declared vacant." Thereupon Thomas Carson was appointed administrator with the will annexed, and directed to give bond in the sum of $100,000, and to take the oath required by law; and afterwards, at another term of the court, held in January, 1883, the said Carson filed his bond and oath as such administrator, which were approved by the court.

At the August term, 1885, of said court Carson, as administrator, etc., filed an application therein, setting forth the appropriation made by Congress to acquire title to and pay for the use and occupancy of the Fort Brown reservation, the existence of adverse claims by Powers's heirs and others to parts of the premises, and asking that he be authorized and empowered to compromise and settle the claims of the estate of Maria Josefa Cavazos with the United States and the adverse claimants referred to, and upon payment by the United States of the sum found due for the rents and property to give thereto proper acquittances and conveyances. This application was made under a statute of the State of Texas, which provides that "whenever an executor or administrator may deem it for the interest of the estate he represents * * * to make compromises or settlements in relation to property or claims in dispute or litigation it shall be his duty to present an application in writing to the county court, at a regular term thereof, representing the facts; and if the court upon the hearing of such application shall be

satisfied that it will be for the interest of the estate to grant the same an order to that effect shall be entered upon the minutes, setting forth fully the authority granted." (Rev. Stat. of Texas, 1879, art. 1934.)

The above application was granted during the same term, and the administrator was by the court authorized as such "for and in behalf of the estate of said Maria Josefa Cavazos, deceased, to unite with the other tenants in common and coowners of said middle third of said Espiritu Santo tract of land, and the other claimants to said Fort Brown reservation, in a sale of the land embraced in said Fort Brown reservation to the United States; and to make, execute, and deliver to the said United States full and complete acquittances, releases, and conveyances of all and singular the right, title, and estate, which he, the said Thomas Carson, now has and holds as administrator of the estate of Maria Josefa Cavazos, deceased, in and to the land embraced within said Fort Brown reservation, and in and to all sums of money due by the United States as rents for the use and occupancy of the same."

Thus conflicting claims to the premises and to the right to dispose of the same to the Government appear to exist between Pedro G. Cavazos, as devisee, etc., under the will of Maria Josefa Cavazos, and Thomas Carson, as administrator *cum testamento annexo* of her estate, in view of which the more prudent, and perhaps the only safe course would be, in acquiring title to the premises and extinguishing the claims of that estate for use and occupation, to require both these claimants to unite in a proper conveyance and acquittance thereof.

Upon the foregoing considerations it is submitted that a good and valid title can be acquired by the United States to the whole of the Fort Brown reservation (exclusive of the National Cemetery, which already belongs to the Government), and all claims for the use and occupancy thereof extinguished, by conveyance and relinquishment from the owners of the property in the following way:

(1) By a deed to the United States granting the whole of the premises, and acknowledging payment of and relinquishing all claims for the use and occupation thereof, executed, acknowledged, and delivered by the said James Stillman, and Pedro G. Cavazos (under the power conferred

upon him as devisee as aforesaid), and Thomas Carson, the latter as administrator *cum testamento annexo* of the estate of Maria Josefa Cavazos, deceased.

(2) In addition to that deed, a quit-claim deed to the United States, embracing the same premises, and containing a release of all claims for the use and occupancy thereof, executed, acknowledged, and delivered by the following parties, namely: The heirs of Stephen Powers; C. S. Dana and his wife, *née* Marie Grogan; the heirs of Antonio Salinas; H. E. Woodhouse, Francisca Yturria, Mat. Gerhard, Juan Salinas, Vicente Salinas and R. D. Hinojosa, his mortgagee, and Charlotte Miller. So far as the papers show, these comprise all the parties who are interested in the adverse claims (as against those deriving title under Maria Josefa Cavazos), to which reference is hereinbefore made.

In behalf of Pedro G. Cavazos and James Stillman, it is urged that by virtue of a certain condemnation proceeding originally instituted in the county court of Cameron County, in 1853, under a statute of the State of Texas, and by virtue of a deed executed by the said Cavazos and Stillman on the 20th of April, 1885, which is offered for the acceptance of the Government, a good and valid title to the whole of the Fort Brown reservation may now be acquired by the United States upon payment *to them* of the consideration named in the deed ($160,000).

At the time of the institution of the said proceeding, the United States had been in the actual occupation of the premises for several years, but no law of Congress then existed authorizing the acquisition of the same for the Government in that or any other mode. The proceeding was accordingly initiated without lawful authority, and nothing was done thereunder at the period referred to beyond the rendition of a verdict by a jury assessing the value of the land, which was appraised at $50,000, and the approval thereof by the court. Many years afterwards, in February, 1879, the said court, *on a motion made in behalf of certain parties below named claiming ownership of the premises* (no one appearing in opposition thereto), entered a judgment of condemnation, by which it was decreed that upon the payment by the United States of the said sum of $50,000, together with interest thereon from

the 29th of November, 1853, at ther ate of 8 per cent. per annum, into the National Bank of the City of Galveston, to be disposed of as thereinafter provided, the whole right, title, and interest of the City of Brownsville, and of Maria Josefa Cavazos, deceased, and also of the said Pedro G. Cavazos, her successor in interest, in and to the premises, shall vest forever in the United States, etc.

The above-mentioned deed recites the institution of the said proceeding and the rendition of the verdict therein in 1853, the subsequent entry of the judgment of condemnation in 1879, etc., and in consideration of the payment of $160,000 to the grantors, conveys the premises in fee simple to the United States, covenanting "that all and every of the duties, obligations, and conditions imposed by the said judgment of the district court of Cameron County, Texas, hereinbefore referred to, upon the said the United States of America, in respect to the complete condemnation and lawful acquisition of the said lands and premises, are now and hereby, in consideration of the above described payment of $160,000, fully completed, discharged, dissolved, satisfied, and performed; and the recording of this conveyance in the clerk's office of said county of Cameron shall be conclusive evidence of the full and complete satisfaction and discharge of said judgment and of all the obligations thereof."

The aforesaid proceeding was instituted under the third section of an act of the Texas legislature, passed December 19, 1849, by which it was provided that where the executive officer or authorized agent employed by the United States to purchase land for public purposes shall be unable to ascertain who the real owner or owners of the land desired to be purchased may be, or where it is uncertain in whom the title to such land may be, it shall be lawful for such officer or agent to apply to the judge of the district court, giving a full description of the land; and after eight weeks' notice of such application shall have been given in some newspaper published in the county where the land is situated, such judge shall call a jury to assess the value of said land, etc.; and the amount of the value of the land so ascertained is to be paid into the treasury of the State, there to be subject to the order of the owner or owners when known, and the clerk

of the court is to make a conveyance of the land under the orders of the court, which conveyance shall be as valid and binding as if the same had been made by the real owner of the land.

It will be observed that the judgment of the court, as entered in 1879, does not conform to the provisions of the statute. The latter requires the amount of the appraised value of the property to be paid into the treasury of the State, "there to be subject to the order of the owner or owners when known," and makes it the duty of the clerk of the court to execute a conveyance of the land. The judgment requires the payment to be made elsewhere, namely, into the National Bank of the City of Galveston, and declares that thereupon "the whole right, title, and interest of the city of Brownsville and of Maria Josefa Cavazos, deceased, and also of Pedro G. Cavazos, her successor in interest," in and to the premises shall vest in the United States. Besides, the deed does not even call for a compliance with the directions of the judgment as regards payment, but requires this to be made directly to the grantors therein.

Irrespective of the circumstance that the proceeding referred to was originally begun by persons acting in behalf of the United States without lawful authority therefrom, and subsequently promoted by other persons acting in behalf of certain parties claiming ownership of the premises, it is doubtful whether a valid title can be derived thereunder by reason of the non-compliance with the provisions of the statute as above pointed out, and hence whether the deed would operate to pass anything more than such interest in the premises as the grantors themselves possess. Moreover, a title acquired under the State statute would be a *qualified* one—*i. e.*, "for the purposes aforesaid and none other;" whereas the act of Congress of March 3, 1885, cited above, requires that a "complete title," in other words, an *absolute* one, shall be vested in the United States before any part of the sum thereby appropriated is paid.

In regard to the question whether, under the provisions of that act, condemnation proceedings may be instituted in the United States court in Texas, I am of the opinion that such provisions do not authorize acquisition of title through the

exercise of the eminent domain power of the Government. The aim of the statute is, as well to extinguish claims for the past use and occupation of the land as to secure title thereto; but this could not be fully accomplished by proceedings of that character. The statute seems to contemplate the attainment of its object solely through a voluntary conveyance of the land and discharge of such claims by the owners of the property.

I have already indicated the parties by whom, and the mode by which, a good and valid title to the Fort Brown reservation can be conveyed and all claims for the use and occupancy thereof extinguished, as contemplated by the provisions of the act of 1885. Should these parties, or any of them, fail or decline to give the necessary deeds and acquittances for such compensation out of the appropriation made by that act as you shall deem it reasonable and just to allow, this may present such an obstacle as to render it expedient for the Government to have recourse to some other method of settling the claims, both for the land and its use. In such event, and in view of the peculiar circumstances of the case, I suggest that application be made to Congress for the passage of an act authorizing any person claiming ownership of the land or any part thereof within the limits of the reservation to institute a suit against the United States in the Court of Claims for the recovery of compensation therefor, including also compensation for its use and occupation, with a provision requiring such suit to be brought within a certain time after the passage of the act, and in default thereof that the claim be forever barred; and also requiring, where two or more parties bring separate suits, based upon conflicting claims to the same land, that such suits be consolidated and tried together, etc., and also giving the court power to grant all proper relief as between the respective claimants as well as between each of them and the United States. With the aid of such legislation, in my judgment, all obstacles in the way of securing for the United States a good and valid title to the land, and of extinguishing all claims for its use and occupation, can be surmounted and those objects fairly and justly accomplished.

In addition to the papers which accompanied your letter

of the 7th of November, other papers have since been forwarded to this Department by you with request that they be considered in connection therewith. Among the latter are papers transmitted with your letter of the 9th instant, relating to a claim of the heirs of Miguel Salinas for the rent of certain houses and compensation for loss sustained by their destruction, and also by the destruction of crops, fences, etc., at Fort Brown, during the Mexican war. When the American forces arrived at the Rio Grande, opposite Matamoros, in the spring of 1846, they found the said Salinas in possession of part of the land upon which they encamped—whether as tenant or proprietor does not appear. The land was under fence, and upon it were growing crops, and also some small houses. Seven of the latter were, about the middle of April, hired from Mr. Salinas, by the quartermaster, at a stipulated rent, for the use of the Army; but shortly afterward (some two or three weeks only) they were destroyed by direction of the officer in command of the troops. The fences were also in great part destroyed and the material used in the construction of the fort there erected and as fuel.

It appears that while but a very small part of the claim of the heirs (only $12.88) is for unpaid rent of the houses referred to, the remainder (amounting to several thousand dollars) is for compensation for the loss of property destroyed, etc.

This claim does not, I think, come within the scope of the appropriation made by the act of March 3, 1885, hereinbefore mentioned. That appropriation is limited to the following objects: payment of the purchase money for the land within the limits of the reservation, and payment to the owner thereof of compensation for its past use and occupation; neither of which seems to touch the subject-matter of the claim referred to.

I return herewith the papers which accompanied your letters, together with others relating to the matter which have been received directly from parties interested therein.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

CUSTOMS DUTIES.

"Medicinal soap" is dutiable as soaps not otherwise provided for at 20 per centum ad valorem, or at 25 per centum as a medicinal preparation or compound.

DEPARTMENT OF JUSTICE,
January 16, 1886.

SIR: I have the honor to acknowledge the receipt of your communication, bearing date the 12th instant, relating to certain so-called "medicinal soap" prepared by Messrs J. D. Stiefel in Germany and imported by Messrs. W. H. Schieffelin & Co., at New York.

After a careful examination of the question submitted, I concur with the appraiser that the "soaps" referred to are not dutiable at the rate of 50 per centum ad valorem as "proprietary medicines," but that they are dutiable as "soaps" not otherwise provided for at 20 per centum ad valorem, or at 25 per centum as a medicinal preparation or compound. For the additional reasons suggested by you as to the difficulty of making a successful defense of any suits which might be brought in consequence of the present classification of such merchandise without the concurrence of the appraiser at the port of importation, I deem it advisable that the decisions in question be so modified as to conform to the classification recommended by the appraiser at New York.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

LIGHT-HOUSE KEEPERS.

Legislation of Congress in regard to the appointment of light-house keepers considered.

Section 4669, Revised Statutes, confines the power of the Light-House Board to the adoption and enforcement of such regulations as concern the management and control of light-house keepers, inspectors, and employes for the purpose of properly administering the Light-House Establishment.

The statute does not authorize the Board to adopt and enforce regulations controlling in any manner the appointment of light-house keepers or other inferior officers, or to designate the appointees.

DEPARTMENT OF JUSTICE,
January 18, 1886.

SIR: The legislation of Congress in regard to the appointment of light-house keepers has not been uniform. Some-

times the appointing power has been vested in the President and sometimes in the Secretary of the Treasury.

The power to appoint such keepers is, in many instances, embodied in the act authorizing the erection of the light-house, and these acts, conferring the appointing power respectively upon the President and the Secretary of the Treasury, occur in about an equal number of statutes, and are not inconsistent with subsequent acts and have not been repealed either expressly or by implication, but remain in full force. The power to appoint such keepers in such instances has not therefore been disturbed, but remains where it was placed by Congress, in the original statutes authorizing the erection, equipment, and appointment of keepers of the respective light-houses.

Previous to 1852 various powers were conferred upon the Secretary of the Treasury of a general character and otherwise, such as authorizing him to erect light-houses, to furnish them with supplies, to fix the salaries of keepers, and to appoint keepers, when directed to do so by the special provisions of any act.

The Secretary of the Treasury retains the absolute power to regulate the salaries of the keepers under the provisions of section 4673, Revised Statutes. But the general power to superintend the Light-House Establishment and to fix salaries does not embrace and carry with it the power to appoint such keepers. It requires an act of Congress to vest the appointment of inferior officers in the President, courts of law, or heads of Departments (Cons., Art. II, sec. 2; *Ex parte Hennen*, 13 Pet., 230). This principle appears to have been well understood and adopted in each instance in the legislation upon the subject of light-houses prior to 1852. By consent or acquiescence the power to appoint light-house keepers appears to have been exercised by the Secretary of the Treasury prior to and since the approval of the appropriation act of August 31, 1852, (10 Stat., 112, 119.) By this act Congress constituted the Light-House Board of the United States, and authorized such Board to discharge certain designated and well-defined administrative duties, under the superintendency and subject to the approval of the Secretary of the Treasury.

The same act, with slight and immaterial changes, so far as it applies to the duties of the Light-House Board, is included in the codification of the statutes of the United States. (Rev. Stat., 906.)

Under the provisions of the sections of the codification arises the question in controversy, and which is presented for consideration. (Rev. Stat., Title LV, 906.)

Various duties devolve upon the Board under the several sections of the statute, but the question presented may be determined by a consideration of two sections of the Revised Statutes, the first of which defines the general administrative duties of the Board, and reads as follows:

"SEC. 4658. The Light-House Board shall be attached to the office of the Secretary of the Treasury, and under his superintendence shall discharge all administrative duties relating to the construction, illumination, inspection, and superintendence of light-houses, light-vessels, beacons, buoys, sea-marks, and their appendages, and embracing the security of foundations of works already existing, procuring illuminating and other apparatus, supplies, and materials of all kinds for building and for rebuilding when necessary and keeping in good repair the light-houses, light-vessels, beacons, and buoys of the United States; and shall have the charge and custody of all the archives, books, documents, drawings, models, returns, apparatus, and other things appertaining to the Light-House Establishment."

For the purpose of more efficiently discharging the duties defined in the section above quoted, or otherwise, the Board, with the approval of such secretary, is authorized to prescribe proper regulations, under a subsequent section, to wit:

"SEC. 4669. The Light-House Board, with the approval of the Secretary of the Treasury, shall prescribe, and from time to time may alter or amend and cause to be distributed, such regulations as they deem proper for securing an efficient, uniform, economical administration of the Light-House Establishment."

Under the latter section the Light-House Board claims and has assumed the power to prescribe rules abridging the appointing power of the Secretary of the Treasury, or such power in whatsoever officer it may exist under the statute,

so as in reality to bring such appointments within their absolute control and jurisdiction, thereby confining the function of the proper appointing officer to a mere confirmation or rejection of nominations. Was it the intention of Congress to empower the Light-House Board under section 4669 (*supra*) to prescribe regulations governing the manner of the appointment of light-house keepers? Or was it the intention to limit such regulations to the general duties of the Board, to be exercised with the approbation of the Secretary, as provided in section 4658 (*supra*) and otherwise?

If the intention of Congress is to be gathered from a consideration and comparison of the act of August 31, 1852 (10 Stat., 112–119) with the codification (Rev. Stat., 906), the latter is undoubtedly the correct conclusion.

Section 4669 (*supra*) is a re-enactment of section 13 of the act of August 31, 1852 (10 Stat., 112–119), and reference may be had to the latter in order to arrive at a proper construction of the former.

Section 13 (*supra*) explains what is meant by regulations, and provides that such regulations are to be distributed among the light-keepers, inspectors, and employés of the Light-House Establishment, for the purpose of securing an efficient, uniform, and economical system of administering the same, and to secure responsibility from such inferior officers. The section reads as follows:

"SEC. 13. *And be it further enacted*, That the Light-House Board, by and with the consent and approbation of the Secretary of the Treasury, be authorized and required to cause to be prepared and distributed among the light-keepers, inspectors, and others employed in the Light-House Establishment, such rules, regulations, and instructions as shall be necessary for securing an efficient, uniform, and economical system of administering the Light-House Establishment of the United States, and to secure responsibility from them, which rules, regulations, and instructions when approved shall be respected and obeyed until altered and annulled by the same authority."

It is true the commissioners in the revision have shorn section 4669 of its explanatory provisions, but in doing so

no new or extended powers were expressly conferred upon the Board, and none can reasonably be implied.

Congress has not conferred power upon the Light-House Board to designate such appointments as is expressly done in the act of August 30, 1852 (10 Stat., 63), in relation to inspectors of hulls and boilers.

Reference is especially made to an opinion upon a similar question by Attorney-General Bates and citations therein. (10 Opin., 204.)

The President has long since ceased to exercise the appointing power that exists under the respective statutes, and it has been for years the practice of the Secretary of the Treasury to make such appointments. In a majority of cases the law now in force does not vest the power to appoint light-house keepers in either the President, the courts of law, or heads of Department, and from this anomalous condition of the law has arisen the custom of the Secretary, in connection with the discharge of his other duties, to appoint such keepers.

The rule of practice followed by the Secretary of the Treasury is one of many years standing, and, by reason of a failure to enact proper laws for the purpose of curing the defect of omission herein mentioned, may be said to have acquired the recognition or sanction of Congress. The Secretary will undoubtedly, for the good of the service, be justified in continuing to act in accordance with such rule of practice until Congress shall enact appropriate and definite laws upon the subject. This is a proper matter for the consideration of Congress, to which the attention of that branch of the Government should be called.

I am of the opinion, therefore, upon a general review of the authorities, that section 4669, Revised Statutes, confines the power of the Light-House Board to the adoption and enforcement of such regulations as have reference to the management and control of light-keepers, inspectors, and employés, for the purpose of securing responsibility from them, and for the further purpose of properly administering the Light-House Establishment; but the statute does not authorize such Board to adopt and enforce regulations abridging or controlling in any manner the appointment of light-house

keepers or other inferior officers, nor does it authorize such Board to designate such appointments. The authority to appoint is vested elsewhere, as indicated in this opinion.

Respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

PURCHASE OF ARMY SUPPLIES.

Purchases of supplies for the Army made in open market after advertisement, where no bids have been received in response to such advertisement, are emergency purchases within the meaning of the act of July 5, 1884, chapter 217, and should be "at once reported to the Secretary of War for his approval."

When parts of machinery, or of stoves or ranges or patented articles, are needed, such articles are required by that act to be purchased in the same way as other quartermaster's supplies—that is, by contract after advertisement, except in cases of emergency, in which cases the purchases are to be reported to the Secretary of War for approval.

DEPARTMENT OF JUSTICE,
January 20, 1886.

SIR: Your letter of the 18th ultimo directs my attention to certain provisions of the act of July 5, 1884, chapter 217, relative to the purchase by the Quartermaster's Department of supplies for the Army, and also to a circular letter of instructions issued by the Adjutant-General, dated January 19, 1885, touching the same subject, and inquires: "Whether, when purchases are made in open market after advertisement, and no bids have been received in response thereto, such purchases are not really emergency purchases within the meaning of the law above referred to; and whether, when parts of machinery, or parts of stoves or ranges, for repairs, or patented articles, are required, they can be purchased in open market without advertisement; and, if so, whether such purchases should be regarded as emergency purchases."

To these inquiries I have now the honor to reply:

The act of 1884 provides that thereafter "all purchases of regular and miscellaneous supplies for the army furnished by the Quartermaster's Department and by the Commissary Department for immediate use shall be made by the officers of such department, under direction of the Secretary of War,

at the places nearest the points where they are needed, the conditions of cost and quality being equal: *Provided, also*, That all purchases of said supplies except in cases of emergency, which must be at once reported to the Secretary of War for his approval, shall be made by contract, after public notice of not less than ten days for small amounts for immediate use, and of not less than from thirty to sixty days whenever, in the opinion of the Secretary of War, the circumstances of the case and conditions of the service shall warrant such extension of time. The award in every case shall be made to the lowest responsible bidder for the best and most suitable article, the right being reserved to reject any and all bids."

By the law in force at the date of this enactment it was made the duty of the officers of the Quartermaster's Department, under the direction of the Secretary of War, to purchase such supplies (sec. 1133, Rev. Stat.), and all purchases thereof were required to be made "by advertising a sufficient time previously for proposals respecting the same," where immediate delivery of the article was not demanded by the public exigencies; but where the public exigencies required immediate delivery, the articles were authorized to be procured "by open purchase or contract at the places and in the manner in which such articles are usually bought and sold between individuals" (sec. 3709, Rev. Stat.). These statutory provisions were supplemented by other provisions in the nature of instructions thereunder, contained in the Army Regulations of 1881 (see paragraphs 1478, 1486–1490, and 1523). The latter, among other things, required that where the exigencies of the service demanded a purchase to be made in the open market without advertisement, the fact should be reported to the proper bureau, with a detailed statement of the quantity, quality, and price of each article so purchased, the names of the sellers, and the circumstances which rendered such a course necessary.

The second clause or proviso in the above-quoted extract from the act of 1884 (to which the present inquiries appear to have especial reference) requires as a rule that "all purchases" of quartermaster's supplies shall be made by contract after public notice, as there prescribed, the only exception

therefrom being purchases "in cases of emergency." In these cases purchases may be made, as before, without previous public notice, in open market, and in the manner in which such articles are usually bought and sold between individuals (sec. 3709, Rev. Stat.), but they are now required to be "at once reported to the Secretary of War for his approval." The latter requirement is imposed as an additional check upon the purchasing officer

The object of this legislation is to secure for the Government the benefit of competition in obtaining supplies and to prevent favoritism in making purchases thereof. It contemplates one general mode of purchase, namely, by contract, after advertisement, with "the lowest responsible bidder, for the best and most suitable article," with but a single exception, and that is where an "emergency" exists requiring the purchase to be otherwise made. Such emergency may arise not only before the required public notice can be given, but after it has once been given, in consequence of the failure to receive any bids or proposals; in either case the purchase thereupon would be an emergency purchase, and come under the requirement of the statute for an immediate report to the Secretary of War for his approval. This requirement is, I think, designed to extend to all purchases which are not made agreeably to the general mode above indicated; and hence it applies to the purchase of parts of machinery, or parts of stoves or ranges, for repairs, or of patented articles, where the same is (as in cases of emergency, and those only, it may be) made in open market.

I am therefore of opinion that purchases in open market under the circumstances stated in the first of your inquiries are emergency purchases within the meaning of the statute, and also that when parts of machinery, or of stoves or ranges, or patented articles, are needed, these supplies are required by the statute to be purchased in the same way as other quartermaster's supplies—*i. e.*, by contract, after public notice, except in cases of emergency, in which cases the purchase should be reported to the Secretary of War for his approval.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

CLERKS AND EMPLOYÉS OF DEPARTMENTS.

Provisions of section 4 of the act of March 3, 1883, chapter 128, relating to leave of absence of Department clerks and other employés, construed.

DEPARTMENT OF JUSTICE,
January 24, 1886.

SIR: Your letter of the 16th instant has been received, in which you ask whether or not you are authorized to withhold the salary of a clerk who is absent on account of sickness over thirty days in a year.

The act approved March 3, 1883, section 4, provides that, "All absence from the Departments on the part of said clerks or other employés in excess of such leave of absence as may be granted by the heads thereof, which shall not exceed thirty days in any one year except in case of sickness, shall be without pay."

The meaning is, that an absence from the Departments in excess of thirty days shall be without pay except in case of sickness; that in a case of sickness an absence in excess of thirty days shall be with pay, so long as the Department shall retain upon its roll the sick employé; that after thirty days of absence in a case of sickness no leave of absence for a different cause can be granted with pay; that when thirty days' absence in any one year has been granted with pay, additional absence can be granted to the same party with pay in case of sickness.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

ACQUISITION OF SITES FOR PUBLIC BUILDINGS.

Under an act of the legislature of New York, passed April 2, 1885, a valid title to certain lands situated in the cities of Troy and Auburn, in that State, which have heretofore been selected for the sites of Government buildings authorized by Congress to be erected there, may be acquired by the United States by condemnation proceedings instituted in the State court pursuant to its provisions.

The acts of Congress of March 3, 1885, chapters 331 and 360, providing for the purchase of such sites, may properly be taken to authorize the

acquisition thereof in any mode which is in conformity to the laws of the State. Hence where, by a law of the State, the property may be condemned and title thereto acquired under the eminent domain power of the State, recourse may be had as well to this mode of acquisition as to any other under the authority conferred by those acts.

DEPARTMENT OF JUSTICE,
January 27, 1886.

SIR: Your letter of the 11th ultimo, calling my attention to the act of March 3, 1885, chapter 331, which authorizes the purchase in the city of Auburn, N. Y., of a site for a public building for the accommodation of the post-office, United States courts, and for other Government uses, and to the act of March 3, 1885, chapter 360, which makes provision for the purchase of a site for a post-office and court-house building at Troy, N. Y., and also to an act of the legislature of New York passed April 2, 1885, entitled "An act granting the consent of the State of New York to the acquisition by the United States of certain lands for the purpose of the erection of Government buildings at the cities of Troy and Auburn," etc., presents for my consideration the following question:

"Whether title to such lands as may be selected for the purpose named can be acquired, under the laws above referred to, by proceedings in condemnation, should the Department be unable to acquire title to the same by purchase."

The sixth section of the act of the New York legislature, above mentioned, provides that if title to the land (which is not to exceed one acre in quantity in each place) or any portion thereof can not be acquired by purchase, application in behalf of the United States may be made to the supreme court for a writ of inquiry of damages, and thereupon the damages shall be ascertained, and the same be paid, in the manner prescribed by certain other statutory provisions therein named. In proceedings under these provisions, where it appears that the writ has been duly executed, the court is authorized to make an order declaring that, upon paying into court the amount of the damages ascertained, the United States shall be entitled to an absolute estate in the real property described in the writ and in the appurtenances belonging thereto.

This legislation authorizes title to the property to be acquired by the United States, in the contingency stated in

the question under consideration, through condemnation proceedings instituted in the State court under the *eminent domain power of the State.*

Two inquiries here arise: first, whether a title so acquired would be valid and sufficient; second, whether authority thus to acquire it is conferred by the provisions of the acts of Congress of 1885 above referred to.

There is some diversity of opinion upon the subject of the power of a State to exercise its right of eminent domain for the purposes of the General Government. In the case of *Trombley* v. *Humphrey* (23 Mich., 471) the supreme court of Michigan denied the existence of such power, asserting the doctrine that the right of eminent domain can only be exerted by a State for its own purposes—that the State can not any more exercise this right for purposes which appertain to the United States, though to be accomplished within the territorial limits of the former, than as if the two governments were wholly foreign to each other. On the other hand, the court of appeals of Maryland in *Reddell* v. *Bryan*, (14 Md., 444); the supreme court of California in *Gilmer* v. *Lime Point* (18 Cal., 229); the supreme judicial court of Massachusetts in *Burt* v. *Merchants' Insurance Company* (106 Mass., 356); and the court of appeals of New York in *Matter of Petition of the United States*, etc. (96 N. Y., 227), lay down a different doctrine, and have affirmed the validity of State laws authorizing condemnations of land under the eminent domain of the State for the uses of the United States. In each of these last-mentioned cases the use of the United States for which the land was taken (namely, for the construction of an aqueduct in the first, the establishment of a fortification in the second, the erection of a post-office building in the third, and the improvement of navigation in the fourth) was regarded as an object of public utility in which the State was equally interested with the General Government, and therefore a *public use*, in respect of which its right of eminent domain might properly be exercised. The court of appeals of New York in the cases above cited remark: "While the Federal Government, as an independent sovereignty, has the power of condemning land within the States for its own use, we see no reason to doubt that it may lay aside its sovereignty,

and, as a petitioner, enter the State courts and there accomplish the same end through proceedings authorized by the State legislature. If the State may delegate its power to a private corporation of another State for the benefit of a canal located within its borders, as was held by this court in the matter of *Peter Townsend* (39 N. Y., 171), so it may to an independent political corporation where the use is public and the convenience shared by its own citizens."

The decision of the court of appeals of New York in the case just adverted to, sustaining the validity of a law in that State which authorized the acquisition of title to land by virtue of the eminent domain power of the State, for the purposes of the General Government, seems to me to relieve from all doubt as to its validity the legislation of the same State hereinbefore referred to authorizing sites for post-office buildings at Auburn and Troy to be acquired through the exercise of the same power. The title so acquired for those purposes pursuant to such legislation, embracing as it would an "absolute estate" in the premises, would, I think, be both valid and sufficient.

As to the other point, namely, whether authority thus to acquire title to the property is imparted by the acts of 1885 above mentioned, I think the direction in the one case "to purchase or otherwise provide a suitable site" and the provision in the other "for purchase of a site" may properly be taken to authorize the acquisition in any mode which is in conformity to the laws of the State wherein the property is situated; and hence where, by a law of the State, the property may be condemned and title thereto acquired under its eminent domain power, recourse may be had as well to this mode of acquisition as to any other under the authority conferred by those acts.

On examination, I find that such has been the practical construction heretofore given similar provisions. Thus, under authority of the provision made by the act of March 3, 1857, chapter 97, "to purchase a site and construct additional defenses for San Francisco," condemnation proceedings were instituted in a court of the State of California, pursuant to a law of that State, for the acquisition of Lime Point (case of *Gilmer* v. *Lime Point, supra*). So, under au-

thority of the joint resolution of March 12, 1868 (No. 20), providing for the "purchase" of a site for a post-office building, etc., in Boston, similar proceedings were instituted, pursuant to a law of Massachusetts, in a court of that State, for the acquisition of such site (case of *Burt* v. *Merchants' Insurance Company*, *supra*), and here Congress subsequently, by act of March 3, 1871 (chap. 115), made an appropriation "to pay the award for the necessary land condemned under authority of the State of Massachusetts for the purposes of said building," thus recognizing the correctness of the construction practically given the joint resolution as above. So, under authority of the provision in the act of June 8, 1872, chapter 362, empowering the Secretary of the Treasury "to purchase a lot of ground in the city of Philadelphia for a post-office site," etc., similar proceedings were resorted to in order to acquire title to a part of the site, in pursuance of statutes of the State of Pennsylvania passed March 6 and April 10, 1873 (Laws of Pa., 1873, pp. 70, 72). Other instances might be mentioned, but the above are thought to be sufficient to indicate the construction which has in practice been given to provisions like those under consideration. I may, however, add that Attorney-General Cushing, in an opinion dated April 24, 1855 (7 Opin., 114), deemed the acquisition of land by the United States, for the use of the Washington Aqueduct, through the means of condemnation proceedings instituted in a Maryland court under a statute of that State, to be a "purchase" within the scope of the joint resolution of September 11, 1841, and that the validity of the title might be certified by the Attorney-General thereunder.

In this connection, I observe that while authority to "purchase" land for the uses of the General Government within the States has thus been taken to authorize its acquisition pursuant to State laws through the exercise of the eminent domain power of the State, such authority has been held to be insufficient of itself to authorize the land to be acquired by virtue of the eminent domain power of the United States. Touching this point, I beg to refer to an opinion of Attorney General Devens, dated May 16, 1879 (16 Opin., 329), and to one of Attorney General Brewster, dated February 1, 1883

(unpublished),* both addressed to the Secretary of the Treasury. The view there adopted is, that to warrant the eminent domain power of the United States to be invoked, the terms of the statute must plainly permit its exercise; that the word purchase does not, as commonly used, impart authority to exert that power; and that where Congress intends to confer the authority other terms clearly indicative of such intent are ordinarily made use of by that body, as in the acts of March 9, 1882, chapter 28, and August 7, 1882, chapter 433 (appropriation for custom-house site at Fall River).

But assuming that there is want of authority, in the terms employed in the acts under consideration, to put in motion the eminent domain power of the United States and acquire the sites in question thereunder, this does not necessarily imply a want of authority to make use of similar means afforded by the laws of the State, in the exercise of its right of eminent domain, for the purpose of obtaining title to the property.

In answer to the question proposed, I have therefore the honor to reply, that in my opinion title to the sites mentioned may, under the circumstances stated, lawfully be acquired by condemnation proceedings instituted in the State court pursuant to the statutes above referred to.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

FORT KEOGH MILITARY RESERVATION.

The Northern Pacific Railroad Company has no interest in any of the lands within the boundaries of the Fort Keogh military reservation, excepting the right of way therein granted to that company by the second section of the act of July 2, 1864, chapter 217, to the extent of 200 feet in width on each side of its road, including all necessary ground for station buildings, workshops, depots, etc.

DEPARTMENT OF JUSTICE,
February 1, 1886.

SIR: I have the honor to return herewith the papers which accompanied your letter of the 12th of October last,

* Since published in 17 Opin., p. 509.

in relation to an application made by citizens of Miles City, Mont., in behalf of the Northern Pacific Railroad Company, asking that that company be allowed to erect shipping pens for cattle upon its right of way within the Fort Keogh military reservation, and also that permission be granted stockmen to drive their cattle across the reservation to such shipping pens.

The question proposed for my consideration is, "as to what interest, if any, the Northern Pacific Railroad Company may have to any portion of the lands embraced within the limits of the above-mentioned reservation."

This calls for an examination of the grant made to that company by Congress in the act of July 2, 1864, chapter 217.

By the second section of that act a right of way through the public lands "is granted to the company for the construction of a railroad and telegraph" to the extent of 200 feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine-shops, switches, side-tracks, turn-tables, and water stations," etc.

The third section grants to the company, for the purpose of aiding in the construction of its railroad and telegraph line, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line," etc., "not reserved, sold, granted, or otherwise appropriated, etc., at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office."

It appears by the papers that the Fort Keogh military reservation, which lies wholly within the 40-mile limits of the grant last mentioned, was established by an Executive order dated March 14, 1878, but that the map of definite location of the railroad through the reservation was not filed until June 25, 1881; and as the lands within the reservation were then already appropriated, they were by the terms of that grant excepted therefrom, and the company consequently acquired under the grant no interest or right in or to any portion thereof. (*Kansas Pacific Railway Company* v. *Dunmyer*, 113 U. S., sec. 629.)

But it would seem that the grant of the *right of way* in the second section of that act differs from the *land* grant above referred to in this, that it contains no reservations or exceptions. "It is a present, absolute grant, subject to no exceptions, except those necessarily implied, such as that the road shall be constructed and used for the purposes designated." (*Railroad Company* v. *Baldwin*, 103 U. S., 426.) In the case just cited, which involved the construction of a similar grant of right of way, the land was vacant and unoccupied public domain at the date of the act making the grant. After the passage of the act, but before the definite location of the railroad line, it was sold by the United States, and subsequently the line was definitely located thereon. The point was, whether the grant of the right of way took effect from the date of the definite location of the road or from the date of the act making the grant. The Supreme Court adopted the latter view, and accordingly held that the purchaser took the land subject to that right. Agreeably to the doctrine of this case, the military reservation of Fort Keogh having been established after the grant of right of way to the railroad company, though before the definite location of its line, it must be deemed to be subject to that right through the same.

In answer, then, to the question proposed by you, I reply that in my opinion the Northern Pacific Railroad Company has no interest whatever in any of the lands embraced within the limits of the reservation, other than the easement granted thereto by the second section of the act of 1864, namely, a right of way for a railroad and telegraph—that it has such right to the extent of 200 feet in width on each side of its road, "including all necessary ground for station buildings, workshops," etc.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

APPRAISEMENT OF DUTIABLE MERCHANDISE.

Statutory provisions relating to the appraisement and reappraisement of imports subject to duty considered, and *held* that, in the absence of any regulation of the Secretary of the Treasury to that effect, the law does not permit importers to appear before the appraisers, with counsel or otherwise, for the purpose of producing witnesses to be examined in their own behalf, or to cross-examine witnesses called by such appraisers. The entire matter is under the control of the Secretary, and subject to such rules and regulations as he may from time to time establish in relation thereto.

DEPARTMENT OF JUSTICE,
February 1, 1886.

SIR: Yours of recent date in regard to the appraisement of imported merchandise has been received, and in it you ask an opinion upon the following proposition, to wit:

"The main differences between certain importers and the customs authorities are, that the importers insist on being permitted to appear by counsel at such reappraisement and to cross-examine witnesses, examine and criticise the confidential testimony and papers which may be submitted to the general and merchant appraiser who may conduct the appraisement, and that they have the right to produce such witnesses as they may deem proper for examination by the reappraisers."

The question presented arises between importers and the customs authorities at the city of New York.

Reference is had in this opinion to sections 2614, 2615, 2785, 2902, 2922, 2930 and 2949 of the Revised Statutes, as containing the provisions of law governing the matter presented for consideration. Upon examination of the foregoing sections it will be observed that the statute requires—

(1) That such appraisers, including the merchant appraisers, shall take and subscribe an oath to diligently examine and inspect such merchandise, and report the true value thereof to the best of their knowledge and belief.

(2) That the owner, consignee, or proper agent thereof shall make an entry of such imported merchandise under oath, in which shall be stated among other things the prime cost. And the original invoices, or documents in lieu thereof, with the bills of lading, must be produced to the collector.

(3) That upon the filing of such entry, and the papers required therewith, it shall be the duty of the customs officers, by all reasonable ways and means in their power, to ascertain, estimate, and appraise the true and actual market value and wholesale price of such merchandise at the time of its exportation in the principal markets of the country from whence it was imported, regardless of the invoice and affidavit of such importer.

(4) If the importer, owner, agent, or consignee of such merchandise shall be dissatisfied with the appraisement aforesaid, he may, if he has complied with the law, give notice thereof in writing to the collector.

(5) The collector shall then select one discreet and experienced merchant, to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same, agreeably to the provisions of the statute.

(6) The appraisers may call upon and examine upon oath any owner, importer, consignee, or other person touching any matter or thing which they may deem material in ascertaining the true market value or wholesale price of any merchandise imported.

(7) Such appraisers may require such importer on oath to produce to the collector or to any permanent appraiser any letters, accounts, or invoices in his possession relating to such merchandise.

(8) The Secretary of the Treasury, from time to time, shall establish such rules and regulations, not inconsistent with law, as will secure a just, faithful, and impartial appraisal of all merchandise imported into the United States, and just and proper entries of the actual market value and wholesale price thereof, as aforesaid.

It is plain that the appraisers may make and report such appraisement upon knowledge obtained by examination and inspection of the imported goods, without resorting to other sources or means of information.

The mode of appraisement from the time of the entry of the importer until the final determination of the question is

one continuous act of appraisement under the statute. The use of such terms as "appeal" and "reappraisement" are not warranted by the provisions of the law. Nor have the appraisers been invested by law with any of the powers of a judicial tribunal. They are not authorized to make rules and regulations for their own government in ascertaining values and concluding appraisements, but are governed by the provisions of the statute and such rules and regulations as the Secretary of the Treasury may from time to time establish.

The appraisers are selected for their supposed knowledge and familiarity with the values of the goods imported, and may act upon such knowledge, when they have examined and inspected the merchandise, without additional evidence; or they may, in their discretion, call the owner, importer, consignee, or other person, and examine him upon oath in regard to any material matter. Such examinations may or may not be made according to the discretion of the appraisers. Such examinations can not be demanded by the importer, but may be required by the appraisers. And as the letters, accounts, or invoices in the possession of the importer may be produced, by direction of the appraisers, under the law for the secret inspection and custody of the collector or permanent appraiser, no good reason can be assigned why the statements of owners, importers, consignees, or other persons, taken as required by law by such appraisers, may not be held as secret information by the customs officers, under a rule or regulation to that effect established by the Secretary of the Treasury. Such a rule is not inconsistent with any law of the United States.

There is nothing in the law upon the subject under consideration vesting the customs officers with judicial powers at any stage in the appraisement, nor has Congress fettered the proceedings with statutory rules; but the establishment of such rules has been wisely delegated to the Secretary of the Treasury. The law authorizes the appraisers to require owners or importers to appear before them and make statements under oath, but the rules and regulations in relation to the manner of conducting such examinations are to be established by the Secretary of the Treasury. He must report the

rules and regulations adopted by him to Congress, with his reasons therefor.

I am of the opinion therefore that the law, in the absence of a rule of the Secretary of the Treasury to that effect, does not permit importers to appear before such customs officers, with counsel or otherwise, for the purpose of producing witnesses to be examined in their own behalf, or to cross-examine witnesses called by such appraisers, or to criticise confidential papers therein, but the entire matter is under the control of the Secretary of the Treasury, and subject to such rules and regulations as he may establish in relation thereto from time to time.

Respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

REFUND OF DUTY.

Cement barrels being deemed non-dutiable charges, it is recommended that the instructions of the Treasury Department of July 20, 1885, be so amended as to apply to cases of exaction of duties on such barrels where the value thereof was added by the importer at the time of entry under a requirement made by the order of April 10, 1884, as contained in the circular of that Department of April 12, 1884.

DEPARTMENT OF JUSTICE,

February 5, 1886.

SIR: I have the honor to acknowledge the receipt of your communication of the 3d instant, inclosing copy of a letter dated New York, the 29th of July last, from Messrs. Hartley & Coleman, in which they ask that your Department's instructions of the 20th of that month for the settlement of suits and appeals covering the question of the exaction of duties on barrels containing cement may be considered as applicable to cases of exaction of duties on such barrels where the cost or value thereof was added at the time of entry by the importers, under and in pursuance of an express requirement of the order of April 10, 1884, as contained in Department's circular of April 12, 1884.

My opinion is requested upon the claim made in said letter that, as the cost of the barrels was added by the importers

under such positive order of the Department and against their written protests and appeals, the legal effect is the same as if the addition had been made by the collector or appraiser after entry.

It appears that the instructions of your Department of the 25th of July, 1885, as to settling suits for refund of duty on cement barrels, limited the cases to "those where the entries did not include the cost of barrels, and where the cost was added by the appraiser or collector to the entered value for the purpose of assessment of duty." Understanding the meaning of said limitation to be that where the addition was made on the entry by the importer, he was bound to pay duty thereon, whether the item added was properly exempt from duty or not, I am of opinion that said limitation should be reconsidered and revoked. I can perceive no difference between the cases in which the cost of the barrels was added by the importers under the positive order of the Department and against their written protests and appeals, and the cases in which the addition has been made by the collector or appraiser after entry. Although in form the addition is the act of the importer, it is in reality the act of the Department. In the case of *Meyers* v. *Shurtleff* (23 Fed. Rep., 577) it was decided that, according to the true construction of section 7 of the act of March 3, 1883, cement barrels are non-dutiable charges. That decision seems to have been acquiesced in by the Government as final. It is accordingly recommended that the instructions of your Department bearing date the 20th of July, 1885, be so amended as to apply to cases of exaction of duties on such barrels where the cost or value thereof was added at the time of entry by the importers under and in pursuance of a requirement made by the order of April 10, 1884, as contained in Department circular of April 12, 1884.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

STEAM REGISTERS.

Sections 4418, 4419, and 4491, Revised Statutes, concerning steam registers used on vessels propelled by steam, considered; and *held* that a steam register, in order to be the subject of approval under section 4419, must be of a description which satisfies the requirements of both section 4418 and section 4419.

The terms "persons engaged in navigating the vessel," as used in section 4419, comprehend the officers and crew, those who are in the service of the vessel, and employed in its management, the working of its machinery, etc., during the voyage. The register is not only to be taken from the control of all persons so employed, but to be secured from such control by the inspectors.

DEPARTMENT OF JUSTICE,
February 11, 1886.

SIR: Your letter of the 30th of December last informs me that "a controversy" has for a number of years existed between the board of supervising inspectors of steam-vessels and the owners and proprietors of what is known as the "Edson recording steam-pressure gauge," touching the proper construction of certain statutory provisions contained in sections 4418, 4419, and 4491, Revised Statutes.

By the first of these sections it is provided that the local inspectors of steamboats shall "satisfy themselves * * * that there is a sufficient number of gauge-cocks properly inserted, and, to indicate the pressure of steam, suitable steam registers that will correctly record each excess of steam carried above the prescribed limit and the highest point attained," etc.

The next section provides that "the steam registers shall be taken wholly from the control of all persons engaged in navigating such vessel and secured by the inspectors."

The remaining section reads as follows: "No kind of instrument, machine, or equipment for the better security of life, provided for by this title, shall be used on any steam-vessel which shall not first be approved by the board of supervising inspectors and also by the Secretary of the Treasury."

The view taken by the board of supervising inspectors appears to be that they have no discretionary power under section 4491 to approve any steam register that does not come within the provisions of the other sections named (4418 and 4419), both in regard to its adaptability as an indicator and

recorder of the pressure of steam and its capability of being placed beyond the control of those who may be engaged in navigating the vessel, and thus secured by the local inspectors. On the other hand, the parties interested in the "Edson recording steam-pressure gauge" (as it seems from your letter) regard the board as in duty bound to approve any steam register that satisfies the provisions of section 4418, irrespective of the requirements of section 4419.

Referring to these conflicting views, you, at the instance of the board, request an opinion "upon the construction of the statutes in controversy."

If what is here proposed for my consideration were nothing more than a subject of controversy between the board and the parties above mentioned, it would not present a question upon which the Attorney-General is authorized to give an official opinion. It is made his duty to give opinions at the call of the heads of Departments, but this is limited to questions of law arising in the administration of their respective Departments (sec. 356, Rev. Stat.). Where the subject-matter is not of that character, and consequently not within the scope of the duty thus marked out, he is without authority to officially advise thereon.

Presuming the subject before me, however, to be one that concerns not only the duties of the board but the exercise of your own functions under section 4491, whatever other feature it possesses, I may well regard it as a matter arising in the administration of your Department, and so not open to that objection.

The point on which my opinion is desired, though not distinctly stated in your letter, I understand to be this: Whether, with respect to steam registers, the approval called for by section 4491 is limited to those instruments which come within the terms of section 4418 and which are also capable of being *secured* as required by section 4419.

The answer to this is plain. The provisions of section 4491 extend only to such instruments, machines, or equipments as are "provided for in Title LII; and since no steam registers are therein provided for other than those covered by sections 4418 and 4419, the register, in order to be the subject of approval under 4491, must be of a description which

satisfies both the sections mentioned. It is not enough that the instrument meets all the requirements of section 4418. Unless it can be taken wholly from the control of the persons engaged in navigating the vessel and secured by the local inspectors, as required by section 4419, it does not properly fall within the provisions of section 4491.

There has been some discussion as to the meaning of the terms "persons engaged in navigating" the vessel, as employed in section 4419. In a general sense, those terms comprehend the officers and crew, all who are in the service of the vessel, and employed in its management and the working of its machinery, etc., during the voyage. I incline to take the view that they are meant to be understood in that broad sense. The register is not only to be taken from the control of "*all*" persons so employed, but to be secured from such control by the inspectors. The aim of the statute thus seems to be to place the register under the exclusive control of the inspectors themselves. Whether this is practicable with regard to the use of any steam register now constructed can not properly be considered to govern the interpretation of the statute, but the intent and meaning thereof must be gathered from its language.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

CUSTOMS DUTIES.

Where certain merchandise, consisting of a fabric composed of silk, cotton, and worsted, met all the requirements of Schedule L of the act of March 3, 1883, chapter 121, and also fulfilled all the conditions imposed by Schedule K of the same act for classification for duty there under: *Held* that under section 2499, Revised Statutes, it should be classified for duty under Schedule L, which imposes the higher rate

DEPARTMENT OF JUSTICE,
February 18, 1886.

SIR: I have the honor to acknowledge the receipt of your communication of the 16th instant, requesting my opinion upon a question involving the classification for duty of cer-

tain merchandise called silk seals, imported under the tariff act of March 3, 1883.

It appears from your statement that the merchandise in question consists of a fabric composed of silk, cotton, and worsted, silk being admittedly the component of chief value, but worsted also forming a component of no inconsiderable value. The question presented is whether the merchandise is dutiable at the rate of 50 per centum ad valorem under the provision in Schedule L, act of March 3, 1883, or whether it is dutiable under the provision of Schedule K, which imposes duties at the rate of 35 cents per pound and 40 per centum ad valorem on all manufactures composed in part of the hair of the alpaca, goat, or other animal, when weighing over 4 ounces per square yard. Inasmuch as these goods fulfill the conditions imposed by Schedule K, and also meet the requirements imposed by Schedule L, it seems to me that the case is governed by section 2499 of the Revised Statutes, incorporated in the act of March 3, 1883. That section provides as follows:

"There shall be levied, collected, and paid, on each and every non-enumerated article which bears a similitude either in material, quality, texture, or the use to which it may be applied to any article enumerated in this title as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles on which different rates are chargeable, there shall be levied, collected, and paid on such non-enumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest duty, and on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which the component material of chief value may be chargeable. If two or more rates of duty should be applicable to any imported article, it shall be classified for duty under the highest of such rates: *Provided*, That non-enumerated articles similar in material and quality and texture and the use to which they may be applied to articles on the free-list, and in the manufacture of which no dutiable materials are used, shall be free."

It appearing that two rates of duty are applicable to the merchandise referred to, I am of opinion that the action of the collector, to the effect that of these rates the higher should be selected, was correct.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

CASE OF MOORE, WHITFIELD, ETC.

Opinions of May 5 and July 7, 1885 (see *ante*, pp. 167, 223), reaffirmed.

DEPARTMENT OF JUSTICE,
March 2, 1886.

SIR: I have duly considered your communication of December 14, 1885, together with the papers accompanying it, which asks for a further consideration of the accounts of Moore, Whitfield, and Woodson, in connection with the sale of certain Indian trust lands.

As you state in your communication, I have on two previous occasions (May 5 and July 7, 1885) rendered your Department opinions in this matter, and now, after the third examination of this case upon the papers presented, I see no cause to change those opinions, or either of them.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

LOSS OF MONEY-ORDER FUNDS.

The act of March 17, 1882, chapter 41, which authorizes the Postmaster-General to grant relief to postmasters for the loss of money-order funds in certain cases, does not annul the requirements of regulation 1099 of the "Postal Laws and Regulations," whereby the postmaster is to make good the loss should he fail to comply with such regulation.

Nor is the Postmaster-General at liberty, so long as the regulation is in force, to disregard it in a case where he is satisfied that the postmaster had in fact remitted the money lost, but did not have the remittance witnessed as the regulation requires.

Loss of Money-Order Funds.

The authority to credit postmasters with lost remittances being limited by the act of 1882 to cases where the remittance is made "in compliance with the instructions of the Postmaster-General," such compliance forms a necessary element in each case to bring it within the statute.

DEPARTMENT OF JUSTICE,
March 3, 1886.

SIR: I have considered the questions in the case of the postmaster at Washington, Ark., which were submitted to me in your letter of the 14th of December last. As stated by you, the case is this:

"On the 29th of November, 1884, the postmaster there (Miss Rosa Wallace) had on hand $381 surplus money-order funds, which by the regulation she was required to deposit in a depository office named, and was required to remit the same in registered packages in the mail. In order to preserve evidence of such remittance of a character that admits of no contradiction, special instructions are given as section 1099, Postal Laws and Regulations. (Here follows that section.)

"As will be seen, the above regulation requires that, in every case of a remittance of money-order funds made by means of paper money, the postmaster should be able to prove by at least one disinterested witness that the money was actually inclosed in a properly registered package addressed to the postmaster at the post-office designated to receive the deposit, and furthermore that said package, with the money inclosed therein, was securely locked in the mail pouch, and was taken from the post-office and out of the postmaster's possession by the contractor, employé of the railway mail service, mail carrier, or other person duly authorized to dispatch the same to its destination. The regulation also provides that should the remitting postmaster fail to comply with the foregoing instructions, he will be required, if the money is lost, to make good the amount.

"Miss Wallace (the postmaster at Washington) states that she scheduled the money for remittance, and inclosed it in an envelope properly sealed and addressed on the night of November 29, and placed it in a large iron safe during the night, together with other packages, to be forwarded in the mail train which passed at 8 o'clock the following morn-

ing; that the next morning she went to the post-office, took the registered packages and locked them in the mail pouch, and they were duly forwarded. At the Hope post-office the bag was found to be cut, and the whole bundle of letter packages, some twelve in all, were reported missing, amongst them the one in question, and have never been found; and there is much evidence justifying suspicion that the packages were stolen in the last-named office. She thereupon duly presented her claim for credit under the act of March 17, 1882, chapter 41.

"The evidence in the case showed that she had no witness, as required by regulation 1099, Postal Laws and Regulations, of the several steps in preparing and forwarding the remittance, although a credible witness happened to be present in the morning and casually saw her put in the mail-pouch packages tied together and appearing to be registered matter, and remembers the fact, although not then called upon to witness it.

"The regulation was adopted and promulgated before the passage of the act of March 17, 1882, and has never been modified or changed by the act of the Postmaster-General, but has been applied in many cases."

In connection with the foregoing you submit the following questions:

"(1) Whether the act of March 17, 1882, above cited, operated to annul the requirement of regulation 1099, so far as it declares that the postmaster shall make good the amount in case the regulation is disregarded.

"(2) If the regulation be in force, has the Postmaster General the right to disregard it in a particular case, where he is satisfied that the postmaster has in fact made the remittance, but has failed to have witnesses to the transaction as the regulation requires."

The act of March 17, 1882, in so far as it relates to the loss of money-order funds, confers upon the Postmaster-General power to grant relief to postmasters in the following cases: First, where the funds, while in the hands of the postmaster, are lost by burglary, fire, or other unavoidable accidents. Second, where the funds, being remitted by the postmaster, are lost or stolen while in transit. The present inquiry is

confined to the provision of the statute and the regulations of the Post-Office Department applicable to cases of the latter description only.

The statutory provision just adverted to authorizes the Postmaster-General "to credit postmasters with the amount of any remittances of money-order funds *made by them in compliance with the instructions of the Postmaster-General* which shall have been lost or stolen while in transit by mail from the office of the remitting postmaster to the office designated as his depository." This provision does not annul regulation 1099, which embodies "special instructions about remittances," but rather recognizes it as a duty of postmasters to comply therewith in making their remittances. And as the authority to credit them with lost remittances is limited to cases where the remittance is made "in compliance with the instructions of the Postmaster-General," such compliance forms a necessary element in each case to bring it within the statute.

The Postmaster-General may undoubtedly amend or modify the existing regulation or instructions upon the subject of these remittances, but the amendment or modification could only be made to apply to cases of loss thereafter happening. Cases of loss which have already occurred must be viewed with reference to the instructions in force at the time of their occurrence. The Postmaster-General has no dispensing power as to them. For while in force and operating they are as binding as if they were statutes, and if in any such case there has been failure on the part of the postmaster in making remittance to comply with the instructions, the loss is not one for which, under the act of 1882, the Postmaster-General is authorized to give him credit.

Agreeably to the foregoing considerations I answer both the questions submitted by you in the negative.

I am sir, very respectfully,

A. H. GARLAND.

The POSTMASTER-GENERAL.

CADET ENGINEERS.

The cadet engineers in the Navy (graduates of the classes of 1881 and 1882) who were discharged under a misconstruction of the act of August 5, 1882, chapter 391, not having been legally removed, are still the lawful incumbents of their respective offices, and should be recognized as in the immediate line of promotion, in their proper order, to fill the vacancies that may occur in the office of assistant engineers.

DEPARTMENT OF JUSTICE,
March 6, 1886.

SIR: Yours of the 27th ultimo in reference to cadet engineers, who are graduates of the classes of 1881 and 1882, has been received. In view of the recent decisions of the Supreme Court in the cases of *The United States* v. *Redgrave*, and *The United States* v. *Perkins*, affirming the decisions of the Court of Claims (20 C. Cls. R., 226, 438) you ask an opinion upon the questions which are hereinafter considered in the order in which they are presented.

(1) "Whether the cadet engineers who, after being notified of their discharge under the act, accepted the same with the accompanying pay, or, after protesting, waived their objections and then accepted the pay, are or are not affected by the decision; or, in other words, whether they are by their own act debarred from participation in the benefit of the decision."

The court held in *Leopold* v. *United States* (18 C. Cls. R., 546) that the act of August 5, 1882 (22 Stat., 285), is prospective and not retroactive, and therefore not applicable to the classes of 1881 and 1882. The subsequent decisions of the Court of Claims and of the Supreme Court have settled this as the law.

The cadet engineers of these classes became inferior officers under the Constitution, and Congress by express enactment vested the power to appoint them in the Secretary of the Navy, subject, however, to the restriction and limitation as to removals which is found in section 1229, Revised Statutes, to wit: "And no officer in the military or naval service shall in time of peace be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect or in commutation thereof."

Inasmuch as it has been held by the Court of Claims in

Perkins v. *United States* (20 C. Cls. R., 438) and affirmed by the Supreme Court, that "the discharge of a cadet engineer by the Secretary of the Navy in 1883, under a mistaken construction of *the act of 5th August*, 1882 (22 Stat., 284), and contrary to the Revised Statutes, section 1229, was void," it is evident the cadet engineers, who have passed the requisite examinations, can only be relieved of their official obligations and duties by one of two methods, either by sentence of a court-martial or by resignation. The former proposition does not enter into the matter under consideration. The honorable discharge of the cadet engineers having been held void by the courts, can it be said that those who accepted their pay without protest or that those who protested against the legality of the discharge, and subsequently accepted such pay, intended thereby to give to their acts the force and effect of resignation? This construction could not reasonably be given to such acts. Such protests and acts could not change the legal force of the statute either for or against them.

"A resignation may be effected by the concurrence of the officer and the appointing power; its essential elements being an intent to resign on the one side and acceptance on the other. The principle upon which it rests is agreement." (14 Opin., 259; and *Mimmack's Case*, 97 U. S., 426.)

One of these cadet engineers has been discharged at his own request. The other twenty-nine have not been legally removed, have not resigned, and are still the proper and legal incumbents of their respective offices, and have been such notwithstanding the misconstruction of the act of August 5, 1882.

That act recognized the rank and office of cadet engineers (graduates) and made an appropriation to pay them for their services, and the courts have held that such act did not make cadet engineers (graduates) of the classes of 1881 and 1882 naval cadets.

"(2) What disposition shall be made of such cadet engineers after their restoration to the Navy Register?"

As the courts have declared the honorable discharges issued under the act of August 5, 1882, void, the cadet engineers (graduates) retain their offices and rank without regard to such discharges. The misconstruction of said act has

placed them in an anomalous position, and embarrassed the Department. These cadet engineers (graduates) were in the immediate line of promotion to assistant engineers, and, only for the misconstruction of the act aforesaid, they would now hold the commissions to the latter office erroneously held by others. It appears the office of cadet engineers (graduates) was ignored in making promotions, under the misconstruction of the act of August 5, 1882, and naval cadets who were inferior in rank were promoted to the vacancies in the office of assistant engineer, which vacancies should have been filled by promotions from the cadet engineers. The cadet engineers are, by the decisions of the courts, in the direct and immediate line of promotion to vacancies to the office of assistant engineers.

Congress, by inadvertent legislation, caused a state of affairs to exist not intended or contemplated. The persons now erroneously holding the commissions as assistant engineers can not well be disturbed. But the misconstruction of the act of August 5, 1882, having been definitely pointed out by the courts, the cadet engineers (graduates) who have so long been deprived of their rights, are now entitled to have them restored, and this can only be accomplished by recognizing them as in the immediate line of promotion, in their proper order, to fill the first vacancies that may occur in the office of assistant engineer.

As to the disposition of the naval cadets who are entitled to promotion, I would suggest a reference of the matter to Congress for immediate consideration.

I am of the opinion, therefore, that all of the twenty-nine cadet engineers (graduates) are in the service as officers, and entitled to participate without distinction in the benefit of the decisions of the courts referred to in your communication, and that such cadet engineers (graduates) remain in their proper order, in the immediate line of promotion to the first vacancies that may occur in the office of assistant engineer, and have preference thereto over naval cadets of inferior rank, and that Congress should be requested to enact a law regulating the promotion of naval cadets, and providing for the discharge of any surplus thereof.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE NAVY.

HAZING AT THE NAVAL ACADEMY.

Where the record of the proceedings of a court-martial in the case of a naval cadet of the second class, who was tried under the act of June 23, 1874, chapter 453, for the offense of hazing, showed that the acts complained of were pulling the nose, striking at, striking, and otherwise maltreating a naval cadet of the fourth class: *Held*, that these facts, in conjunction with other circumstances, present a case containing all that is essential to constitute the offense of hazing within the meaning of the statute, and that the court had jurisdiction of the complaint.

DEPARTMENT OF JUSTICE,
March 12, 1886.

SIR: I have examined the question submitted in your letter of the 18th ultimo, transmitting the record of the proceedings of a court-martial in the case of Naval Cadet Glen Waters, namely: "Whether the court had jurisdiction of the case."

This is one of several cases recently tried before the court-martial referred to for violation of the act of June 23, 1874, to prevent hazing at the Naval Academy, in all of which the charges had relation to or were based upon the same occurrences.

In the case under consideration the charge and specifications were these:

"*Charge:* Violation of the act of Congress approved on the 23d day of June, 1874, to prevent hazing at the Naval Academy.

"*Specification first:* In this that the said Naval Cadet Glen Waters, while attached to and serving at the said Academy, on or about the 31st day of December, 1885, in the cadet quarters of said Academy, did 'haze' Naval Cadet Louis L. Driggs, a cadet of the fourth class, attached to and serving at the said Academy, by pulling the nose of the said Driggs, and otherwise maltreating the said Driggs.

"*Specification second:* In this that the said Naval Cadet Glen Waters, between October 1 and December 31, 1885, in the cadet quarters, did haze Naval Cadet Louis L. Driggs, a cadet of the fourth class, attached to and serving at the said Academy, by striking at said Driggs and otherwise annoying the said Driggs."

Here the inquiry arises, do the allegations in the above charge and specifications, assuming them to be true, amount to the "offense commonly known as hazing," within the meaning of the act of 1874? If so, then undoubtedly the court-martial not only had jurisdiction of the complaint, but was bound to entertain it and to determine its truth or falsity upon the testimony adduced.

In a former opinion addressed to you, dated November 12, 1885, I had occasion to examine the subject, what constitutes the offense of hazing, mentioned in that act—the act itself containing no definition of such offense, and it being unknown either to the common or statutory law of the land. The result reached was, that for a definition of the offense recourse must be had to the rules and regulations in force at the Naval Academy at the time of the passage of the act, and that according to these the offense consists in the maltreatment of a new cadet of the fourth class by any of the cadets of the senior classes. In paragraph 170 of the regulations of the Academy of 1876, it is described as "molesting, annoying, ridiculing, maltreating, or assuming unauthorized authority over the new cadets of the fourth class" by the older cadets.

It is averred in the specifications that the person upon whom the offense is alleged to have been committed was at the time "a cadet of the fourth class, attached to and serving at the said Academy;" and it elsewhere appears in the record that the person charged with the offense was then a cadet of the second class; while the acts of the latter which go to form the gravamen of the complaint are (specification first), "pulling the nose of the said Driggs, striking the said Driggs, and otherwise maltreating the said Driggs," and (specification second) "striking at said Driggs, and otherwise annoying the said Driggs," he being a cadet of the fourth class. These facts plainly exhibit a case of *maltreatment*, which, in conjunction with the other circumstances mentioned, contains all that is essential to constitute the offense of "hazing" in the sense of the statute.

The court-martial, then, having jurisdiction of the case as set forth in the complaint, it had power under the statute to inquire into all the facts and circumstances thereof and make

a finding thereon. Whether the facts and circumstances disclosed by the evidence did or did not establish the offense charged was for the court to decide, and whether the decision rendered was correct or erroneous this could not affect the validity or effect of its finding when approved by the proper authority.

It is suggested that if the facts in evidence, as shown by the record, make out a case of personal rencounter or fight between the parties, the court was thereby ousted of its jurisdiction, and its finding was consequently a nullity. But conceding, for the present purpose, that the facts do make out a case of that sort, this would only go to show that the decision of the court was wrong, not that it acted without jurisdiction. If the court had cognizance of the *offense charged* its jurisdiction to receive evidence and to determine from the testimony given whether the accused was guilty of *that offense* could not be defeated by the state of facts developed on the trial (*Regina* v. *Bolton*, 1 L. B., 66; *Wilkinson* v. *Dutton*, 3 B. & S. 821), unless the absence of some *jurisdictional* fact, as that the victim of the maltreatment was not a cadet of the fourth class, or that the accused was not a cadet of one of the senior classes, should thereby be made to appear.

Whether the *acts of the accused* which were proved on the trial constituted the offense wherewith he was charged was a fact which the court had to decide; but how could it decide without the possession and exercise of jurisdiction over the subject-matter?

The power to hear and determine a cause is jurisdiction; and it is *coram judice* whenever a case is presented which brings this power into action. (*United States* v. *Arredendo*, 6 Pet., 709). It is a general rule that when the court has jurisdiction by law of the offense charged, and of the party who is charged therewith, its judgments in the case are not nullities. (*Ex parte Bigelow*, 113 U. S., 328.) When it appears that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected, that such complaint has actually been preferred, and that such person or thing has been properly brought before the tribunal to answer the charge therein contained, the jurisdiction has attached, the right to hear

and determine is perfect, and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred, and whether determined rightfully or wrongfully, correctly or erroneously, is alike immaterial to the validity, force, and effect of the final judgment, when brought collaterally in question. (*Sheldon* v. *Newton*, 3 Ohio Stat., 494.)

The principles stated in the authorities just cited have become axiomatic and apply to the court and case under consideration. Upon examination of the record I find myself unable to reach any other conclusion than that the case was within the jurisdiction of the court.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE NAVY.

ABATEMENT OF TAX ON DISTILLED SPIRITS.

A large quantity of whisky, part of which had been in warehouse beyond the bonded period of three years, was accidentally destroyed by fire in July, 1884, without any fraud, collusion, or negligence of the distillers, and while the same remained under custody of an internal-revenue officer in a distillery warehouse. The tax thereon had not been paid. Application having been made to the secretary of the Treasury for an abatement of the tax under section 3221, Revised Statutes: *Advised* that the Secretary has authority, by the terms of that section, under the state of facts shown, to abate the tax on said spirits.

DEPARTMENT OF JUSTICE,
March 19, 1886.

SIR: I have the honor to acknowledge the receipt of your communication of the 15th instant, in which you request an expression of opinion as to the authority of the Secretary of the Treasury, under section 3221 of the Revised Statutes, to abate the tax on distilled spirits under the circumstances as stated.

It appears from the statement that A. Overholt & Co., distillers in the twenty-second district of Pennsylvania, applied to the Secretary under said section 3221 for an abatement of the tax on 333,825 gallons of whisky which the proof showed to have been accidentally destroyed by fire on the night of the 23d of July, 1884, without any fraud, collusion,

or negligence of the distillers, while the same remained under the custody of an internal-revenue officer in the distillery warehouse of the claimants. Of the total amount thus destroyed, it was found that 22,962 gallons had been in the warehouse some twenty-three days beyond the bonded period of three years allowed by section 3293, Revised Statutes, as amended by section 4 of the act of May 28, 1880 (21 Stat., 145).

Section 3221 of the Revised Statutes reads as follows:

"The Secretary of the Treasury, upon the production to him of satisfactory proof of the actual destruction by accidental fire or other casualty, and without any fraud, collusion, or negligence of the owner thereof, of any distilled spirits, while the same remained in the custody of any officer of internal revenue, in any distillery warehouse or bonded warehouse of the United States, and before the tax thereon has been paid, may abate the amount of internal taxes accruing thereon, and may cancel any warehouse bond, or enter satisfaction thereon, in whole or in part, as the case may be. And if such taxes have been collected since destruction of said spirits, the said Secretary shall refund the same to the owners thereof out of any moneys in the Treasury not otherwise appropriated."

Section 4 of the act entitled "An act to amend the laws in relation to internal revenue," approved May 28, 1880, provides among other things that, "in case the distiller or owner fails or refuses to give the bond hereinbefore required, or to renew the same, or neglects to immediately withdraw the spirits and pay the tax thereon, before the expiration of the time limited in the bond, the collector shall proceed to collect the tax by distraint," etc. The same section provides also "that the tax on all distilled spirits hereafter entered for deposit in distillery warehouses shall be payable before and at the time the same are withdrawn therefrom, and within three years of the date of the entry for deposit therein."

Undoubtedly the collector could have proceeded to collect the tax by distraint immediately upon the expiration of the bonded period of three years allowed by law, but it seems that he has not done so, and that the tax upon the distilled spirits in question *has not been paid.* Section 3221, being in the nature of a remedial statute, must be construed liberally; but, without invoking this principle, I am of opinion that

before the tax has been paid the Secretary of the Treasury has authority, by the express terms of the statute under the state of circumstances as shown, to abate the tax on the distilled spirits.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

BONDED WAREHOUSE.

Where domestic merchandise, exported in good faith, has been imported back again, and is subject to duty, it is entitled to be admitted to entry for storage in a bonded warehouse under section 2962, Revised Statutes.

DEPARTMENT OF JUSTICE,
March 25, 1886.

SIR: Your communication of the 19th instant, asking an opinion as to "whether imported goods, wares, and merchandise the product or manufacture of the United States, which, under section 2500, Revised Statutes, are liable to a duty equal to the tax imposed by the internal-revenue laws, are entitled to the privilege of the bonded-warehouse system prescribed by sections 2962, etc., of the Revised Statutes," has received my consideration, and I have to say in reply that, in my opinion, such goods, wares, and merchandise are entitled to the privilege of the bonded-warehouse system.

The law (sec. 2962, Rev. Stat.) admits to entry for storage in a bonded warehouse "*any merchandise subject to duty*," brought into any port of entry of the United States, and to deny the right to enter for storage reimported domestic merchandise is to refuse to give proper effect to the words of the law.

The opinion of my predecessor of the 2d July, 1883, to which you refer, does not admit of the construction that has been put on it in the Treasury Department. That opinion goes no farther than to lay down that the privileges extended to importations can not be enjoyed by domestic merchandise taken out of the country upon a formed plan to bring it back again, and that in such case there is a merely *colorable* exportation, and, consequently, no reimportation in the statu-

tory sense. And this opinion is applicable only to cases where domestic merchandise exported in good faith has been reimported.

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

AMERICAN CARRYING TRADE.

Section 14 of the act of June 26, 1884, chapter 121 "to remove certain burdens on the American merchant marine and to encourage the American carrying trade," etc., considered in connection with the eighth article of the treaty of 1827 with Sweden and Norway.

No warrant is found in the treaty for the claim that the shipping of that power is entitled to the benefits of the act without submitting to its conditions.

DEPARTMENT OF JUSTICE,

March 26, 1886.

SIR: As requested by you, I have reviewed in the light of the note of the minister of Sweden and Norway to you, a copy of which has been furnished me, the opinion of this Department of the 19th September, 1885, upon the claims of certain foreign powers to be admitted to the benefits of the fourteenth section of the act of Congress of the 26th June, 1884, entitled "An act to remove certain burdens on the American merchant marine and to encourage the American carrying trade, and for other purposes," without submission to the geographical conditions and limitations of that law, and find it quite as difficult to yield to the claim of Sweden and Norway under the eighth article of the treaty of 1827 as to the supposed claim under the "most favored nation" clause of that treaty.

The eighth article of the treaty of 1827 is in these words:

"The two high contracting parties engaged not to impose upon the navigation between their respective territories, in the vessels of either, any tonnage or other duties, of any kind or denomination, which shall be higher or other than those which shall be imposed on every other navigation except that which they have reserved to themselves, respectively, by the sixth article of the present treaty."

It is not denied that the benefit of the reduced tonnage duty of the act of the 26th June, 1884, is open to the shipping of Sweden and Norway on the conditions of that law which apply to "*every other navigation*," but it is claimed that the shipping of that power is entitled to the benefits of the act without submitting to its qualifications or conditions. For this view I can find no warrant whatever in the treaty, the object of which, in the article now under consideration, was to secure the shipping of each of the contracting parties from discriminations imposed by the other and not practiced against other powers.

The act of 1884 admits all nations to its benefits, but these can only be enjoyed upon the terms on which they are offered, and Sweden and Norway are expected to submit to those terms in common with all other nations. The act of Congress must have effect, as the last expression of the law-making power, even though it should be in conflict with the treaty, which, however, I do not think it is.

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF STATE.

CUSTOMS DUTIES.

The article called toluidine, being a product of coal-tar, is within the provision of the act of March 3, 1883, chapter 121, covering "all preparations of coal-tar not colors or dye, not specially enumerated or provided for," and is dutiable thereunder.

DEPARTMENT OF JUSTICE,
March 30, 1886.

SIR: By your letter of the 19th instant it appears that a certain article of merchandise, called toluidine, was by a Department decision, dated the 8th of December last, held to be dutiable under the general provision of the act of 1883, covering "all preparations of coal-tar, not colors or dye, not specially enumerated or provided for" therein. (T. I., new, 83.) It is now claimed that the article mentioned should be classified as "aniline, crude," which is exempt from duty under that act. (T. I., new, 559.)

The latter view is put upon the ground, I understand, that crude aniline, as an article of commerce, is practically unknown, and that as toluidine, xylidine, cumidine, and other similar products, constitute the only articles of commerce approximating to crude aniline, they should be admitted free of duty as crude aniline. However, each of those articles (toluidine, xylidine, etc.), being a product or preparation of coal-tar, comes fairly within the terms of the provision quoted above, "all preparations of coal-tar, not colors," etc., and in the absence of any other provision in the same act under which such article may be classified, it is undoubtedly dutiable under that. The ground suggested for classifying it as crude aniline—its approximation to crude aniline—is to my mind insufficient.

I perceive nothing in the accompanying papers which satisfies me that the Department decision above referred to is erroneous, and therefore do not recommend a reversal or modification thereof.

I am, sir, very respectfully,

JOHN GOODE,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

TITLE TO "POINT PETER," GEORGIA.

History of the title of the United States to the tract of land known as "Point Peter," situated at the mouth of St. Mary's River, Georgia, given, and adverse claims to ownership of the premises set up by one Alex. Curtis, a resident of Georgia, shown to be utterly groundless.

DEPARTMENT OF JUSTICE,
April 20, 1886.

SIR: I have examined the papers which accompanied your letter of the 8th ultimo, in relation to a certain tract of land known as "Point Peter," situated at the mouth of St. Mary's River, Georgia, and in compliance with your request have now the honor to state to you my views concerning the title of the United States to the premises.

It appears that by a deed made January 10, 1818, the land referred to was conveyed to the United States in fee by Samuel Breck, sole surviving executor of the last will and

testament of John Ross, deceased, in consideration of the sum of $6,000. The grantor in that deed derived title from Samuel Howard and wife, dated October 21, 1815. The recitals in the last-mentioned deed and other evidence show that the premises were originally granted by the State of Georgia to Jacob Weed, May 12, 1787, and on the 6th of May, 1806, were sold and by a deed of that date conveyed to the said Samuel Howard by the United States marshal for the district of Georgia as the property of James Seagrove, pursuant to a decree of the United States circuit court for that district, rendered in a suit for the foreclosure of a mortgage of the premises given by the said Seagrove, dated December 17, 1804. The originals of the aforesaid deeds of Howard and wife and Samuel Breck, and a certified copy of the above-mentioned deed of the United States marshal, are among the papers herewith. In what way Seagrove succeeded to the title of Weed does not appear; but information on that point is deemed unimportant, in view of the great length of time which has since elapsed and other circumstances.

Such is the history of the title of the United States as disclosed by the papers. In the first place, the State of Georgia on the 12th of May, 1787, granted away all *its* interest in the premises. Next, title thereto is deduced to the United States by a regular chain of conveyances founded upon a judicial sale in 1806 on the foreclosure of a mortgage decreed in 1804; and as it may well be presumed that the mortgagee had inquired into the title of the mortgagor, and would not have advanced his money upon one which was doubtful, the sale under the foreclosure proceedings constitutes a very satisfactory commencement in the chain of title (especially after the lapse of so long a time), a previous grant from the State being shown.

Standing, then, upon that sale, together with the previous grant of the State, as the foundation of the title which was subsequently conveyed to the United States by the aforesaid deed of Samuel Breck, sole surviving executor, etc., I entertain no doubt that the Government acquired by that deed, and now holds thereunder, a good and valid title to the premises.

But it seems that a title adverse to that of the United States is set up by Mr. Alex. Curtis, a resident of Georgia, originating as follows: In 1870 Daniel R. Proctor having located a head-right warrant, issued under the laws of Georgia upon the premises, applied for and obtained a grant of the same from the governor of the State. The grantee, Proctor, by deed dated March 6, 1876, which was recorded in January following, conveyed all his right, title, and interest in the premises to the said Curtis, who alleges that he has since spent considerable sums of money in fencing, clearing, and otherwise improving the land, etc.

Curtis claims that the deed of conveyance to the United States is invalid, because not recorded within one year from its date, agreeably to the law of the State; that the right of disposing of the land subsequently lapsed to the State; and furthermore, that undisturbed occupancy for a period of seven years gives title, etc. These claims are utterly groundless for the following reasons:

(1) Under the laws of Georgia failure to record a deed concerns none excepting those who derive title from the *same grantor* by a deed of subsequent date; as against others, the validity and operation of the deed are under no circumstances affected by such failure. (*Roe* v. *Doe ex dem. Neal*, Dudley, 168; *Whittington* v. *Doe ex dem. Wright*, 9 Ga., 23; *Hand* v. *McKinney*, 25 Ga., 648; *Martin* v. *Willis*, 27 Ga., 407; *Anderson* v. *Dugas*, 29 Ga., 440); and an unrecorded deed thirty years old, apparently genuine, and coming from the proper custody, is admissible in evidence without proof of execution. (*Whitman* v. *Thiot et. al.*, 64 Ga., 11.) So that although the deed of Breck to the United States, executed in 1818, was not recorded until 1885, after the execution and registration of the deed of Proctor to Curtis (both of which occurred in 1876), yet as these deeds emanate from *different grantors*, the latter deed, notwithstanding it was recorded within a year from its execution, is entitled to no preference over and can avail nothing as against the former deed, which, for aught that appears, has the same validity now that it had on the day of its delivery.

(2) Title to the land having passed out of the State by the Grant to Weed in 1787, it thereupon ceased to be subject to

be regranted by the State, whether under the head-right or any other laws. (*Vickety* v. *Benson*, 26 Ga., 590.) There is no pretension that the title has since returned to the State by escheat on proper inquest of office, which is the only mode whereby it could *lapse* to the State. Moreover, escheated lands in Georgia are disposed of under statutory provisions specially applicable thereto; they are not subject to grant under the head-right laws of the State. Only such land as is of the public domain of the State and vacant is subject to grant thereunder. The premises not being land of that description, and furthermore the State having *no title whatever* thereto, the grant thereof to Proctor in 1870, on the location of a head-right warrant, could not impart a valid title.

(3) By the laws of Georgia, adverse possession, no matter for what length of time, gives no title against the State; nor can it give any title against the United States for the reason that statutes of limitation of a State—which are necessary to perfect a title thus acquired—do not apply to them. (*United States* v. *Thompson*, 98 U. S., 486; *Gibson* v. *Chouteau*, 13 Wall., 92; *Lindsey* v. *Miller's Lessee*, 6 Pet., 666; *Doe ex dem. Daggett* v. *Roe et al.*, 20 Ga., 467.)

In your letter it is stated that jurisdiction over the premises was ceded to the United States by an act of the legislature of Georgia of December 22, 1808. On examination of that act (of which a copy is herewith) I find that it grants jurisdiction to the United States over all lands then acquired or which may thereafter be acquired by them for the purpose of erecting forts or fortifications in that State; but this is coupled with a proviso that "the said United States do or shall cause forts or fortifications to be erected thereon." The proviso may be construed to operate as a condition precedent, which renders it at least doubtful whether the cession of jurisdiction as to any land was intended to take effect *until* the erection of a fort or fortification thereon.

I am, sir, very respectfully,

JOHN GOODE,
Acting Attorney-General.

The SECRETARY OF WAR.

CHINESE LABORERS.

The remedy for the alleged evil of Chinese laborers passing through the territory of the United States to, and returning from, China and other foreign countries, is proper matter for the consideration of Congress.

Opinion of Attorney-General Brewster, of July 18, 1882 (17 Opin., 416), construing the act of May 6, 1882, chapter 126, cited with approval.

DEPARTMENT OF JUSTICE,
April 26, 1886.

SIR: Yours of the 3d instant, inclosing communications of Hon. W. W. Morrow, in relation to "the alleged evil of Chinese laborers passing through the territory of the United States to, and returning from, China and other foreign countries," has been received.

I have examined the opinions of my predecessor, in connection with the law now in force, and adhere to the statement contained in my letter of recent date, that the remedy for the alleged evil is proper matter of legislation for the Congress of the United States.

The act of Congress (22 Stat., 58) restricting the coming of Chinese laborers to this country has been amended since the opinions were rendered by my predecessor, and the exceptions to the general provisions of the original act have been fully set out and made more explicit. (23 Stat., 115.)

The opinion of 18th July, 1882, was based upon the construction of the enacting clauses of the statute, while the opinion of December 26, 1882, turns largely upon the intention of Congress as expressed in the preamble to the act.

In the absence of apparent ambiguity in the enacting clauses, I deem it preferable to give effect to the statute without reference to the preamble. Under such circumstances, the preamble should not, in my judgment, control the entire statute.

I still maintain my position, as above stated, that it is properly a matter for Congress to determine, but if an opinion upon the subject is insisted upon, I do not hesitate to say the opinion of my predecessor, dated 18th July, 1882, ex-

presses the intention of Congress, and presents a fair and clear construction of the law now in force upon the coming of Chinese laborers into the United States.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

EIGHT-HOUR LAW.

Construction of the act of June 25, 1868, chapter 72, known as the eight-hour law, as given by former Attorneys-Generals, and also by the Court of Claims and Supreme Court, stated, and particular cases of alleged violation of the act considered with reference thereto.

The act is a legislative declaration that for the persons described therein eight hours a day is a reasonable day's labor; and where the public interests can be subserved, this should be a guide to officers, both civil and military, in contracting for the public service.

DEPARTMENT OF JUSTICE,

May 1, 1886.

SIR: I have the honor to acknowledge the receipt of your communication of 17th ultimo, inclosing letters from George G. Orr, Atlanta, Ga.; John Connolly, Cincinnati, Ohio; T. C. Rowe, secretary, etc., San Francisco, Cal.; Stephen Groves, Hon. S. M. Stockslager.

You ask that I examine the reports of the officers of the Army on these accompanying papers and inform you whether in my opinion the conditions which governed the employment of any class of labor by these officers involves a violation of the *eight-hour law*, and whether any of the employés herein mentioned, who have been required to work more than eight hours per day, should be considered as coming within that rule.

The construction of the act of June 25, 1868, chapter 72, (embraced in section 3738, Revised Statutes), has been frequently before this Department and has received careful consideration. Almost every question upon which even a fanciful or conjectural doubt could be raised in the interpretation of this statute, has been brought to the attention of my predecessors; and the answers to the applications for opinions have been singularly full and explicit.

And more, these questions have been submitted, and, after full argument, they have been decided in both the Court of Claims and the Supreme Court of the United States.

Before answering the questions presented to me, I refer to the following authorities for the statement I have made:

Opinion of Attorney-General Evarts (12 Opin., 530); opinion of Attorney-General Hoar (13 Opin., 29); opinion of Attorney-General Akerman (13 Opin., 424); opinion of Solicitor-General and Acting Attorney-General Bristow (14 Opin., 37, 45); opinion of Acting Attorney-General Hill (14 Opin., 128); opinion of Attorney-General Devens (16 Opin., 58); *United States* v. *Martin* (10 C. Cls. R., 276); *United States* v. *Martin* (94 U. S., 400).

In an opinion of Mr. Attorney-General Brewster (MS.), a copy of which I inclose with this, the whole matter is reviewed and a valuable exposition of the law given. I concur fully in the views therein expressed.

From these opinions of my predecessors, and the decisions of the Court of Claims and the Supreme Court of the United States, may be deduced the following propositions, which, I think, will meet any case heretofore presented or that may hereafter be presented to you:

(1) That the act of 1868 (sec. 3738, Rev. Stat.) prescribes the length of time which shall constitute a day's work; but it does not establish any rule by which the compensation for a day's work shall be determined—this being left to be fixed in the ordinary or customary manner where the law does not otherwise provide.

(2) That it does not contemplate a reduction of wages simply because of the reduction thereby made in the length of the day's work; but, on the other hand, it does not require that the same wages shall be paid therefor as are received by those who, in similar private employments, work a greater length of time per day. This matter of wages is to be dealt with as pointed out in the preceding paragraph, having due regard to the public interests.

(3) That it does not forbid the making of contracts for labor, fixing a different length of time for the day's work than that prescribed in the law.

(4) The provisions of the act are not applicable to mechanics, workmen, and laborers who are in the employment of a contractor of the United States. It was not intended that the act should extend to any others than the immediate employés of the Government.

(5) All persons who are employed and paid by the day are included within the act, even though they do not fall within the strict language of "laborers, workmen, and mechanics."

Under date of January 23, 1886, Mr. George G. Orr complains to the President that carpenters at Fort Spokane were compelled from September, 1882, until July, 1884, to work more than eight hours per day, and asks that they be paid as for extra time for labor done beyond those hours.

Where there is a special agreement between the employer —in this case the Government—and the laborer that the laborer shall work less or more than eight hours a day, and it is reasonable, there is nothing in the statute to prohibit such a contract.

The statute is regarded "as in the nature of a direction from a principal to his agent, that eight hours is deemed to be a proper length of time for a day's labor, and that his contracts shall be based upon that theory. It is a matter between the principal and his agent in which a third party has no interest. The proclamation of the President and the act of 1872 are in harmony with this view of the statute. We are of opinion, therefore, that contracts fixing or giving a different length of time as the day's work are legal and binding upon the parties making them." (*United States* v. *Martin*, 94 U. S., 404.)

If the carpenters at Spokane understood that they were to work nine or ten hours per day or to be discharged, and continued in employment with that understanding, they must be held to the conditions of a contract both voluntary and reasonable, and they can not now recover as for overtime.

Mr. Connolly writes that Major King for three years violated the provisions of this statute in work upon the Tennessee River. But the record transmitted to me shows that the stone-cutters and stone-masons accepted the employment with a full knowledge of the time of labor required and the compensation. It is altogether a mistake that by some reser-

vation in mind the employé can have a claim against the Government for compensation for hours beyond the eight hours designated in the statute, he having accepted the employment with the understanding he is to labor the length of time required.

Mr. T. C. Rowe, corresponding secretary Union 22, Brotherhood of Carpenters and Joiners, writes that this statute is violated by contractors on the Presidio Reservation. It has been decided in this Department that "the letter of the act of Congress limits its operation to laborers, workmen, and mechanics employed by or on behalf of the Government of the United States, and has no application beyond the immediate employés of the Government." (14 Opin., 38.)

The contract is between the contractor and the workmen; and the Government has no control over these relations.

Mr. Stephen Groves writes that ship carpenters at St. Louis had been required to work ten hours a day by Major Ernst.

The facts show that these employés always worked under contract and received compensation by the month or by the hour. There was no violation of the statute.

The same observations apply to the matter, referred from S. M. Stockslager, of watchmen, etc., at Jeffersonville, Ind. I can see no violation of the statute there; the men being willing to accept the employment for more hours than eight per day.

There is one consideration, however, to which I desire to call your attention. The enactment of this statute was a legislative declaration that for the persons specified eight hours a day was a reasonable day's labor. And where the public interests can be subserved this should be a guide to officers, both civil and military, in contracting for the public service. There must of necessity be cases where it is impossible to consider this as an arbitrary rule. There are other cases where the party for whose benefit the statute was made prefers to have the time extended, and he has that privilege.

In conclusion, I am of opinion that the law has not been violated in any case presented to me; and I hope I have, in

answering your requests, covered all cases which may be brought to your notice.

I inclose the papers referred to me.

Very respectfully, your obedient servant,

A. H. GARLAND.

The SECRETARY OF WAR.

PROMOTION IN THE NAVY.

On February 18, 1886, E., a rear-admiral, was, under section 1444, Revised Statutes, transferred from the active to the retired list of the Navy, and T., a commodore (being first in the line of promotion), was, after having successfully passed an examination, nominated by the President to be a rear-admiral to fill the vacancy caused by the retirement of E. While this nomination was before the Senate awaiting action thereon, T. attained the age of sixty-two years, and under said section was transferred from the active to the retired list to rank as commodore: *Advised* that, according to the law and usage of the service, T. was entitled to be a rear-admiral from the 18th of February, 1886, by relation, and to receive the pay of a rear-admiral from that date, and, if the Senate should confirm his nomination, might be commissioned as a rear-admiral and placed on the retired list as of that grade.

DEPARTMENT OF JUSTICE,

May 4, 1886.

SIR: An opinion is asked by you upon the following case: On the 18th of February, 1886, Rear-Admiral Earl English was, by virtue of section 1444 of the Revised Statutes, transferred from the active to the retired list of the Navy, and Commodore William T. Truxtun was nominated by the President to be a rear-admiral on the active list of the Navy to fill the vacancy caused by the retirement of Rear-Admiral English, after having been duly examined and found qualified for promotion.

While this nomination was before the Senate awaiting final action, Commodore Truxtun attained the age of sixty-two years, and was, by force of said section 1444, transferred from the active to the retired list to rank as commodore.

If Commodore Truxtun had attained the age of sixty-two after confirmation and appointment as rear-admiral he would have gone upon the retired list with that rank.

The question arising upon this state of facts is whether this officer could still be commissioned as a rear-admiral if the Senate should confirm his nomination for that position which is now pending before them.

Promotion among officers in the line of the Navy goes by seniority, and seniority is determined by the date of commission, that is to say, the date from which the commission recites that the appointment to a given grade begins.

By the law and usage of the service, a line officer of the Navy has as good a right to promotion, if found qualified for it, and to his proper rank in the grade to which he belongs, as he has to his pay, and questions involving the right to rank or promotion are always important because of the bearing they have on the efficiency of the service.

By the settled practice of the service promotion to a higher grade includes the right to the rank of that grade from the date of the vacancy filled by the promotion. This practice has the distinct recognition of Congress. Section 1562 of the Revised Statutes provides that where an officer, through no fault of his own, is prevented from undergoing an examination for promotion at the appointed time and shall afterwards pass his examination, the increased pay to which the promotion entitles him shall commence from the time when he should have been examined in regular course. And by the first section of the act of June 22, 1874 (18 Stat., 19), it is provided that "any officer of the Navy who may be promoted in course to fill a vacancy in the next higher grade shall be entitled to the pay of the grade to which promoted *from the date he takes rank therein* if it be subsequent to the vacancy he is appointed to fill," thus not only recognizing the practice of making the right to rank antedate the time of the appointment to which the rank belongs, but extending it so as to give pay from the time rank begins.

Before the legislation referred to, several of my predecessors had decided that it was competent for the appointing power to give rank by relation in making promotions. "For instance," says Mr. Legare, "an officer under arrest on groundless charges is not promoted, because promotion were a pardon; he is acquitted and is nominated by relation back. Everybody sees that this is no arbitrary advancement through

partiality, but sheer justice and a faithful execution of the law. So, if any law entitle an officer to promotion at the end of ten years, and the Executive, having neglected to give him his due for some time, afterwards confer it, relation back seems called for by the law itself. This is *Vinton's Case*, 2 Sumner, 299." (4 Opin., 124.) For other recognitions of the practice of promoting by relation I beg to refer to the opinion of Mr. Attorney-General Cushing on the Navy efficiency act, and to the precedents therein mentioned. (8 Opin., 237.)

It follows, then, that Commodore Truxtun is, according to the law and usage of the service, entitled to be a rear-admiral from the 19th of February, 1886, by relation, and to receive the pay of a rear-admiral from that date and be placed on the retired list as of that grade, otherwise the non-action of the Senate touching his nomination would have the effect of depriving this officer of a valuable right.

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE NAVY.

CADET ENGINEERS IN THE NAVY.

Cases of Robert B. Higgins, Clarence H. Matthews, and William B. Day, for reinstatement in the Navy as cadet engineers, considered.

DEPARTMENT OF JUSTICE,

May 14, 1886.

SIR: I have the honor to acknowledge the receipt of your communication of the 7th instant, in which you submit for decision certain questions that have arisen in the cases of Robert B. Higgins, Clarence H. Matthews, and William B. Day, who are seeking reinstatement in the Navy as cadet engineers, under the decisions of the Supreme Court of the United States in the cases of Redgrave and Perkins.

I will consider Mr. Higgins's case separately, as the question presented in that is entirely different from the one involved in the other two. In his case you ask:

"Does the fact of Mr. Higgins's appointment to the office of second assistant engineer in the Revenue Marine Service and his acceptance thereof conflict with or operate to prevent his reinstatement as a cadet engineer in the Navy?"

Mr. Higgins must be reinstated, if at all, upon the hypothesis that he has held the office *de jure* continuously from the date of his appointment in 1878 to the present time.

Is that hypothesis reconcilable with the fact that during this period he has held the office of second assistant engineer in the Revenue Marine? The question is not altogether free from difficulty. The two offices are incompatible, and the general rule is, that the acceptance of a second incompatible office operates as a resignation of the first.

On the other hand, at the time of the acceptance of the second office, Mr. Higgins had been illegally deposed from a performance of the duties and from an enjoyment of the emoluments of the first office, and to deny him the right to accept employment at such a time, though it be incompatible with the duties and obligations of a cadet engineer in active service, would enable the Navy Department to leave the victim of an illegal discharge no alternative but submission or starvation.

In view of the peculiar circumstances of this case, I do not think it within the reason of the general rule. Acceptance of the second office was not inconsistent with an intent on Mr. Higgins's part to resume the exercise of the office of cadet engineer as soon as he might be recognized as such. Official employment by the same General Government should not be held more inconsistent with the title to the office of cadet engineer than any other employment from which he might derive a support until his rights were recognized. The difficulty of reconciling his occupancy of the second office with his title to the first is a purely technical one, for any obligations assumed by accepting the second office were between him and the same general authority to whom his obligations were due as cadet engineer, and a recognition of his rights and duties as cadet engineer involved a cancellation of any conflicting obligations. But has he been *de jure* second assistant engineer in the Revenue Marine Service?

He could not resign the first office at will, nor is the doctrine of resignation by implication, applicable to civil officers, to be favored in the Navy and Army where forms and regulations are prescribed and must be enforced.

A resignation by a naval officer is inoperative until accepted

by the proper authority, and even if the acceptance of the second office be held equivalent to a tender of resignation by Mr. Higgins I am of opinion that he still remained an incumbent of the office of cadet engineer, because his resignation has not been accepted, and therefore, as the two offices are incompatible, he has never been *de jure* a second assistant engineer in the Revenue Marine. Taking a broader view of the question all doubt vanishes. By the error of your predecessor Mr. Higgins was ejected from an office that he was entitled to hold. If he has done anything which could be construed into a resignation of the office, the act was a consequence of the injustice he had suffered, and not a willingness to abandon his place. Now that his title to the office has been vindicated, he asks that it be restored to him. The restoration can be made, justice demands that it should be made, and any doubts as to technicalities should be resolved in favor of its being made.

I am satisfied, in view of all the facts, that what he has done does not amount to a resignation or abandonment of the office of cadet engineer, that he still holds it, and should be reinstated in the actual enjoyment and occupation of it.

Next as to the cases of Clarence H. Matthews and William B. Day: These gentlemen were appointed as cadet engineers, completed the four years' course, passed their final examination, and received the usual certificate of graduation, one in June, 1881, and the other in June, 1882. Under the theory that the act of August 5, 1882, embraced them within its provisions and transmuted them into naval cadets, they were two years or more after their graduation as cadet engineers returned to the Academy for final examination as naval cadets. At such examination Matthews was found disqualified physically and Day deficient in certain academic branches not prescribed for cadet engineers. Both were dropped from the roll of the Navy by order of Secretary Chandler on account of the failure to pass this examination. You ask whether this action was legal? I reply that it was not. The orders dropping them are void, they are still in the service, and entitled to reinstatement with their classmates upon the roll of the Navy. The theory that they were transmuted by the act of August 5, 1882, into naval cadets, and consequently liable to exami-

nation and dismissal for failure to pass as such, was wholly fallacious. (*United States* v. *Redgrave*, 116 U. S., 474.)

Speaking in the case of their classmate, and of cadet engineers after graduation in the four years' course, Mr. Justice Scofield, speaking for the court, says:

"They are not subject to academic orders, nor are they expected to pursue academic studies, but to take charge of and run engines. Their school exercises are ended and their life work begun. They are as much in the service and as subject to all its requirements as they ever will be. When, at the end of the two years or rather at the end of a course which may last three years or more, they are examined, it is for promotion only. This examination is not at the Academy nor before the Academic Board, but is the same kind of an examination that every officer at each step in his advancement is required to undergo. So emphatically does the law consider these two years as years of service that it doubles the pay." (*Leopold* v. *United States*, 18 C. Cls. R., 557.)

These men after graduation in the four years' academic course were officers in the naval service, and could only lose their offices against their will, in pursuance of the sentence of a court-martial or in commutation thereof. (*Perkins* v. *United States*, 116 U. S., 483.)

I return herewith the applications of Messrs. Higgins, Matthews, and Day, as requested.

Respectfully,

A. H. GARLAND.

The SECRETARY OF THE NAVY.

COMPENSATION OF INTERNAL REVENUE STORE-KEEPER.

Under the act of August 15, 1876, chapter 287, an internal-revenue storekeeper is entitled to receive a *per diem* compensation only while "rendering actual service." Hence during such time as he is not assigned to duty and does not perform duty no compensation can be allowed him.

DEPARTMENT OF JUSTICE,

May 19, 1886.

SIR: I have the honor to acknowledge the receipt of a letter addressed to you on the 5th instant by the Commis-

sioner of Internal Revenue and by your order of the 8th instant referred to me.

This letter and order of reference submit for determination the claim for additional compensation of H. B. McNiel, late internal-revenue store-keeper.

I have carefully considered the brief filed in support of the claim, which, together with the letter of the late Acting Commissioner Rogers disallowing the same, were inclosed to me and are herewith returned.

I am of opinion that the claim is without merit, and was properly disallowed.

Mr. McNiel during his term of office was from time to time assigned to duty at various distilleries and has been paid at the maximum rate for every day while on duty under such assignments.

When not under an assignment to duty no service whatever was required of him or rendered by him to the Government.

His present claim is for compensation for those days during his term when he was not under any assignment to duty and not performing any duties.

The law in force at the date of his appointment and throughout his term provides that internal-revenue store-keepers shall receive such compensation, not exceeding $4 a day, to be paid monthly, as may be determined by the Commissioner of Internal Revenue, and "said store-keepers shall only receive compensation when rendering actual service." (19 Stat., 152.)

While the fact that a store-keeper, when not under an assignment to duty, was obliged to hold himself in readiness to perform any duty that might be assigned, could have been considered as an element in determining his compensation and may have been considered in fixing the amount when on duty, the express inhibition of the statute prevents any such consideration from entering into the determination of the time during which the per diem salary is computed. The time during which the store-keeper "rendered actual service" could alone be taken into account. The interpretation adopted by the Commissioner not only gives the words employed their usual and natural significance, but is unembar-

rassed by conflicting considerations arising either from other provisions in the law or any general policy or practice in connection with the internal-revenue system.

Indeed it is the only possible construction. Under the system arranged by law, the store-keeper in the service was either rendering actual service under an assignment to duty, or unable to render any service because unassigned. Therefore the provision quoted either has the meaning assigned it or none at all. If it does not prohibit per diem allowance when the store-keeper is not assigned to duty, during what time does it prohibit the allowance?

It is not presumed that Congress would have inserted any clause which was altogether devoid of meaning.

Respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

FORT BROWN RESERVATION, TEXAS.

Deed of conveyance executed by James Stillman and Thomas Carson (the latter as administrator with the will annexed of Maria Josefa Cavazos, deceased), dated May 12, 1886, and deed of release executed by Kate M. Combe and others, by their attorney in fact, James B. Wells, jr., dated April 17, 1886, not deemed sufficient to impart a valid title to the whole of the Fort Brown Reservation, for reasons stated.

DEPARTMENT OF JUSTICE,

May 20, 1886.

SIR: Your letter to me of the 23d of February last inclosed a communication from James R. Cox, esq., attorney for P. G. Cavazos and James Stillman, together with one from James B. Wells, jr., attorney for Charles S. Dana and others, and called attention thereto in connection with an opinion which I had the honor to submit to you on the 16th of January last, concerning the title to the site of Fort Brown, Texas. With a subsequent letter, dated March 4, you transmitted all the papers then in your Department relating to that subject, to enable me to examine the case upon the points adverted to in the above-mentioned communications, should I desire to do so.

Action on this matter has been delayed, at the request of Mr. Cox, to afford him an opportunity to adduce additional

information touching some of the points referred to; but he has failed to produce any such information, and none having been received from other sources, the case stands precisely as it was at the date of your last-mentioned letter, with the exception of an additional paper (a copy of the will of José Miguel Paredes) which has since been furnished at my request and is with the other papers.

Upon further examination and reflection, I remain entirely satisfied with the conclusions reached in my opinion as to the questions there considered, and return herewith all the papers which accompanied your above-mentioned letters.

After the foregoing was written, I received your letter of the 18th instant, transmitting additional papers relating to the same matter, among which are a number of powers of attorney, deeds of conveyance, etc., and requesting my opinion as to the validity of the title proposed to be conveyed by these papers.

One of the instruments referred to is a deed to the United States, dated May 12, 1886, which is executed by James Stillman and Thomas Carson, the latter as administrator with the will annexed of Maria Josefa Cavazos, deceased. This deed, for the consideration therein stated, grants the whole of the premises embraced in the limits of the Fort Brown reservation, comprising 358.8 acres, more or less, and relinquishes all claim for past use and occupation of the same.

Another is a deed to the United States, dated April 17, 1886, executed by the following parties: Kate M. Combe and husband, Annette P. Hicks and husband, Agnes A. Browne and husband, and Frances C. Powers, by their attorney in fact, James B. Wells, jr.; B. O. Hicks, as guardian of Frances E. Powers; B. O. Hicks and C. B. Combe, as executors of the last will of Stephen Powers, deceased; Francisco Yturria, Vicente Salinas, Matt. Gerhard, Juan Salinas, Marie Grogan Dana and husband, by their attorney in fact, James B. Wells, jr. It releases to the United States, for the consideration mentioned therein, all right and interest of the grantors to or in the same premises, and relinquishes all their claims and demands for the use and occupancy thereof.

While all of the parties to the latter instrument are either

claimants under the so-called "Salinas" title or under the "Paredes" title, they do not comprise the whole of such claimants.

Thus it would appear by the abstract of title and accompanying exhibits that a part of the "Salinas" claim is still in H. E. Woodhouse and Tiburcio Salinas, neither of whom is a party to the deed. Besides, there are others not parties to the deed who assert title to the premises embraced by the same claim adversely to the grantors in such deed, namely: Charlotte Miller and the heirs of Henry Miller deceased; the title of these resting upon a sheriff's sale under an execution against Antonio Salinas, through whom the "Salinas" claim is derived.

As regards the "Paredes" claim, the title thereto is partly in the heirs of Stephen Powers and partly in Marie Grogan Dana, wife of Charles S. Dana. All of said heirs are parties to the deed; but one of them (Frances E. Powers) is a minor, and although the deed is executed by her guardian, yet there is nothing to show that he has been duly authorized so to do. Mrs. Dana executes the deed by attorney, but the power of attorney given by her is limited to a release of her right to the "Salinas" claim (in which she never had any interest), and is therefore inadequate for the purpose of relinquishing her rights under the "Paredes" title.

So far, then, as the "Salinas" and "Paredes" titles are concerned, the last-mentioned deed appears to be insufficient to extinguish the rights of claimants under those titles for the following reasons: (1) H. E. Woodhouse and Tiburcio Salinas, who apparently have claims under the former title, are not parties to the deed; (2) Charlotte Miller and the heirs of her deceased husband, Henry Miller (whose claim is a cloud upon that of the other claimants under the "Salinas" title), are not parties thereto; (3) No authority is shown for B. O. Hicks to execute the deed as guardian of Frances E. Powers, a claimant under the "Paredes" title; (4) The power of attorney given to James B. Wells, jr., by Mrs. Dana and husband (Mrs. Dana being a claimant under the last-mentioned title) is defective as above pointed out.

With respect to the instrument first hereinbefore mentioned, its sufficiency to pass title depends solely upon

whether it is of itself a valid conveyance of the entire interests of both James Stillman and the estate of Maria Josefa Cavazos in the premises. As a conveyance of the Stillman interest simply, it is not objectionable. But I entertain some doubt whether it is free from objection as regards the interest of the Cavazos estate. By the will of Mrs. Cavazos all the title which she had in the premises devolved upon her son, Pedro G. Cavazos, as a devisee in trust. There was no executor named in the will, but on the probate thereof the said Pedro was appointed "executor" and required to give bond; failing in this he was removed, and Mr. Carson appointed administrator with the will annexed. The duties and powers of such administrator are regulated by and depend upon statute. The rights and powers of the devisee in trust are imparted by the will. The latter may be removed by a court of competent jurisdiction in a proper proceeding before it for that purpose and a new trustee appointed to execute the trust; but I do not understand that this has been done. The administrator, Carson, who has signed the deed, could do so only by virtue of such authority as he is invested with as administrator. Apparently the trust created by the will, together with the legal title to the trust property, is still in Pedro, subject, of course, to the right of the administrator to deal with such property in proper cases arising in the due administration of the estate. Under these circumstances I think that in order to convey an unobjectionable title to the entire interest of the Cavazos estate in the premises, including release of all claims for past use and occupation thereof, the said devisee, Pedro G. Cavazos, should be a party to the deed as well as the said administrator Carson.

In reply to the inquiry contained in your letter of the 18th instant, I therefore beg to state, that in my opinion the instruments above referred to are not sufficient to convey a valid title to the whole of the Fort Brown property, for reasons already indicated.

The papers which accompanied that letter are herewith returned.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

OBSTRUCTION TO NAVIGATION.

Obstruction to navigation of certain rivers within the State of California, caused by hydraulic mining, considered; and *advised* that the case is one calling for the interposition of the restraining arm of equity in an appropriate action on behalf of the United States, with a view to remedying the evil.

DEPARTMENT OF JUSTICE,
May 25, 1886.

SIR: Your several communications, with the accompanying papers, relating to the alleged serious impairment of the navigation of certain waters of the State of California, and the threatened destruction of the navigation of some of those waters by the débris which is being constantly discharged into them from gold mines worked by hydraulic pressure, and asking to know if there is any way, and, if any, what way, by which the executive department of the National Government can take action properly, with a view to stopping the evil complained of, have received my consideration.

Commerce between the people of the several States and with foreign nations existed at the time the Constitution of the United States was adopted, as it had always theretofore existed between the nations of the earth, *jure gentium*, and was so recognized by the Constitution, which simply gives Congress the power to regulate it as a subsisting right. (*Vide*, the concurring opinion of Mr. Justice Johnson in *Gibbons* v. *Ogden*, 9 Wheat., 1, 222.)

This regulating power is, it is well settled, not confined to the subjects of traffic, but extends to the channels through which traffic is carried on, and therefore embraces a jurisdiction in Congress over the navigable waters of the country as to all things appertaining to them as highways of trade and intercourse and especially as to whatever affects navigation. (*Gibbons* v. *Ogden*, 9 Wheat., 1; *Wheeling Bridge Case*, 18 How., 431; *Gilman* v. *Philadelphia*, 3 Wall., 714; *Transportation Company* v. *Parkersburg*, 107 U. S., 700.) It rests with Congress, therefore, to say whether any of those waters shall be bridged, and on what plan the bridge shall be constructed. For

a like reason Congress establishes light-houses, lays down a system of regulations to which all vessels navigating our waters are required to conform, and adopts measures for the improvement of navigation, to the extent even of changing the channels of rivers. (*South Carolina* v. *Georgia*, 93 U. S., 410.) For such and like purposes these waters are "the public property of the nation and subject to all the requisite legislation by Congress." (*South Carolina* v. *Georgia, supra; Gilman* v. *Philadelphia, supra.*)

It was to promote commerce as a thing existing quite as independently of the Constitution as the right to life and the pursuit of happiness that the power to regulate it was given, and given exclusively because essentially a unit. And the States having thus abdicated control over commerce, a high and imperative duty was laid on the National Government to protect and encourage it.

As to many things belonging to commerce Congress has legislated, while as to many others it has preserved silence, but its very silence is a regulation of them, for it indicates the purpose to leave them absolutely free. (*Welling* v. *Michigan*, 115 U. S., 446, 455, and the cases referred to.)

The power to regulate commerce is one of the instances in which the Constitution operates *proprio vigore*, and its effect as to the navigable waters of the Union was to establish them as highways, open to the free and unrestricted use of all persons engaged in foreign or interstate commerce. To secure this great end was one of the inducements to the States to surrender control over their waters.

Whether, then, Congress has spoken or not spoken, the duty of the United States towards commerce in its several departments of traffic, intercourse, and navigation is equally imperative.

It follows, therefore, if what has been said is well founded, that the Constitution has placed the National Government under a high duty to take effective measures to repel all acts, whether of States or individuals, having a tendency to injure the navigation of waters over which interstate or foreign commerce is carried on.

Nor is this duty of the United States to be deduced wholly from the self-executing commercial power of the Constitution,

for every enrollment and license under our navigation laws to carry on the coastwise trade engages the national faith to protect the license from unauthorized interference, such as by injuring the navigation of waters open to that trade.

This brings me to the consideration of the question submitted.

The papers before me furnish convincing evidence that the navigation of the Sacramento and San Joaquin Rivers and their tributaries has been seriously impaired and in some places destroyed, and, moreover, is threatened with complete destruction by the washings into them from gold mines worked by the hydraulic process. It seems that the evil extends to the Suisun and San Pablo Bays into which these rivers empty, and even manifests itself in the great bay of San Francisco.

The navy-yard at Mare Island and other Government works requiring an unobstructed access to the sea must be seriously damaged if hydraulic mining as now conducted is allowed to continue; and Congress, in the river and harbor bill for 1884 (23 Stat., 143), expresses its sense of the injurious consequences of making rivers the receptacles of the washings from hydraulic mines by directing that the bulk of the money appropriated for the improvement of the Sacramento and Feather Rivers should not be used "until the Secretary of War shall have been satisfied of the cessation of hydraulic mining on said rivers and their tributaries."

The rivers referred to lie wholly within the limits of California, but they communicate directly with and are navigable from the sea, and consequently are the highways of interstate and foreign commerce, and fall within the jurisdiction of Congress under the commercial power.

It can not be doubted, if what is represented be true, that the filling up of the channels of these great highways of commerce is a public nuisance, stupendous in extent and injury, and that it loudly calls for the interference of some restraining power. The question is, can that restraining power be exerted by the Government of the United States without additional legislation?

There are three ways of correcting a public nuisance in the jurisprudence of England—by indictment, by information

in chancery at the suit of the attorney-general, and by bill in chancery exhibited by some private person who has sustained a special damage over and above what can be laid *ad commune nocumentum* (*City of Georgetown* v. *The Alexandria Canal Company*, 12 Pet., 91, 97, 98; Story, Eq. Jur., § 920, etc.; Kerr, Inj., chap. 6, p. 165.)

There being no provision in the criminal legislation of Congress making it an offense to obstruct navigation, the remedy by indictment may be passed without further remark, it being settled that a thing can not be an offense against the United States except it has been declared such by act of Congress. (*United States* v. *Britton*, 108 U. S., 199, 206; *United States* v. *Bevens*, 3 Wheat., 336.)

Can the judicial department of the National Government afford a remedy by injunction upon the application of the executive department?

Undoubtedly the jurisdiction of that department extends, amongst other things, to all cases in law and equity arising under the Constitution (Art. III, sec. 2), and it has been established by repeated decisions of the Supreme Court of the United States that "the equity jurisdiction conferred on the Federal courts is the same that the high court of chancery in England possesses; is subject to neither limitation nor restraint by State legislation, and is uniform throughout the different States of the Union." (*Payne* v. *Hook*, 7 Wall., 425, 430; *Thompson* v. *Railroad Companies*, 6 Wall., 134, 137; *Robinson* v. *Campbell*, 3 Wheat., 212, 223; *The Wheeling Bridge Case*, 13 How., 518, 563; *United States* v. *Howland*, 4 Wheat., 108, 115.)

That the United States courts will interfere by injunction to restrain a public nuisance—as, for instance, the obstruction of navigation by a bridge, at the suit of a party who has sustained a special damage—has been settled, on great consideration, by the Supreme Court of the United States (*The Wheeling Bridge case, supra*), and as that court accepted, without qualification, the doctrine of the English court of chancery as to this particular mode of redress against a public nuisance, it may be safely assumed that when a proper case is presented it will also accept the doctrine, equally well established in England, that equity will give relief against a public nui-

sance by injunction at the suit of the Attorney-General. Indeed, the Supreme Court has already distinctly recognized this doctrine in a case which did not, however, call for a decision on the point. Its language is, "Besides the remedy at law, it is now settled that a court of equity may take jurisdiction in cases of public nuisance by an information filed by the Attorney-General. This jurisdiction seems to have been acted on with great caution and hesitancy." (*City of Georgetown* v. *The Alexandria Canal Company*, 12 Pet., 98, 99.)

This subject of the proper form of remedy against nuisances affecting the United States came before Mr. Attorney-General Cushing in the matter of the Waukegan Breakwater (6 Opin., 172), and the conclusion reached by him was, that it was the undeniable law of the land that the Attorney-General of the United States has authority, "when occasion requires the abatement of a public nuisance to navigable waters, to file an information therefor and a bill for injunction in a proper court of the United States."

I am not called upon to consider the effect of any action of the State of California authorizing the injurious use of the above-named rivers as receptacles of debris produced by hydraulic mining, supposing such action could have any possible validity in view of the "express condition" on which the State was admitted into the Union "*that all the navigable waters within the said State shall be common highways, and forever free, as well to the inhabitants of said State as to the citizens of the United States*," *without duty or impost therefor*, (9 Stat., 453), for no one pretends that the State has given any such authority in express terms, and the argument that the authority may be collected by implication from the legislation of the State or the United States or both together has been completely met and overthrown by the learned circuit judge of the ninth circuit in his opinion in the important cause of *Woodruff* v. *North Bloomfield Gravel Mining Company*, in which the facts now before me were held to constitute a public nuisance that might be properly enjoined on a bill filed by a private person specially aggrieved.

Looking, then, at the question submitted on reason and authority, I can not entertain a doubt that the evil complained of is levelled at a great national right which is placed by the

Constitution under the peculiar protection of the United States, that it is a case specially calling for the interposition of the restraining arm of equity, there being an entire *absence of the ordinary remedy at law by indictment*, and that it is the duty of the United States to take prompt action, either by an information in chancery or by legislation making it penal to obstruct or impair the navigation of any water under the jurisdiction of the United States; and, in view of the urgency and importance of the subject, I take leave to recommend that it be brought to the attention of Congress at its present session.

It may be proper to add, in conclusion, that this opinion is in harmony with my opinions of the 1st of May and 16th June, 1885, which presented the question whether any other department of the National Government than the legislative had authority to take action to abate as public nuisances bridges erected over navigable rivers by State authority, one of the bridges being over a river wholly within the State of Virginia, and the other over that part of the Mississippi River which flows entirely within the limits of the State of Minnesota. And the same may be said of the opinions of one of my predecessors in the cases of the St. Louis and the Steubenville dikes. (15 Opin., 515, 526.)

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF WAR.

CIVIL SERVICE COMMISSION—CHIEF EXAMINER.

The office of chief examiner in the Civil Service Commission, created by the act of January 16, 1883, chapter 27, is to be filled by appointment by the President, with the advice and consent of the Senate.

DEPARTMENT OF JUSTICE,
May 26, 1886.

SIR: On the 22d instant you requested my opinion whether or not the appointment of the chief examiner in the Civil Service Commission is to be made by you or the Civil Service

Commission. The question turns upon the following words in the civil-service act of January 16, 1883:

"That said Commission is authorized to employ a chief examiner, a part of whose duty it shall be, under its direction, to act with the examining boards, so far as practicable, whether at Washington or elsewhere, and to secure accuracy, uniformity, and justice in all their proceedings, which shall be at all times open to him." And the act then more specifically defines his duties, and fixes his compensation at the rate of $3,000 per annum with his traveling expenses.

It is claimed that the chief examiner is an officer to be appointed by the President and confirmed by the Senate, under clause 2, section 2, Article II, of the Constitution, of which clause the words pertinent to the question are that the President shall appoint "all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law, and Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts, or in the heads of Departments."

The Constitution thus classifies (1) officers and (2) inferior officers.

(1) "Officers."—Embassadors, ministers, consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, which shall be established by law.

(2) "Inferior officers."—Those whose appointments are vested by Congress in the President, courts of law, or heads of Departments.

The examiner is certainly, under this act, an officer, as distinguished from a mere agent, clerk, or employé. His station embraces the ideas of tenure, duration, emolument, and duties, and then becomes an office. (*United States* v. *Hartwell*, 6 Wall, 385.)

Under previous constructions of the clause of the Constitution already referred to, this appointment might well have been placed with the head of the appropriate Department, but not with a subordinate commission. (*Ex parte Hennen*, 13 Pet., 230.)

The examiner whose employment is conferred by the statute

upon the Civil Service Commission does not appear to properly belong to the "inferior officers," the power of his appointment not being vested by Congress in the President, a court of law, or the head of a Department; and, although the civil-service act says that "said Commission is authorized to employ a chief examiner," the power to employ the chief examiner as contemplated by the Constitution is relegated to the President; as one of "all other officers of the United States" established by law.

The examiner is an officer to be appointed by the President by and with the advice and consent of the Senate.

Very respectfully, your obedient servant,

A. H. GARLAND.

The PRESIDENT.

MAIL TRANSPORTATION.

The clause in the act of March 3, 1885, chapter 342, authorizing the Postmaster-General "to contract for inland and foreign steam-boat mail service, when it can be confined in one route, where the foreign office or offices are not more than two hundred miles distant from the domestic office, on the same terms and conditions as inland steam-boat service, and pay for the same out of the appropriation for inland steam-boat service," is permanent in character and amendatory of the general law; but the authority of the Postmaster-General thereunder is limited by the terms and conditions imposed in the latter part of the same clause.

DEPARTMENT OF JUSTICE,
May 27, 1886.

SIR: In your letter of yesterday my attention is called to the following clause in the act of March 3, 1885, making appropriations for the service of the Post-Office Department, taken from page 386, twenty-third Statutes: "The Postmaster-General is authorized to contract for inland and foreign steam-boat mail service, when it can be confined in one route, where the foreign office or offices are not more than two hundred miles distant from the domestic office, on the same terms and conditions as inland steam-boat service, and pay for the same out of the appropriation for inland steam-boat service," and then my opinion is asked whether this clause gives a con-

tinuing authority, amendatory of the general law, or whether it must be regarded as limited to the expenditure of the appropriation made in the act.

From the context it is quite clear to me that the clause referred to confers authority regardless of the appropriation made just preceding it, and such legislation has not been uncommon. Laying aside the wording of the whole section and a construction of it by itself, this view is strengthened by going back a few clauses in the same act on the same page, where an appropriation for rent, light, and fuel is made, and in it limitations are fixed to the payment out of the particular appropriation and as to the term of years, etc. There being no such restrictions in the clause you speak of, it may well be inferred none were intended.

In the latter part of the clause under consideration you will observe certain terms and conditions are imposed and an appropriation for inland steam-boat service is specified, and as a matter of course your authority under this clause will be limited and restricted by those terms and conditions; and with this exception I answer your question, the clause referred to in your letter gives a continuing authority amendatory of the general law.

Very respectfully,

A. H. GARLAND.

The POSTMASTER-GENERAL.

PAY OF THE NAVY AND MARINE CORPS.

Unexpended balances of moneys appropriated for the pay of the Navy and Marine Corps for the fiscal year ending June 30, 1884, are not available for payment of the Navy and Marine Corps for services rendered during the fiscal year ending June 30, 1885.

DEPARTMENT OF JUSTICE,
June 11, 1886.

SIR: I have this day received your letter, in which you ask "whether or not moneys appropriated under the heads of pay of the Navy and pay of the Marine Corps," 1884 (of which there are unexpended balances, without outstanding indebtedness against them), "can now be used in payment of sums due for pay of the Navy and pay of the Marine Corps on account of services in the fiscal year 1885."

Pay of the Navy and Marine Corps.

In answer to the inquiry, your attention is directed to the language of the naval act of March 3, 1883, entitled "An act making appropriations for the naval service for the fiscal year ending June 30, 1884, and for other purposes."

You observe that the language limits the time for which the appropriation is available to the "fiscal year ending June 30, 1884."

This is the language of an annual appropriation bill, and made specifically for the service of a fiscal year; and you are referred to section 3690 of the Revised Statutes, viz:

"All balances of appropriations contained in the annual appropriation bills and made specifically for the service of any fiscal year and remaining unexpended at the expiration of such fiscal year shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year; and balances not needed for such purposes shall be carried to the surplus fund. This section, however, shall not apply to appropriations known as permanent or indefinite appropriations."

This section makes the appropriation for the service of a fiscal year applicable only to the payment of expenses properly incurred during that year, or the fulfillment of contracts properly made within that year.

Your letter states that there are no outstanding claims against the appropriation for the fiscal year 1884, so that there is no existing contingency relative to the fulfillment of contracts properly made within the fiscal year 1884.

Reference to act of June 19, 1878 (20 Stat., 167), limits the appropriation for pay of the Navy, "to be exclusively used to pay current obligations for its legitimate purpose as provided by law."

From this statement, the conclusion is reached that the balance remaining unexpended at the expiration of the fiscal year 1884 can not be applied to the payment of expenses incurred in the year 1885.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE NAVY.

MAIL CONTRACTS—DOUBLE PAYMENTS.

H. and others were mail contractors for certain routes in the State of Arkansas, service on which was discontinued May 31, 1861, up to which time from January 1, 1861, they were paid by the Government in full what was due them. Afterwards they collected from the State of Arkansas for the same period of service (January 1 to May 31, 1861) certain amounts, which were paid out of moneys belonging to the United States that had been seized by the State: *Advised* that the contractors are under a legal liability to make restitution to the United States of the amounts so collected, but that their sureties can not be held responsible therefor upon the undertaking of the latter.

DEPARTMENT OF JUSTICE,
June 16, 1886.

SIR: I have the honor to acknowledge the receipt of your communication of the 13th of February, 1886, returning the letter of P. Hanger, of Little Rock, Ark., addressed to the Attorney-General under date of January 8, 1886, and referred to you by his indorsement of the 18th of January last, relating to a proposed action to recover from him (Hanger) moneys of the United States which he obtained by securing double payments, one from the United States and one from the State of Arkansas, out of moneys of the United States, upon three several mail routes in which he was interested.

From the communication of the Assistant Attorney-General of your Department accompanying your letter, the following facts appear:

(1) In 1861, Peter Hanger was contractor on routes 7806, 7807, and 7937, in Arkansas. The service was discontinued on these routes, and the contractor was paid for the time in 1861, viz, from January 1 to May 31, 1861, the sum of $4,196.71. It appears also that said Peter Hanger collected from the State of Arkansas for the same period of service on the 2d of October, 1861, the sum of $1,915.44. This sum was paid for such service on his making proof that the service had been rendered and was unpaid; and that sum was thereupon paid him out of moneys which the State of Arkansas had seized belonging to the United States. Hence it appears that for said service the contractor has been paid twice out of moneys belonging to the United States.

(2) Messrs. Hanger and Ayliff were contractors for route 7803, Arkansas. For the service rendered from January 1, 1861, to May 31, 1861 (the date when the service was discontinued), there was due them the sum of $14,725.63, which was paid in full. It appears also that for the same service the State of Arkansas paid to the same contractors, out of funds of the United States which the State of Arkansas had seized, the sum of $10,211.82 on the 2d of October, 1861. The last-mentioned amount is, therefore, an overpayment.

(3) Messrs. Hanger, Rapley and Gaines were contractors for routes Nos. 7801, 7802, 7804, 7831, and 7846. On these routes there was due May 31, 1861, the sum of $14,265.61, which was fully paid to them in the usual method. In addition to the above-named amount it appears that the said contractors received from the State of Arkansas, out of moneys seized by that State and belonging to the United States, the sum of $16,102.97 for the same service, covering the same period, and on the same routes.

It is clear, I think, that there is a legal liability upon the contractors to make restitution to the United States of the sums of money thus overpaid them. The seizure of the money by the State of Arkansas was illegal, and the demand made upon that State by the contractors for payment was without warrant of law. It is a well-settled principle of the common law that an action lies for money paid by mistake, or upon a consideration which happens to fail, or for money gotten through imposition. The Supreme Court of the United States has decided (in *Bayne et al., trustees*, v. *The United States*, 93 U. S., 642) that an action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial. While there can be no doubt, I think, as to the legal liability of the said contractors to make restitution of the money which has been improperly overpaid to them, your Department must decide, as a practical question, whether recovery is now possible by reason of the circumstances referred to in the report of the special agent of the Treasury. In my opinion the sureties of the contractors can not be held responsible for the money which has been thus

illegally and improperly collected. According to the form of contract which has been furnished to this Department the undertaking of the sureties was as follows:

"They further undertake, covenant, and agree with the United States that the said contractors will collect quarterly, if required by the Postmaster-General, of postmasters on said route the balances due from them to the United States on their quarterly returns, and faithfully render an account thereof to the Postmaster-General in the settlement of their quarterly accounts, and will pay over to the Auditor of the Treasury for the Post-Office Department, on the order of the Postmaster-General, all balances remaining in their hands."

It does not appear from the statement of facts submitted that there has been any failure on the part of the said contractors to comply with their undertaking in this respect. It seems to be conceded that the mail service was performed according to the terms of the contract; that such service was discontinued by the United States, and a settlement made up to the 31st of May, 1861. When the illegal seizure of the money of the United States by the State of Arkansas was made and the payment wrongfully made to the said parties they were no longer mail contractors. Their duties had been fully performed as such and their accounts had been adjusted. In my opinion this operated as an acquittance and discharge of the sureties. The seizure of the money by the State and the wrongful payment of it can not be construed as a breach of the contract by which the sureties were bound. In *Miller* v. *Stewart* (9 Wheat., 680), Judge Story, in delivering the opinion of the court, says: "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation he is bound, and no further. He has a right to stand on the very terms of his contract, and if he does not assent to any variation of it and a variation is made, it is fatal. And courts of equity, as well as of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness."

This doctrine has been fully recognized by the Supreme

Court in *United States* v. *Boyd* (15 Pet., 187); *McMicken* v. *Webb* (6 How., 292). In the latter case the court said:

"Even as between principals a court will not bind parties to conditions or obligations to which they have not bound themselves, according to a fair interpretation of their contract; but as against a surety neither a court of law nor a court of equity will lend its aid to affect him beyond the plain necessary import of his undertaking. He must be permitted to remain in precisely the situation in which he has placed himself."

In view of this well-settled doctrine I am of opinion that a suit against the sureties to recover the money improperly paid to the contractors would be unavailing.

Very respectfully,

JOHN GOODE,
Acting Attorney-General in this Case.

The POSTMASTER-GENERAL.

THE TRADE-DOLLAR.

The United States Treasurer is not authorized to receive "trade-dollars" at par in exchange for silver certificates under the third section of the act of February 28, 1878, chapter 20. Nor are such dollars receivable at par in payment of public dues.

DEPARTMENT OF JUSTICE,
June 17, 1886.

SIR: The petition signed by the presidents of a number of national banks, calling your attention to the refusal of the Treasurer of the United States to receive trade dollars in exchange for silver certificates, and asking that you will direct that officer to receive these dollars at par, or, in case of doubt as to your power to do so, refer the subject to the Attorney-General, and other papers having more or less relation to the object of the petition, have received my consideration, and I have the honor to submit an opinion upon the questions which seem to be presented, namely: (1) whether any power resides in your hands to direct the Treasurer to receive the trade-dollar at par in exchange for silver certificates under the third section of the act of the 28th Febru-

ary, 1878 (20 Stat., 25), as coin authorized by the first section of that act; and (2) whether the Government is bound to receive trade-dollars at par in payment of public dues.

The coin called trade-dollar was established by the fifteenth section of the act of February, 1873 (17 Stat., 427), now contained in section 3513 of the Revised Statutes, which provides that "the silver coins of the United States shall be a trade-dollar, * * * and the weight of the trade-dollar shall be four hundred and twenty grains troy." * * * By the same section of the act mentioned silver coins were made a legal tender at their nominal value for any amount not exceeding $5, and this provision is now represented by section 3586 of the Revised Statutes. By the second section of the joint resolution of the 22d July, 1876 (19 Stat., 215), it is enacted that the trade-dollar "shall not hereafter be a legal tender."

By the first section of the act of the 28th February, 1878 (*supra*), it was enacted: "There shall be coined at the several mints of the United States, silver dollars of the weight of four hundred and twelve and a half grains troy of standard silver, as provided in the act of January eighteenth, eighteen hundred and thirty-seven, on which shall be the devices and superscriptions provided by said act; which coins, together with all silver dollars heretofore coined by the United States, of like weight and fineness, shall be a legal tender, at their nominal value, for all debts and dues, public and private, except where otherwise expressly stipulated in the contract" * * *

It would seem clear that it was the purpose of Congress by this law to deny to some description or descriptions of dollar previously authorized the quality of being legal tender for public and private dues, and that after it went into effect receivers of public moneys had no authority to take payment in silver dollars not of the weight and fineness prescribed by it, that is to say, not weighing 412½ grains, and containing 900 parts of pure metal and 100 of alloy in the 1,000 parts by weight or, as usually expressed, "900 fine," for, by directing that silver dollars of a particular description should be accepted for public dues, Congress must be understood as prohibiting the receipt of any other kind, it being, in my opinion, quite inadmissible to take the words of the

act as directory only, or as consistent with a discretion of any sort.

And by a parity of reasoning the authority conferred by the third section of the act of 1878 on the Treasurer and assistant treasurers of the United States to give certificates in exchange for "coin authorized by this act" must be restricted to silver dollars of the weight and fineness required by the first section.

If these positions are sound, it follows that unless the trade-dollar is of the description of dollar called for by the first section of the act of 1878 it can not be received from the public debtor or exchanged for certificates under the third section of that act.

Turning now to the legislation on the silver dollar, not yet mentioned, we find that by the act of the 2d April, 1792 (1 Stat., 246), it was required to contain $371\frac{4}{16}$ grains of pure or 416 grains of standard silver, and this continued to be the law until the act of the 18th January, 1837 (5 Stat., 136), under which the standard of both gold and silver coins was such that of 1,000 parts by weight 900 should be of pure metal and 100 of alloy, and the weight of the silver dollar was to be $412\frac{1}{2}$ grains, which, at 900 fine, called for 371.25 grains of pure silver. In 1873 Congress, by an act approved the 12th February (17 Stat., 427, and sec. 3513 Rev. Stat.), declared that the silver dollar should be a trade-dollar, weighing 420 grains and 900 fine, and so contain 378 grains of pure silver. Finally, by the act of 1878 (*supra*) Congress restored the dollar of the act of 1837, and declared, as we have seen, that it and all other dollars previously coined *of like weight and fineness*, that is to say, weighing $412\frac{1}{2}$ grains and 900 fine, should be legal tender "at their nominal value" for debts public and private; and here it may be pertinently remarked that in restoring the silver dollar of 1837 Congress virtually restored the dollar of 1792, both coins containing precisely the same amount of pure silver (371.25 grains) although the older one weighed $3\frac{1}{2}$ grains more than the other, the excess being of alloy merely.

If Congress had intended to put all silver dollars previously coined on a footing with that established by the act of 1878 (*supra*) it would have said so, as it did in the act of 1837

when the dollar of 412½ grains was introduced. The language of the act of 1878 compels us to deny the quality of any legal tender to any dollar that does not weigh 412½ grains and is not 900 fine. It is useless to argue, as has been argued, that the dollars coined under the act of 1792 and 1873 contained in the one case as much pure metal as, and in the other more, than the standard dollar, for they could not be treated as the equivalents of the latter without exercising a dispensing power over the statute the intent of which in this respect is, I think, almost too clear for argument.

Nor is there anything in the consequent resulting from this interpretation, so far as I can see, to raise a doubt of its soundness. The alleged injustice of rejecting silver dollars coined before the act of 1837 is largely, and we suspect altogether, imaginary, there being little probability that any of that coinage, not laid away in cabinets and museums, is outstanding. As to the trade-dollar, its name and history show very satisfactorily that it was not expected to find its way into the channels of domestic commerce, and when it did so, through an unforeseen disturbance in the relative values of silver and gold, Congress, by the third section of the joint resolution of the 22d July, 1876 (*supra*), took from it the quality of legal tender, furnishing at the same time additional evidence of the purpose for which it was created by authorizing the restriction of its coinage to "the *export* demand for the same."

But even if the interpretation given the act of 1878 were not so clearly right, I should hesitate to advise you to supplant it by another, especially in view of the fact that Congress has resisted repeated vigorous efforts to have the trade-dollar declared legal tender.

If the power of Congress to legislate on the currency does not extend to declaring that a given description of money, already in circulation, shall cease to be legal tender for public dues, it must be in virtue of some express or implied limitation of the Constitution. I think it clear that no such limitation exists in respect of dues arising after the passage of the act of 1876. It is unnecessary to inquire as to prior debts in the present case.

The result of the discussion, then, is that the action of the Treasury Department as to the trade-dollar complained of is in accordance with the law.

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The PRESIDENT.

CLAIM OF PARTICIPANT IN THE REBELLION.

In 1860 E., a naval officer, became entitled to a share in the proceeds of a captured slaver, the amount of which was certified to the Treasury Department by the Secretary of the Navy, but remains unpaid. In 1861 E. resigned his commission and entered the Confederate service: *Held* that by force of the joint resolution of March 2, 1867 (sec. 3480, Rev. Stat.), payment of such share can not now be made, notwithstanding the President's proclamation of amnesty of December 25, 1868, and that to authorize its payment an act of Congress is necessary.

DEPARTMENT OF JUSTICE,
June 17, 1886.

SIR: Your communication of the 7th May, ultimo, presents the following case for an opinion:

In 1860 one Eggleston, then an officer in the Navy of the United States, became entitled, as such officer, to a certain sum of money, being his share, according to the scheme of distribution prescribed by law, of the proceeds of a slaver captured off the coast of Cuba. The amount thus due was certified to the Treasury Department by the Secretary of the Navy on the 19th September, 1860, and on the 20th of the same month the claim was referred to the First Auditor. That officer took no action thereon. In 1861 Eggleston resigned his commission in the Navy and served in the Confederate army.

Upon this state of facts it is asked whether the President's proclamation of amnesty of the 25th December, 1868, annulled so much of the joint resolution of the 2d March, 1867 (14 Stat., 571), and section 3480, Revised Statutes, "as forbids accounting officers settling claims existing prior to the 13th day of April, 1861, in favor of participants in the late insurrection or rebellion and against the United States."

Congress has said by this joint resolution that money in

the Treasury shall not be applied to the payment of claimants "who promoted, encouraged, or in any manner sustained the rebellion," or who, during such rebellion, were not "known to be opposed thereto and distinctly in favor of its suppression," and that no pardon theretofore granted should authorize any such payment.

The Constitution of the United States (Art. I, sec. 9) provides that "no money shall be drawn from the Treasury but in consequence of appropriations made by law," * * * "and Congress has the undeniable right to annex such conditions to the payment of the public money as it sees fit. It has exercised that right by the joint resolution of the 2d March, 1867 (*supra*), and the conditions so prescribed must be respected, unless it can be shown that one of the consequences of a pardon in a case like the present is to enable the grantee of it to draw money from the Treasury in a way different from that required by Congress.

This view as to the relation of a pardon to the joint resolution of the 2d March, 1867, has been distinctly laid down by the Supreme Court of the United States in the recent case of *Hart* v. *United States* (118 U. S., 62) affirming a judgment of the Court of Claims. If this is the law in a case like Hart's, where the claimant was pardoned some time before the joint resolution was passed, it must be so, *a fortiori*, in a case like the present, where the pardon was granted after the joint resolution became law.

As a consequence, it must be replied to your question that the proclamation of amnesty of the 25th December, 1868, did not defeat the intent of the joint resolution of the 2d March, 1867, as to the claimant Eggleston, whose claim can not be paid without an act of Congress authorizing it.

Very respectfully, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

EMIGRANT HALF-BREED INDIANS.

Half-breed Indians emigrating to the United States from Canada are not precluded by existing legislation from retaining the bounty of the United States in addition to that of the Dominion of Canada.

DEPARTMENT OF JUSTICE,
June 21, 1886.

SIR: Your communication of the 19th May, ultimo, with the accompanying papers, has received my consideration.

The Dominion Government of Canada asks to be furnished official evidence of alleged applications to this Government of certain half-breeds commorant in the Territory of Dakota, for grants of land or scrip, or both, the declared purpose of the request for this evidence being to defeat certain applications of the same half-breeds, made while they were commorant in Manitoba, a province of the Dominion of Canada, for the benefit of the Canadian order in council of the 20th April, 1885.

Whether the evidence applied for should be furnished is a matter that would seem to reside entirely in the discretion of the Department of State, to which the application has been made, and is not understood to be submitted to me for opinion.

As to the status of the half-breeds in question, they can not become citizens of the United States except by some authority of law giving them that privilege. No benefaction of a pecuniary or property kind extended to them by the United States can clothe them with the character of citizens unless conferred in such a way as to necessitate the implication that such was the intention of Congress. In a recent case the Supreme Court of the United States has established the principle that an Indian, to be a citizen, must, like any other foreigner, be naturalized by authority of Congress. (*Elk* v. *Wilkins*, 112 U. S., 94.)

In my opinion there is nothing in the Indian legislation to prevent these half-breeds from sharing the bounty of the United States in addition to that of the Dominion of Canada. But whether the order in council extending the Dominion bounty excludes applicants who afterwards migrate from

the Dominion or accept favors at the hands of another government is a matter on which I am not asked to express an opinion.

Very respectfully, your obedient servant,

A. H. GARLAND.

The SECRETARY OF STATE.

CONTINGENT FUND.

Under section 3683, Revised Statutes, heads of Departments are alone authorized to give orders for purchases payable from the contingent fund and to approve vouchers therefor.

DEPARTMENT OF JUSTICE,
July 16, 1886.

SIR: Your communication of the 15th instant, requesting my opinion as to whether any one besides the head of a Department can order the purchase of any articles to be paid for out of the contingent fund, and whether any one but the head of a Department can approve the vouchers for such purchase under section 3683 of the Revised Statutes, has been received, and I beg leave to reply that the authority delegated by that section to the heads of Departments is a special authority, and cannot be by the head of the Department delegated or transferred to any one else, and the head of the Department should not only give the order himself for the purchase, but should approve the vouchers therefor also.

Very respectfully,

A. H. GARLAND.

The ACTING SECRETARY OF THE TREASURY.

PROHIBITED IMPORTATION—FORFEITURE.

The Secretary of the Treasury has no power to remit the forfeiture of articles contained in the same package with other articles imported in violation of section 2491, Revised Statutes.

DEPARTMENT OF JUSTICE,
July 17, 1886.

SIR: In reply to your communication requesting an opinion upon the proposition, "Whether under section 2491,

Revised Statutes, which prohibits the importation into the United States of certain obscene articles therein enumerated, and declares such articles forfeited upon importation, it is within the power of the Secretary of the Treasury, under the provisions of Title LXVIII of the Revised Statutes, to remit the forfeiture of articles *not* obscene contained in the same invoice or package with such as are prohibited?"

In my opinion there can be no such remission. The articles otherwise unobjectionable and entitled to entry have become tainted with illegality by association, and were therefore taken *in delicto*, and must share the fate of the portion of the contents of the package which has produced the contamination.

I have the honor to be, sir, you obedient servant,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

BRIDGE ACROSS THE LITTLE KANAWHA.

Under authority of the legislature of West Virginia it is proposed to construct a bridge over the Little Kanawha, a navigable river within the limits of that State, which bridge, if built, will be an obstruction to navigation; but its construction being neither expressly nor impliedly forbidden by any law of Congress: *Advised* that the case is not one which warrants the institution of judicial proceedings for the prevention of obstruction to navigation threatened.

A State may authorize a navigable stream within its limits to be obstructed by a bridge in the absence of any legislation by Congress on the subject.

DEPARTMENT OF JUSTICE,
July 17, 1886.

SIR: I have examined the accompanying papers, which were received with your letters to me of the 24th ultimo and 15th instant, in relation to a bridge proposed to be constructed by the Ohio River Railroad Company across Little Kanawha River near its mouth (about 300 feet from its junction with the Ohio) under authority of a law of the State of West Virginia.

It is stated therein that the bridge, if constructed as now projected, will be an obstruction to the commerce not only of the Little Kanawha but of the Ohio River, the Little Kana-

wha, for some 1,100 feet from its mouth, being used as an ice harbor for the protection of the Ohio River boats, and also as a landing place for them. Furthermore it is suggested therein that the laws of the United States regulating the construction of bridges across the Ohio may be applicable to the bridging of the Little Kanawha at the point above indicated.

As regards the suggestion just mentioned, I find nothing in the laws referred to (act of December 17, 1872, chapter 4, as amended by the act of February 14, 1883, chapter 44), which authorizes their application to the construction of bridges across any other river than the Ohio, and in my view the case presented by the papers would not come within their operation.

That case is briefly this: A bridge over the Little Kanawha, a navigable stream within the limits of West Virginia, is proposed to be constructed under authority of the legislature of that State. If built at the place and according to the plan now contemplated the bridge will be an obstruction to the navigation of that stream, and also greatly impair its usefulness as a harbor for boats navigating the Ohio River. *But the construction of the bridge is neither expressly nor impliedly forbiden by any law of Congress.*

Such case, I am satisfied, in view of the doctrine asserted and reasserted by the Supreme Court of the United States in *Wilson* v. *Blackford Qreek Marsh Company* (2 Pet., 245), *Gilman* v. *Philadelphia* (3 Wall., 713), *Pound* v. *Turck* (95 U. S., 459), *Escanaba Company* v. *Chicago* (107 U. S., 678), and *Cardwell* v. *Bridge Company* (113 U. S., 205), would not justify the institution of judicial proceedings for the prevention of the obstruction to navigation, etc., threatened. It does not appear to differ, in any essential feature, from the cases directly passed upon by that court in its decisions referred to. According to the doctrine there laid down, a State may authorize a navigable stream within its limits to be obstructed by a bridge in the absence of any legislation by Congress on the subject.

I observe that the attention of Congress has at the present session been officially called to the proposed bridge (see Ex. Doc. No. 12, Senate, Forty-ninth Congress, first session, p. 55),

and recently, as I gather from the accompanying papers, a great many citizens engaged in the navigation of the Ohio and its tributaries between Pittsburgh and Cincinnati have memorialized Congress against the erection of such bridge, particularly at the place selected therefor. My opinion is, that some action by that body on the subject, having the effect to supersede the authority of the State, is necessary before any effective steps can be taken, by suit or otherwise, to prevent the construction of the bridge as now projected.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

CASE OF CHARLES E. HOLMES.

H. entered the military service in August, 1862, as a volunteer, to serve for three years; he subsequently deserted; but he afterwards voluntarily returned to service under the President's proclamation (of pardon) of March 11, 1865, and was mustered out of service along with his company in July 2, 1865: *Advised* that the time which elapsed between his desertion and his return should not be credited to him in a discharge or otherwise, but that he is entitled to have his actual service credited to him in an honorable discharge.

DEPARTMENT OF JUSTICE,
July 21, 1886.

SIR: I have the honor to acknowledge the receipt of your communication of the 10th instant, in which you call my attention "to the application of Mr. Charles E. Holmes for the removal of the charge of desertion standing against his record as a member of Company E, Sixth Maryland Volunteers, and for an honorable discharge therefrom."

The facts in Mr. Holmes's case, as recited in your communication, are that he "was enrolled August 21, 1862, to serve three years, in Company E, Sixth Maryland Volunteers, and served therein until June 15, 1863, when he was captured by the enemy at Winchester, Va. He was paroled at City Point, Va., July 8, 1863; reported at College Green Barracks, Annapolis, Md., July 9, 1863, and the words 'In hospi-

tal' appear opposite his name on the records of said barracks. The records do not show what disposition was made of him after July 9, 1863, but he admits that he left Annapolis in August, 1863. He is reported on the muster rolls of his company for July and August, September and October, 1863, as absent paroled prisoner; on the roll for November and December, 1863, as 'deserted'; the date or place of desertion is not stated. His name is dropped from subsequent muster rolls of the company to February 28, 1865. He is reported on the roll for March and April, 1865, as 'present,' with the remark, *returned voluntarily under the President's proclamation, April* 3, 1865. He was transferred to Company C, First Maryland Volunteers, in May or June, 1865, and on the muster-out roll of that company, dated July 2, 1865, he is borne as mustered out with the company, with the remark, 'Deserted June 24, 1863, from Camp Parole, Annapolis, Md.; returned under the President's proclamation."

I understand from the foregoing statement that Mr. Holmes received an honorable discharge from Company C, First Maryland Volunteers, covering the time of his service in that command, and that he now claims an honorable discharge from Company E, Sixth Maryland Volunteers, covering the time from date of enlistment to date of transfer.

The discharge claimed, if given, would be a "formal final judgment passed by the Government upon the entire military record of the soldier, and an authoritative declaration by it that he had left the service in a *status* of honor." (*United States v. Kelly*, 15 Wall., 34.)

Is Mr. Holmes entitled to such a judgment? When he was mustered into service August 21, 1862, he assumed grave obligations to the Government. The Government provided compensation for the performance and denounced penalties against the violation of these obligations. By desertion in August, 1863, he violated them, incurring a penalty or penalties. The desertion, persisted in as it was for twenty months, involved not only crime, but a total failure during that period to perform any service for which compensation was provided. He returned to the performance of his obligations April 3, 1865, upon the terms offered by the President's proclamation of March 11, 1865. Those terms were, pardon

for his crime upon condition that he should serve the remainder of his term of enlistment, and, in addition thereto, a period equal to the time lost by desertion. His connection with Company E, Sixth Maryland Volunteers, was severed in May or June, 1865, by his transfer to Company C, First Maryland Volunteers, and at the close of the war, to wit, July 2, 1865, after a total service of about fifteen months, he was mustered out with said latter company. By reason of this mustering out the Government waived, and he was unable to serve out, the full term of enlistment, and, in addition, a period equal to that lost by desertion.

The solution of the question of the effect of this conditional pardon and subsequent waiver upon his record and consequent rights as a soldier is not free from difficulty. Certainly "a full pardon reaches both the punishment prescribed for the offense and the guilt of the offender. * * * It releases the punishment and blots out the existence of guilt, so that in the eyes of the law the offender is as innocent as if he had never committed the offense. * * * It restores him to all his rights." (*Ex parte Garland*, 4 Wall., p. 333.)

I am perfectly clear in the opinion that the pardon did relieve Mr. Holmes not only from "corporal punishment for the crime," but also from "the status into which his own act had placed him and from the *onus* of his crime." His record is as clear from all stain by reason of desertion as though the time from the last performance of duty prior to desertion up to his return had never been. He is clearly entitled to full credit for service performed prior to desertion and after his return, and his record during those periods is unaffected in the slightest by the crime for which he was pardoned. But for the period covered by the desertion I do not think he should be held to have "been present at every roll-call" performing the duties of and earning a soldier's compensation.

Without considering the power of the President to produce this result by a pardon, it is evident that the pardon extended in the proclamation was not intended to operate as or to take the place of specific performance.

The crime was pardoned, and with legislative sanction

the President's proclamation extended the time within which Mr. Holmes might perform his contract obligations and earn the compensation provided for performance. The effect was to blot out the twenty months which covered the crime and consequent failure to do duty, leaving Mr. Holmes just where he was before desertion.

His original contract of service was for three years or the war. Having served one year before desertion, his contract upon return under the proclamation was for two years or the war. He simply took up the original contract where he laid it down. His past performance was credited on the total measure of his original obligation, and the pardon became absolute upon performance of the remainder. As the ending of the war in fifteen months after enlistment would have deprived him of the opportunity to earn and the right to demand compensation dependent on greater length of service, so the ending of the war within three months after his return deprived him of the opportunity to make good and the right to demand compensation for the services he might have performed in the twenty months lost by desertion.

The Goverment was not under any obligation at any time to keep him in the service for the full term of three years, nor to pay him for any length of time after the war ended and he was mustered out.

If, after his return, he had served the two years which would complete his original term and, in addition, make good the time lost by desertion, he would have been entitled to just that compensation which he indirectly demands now by claiming a discharge covering time from enlistment to date of transfer.

Since he did not serve but three months of that two years, and since the clear purpose of the proclamation was that the compensation should be measured by the service, I am of opinion that he should be paid for that service, and not for the whole service he might have been, but was not, called on to render.

The pardon was not intended to place a deserter upon higher ground nor to secure him more favorable terms than were given to the soldier who never faltered in discharge of duty. Such a soldier was compensated for actual service.

The deserter who accepted the terms of the President's proclamation was entitled to no more, no less. Mr. Holmes is entitled to be credited by his services from date of enlistment to date of desertion, and from date of return to date on which he was mustered out. The mustering out before the expiration of his full term waived continued service as a condition to immunity from all guilt, from all punishment, from all stain, in the eye of the law, on his record as a soldier by reason of the desertion, but it did not waive the condition of the original contract, that compensation should be proportioned to length of service, nor the condition of the proclamation that time lost by desertion should not be computed in estimating length of service.

Neither the President nor Congress could give back to Mr. Holmes the time so full of opportunities for serving his country that had elapsed after desertion and before the pardon was given and accepted, and the plain purpose of both was to exclude such time from the estimate of his service.

I have thus generally stated my conclusions as to the effect of the pardon and waiver of full term of service upon Mr. Holmes' rights on account of service in the Army, because such a statement is necessary to a full answer of your specific questions.

You ask, "(1) Whether, under the President's proclamation of March 11, 1865, Holmes was entitled by his voluntary surrender as a deserter to a cancellation of the record of desertion standing against him, and (2) Whether by virtue of the said proclamation and his return thereunder he is entitled to an honorable discharge from Company E, Sixth Maryland Volunteers?" He remained in the service as a member of that company until the transfer to Company C, First Maryland Volunteers, but the time which elapsed between his desertion and his return should not be credited to him in a discharge or otherwise. Mr. Holmes is entitled to have the actual service in Company E, Sixth Maryland Volunteers, credited to him in an honorable discharge. If a soldier transferred from one company and regiment to another is entitled to a discharge from the company he leaves, then Mr. Holmes is entitled to an honorable discharge from

Company E, Sixth Maryland Volunteers, showing his length of service exclusive of time lost by desertion.

The papers inclosed with your communication are herewith returned.

Respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

CONTINGENT FUND.

Opinion of July 16, 1886 (ante, p. 424), in regard to the power conferred upon heads of Departments by section 3683, Revised Statutes, respecting purchases payable from the contingent fund, does not apply to the Assistant Secretary of the Interior while in the exercise of authority *prescribed* for him by the Secretary of the Interior under section 439, Revised Statute.

DEPARTMENT OF JUSTICE,
July 23, 1886.

SIR: I have the honor to submit, in reply to your communication of the 22d instant, that my opinion touching the authority delegated to heads of Departments under section 3683, Revised Statutes, does not apply to the Assistant Secretary of the Interior while in the exercise of authority *prescribed* for him by the Secretary of the Interior under section 439, Revised Statutes. As to the authority *so prescribed* the Assistant Secretary has the full power of the Secretary himself.

It is to be observed that section 3683, Revised Statutes, was enacted in 1842, and section 439, Revised Statutes, in 1862. With this provision as to the contingent fund before Congress when the duties of the Assistant Secretary were designated in 1862, it is to be presumed it was intended to include this authority or duty, as well as all others that the Secretary of the Interior might *prescribe* to the Assistant. This section 439, in other words, empowers the Secretary to make the Assistant, as it were, his deputy in all things. It follows, then, that the Secretary of the Interior can lawfully devolve the authority vested in him by section 3683, Revised Statutes, upon the Assistant Secretary of the Interior. This is entirely consistent with my opinion of the 16th instant, to

which you refer, which is in effect that the duty mentioned in section 3683 can only be exercised by the head of a Department, and cannot be transferred to an inferior officer. So long as the powers delegated to the Assistant Secretary of the Interior by his superior remain unrevoked, the authority of the former is co-ordinate and concurrent with that of the latter.

The opinion referred to, as you will observe, was given in answer to an inquiry from the Secretary of the Treasury, whether the authority delegated under section 3683, Revised Statutes, could be exercised by a chief clerk of a Department in the one case and by a chief of a division in the other.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR,

WATCHMEN IN PUBLIC SQUARES OR RESERVATIONS.

The watchmen employed by the Government under the act of August 5, 1882, chapter 389, for service in the public squares or reservations in the District of Columbia, are by that act invested with the powers of the metropolitan police, and may make arrests outside of such squares and reservations for offenses committed within the same.

DEPARTMENT OF JUSTICE,

July 30, 1886.

SIR: I have the honor to acknowledge the receipt of your communication of the 29th instant, in which you ask "Whether the District commissioners must appoint these watchmen (the watchmen provided for by the United States Government for service in any of the public squares or reservations in the District of Columbia) additional policemen before they can perform the full duties and powers of the metropolitan police, or whether the law confers full authority upon the watchmen to arrest persons outside of the reservations and take them to the police courts for crime committed within the reservations or connected therewith in any way."

The language of the act of Congress, approved August 5, 1882 (22 Stat., 243), is so clear and explicit, that there can be no doubt as to its meaning.

The powers and duties of the metropolitan police are conferred upon these watchmen by the act itself, without the intervention of any appointment from the commissioners of the District. The legislative purpose was to invest these watchmen with the powers and duties of the metropolitan police without connecting them with that organization.

One of these watchmen has the same authority for arresting offenders and turning them over to the courts for trial that a metropolitan policeman would have who was detailed to perform a watchman's duties.

Respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

TIMBER UNLAWFULLY CUT ON PUBLIC LANDS.

The Land Department has authority to make seizure, through its officers or agents, of timber unlawfully cut on the public lands.

Timber unlawfully cut on the public lands, which has been seized by duly-authorized agents of the Land Department, and is in their custody, may be disposed of by that Department; and whether this be done by public or private sale, with or without previous advertisement, is a matter entirely discretionary therewith.

DEPARTMENT OF JUSTICE,
August 23, 1886.

SIR: By your letter to the Attorney-General of the 14th ultimo attention is called to a communication received by you from the Commissioner of the General Land Office, a copy of which was transmitted therewith, touching the disposition of a large quantity of timber alleged to have been unlawfully cut on the public lands in Montana Territory, and which has recently been seized as the property of the United States under instructions from that office, and the question presented for consideration is, Whether the Commissioner may "direct the sale of the property so seized, and if so, whether it may be disposed of at private sale, and in such way as may be both to the advantage of the Government and to the benefit of the community, without advertising the

same?" Having carefully examined this subject, I now beg to submit the following in reply:

The question proposed seems to involve a preliminary inquiry, namely, as to the authority of the officers of the Land Department to make seizure of timber unlawfully cut on the public lands. Upon this point I entertain no doubt.

Congress has provided a remedy for the protection of the timber on the public lands by imposing certain penalties and forfeitures (see sec. 2461 and 2462, Rev. Stats.; also sec. 3 of the act of June 3, 1878, chap. 150, and sec. 4 of the act of June 3, 1878, chap. 151), which can only be enforced by indictment or information, and by section 2 of the act of April 30, 1878, chapter 76, it is further provided "that if any timber cut on the public lands shall be *exported from the Territories* of the United States it shall be liable to seizure by United States authority wherever found."

But these statutory remedies are not the only ones available to the Government. In *Cotton* v. *United States* (11 How., 229) it was held that the United States have a right to bring an action of trespass *quare clausum fregit* against a person for cutting and carrying away trees from the public lands. Agreeably to the doctrine of that case the United States may resort to the same civil remedies for the protection of their property which are open to any other proprietor. Thus they may seize the timber cut, arrest it by replevin, or recover damages in trespass for the taking and conversion (*United States* v. *Cook*, 19 Wall., 594). These are the ordinary remedies given by the common law for the recovery of personal property or its value. Seizure or recaption (which is one of them) is a remedy by the mere act of the party injured, and may be resorted to for the recovery of such property where its exertion will not endanger the public peace. (3 Black. Com., 4.)

Authority to exert this remedy in behalf of the United States must be deemed to belong to the Commissioner of the General Land-Office, under the supervision of the Secretary of the Interior, as a power included in the general duties respecting the public lands which are devolved upon him (sec. 453, Rev. Stat.). Such authority, indeed, has long been

asserted and frequently exercised by the Land Department through its officers or agents, the latter acting under instructions issued by the Commissioner, with the sanction of the Secretary. Referring to this, the Supreme Court in *Wells* v. *Nickles* (104 U. S., 447) observes:

"The Department of the Interior, under the idea of protecting from depredation timber on the lands of the Government, has gradually come to assert the right to seize what is cut and taken away from them wherever it can be traced. In aid of this, the registers and receivers of the land-office have, by instructions from the Secretary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. If any authority to do this was necessary, it may be fairly inferred from appropriations made to pay the services of these special timber agents."

In that case a compromise by timber agents with a trespasser respecting the disposition of timber cut by him on the public lands and seized by such agents, which was made in conformity to instructions of the Commissioner of the General Land-Office, was held to be valid. This amounts to an affirmation of the authority of the Commissioner, through those agents, to act for the United States in matters connected with timber depredations on the public domain; and I think it safe to say, that under such authority the remedy by recaption or seizure, as well as any other of the before-mentioned common-law remedies, may be resorted to for the recovery of timber unlawfully cut on the public lands, according to the circumstances of the case. While I entertain no doubt as to the existence of the remedy by seizure, yet its liability to abuse and to become an instrument of oppression demand that it should be used with judicious discretion and only in clear or emergent cases; and except in such cases the regular procedure of the courts should be preferred.

As to the authority of the Commissioner to dispose of such timber by public or private sale, where the same has been seized by duly-authorized agents of the Land Department and remains in their custody, I apprehend that this power exists, subject to the general supervision or direction of the Secretary of the Interior. There being no statutory pro-

vision covering a case of that kind, or regulating the disposition of the property, it must be regarded as a subject left to the Land Department to be dealt with in such manner as in the judgment of that department will best protect the interests of the Government. As the property is perishable in its nature, and its custody may involve expense, it is not only within the power, but it is the duty of the department, for the avoidance of loss to the Government, to convert the same into money; and whether this be done by public or private sale, is a matter entirely discretionary with it. While, ordinarily, the public interests (which are always to be kept in view) will be best subserved by a public sale after advertisement, yet I perceive no objection, legal or other, to a private sale either with or without previous advertisement, where the mode of disposal is advantageous to the Government; but as a general rule public sale should be had.

In direct response to the question presented by you, I therefore submit that, in my opinion, the Commissioner may direct the sale of the property seized, and that "it may be disposed of at private sale, and in such way as may be both to the advantage of the Government and to the benefit of the community without advertising the same."

I am, sir, very respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE INTERIOR.

POTOMAC FLATS IMPROVEMENT.

Title of the United States to certain parts (Sections II and III) of the Potomac Flats Improvement considered, and *advised* that the prohibition contained in the acts of August 5, 1886, chapters 929 and 930, against the expenditure of money appropriated for the improvement, does not apply to such parts.

DEPARTMENT OF JUSTICE,
August 28, 1886.

SIR: Your letters of the 18th and 25th instant, inclosing communications addressed to the Chief of Engineers by Maj. P. C. Hains, of the Engineer Corps, in charge of the Potomac

River Flats Improvement, together with a map of that improvement, call attention to section 6 of the act of August, 5, 1886, entitled "An Act to provide for protecting the interests of the United States in the Potomac River Flats," etc., and also to the proviso in that part of the river and harbor act of August 5, 1886, which makes an appropriation "for continuing the improvement of the Potomac River in the vicinity of Washington," etc., and in connection therewith submit the following inquiries, viz: Whether there is any claim of title adverse to the title of the United States with respect to Sections II and III of the Potomac Flats, as described on said map, and whether there is any impediment to the immediate expenditure of said appropriation on such sections.

In regard to all that part of the Potomac River Flats Improvement which is embraced in Sections II and III, as described on said map, this Department has no information of any claim of title adverse to that of the United States covering any part of the soil included therein, nor is it believed that any foundation for such a claim exists. Formerly the whole of the soil referred to constituted part of the bed of the river, and was owned by the State of Maryland. While it still remained part of the river bed, the United States succeeded to the title of the State thereto by virtue of the act of cession passed by the Maryland legislature December 19, 1791, and it does not appear that there has been any change of ownership since. In an official report to the Secretary of the Interior dated February 18, 1885, the Commissioner of the General Land Office states that the only patent or other title paper shown by the records of this (the General Land) office to have been issued for any portion of the Potomac Flats, so called, is the patent issued December 6, 1869, to John L. Kidwell, for 47.71 acres in the Potomac River adjacent to the United States Observatory." No part of the land covered by this patent lies within either of the above-mentioned sections.

The Kidwell claim, just adverted to, is located wholly within Section I on the map. This section includes a large area, extending from Easby's Point (foot of Twenty seventh street) to Seventeenth street, and between the points here

indicated, fronting the same section, the Chesapeake and Ohio Canal Company and others claim riparian rights. But below Seventeeth street, and fronting on Sections II and III, there is no riparian property except what is owned by the United States, and no riparian rights are claimed there by any one adversely to the United States, within the knowledge of this Department.

As to the expenditure of the appropriation referred to, the act making that appropriation provides that it shall not be expended "upon or with reference to any place in respect of which the title of the United States is in doubt, or in respect to which any claim adverse to the United States has been made;" and section 6 of the first above-named act of August 5, 1886, also forbids the expenditure of any moneys so appropriated "otherwise than upon property in respect of which there is no claim adverse to the title of the United States," etc. Respecting the area within the limits of Sections II and III on said map it has already been intimated that the Department has no information of the existence of any claim adverse to the title of the United States to any part of the soil included in that area, or that any such claim has ever been asserted. Indeed, the title of the United States to the land within the whole of that area appears to be absolute and free from all doubt. Under these circumstances I think it may reasonably be concluded that the land is property in respect of which there "is no claim adverse to the title of the United States," and that it is not a "place in which the title of the United States is in doubt, or in respect to which any claim adverse to the United States has been made," and that, consequently, the prohibition contained in the acts above cited against expending the aforesaid appropriation do not apply thereto.

I accordingly answer the inquiries submitted by you in the negative.

I am, sir, very respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF WAR.

INDIAN POLICE.

The powers and duties of the Indian police authorized by the act of May 15, 1886, chapter 333, cannot be exercised outside of the reservation to which they may be assigned.

DEPARTMENT OF JUSTICE,
August 28, 1886.

SIR: The proposition submitted for consideration in your letter of the 24th instant is, "Does the jurisdiction of the Indian police, authorized by the act of May 15, 1886 (Public No. 49), extend for any purpose beyond the limits of the reservation within which they are employed?"

The language of the act above referred to is, "The service * * * of Indian police to be employed in maintaining order and prohibiting illegal traffic in liquor on the several Indian reservations." No other definition of the power of the Indian police is furnished by statute.

The statute fixes their employment as *on* the several Indian reservations. It would be doing violence to the intent of the statute, as clearly expressed by its language, to extend the exercise of their power beyond the reservation. The purpose of their appointment is to "maintain order and prohibit illegal traffic in liquor." Their chief duty is rather to prevent crime than to punish criminals. When arrest becomes necessary as an incident to the prevention of disorder or the traffic in liquor, when the offender is delivered to the proper tribunal within the reservation, if its jurisdiction extends for purpose of punishment beyond the reservation, the convicted criminal will then by the order of the court be placed in the custody of an officer with sufficient authority to execute the sentence.

From the provisions of the statute and the necessarily local character of the duties devolving upon the Indian police, I am of opinion their power does not *ex officio* extend outside of the Indian reservation to which they may be assigned.

I am, very respectfully, yours,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE INTERIOR.

WHARVES IN FRONT OF WASHINGTON CITY.

Semble that the Chief of Engineers of the Army is not and never has been vested with authority to grant licenses for the erection of wharves along the river front of the city of Washington, D. C.

DEPARTMENT OF JUSTICE,
September 3, 1886.

SIR: I have considered with much care the question propounded by you in a letter to the Attorney General, dated the 16th of April last, as to the authority of the Chief of Engineers to grant licenses for the erection of wharves along the river front of the city of Washington.

It appears by the papers which accompanied your letter that this authority is assumed by that officer to belong to him by virtue of the act of the Maryland legislature of December 19, 1791, and the acts of Congress of May 1, 1802, chapter 41; April 29, 1816, chapter 150; and March 2, 1867, chapter 167. The Maryland act of 1791 provided that the commissioners appointed by the President under the act of Congress of July 16, 1790, chapter 28, "should from time to time, *until Congress shall exercise the jurisdiction and government within the said territory*, have power to license the building of wharves in the waters of the Potomac and the Eastern Branch, adjoining the said city," etc. The offices of these commissioners were abolished, and the appointment of a new officer, called a superintendent, authorized, by the act of Congress of 1802, which contained this provision: "The said superintendent is hereby invested with all powers, and shall hereafter perform all duties, which the said commissioners *are now vested with, or are required to perform*, by or in virtue of any act of Congress, or any act of the general assembly of Maryland, or any deed or deeds of trust from the original proprietors of the lots in the said city," etc. The act of 1816 abolished the office of superintendent, and authorized the appointment of a commissioner of public buildings, and declared that the latter officer "shall be vested with all the powers and perform all the duties conferred upon the superintendent aforesaid." The act of 1867 abolished the office of Commissioner of Public Buildings, and pro-

vided that "the Chief Engineer of the Army shall perform all the duties now required by law of said commissioner."

This legislation, however, should be viewed in connection with other legislation, namely, the acts of Congress of February 27, 1801, chapter 15; February 24, 1804, chapter 14; May 4, 1812, chapter 75; and May 15, 1820, chapter 104.

By the first of these acts Congress completely assumed to exercise jurisdiction and government within the territory described in the Maryland act of 1791. According to the view of the supreme court of the District of Columbia in the case of the *District* v. *Johnson* (3 Mack., 120), the power to license the erection of wharves which was conferred by the last-mentioned act upon the commissioners named therein, and which is regarded as of a purely temporary and provisional character, ceased to exist by the very terms of such act upon the assumption of jurisdiction by Congress as above, and consequently did not devolve upon the superintendent created by the act of 1802, as this act transferred to him only the powers *then vested* in said commissioners. If this view is correct, that power was not transmitted to the Commissioner of Public Buildings and from him to the Chief of Engineers by force of the subsequent acts of 1816 and 1867.

Furthermore, it would seem that the act of February 24, 1804, May, 4, 1812, and May 15, 1820, cited above, devolved the same power elsewhere. Thus the act of 1804 provided that the corporation of the city of Washington should have power "to erect, repair, and regulate public wharves," etc; the act of 1812 authorized the raising of taxes by the same corporation, to be expended "in erecting and repairing wharves;" and the act of 1820, which gave a new charter to the city of Washington, conferred upon the corporation power "to erect, repair and regulate public wharves," etc., and "to regulate the manner of erecting and the rates of wharfage at private wharves."

The provisions of the last-named act, which embrace wharves both public and private, confer plenary power over their establishment, and they are manifestly irreconcilable with the existence, separate from or independent of said corporation, of an authority to license the erection of such wharves. Commenting on the same provisions, the court in

the case above referred to remarks: "The power, then, claimed to be in the Commissioner of Public Buildings or the Chief Engineer of the Army, his successor, to issue licenses for the building of wharves would be inconsistent with the power given to the city. And therefore, even if the power was conferred on the original commissioners, the act incorporating the city transferred it to the authorities of the city of Washington. Therefore, in our judgment, the Engineer of the Army never had the slightest power in the world to license the erection of wharves on the Potomac and Eastern Branch."

I observe that, in an opinion of Attorney-General Wirt, dated July 8, 1818 (1 Opin., 223), in which the subject considered was the construction of wharves *by the proprietors of water lots* on the Potomac and Eastern Branch, and therefore related to *private wharves*, the power to license the building thereof possessed under the Maryland act of 1791 by the commissioners first in office is regarded (contrary to the view of the supreme court of the District of Columbia in the case above cited) as having devolved upon their successor, the superintendent, and upon the successor of the latter officer, the Commissioner of Public Buildings, by operation of the acts of 1802 and 1816, hereinbefore mentioned, and that at the date of the opinion the whole subject of licensing these wharves is deemed to be under the control of the Commissioner of Public Buildings. But that opinion was given prior to the enactment of the aforesaid act of 1820, the provisions of which include private as well as public wharves, and, as already intimated, would be clearly inconsistent with the exercise of a licensing power by such commissioner; so that, if this power had previously resided in the latter, it ceased to exist in him upon the passage of that act, being impliedly revoked thereby.

The powers granted to the city of Washington by the act of 1820 over the establishment of wharves were subsequently exercised by the corporation, from time to time, in the adoption of ordinances regulating that subject. (See Webb's Digest, p. 423.)

But there is another point which is suggested by the Chief of Engineers in the papers transmitted with your

letter, and which calls for examination in connection with the present inquiry, and that is, that the *dock spaces* are public reservations, and that it is his duty to see that they are not occupied by any private person for any private purpose whatever; in support of which he cites sections 222 and 226 of the Revised Statutes relating to the District of Columbia. The first of these sections declares that "no open space, public reservation, or other public ground in the city of Washington, nor any portion of the public streets or avenues in said city, shall be occupied by any private person, or for any private purpose whatever." This provision is taken partly from the act of May 17, 1848, amending the charter of said city, and partly from the act of April 6, 1870, conferring certain authority upon the city relative to parking the streets and avenues. The term "public reservation," as there employed, signifies an area of ground set apart for public purposes in the plan of the city; it would not ordinarily be taken to include a dock space; and in my opinion neither that nor any of the other terms used in the section were meant to apply to spaces of that sort. Besides, no power is granted by that section to the Chief of Engineers; and while section 226 makes it his duty "to cause obstacles of every kind to be removed from such streets, avenues, and sidewalks in the city of Washington as have been or may be improved in whole or in part by the United States, and to keep the same at all times free from obstructions," yet this duty is by the terms of the statute limited to "streets, avenues, and sidewalks" where the same are improved as above, and cannot be deemed to embrace localities not within that description. There is clearly nothing in these sections from which a power to license the erection of wharves may be derived.

In answer, then, to the question presented by you, I have the honor to reply, that in my opinion the Chief of Engineers is not now and never has been clothed with authority to grant licenses for the erection of wharves along the river front of the city of Washington.

I am, sir, very respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF WAR.

PASSENGER TRANSPORTATION IN FOREIGN VESSELS.

Under the eighth sectionof the act of June 19, 1886, chapter 421, a foreign vessel is liable to a fine of $2 for every passenger transported by it from one port in the United States to another port in the United States, though the continuity of the voyage may have been broken by the vessel touching at an intermediate foreign port.

DEPARTMENT OF JUSTICE,
September 4, 1886.

SIR: In your letter of the 25th of August you ask the following question:

"Under the eighth section of the act 'to abolish certain fees for official services to American vessels,' etc., approved June 19, 1886, is a foreign vessel liable to a fine of $2 for every person transported by her from one American port to another when such person takes passage for an intermediate foreign port and thence again takes passage for a domestic port, the continuity of the voyage of the vessel being temporarily broken?"

The language of the section referred to is:

"SEC. 8. That foreign vessels found transporting passengers between places or ports in the United States, when such passengers have been taken on board in the United States, shall be liable to a fine of two dollars for every passenger landed?"

By the provision of this act the fine is imposed upon the vessel for the wrong-doing of the vessel, and not for any act done by the passengers; hence the inquiry is one between the United States and the vessel. The custom-house officers are not burdened with the difficult task of inquiring what each passenger did, whether he paid for his ticket, or the terms on which he was transported by the vessel, or any other act or doing of a passenger, except as a means of determining where the passenger was taken on board or landed. In the case submitted, the fact that the vessel was a foreign one is undisputed; that the passengers were landed at Chicago is equally well established. If there is a criminating fact which is involved in doubt, it is whether the passengers were taken on board at a port within the United

States. They were first taken on board at Cleveland by the vessel from which they were landed. The voyage was a continuous one, being, in the language of the case stated, "temporarily broken" at the port of Windsor, in Canada. Thus, if it was a broken voyage, one part being from Cleveland to Windsor and the other part from Windsor to Chicago, the two parts (if but temporarily broken by the stopping at Windsor and after that a resumption and consummation of the original purpose) would constitute substantially a continuous voyage. If there had been no such temporary delay, but the vessel had gone directly from Cleveland to Chicago and carried the passengers from the one port to the other, no doubt could have arisen as to the liability to the payment of the fines. The fact that each of the passengers paid his fare in two separate payments, and had his trunks examined by the custom-house officers, should not be allowed to change the result following from the continuity of the voyage; for it must be borne in mind that it is the vessel that is subjected to the fine, and not the passengers. The claim for the fine is by the United States against the vessel. Those controlling the vessel may arrange with the passengers or the officers of the foreign custom-house as it may best suit their mutual convenience, but as the United States has no control over the parties to such arrangements, and is in no way a party to them, her rights can not be prejudiced or the operation of her laws evaded by them. Even if each passenger, when taken on board, had intended making Windsor the end of his voyage on that vessel, and in consequence of the temporary suspension of the voyage changed his mind and resumed travel on the same vessel, it would be entirely in the power of those controlling the vessel to add the amount of the fine ($2) to the fare, and thereby without loss pay the fine; or the passenger could, at his option, take passage on another vessel, and the amercement be avoided. A different construction of the law would render the act practically inoperative and the intent of the law-makers ineffectual. Hence the conclusion follows that the decisive facts in this and similar cases are: Was the vessel a foreign one? Did she take the passengers on board at a port of the United States and after a substantially continuous voyage

land them at another port of the United States? When this conjunction of facts exists, the vessel is subjected to liability for the fine; and, as these facts are all found to exist in the case submitted, the vessel is subject to the penalties provided by the act.

I am, sir, very respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

POTTAWATOMIE INDIANS.

Under the authority granted to the agents and attorneys named in the letter of attorney made by certain heads of families and individual members of the Pottawatomie Indians, the powers and duties committed to such agents and attorneys can not be performed by any two of them in the absence or without the concurrence of the third.

DEPARTMENT OF JUSTICE,
September 9, 1886.

SIR: Your letter of the 6th instant, with the documents that accompanied it, was received.

The inquiry you propose is in substance whether, under the authority granted to the attorneys named in the power of attorney made by certain heads of families and individual members of the Pottawatomie nation of Indians, the powers and duties can be performed by any two of them in the absence of the third.

I find, in the examination of the power of attorney referred to, these words:

"We, the undersigned, heads of families and individual members of the Citizen Band of the Pottawatomie nation of Indians, * * * and also * * * the undersigned members of the Huron Band of the Pottawatomie nation of Indians, * * * for ourselves, our heirs and assigns, reposing full faith and confidence in the fidelity, integrity, and capacity of Anthony F. Navarre and Stephen Neyonquet and John Anderson, members of our said Pottawatomie nation of Indians, residing in the Indian Territory, do hereby nominate, constitute, and appoint, and by these presents have consti-

tuted, nominated, and appointed, said Anthony F. Navarre and said John Anderson our lawful agents and attorneys in fact," for the purposes therein stated.

Reading thus far it will appear that only two agents or attorneys were empowered to act in the matter delegated. It would seem, therefore, that the answer to your inquiry must be confined to the authority of Navarre and Anderson, unless the omission of Neyonquet's name was a clerical error. But while this omission, if it be not a clerical error, might be decisive of the question submitted, yet, assuming that three agents were appointed, the question may be disposed of on other grounds.

The duty to be performed by the agents nominated was to present certain claims of the Pottawatomie Indian nation before Congress, the Departments, and courts, to contract with responsible lawyers for the prosecution of the claims, to agree upon the fees to be paid them, and to do and perform all other acts necessary to the collection of the claims.

It is the general rule of the common law that when an authority is given to two or more persons to do an act the act is valid to bind the principal only when all of them concur in doing it; for the authority is construed strictly, and the power is understood to be joint and not several. (Story on Agency, 42; *Greenleaf's Lessee* v. *Birch*, 5 Pet., 139; Sugd., Pow., 129, 142, 143; *Wardwell* v. *McDowell et al*, 31 Ill., 364.)

The rule is different when the power is conferred by law. Lord Coke says in respect to this difference: "Two or more may have a trust or an authoritie committed to them jointly, and yet it shall not survive. But herein are divers diversities to be observed. * * * Secondly, there is a diversitie between authorities created by the partie for private causes, and authoritie created by law for execution of justice." And he gives this illustration: "If a man make a letter of attorney to two, to do any act, if one of them dye, the survivor shall not do it; but if a *venire facias* be awarded to four coroners to impannell and return a jury, and one of them dye, yet the others shall execute and return the same." (Co.-Litt., 181 *b*.) The same doctrine is laid down in *Pennington* against *Moore* (Dyer, 38 H. 861, *b* 34), and in *Hoe's Case* (5 Co., 91), and in *Vincent and Lee* (Co.-Litt., 113 *a*; Sugd. Pow. 144).

It is a principle in law that when the matter is one of personal confidence or trust the power can not be extended beyond the express words and clear intention of the donor. (*Cole* v. *Wade*, 16 Ves., 44; *Stile* v. *Tomson*, Dyer, 210 *a*; Perry on Trusts, 496, 497.)

The power in the present case must, it appears to me, be regarded as a personal trust and confidence, and as private in its nature. Immediately preceding the nomination of the persons named in the letter of attorney there is an express declaration of faith and confidence in their fidelity, integrity, and capacity; and there is absent from the instrument the power of substitution, which is usual in such documents. If there be any doubt on this point, it must be resolved, according to our Indian policy, in favor of the grantors of the power. The acts to be done are not of a public or official character. They affect only the rights of individual families and members of two bands of the Pottawatomie nation of Indians, some residing in the Indian Territory and others in the States of Kansas and Michigan. The claim is for individual rights, not public or national rights.

In private cases it is generally a question as to the intention of the donors, whether the power should be executed by all the persons named, or by any one or more of them. In other words, to speak in the language of trusts, the question is as to whether the grantor reposed a personal trust and confidence in the trustees appointed, or whether he intended the power to vest in whomsoever might in fact fill the office of trustee.

In the case submitted there is, as already stated, express language of personal confidence and trust in respect to the agents named, and the power is of a private nature. I am, therefore, of the opinion that all the grantees of the power must unite in order to bind the principals.

Very respectfully,

G. A. JENKS,
Acting Attorney-General.

Hon. H. L. MULDROW,
Acting Secretary of the Interior.

ACCOUNTS RELATING TO THE PUBLIC LANDS.

The First Comptroller is not clothed with power, where in his opinion further delay would be injurious to the Government, *to direct* the Commissioner of the General Land Office forthwith to audit any particular account relating to the public lands, the settlement whereof is devolved upon the latter officer.

The Commissioner, with respect to the discharge of his duties in such matter, is subject only to the direction of the Secretary of the Interior.

DEPARTMENT OF JUSTICE,
September 9, 1886.

SIR: The question presented by yours of the 18th of August is: "Has the First Comptroller, in every case where in his opinion further delay would be injurious to the United States, power *to direct* the Commissioner of the General Land Office *forthwith to audit and settle* any particular account which said officer may be authorized to audit and settle?"

If such power exists, it is vested in the Comptroller by the second section of the act of the 3d of March, 1809, (2 Stat., 536), which enacts: "That it shall be the duty of the Comptroller of the Treasury, in every case where in his opinion further delay would be injurious to the United States, and he is hereby authorized, to direct the Auditor of the Treasury and the accountants of the War and Navy Departments at any time forthwith to audit and settle any particular account which the said officers may be respectively authorized to audit and settle."

At the time of the passage of this act all the accounts of the Government, except those of the War and Navy Departments, were audited by the Auditor of the Treasury, there being but one; hence the accounts now audited by the Commissioner of the General Land Office were included in the duties of the Auditor; and by the terms of the act of the 3rd of March, 1809, the Comptroller in a proper case had power to direct an immediate audit *by the Auditors.*

National growth increased official labor, and on the 25th of April, 1812, the General Land Office was established, and at its head a new officer placed—the Commissioner of the General Land Office. By the ninth section of the organic act

(2 Stat., 717), it is provided, "That all returns relative to the public lands heretofore directed to be made to the Secretary of the Treasury shall hereafter be made to the said Commissioner, who shall have power to audit and settle all public accounts relative to the public lands: *Provided*, It shall be the duty of the said Commissioner, upon the settlement of any such account, to certify the balance and transmit the account, with the vouchers and certificate, to the Comptroller of the Treasury for his examination and decision thereon." At the time of the passage of the act of 1809 the direction provided by that act could not have applied to the Commissioner of the General Land Office, as the office of the Commissioner did not exist till 1812. The power was not extended over the Commissioner by the act of 1812, nor by any other express statutory provision. If, then, the power exists at all, it must arise by extending the provisions of the act of 1809 and incorporating them, by implication, into the act of 1812.

The only ground to sustain this implication is that a part of the duties imposed on the Auditor prior to the passage of the act of 1809 was, on the redistribution of labor contained in the act of 1812, transferred to the Commissioner. As a principle this could not, as a general rule, be sustained. For, if it were true, then whenever a new bureau should be organized by aggregating different duties from several bureaus or Departments, the head of the new bureau would be subject to the command of as many different chiefs as there were different sources from which his bureau was composed, and the administration of such a composite bureau would be involved in inextricable confusion. To avoid this confusion, it may fairly be inferred that when an officer or bureau is transferred from one Department of the Government to another, and express general power of direction is conferred on the Department to which he or it is transferred, the power of direction that existed in the Department from which it was transferred is transferred to the Department last clothed with the power.

The Commissioner of the General Land Office was by the act charged with many other important duties whose consideration might be sometimes emergent, of the urgency of which other duties the Comptroller might have no oppor-

tunity to know. That the Comptroller should be authorized, without knowledge as to the other duties or what evil might accrue from diverting the attention of the Commissioner from them, to direct a suspension of those duties and command the auditing of a particular account would be an unreasonable implication. A much more reasonable implication would arise, in the absence of express legislation, that the same officer who had supervision of the whole work should have the power to direct the Commissioner (in case direction became necessary) as to which work should have precedence. In conformity to this better reason, the first section of the act establishing the Land Office expressly provides: "The chief officer shall be called Commissioner of the General Land Office, whose duty it shall be, under the *direction* of the head of the Department (then the Secretary of the Treasury), to superintend, execute, and perform all such acts and things touching and respecting the public lands of the United States and other lands patented or granted by the United States as have heretofore been directed by law to be done or performed in the office of the Secretary of State, of the Secretary and Register of the Treasury, and of the Secretary of War, or which *shall hereafter by law be assigned to the said office.*" Afterwards in the same act this duty of auditing is imposed on the Commissioner. The first section then prescribes it shall be done under the direction of the Secretary of the Treasury, and rebuts the implication that the Comptroller still retained the power of direction.

The ninth section, by its proviso—doubtless to avoid the implication that the audit of the Commissioner should be final—grants express power to the Comptroller to examine and decide upon the account as audited by the Commissioner, but as it does not provide for any power of direction such as the act of 1809 authorized the Comptroller to exert over the Auditor, the express granting of one power, which the Comptroller before exercised over the Auditor, would seem to imply the exclusion of the other which is not granted.

The act of 1809 gave the Comptroller the same power to direct an audit forthwith by the accountants of the War and Navy Departments that it did by the Auditor of the Treasury. By the act of March 3, 1817 (3 Stat., 366), the accounts au-

dited by the accountants of the War and Navy were transferred to the Second, Third, and Fourth Auditors, which officers were first provided for by that act; but it has never been urged or claimed since the passage of the act of 1817, as to the Second, Third and Fourth Auditors, that the power to direct an audit forthwith existed in the First Comptroller under the provisions of the act of 1809; on the contrary, in the absence of express direction, Attorney-General Butler, on the 26th of March, 1834 (2 Opin., 621), announced that by the act of 1817 the power before conferred upon the First Comptroller over the accountants of the War and Navy Departments who were superseded by the Second, Third, and Fourth Auditors, was by implication taken from the First and transferred to the Second Comptroller, whose office was first created by that act.

On the 3d of March, 1849, Congress passed the act authorizing the organization of the Department of the Interior. The third section of that act (9 Stat., 395), vested all the powers formerly exercised by the Secretary of the Treasury in the Secretary of the Interior, including the power to direct the Commissioner of the General Land Office, with the same control in the First Comptroller then exercised by him. This act neither enlarges nor diminishes the power of the Comptroller, but strongly rebuts the view that the act of 1809 by implication was extended by the act of 1812 over the Commissioner of the General Land Office. For, if it might be difficult for the Commissioner to conform to a double allegiance in the discharge of his official duties while in the same Department, that difficulty would be largely increased when this right to command was lodged in a different Department.

The act of 1812 has received a clear legislative interpretation against an implied grant of power to the Comptroller to direct the Commissioner, in the revision of the statutes approved 22d day of June, 1874.

Section 5595, Revised Statutes, declares: "The foregoing seventy-three titles embrace the statutes of the United States, general and permanent in their nature, in force on the 1st day of December, one thousand eight hundred and seventy-three." The power of direction claimed by the Comptroller is not contained in the Revised Statutes.

Section 5596 provides: "All acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision having been repealed or *superseded* by subsequent acts, or not being general or permanent in their nature." A part of the act of 1809 is embraced in section 271 of the revision, but by this section its operation is confined to the First and Fifth Auditors.

Section 441 enacts: "The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

* * * * *

"Second: The public lands, including mines." * * *

Section 453 declares: "The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States or in any wise respecting such public lands."

Section 271 re-enacts so much of the act of 1809 as *has not been superseded* by the act of 1812 under which the General Land Office was organized, and is as follows: "The First Comptroller, in every case where, in his opinion, further delays would be injurious to the United States, shall direct the First and Fifth Auditors of the Treasury forthwith to audit and settle any particular account which said officers may be authorized to audit and settle, and to report such settlement for revision and final decision by the First Comptroller."

This enactment does not include among the powers of the First Comptroller the authority to direct the Second, Third, and Fourth Auditors nor the Commissioner of the General Land Office, but expressly limits his power to the First and Fifth Auditors. Those officers are omitted doubtless for the same reason, which seems to be that the offices were created after the passage of the act of 1809, and at the time of the creation of each it was placed under the direction of another officer; hence the power of the Comptroller was *superseded*. By the act of 1817 the Second, Third,

and Fourth Auditors were first provided for and were impliedly subjected to the direction of the Second Comptroller; and by the act of 1812 the Commissioner of the General Land Office was first provided for, and was *expressly* subjected to the *direction* of the Secretary of the Treasury, and afterward more broadly of the Secretary of the Interior. Hence in neither case was the power vested in the First Comptroller by the act of 1809, to direct an audit forthwith, extended by implication to the new officers whose offices were made subject at the time of their creation to the direction of the heads of other departments or bureaus.

This Congressional interpretation is additionally enforced by the provision of section 456, which is: "All returns relative to the public lands shall be made to the Commissioner of the General Land Office; and he shall have power to audit and settle all public accounts relative to the public lands, and upon the settlement of every such account he shall certify the balance and transmit the accounts with the vouchers and certificate to the First Comptroller of the Treasury for his examination and decision thereon."

This section, which defines the subjection, and the whole subjection, of the Commissioner of the General Land Office to the First Comptroller, so far as express statutory provision is concerned, was first enacted in 1812, re-enacted substantially in 1849, and again re-enacted almost literally on the revision of the statutes, with an entire absence of any statutory recognition from the beginning of any power in the First Comptroller to *direct* the Commissioner to *audit forthwith.* This repeated grant of express power with the as often repeated omission of the power sought to be implied seems to invoke the application of the maxim *expressio unius est exclusio alterius.*

While under the provisions of the act of 1817 it might be a question of grave doubt whether the act granting the power to the Commissioner of the General Land Office to audit was not repealed, yet, as the act of 1849 seems to imply that the power was still left to the Commissioner, and since 1832 it has been exercised by him, departmental usage of such long standing would solve the doubt in favor of the power of the Commissioner; *but,* if it was revoked by the act

of 1817, then the revision of the statutes, wherein the power was expressly conferred, would be in the nature of a new grant. If the revision was a grant of power not before intrusted to the Commissioner, as by the revision he was to perform all his duties subject to the supervision and under the direction of the Secretary of the Interior, the power would be lodged in the Secretary. The autonomy of the departmental system, which by the growth of the nation has become indispensable, is best preserved by maintaining, as far as is consistent with legislative provisions, the unity of the power of personal direction of subordinate officers under the heads of the Departments. Doubtless this consideration among others influenced Congress in the revision to limit the power of the First Comptroller under the act of 1809, as carried into the revision in section 271, to the First and Fifth Auditors. If additional support for the views indicated in this opinion were needed, it may be found in the fact that since the passage of the act of 1812, a period of seventy-four years, the power now claimed by the First Comptroller has never been actually exercised, and, so far as known, but once even claimed by the Comptroller to exist in him.

This general review of substantially all the legislation on the subject, leads to the conclusion that the provisions of the act of 1809 can not, by implication, be incorporated into the act of 1812; hence the Comptroller has no power under the law to direct the Commissioner to forthwith audit and settle an account for surveying the public lands when in the judgment of the Comptroller a further delay in the settlement of the accounts would be injurious to the United States, but the necessary power of direction is vested in the Secretary of the Interior.

Very respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

IMPORTATION BY MAIL.

Precious stones and other articles, where the same are liable to customs duty, are prohibited by the Universal Postal Union Convention of June 1, 1878, to be sent through the mail; and if imported by mail they become subject to seizure and forfeiture under section 3061, Revised Statutes.

DEPARTMENT OF JUSTICE,
September 15, 1886.

SIR: I have the honor to acknowledge the receipt of your communication of the 8th instant, in which you ask for my "opinion upon the following points:"

"First. Whether precious stones and other articles enumerated in the third paragraph of said article 11 (Universal Postal Union Convention of June, 1878) are forbidden to be imported by mail by any special legislation.

"Second. Whether the same articles, even if not forbidden by special statute to be imported by mail, are forbidden importation by mail by the second paragraph of said article, in case they shall be found to be dutiable; and, if they are thus prohibited, whether they are liable to seizure and forfeiture."

I answer, first, I have been unable to find any "special legislation" forbidding the importation by mail of precious stones and other articles enumerated in said article 11. The laws passed by Congress at its last session have not been printed, and I have not examined them in this connection.

Second. Article 11, Convention of June, 1878, provides: "It is forbidden to the public to send by mail, (1) letters or packets containing gold or silver substances, pieces of money, jewelry, or precious articles; (2) any packages whatever containing articles liable to customs duty."

The convention of Lisbon, March 21, 1885, article 8, provides: "The first three paragraphs of article 11 are suppressed and are replaced by the following provisions: 'It is forbidden to the public to send by mail, (1) letters or packets containing pieces of money; (2) any packet whatever containing articles liable to customs duty; (3) gold or silver bullion, precious stones, jewelry, or other precious articles, but only in case the legislation of the countries concerned

prohibits their being placed in the mail, or their being forwarded.'"

The modification in the Lisbon convention of that paragraph in the convention of Paris which forbids the importation by mail of "gold or silver substances, pieces of money, jewelry or precious articles," does not affect the inhibition in both conventions against the importation by mail of articles liable to customs duty. Such of the enumerated articles as are liable to customs duty are still prohibited from importation by mail. Their importation by mail being thus prohibited is unlawful, and they are liable to seizure and forfeiture under section 3061, Revised Statutes (*Cotzhausen* v. *Nazro*, 107 U. S. 215).

I herewith return, as requested, the correspondence inclosed in your communication to me.

Respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

COLLECTOR'S BOND.

The omission of the words "in the State of Vermont" from the official bond of the collector of customs for the district of Vermont does not impair its validity. The bond held to be valid, either under the statute or at common law.

DEPARTMENT OF JUSTICE,
September 16, 1886.

SIR: Yours of September 14, 1886, received. You ask an opinion as to whether the omission of the words "in the State of Vermont" from the official bond of Bradley B. Smalley, collector of customs for the district of Vermont, impairs the validity of the bond.

It was the intention, no doubt, to execute the bond according to the provisions of section 2619, Revised Statutes (19 Stat., 245).

The first inquiry, then, is whether the omission would affect its validity as a statutory bond. The statute authorizing the

execution of the bond is a directory one. A mistake occurred in the form of an official bond of a paymaster, the conditions of which were prescribed by a statute similar to the one now under consideration, and in an opinion of the Supreme Court, delivered by Mr. Justice Story (*United States* v. *Bradley*, 10 Pet., 365) it is said:

"It has been urged, however, in the present case, that the act of 1816, chapter 69, does, by necessary implication, prohibit the taking of any bonds from paymasters, other than those in the form prescribed by the sixth section of the act; and therefore that bonds taken in any other form are utterly void. We do not think so. The act merely prescribes the form and purport of the bond to be taken of paymasters by the War Department. It is in this respect directory to that Department; and, doubtless, it would be illegal for that Department to insist upon a bond containing other provisions and conditions differing from those prescribed or required by law. But the act has nowhere declared that all other bonds, not taken in the prescribed form, shall be utterly void; nor does such an implication arise from any of the terms contained in the act, or from any principles of public policy which it is designed to promote. A bond may, by mutual mistake or accident, and wholly without design, be taken in a form not prescribed by the act. It would be a very mischievous interpretation of the act to suppose that under such circumstances it was the intendment of the act that the bond should be utterly void. Nothing, we think, but very strong and express language, should induce a court of justice to adopt such an interpretation. Where the act speaks out, it would be our duty to follow it; where it is silent, it is a sufficient compliance with the policy of the act to declare the bond void as to any conditions which are imposed upon a party beyond what the law requires. This is not only the dictate of the common law, but of common sense."

The above case has been frequently sustained by the Supreme Court, and was cited as the law in the case of *Jessup* v. *The United States* (106 U. S., 151), where a number of the decisions of the Supreme Court upon this question are reviewed. The decisions of the Supreme Court sustaining the

validity of bonds executed, under directory statutes, where mistakes and omissions have occurred therein, are as follows: *Jessup* v. *United States* (106 U. S., 147); *United States* v. *Mora* (97 U. S., 421); *United States* v. *Bradley* (10 Pet., 362); *Brown* v. *The United States* (5 Pet., 372).

It has been repeatedly held by the Supreme Court that the United States can make a contract in the absence of the authority of any statute. This being the case, the bond of Smalley is good at common law. In the case of *Jessup* v. *The United States* (106 U. S., 152), the court, after reviewing the authorities, says:

"The authorities show that the United States can, without the authority of any statute, make a valid contract, and that when the form of a contract is prescribed by the statute, a departure from its directions will not render the contract invalid. The bond is good at common law."

Other authorities sustain this doctrine, viz, *United States* v. *Mora* (97 U. S, 421); *United States* v. *Linn* (15 Pet., 311); *United States* v. *Bradley* (10 Pet., 343); *United States* v. *Tingey* (5 Pet., 115).

I am of the opinion, therefore, that the omission of the words as stated does not impair the validity of Smalley's bond as collector, but that the bond is a valid one, either under the statute or at common law.

Respectfully,

G. A. JENKS,
Acting Attorney-General.

Hon. C. S. FAIRCHILD,
Acting Secretary of the Treasury.

FREE LIST.

Where certain law reports, printed in the year 1840–'41, were imported into the United States in an unbound condition, the printed sheets not being even stitched together: *Held* that they came within the provision of the act of March 3, 1883, chapter 121, exempting from duty "books * * * bound or unbound * * * which shall have been been printed and manufactured more than twenty years at the date of importation," and were therefore not dutiable.

DEPARTMENT OF JUSTICE,
September 16, 1886.

SIR: Yours of September 13, instant, has been duly considered.

The determination of the question presented depends upon the construction of two paragraphs of the act of March 3, 1883, entitled "An act to reduce internal-revenue taxation, and for other purposes." (22 Stat., 488.) The paragraph of the act (*ib.*, 510) which imposes the duty reads as follows:

"Books, pamphlets, bound or unbound, and all printed matter, not specifically enumerated or provided for in this act, engravings, bound or unbound, etchings, illustrated books, maps, and charts, twenty-five per centum ad valorem."

The other paragraph providing what articles of the same character shall be placed upon the free list and exempted from duty reads as follows:

"Books, engravings, bound or unbound, etchings, maps, and charts, which shall have been printed and manufactured more than twenty years at the date of importation."

The articles imported in this instance are "certain law reports, printed in the years 1840 and 1841, but which are imported into the United States in an unbound condition, the printed sheets being neither sewed together nor bound."

The question is whether such imported goods are liable to the ad valorem duty of 25 per centum as "printed matter" or whether they are exempt as "Books * * * unbound * * * which shall have been printed and manufactured more than twenty years at the date of importation."

The imported law reports are printed matter not bound into books, and dutiable, unless they are embraced in the

free list. In order to be exempted they must therefore come within the class of unbound books, which shall have been printed more than twenty years at the date of importation. It is admitted they were printed in 1840 and 1841, which disposes of this branch of the question. The only question remaining to be determined is, therefore, whether the printed matter can be classed as unbound books, for if they belong to this class they are exempt from duty. There is no statutory definition of the word "book" in the United States as there is in the English acts. And in the authorities the courts have, in nearly every instance, been called upon to define it in the copyright, and not in the revenue statutes.

The Supreme Court of the United States, in the case of *Mumford* v. *Wardell* (6 Wall., 423), in passing upon the title to real estate, where a deed was required to be registered or recorded in some *book* in the recorder's office of the county, held "that the term 'book' was satisfied, within the meaning of the act, by copies of the deed on sheets, not bound or fastened together in any manner, but folded, * * * the sheets not being bound up in the form of books until 1856, when they were so bound."

The English courts have held that a single sheet of printed matter, complete within itself, and unbound, is a book and the American authorities have to some extent adopted this doctrine. But these decisions, as stated before, relate to copyrights under the statutes. They are *Clayton* v. *Stone* (2 Paine's C. C. Rep., 382); *Stowe* v. *Thomas* (2 Am. Law Register, 229); *Clementi* v. *Golding* (2 Campbell's N. P. Rep., 39).

If the English courts have held a single printed sheet, without binding, to be a book, under a statute in which the word is used as it is in the one now under consideration, and the American courts have adopted the doctrine, can it be said in reason or common sense that a number of printed sheets, properly paged, and ready for the bindery, is not an unbound book and exempt under the revenue laws? I think not. This conclusion is entitled to additional force when we take into consideration the fact that the exemption of this class of goods from duty, under the condition named, is a new feature in revenue legislation, and appears in an

act of Congress which declares its purpose to be a reduction of taxation.

The statute imposing a duty on books, and the other items mentioned, unless twenty years old at date of importation, had for one of its objects, no doubt, the protection of copyrights in the United States, and for this reason the foreign and American authorities cited above may be appropriately used in reaching a conclusion herein.

I am of the opinion, therefore, that under the facts stated in your communication the law reports are unbound books which had been printed more than twenty years at the date of importation, and therefore they are on the free list, and exempt from the customs duty of twenty-five per cent. ad valorem.

Respectfully,

G. A. JENKS,
Acting Attorney-General.

Hon. C. S. FAIRCHILD,
Acting Secretary of the Treasury.

MISSISSIPPI RIVER COMMISSION.

The salaries and traveling expenses of the members of the Mississippi River Commission appointed from civil life (Congress having failed to make a specific appropriation therefor) can not lawfully be defrayed out of the fund provided for the Mississippi River improvement. The application of such fund to that object would be inconsistent with section 3678, Revised Statutes.

DEPARTMENT OF JUSTICE,
September 18, 1886.

SIR: I have the honor to acknowledge the receipt of your letter of the 3d instant, as follows:

"The river and harbor act of August 5, 1886, of which a copy is herewith inclosed, provides as follows:

"'Improving Mississippi River from Head of the Passes to the mouth of the Ohio River: Continuing improvement, two million dollars, which sum shall be expended under the direction of the Secretary of War, in accordance with the plans, specifications, and recommendations of the Mississippi

River Commission,' etc., and further provides, with reference to the appropriation for deepening the channel at Vicksburg, that this last-named sum shall not be expended, unless after another examination or survey the Commission shall deem it advisable.

"The sundry civil act of July 7, 1884, made provision for the Mississippi River Commission as follows:

"'For salaries and traveling expenses of the Mississippi River Commission, and for salaries and traveling expenses of assistant engineers under them, and for office expenses and contingencies, seventy-five thousand dollars.'

"Congress at its last session, though imposing continued duties upon the Commission, as is above shown, failed to make any provision for their salaries and other expenses, and the question as to the means whereby such expenses may be met is one involving important considerations, affecting, as will be readily apparent, the whole work of improvement of the Mississippi River.

"In thus briefly submitting the case, deeming it unnecessary to enlarge upon its importance, I have the honor to ask that you will please favor this Department with an opinion whether, in view of the facts cited, the salaries and traveling and other expenses of the Mississippi River Commission may not properly be defrayed from the appropriation for the Mississippi River improvement, the appropriation made by the act of July 7, 1884, as above quoted, being wholly exhausted.

"It may be added that expenses incident to the improvement of rivers and harbors are uniformly paid from the appropriation for the work of improvement, and that no specific appropriations for such expenses are made.

"In view of the importance of continuing the work, an early reply is respectfully requested."

The Mississippi River Commission was constituted by the act of the 28th of June, 1879. (Sup. Rev. Stat., 496). By the terms of the organic act it is composed of seven officers, three of whom are selected from the Engineer Corps of the Army, one from the Coast and Geodetic Survey, and three from civil life. The first four, who were selected from officers in the United States service, were to receive no additional salary; and $3,000 per annum was to be paid to those

selected from civil life. The appointment of the members of the Commission is made by the President, by and with the advice and consent of the Senate. The Commission is permanent in its nature, and its constituent members are made permanent officers of the Government. It is invested with large powers and charged with important duties. Many different appropriations are to be applied to the different works which come under its supervision. The salaries and expenses of such a body of permanent officers can not be all charged up against one appropriation for one single improvement. The fact that by virtue of their offices they are required to perform certain duties with reference to such improvement will not sustain so broad an inference. In the same section of the same act which imposes duties upon the Commission duties are also imposed upon the Secretary of War. If Congress had failed to appropriate for the salary of the Secretary, it would not be seriously contended that his salary ought to be paid out of this appropriation. If no appropriation had been made for the salaries of the officers of the Engineer Corps or officers of the Coast and Geodetic Survey, the appropriation under consideration could not be resorted to to pay their salaries. The present appropriation is almost identical in terms with the two for the same purpose made by Congress in 1884. They were not considered by Congress or the Department as embracing within their provisions the salaries and expenses of this Commission. On the contrary, Congress, after the passage of the two appropriation acts referred to, in 1884 (on the 7th of July of the same year), passed an act specifically to provide for the salaries and expenses of the Commission. After the passage of the act, on the 5th of August, 1886, in the House of Representatives, a joint resolution was offered and passed in the Senate "for salaries and traveling expenses of the Mississippi River Commission, and for salaries and traveling expenses of assistant-engineers under them, and for office expenses and contingencies, one hundred thousand dollars." But, probably for want of time, the resolution was not passed by the House of Representatives.

In other departments of the Government, when there is a failure to make appropriations for salaries and expenses of

permanent officers, it has not been permitted to pay their salaries or expenses out of any appropriation made for any other specific purpose. That failure has usually been supplied by the passage of a deficiency bill to meet the case. There is no sufficient reason to sustain the view that the intent of the legislative department in the passage of the act under consideration was different from its intent in the passage of similar acts in the past, or that any new rule as to the payment of permanent salaried officers was intended to be inaugurated.

It would be inconsistent with section 3678 of the Revised Statutes, which provides that "all sums appropriated for various branches of expenditure in the public service shall be applied solely for the objects for which they are made and no other," to apply the appropriation referred to in your letter, or any part of it, to the payment of the salaries and expenses of the Mississippi River Commission.

Very respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF WAR.

DUTY ON IRON ORE.

In determining the meaning of "iron ore," as used in the provision of the act of March 3, 1883, chapter 121, which imposes a duty thereon, regard should be had to the commercial signification of the term, as Congress must be understood to have used the same in its commercial sense.

DEPARTMENT OF JUSTICE,
September 17, 1886.

SIR: I have considered the subject contained in your letter, with inclosures, of the 14th of September, instant. You state Messrs. "Nailor & Co. now contend that the provision in the tariff act of the 3rd of March, 1883, imposing a duty of 75 cents per ton upon iron ore, means ore dry at the temperature of 212°, Fah., which, it is understood, is the test or standard adopted in commercial transactions of iron ore." * * *

Duty on Iron Ore.

I will thank you to return all the inclosures, with an expression of your opinion as to whether the provision in the tariff act of the 3d of March, 1883, for iron ore should be construed in the manner contended for by the applicants to mean that duty shall be assessed on the ore in a dry state."

The provision of the act of the 3d of March, 1883, imposing the duty, is "Iron ore, including manganiferous iron ore, also the dross or residuum from burnt pyrites, seventy-five cents per ton." (22 Stat., 497.) By this a specific duty of 75 cents per ton is charged on the importation of iron ore. The inquiry involved in yours is substantially, What is the legal meaning of *iron ore*, as used in the statute? In the interpretation of the customs laws Justice Story, in the case of *Two Hundred Chests of Tea* (9 Wheat., 430), declares "Congress must be understood to use the word in its known commercial sense." In the case of *Barlow* v. *United States* (7 Pet., 404) he repeats, "Congress must be presumed to use words in their known habitual commercial sense." The same rule for the definition of words has been reiterated in numerous cases ever since, the latest of which is as late as the case of *Drew* v *Grinnell* (115 U. S., 477). This is the rule now. Whatever is the known commercial signification of *iron ore* is that on which the duty is to be levied. If, as stated in yours, "iron ore dried at a temperature of 212° Fah., which it is understood is the test or standard adopted in commercial transactions of iron ore," be what is known in commerce as iron ore, it is the ore contemplated by the statute, and on that basis the duty should be levied.

I return herewith the inclosures which accompanied your letter.

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

COVERINGS OF IMPORTED MERCHANDISE.

Sacks, boxes, or coverings of any kind, the duty on which as *charges* was repealed by section 7 of the act of March 3, 1883, chapter 121, are not subject to duty, either separately from or as a part of the value of the goods imported therein, excepting where they come under the *proviso* in that section or fall within some special provision of law.

The 10 per centum ad valorem, mentioned in said proviso, can be imposed upon sacks, boxes, or other coverings of imported merchandise only where their material or form justifies the conclusion that they were used as coverings to evade duties, or where they were designed or contemplated to be applied to some use other than that of coverings for imported merchandise, even though their use as coverings only should continue after the goods had passed beyond the custom-house to the market or consumer.

The mere fact that the boxes, sacks, etc., are, after importation, put to other uses, if such uses were not designed at or before the time of importation, and if there was no design to evade duty in using them as coverings, will not subject them to the 100 per centum ad valorem duty.

DEPARTMENT OF JUSTICE,
September 17, 1886.

SIR: Your communication of the 2d instant submits for consideration four subjects:

First: As sacks, boxes, and other receptacles which are ordinarily used in the importation of merchandise would, if imported separately, be dutiable under the respective provisions of the tariff applicable thereto, the question presents itself whether they lose their dutiable character by being filled with or used for the transportation of such goods.

Second: In the case of *Oberteuffer* v. *Robertson*, No. 1192, of October term, 1885, in the Supreme Court, in considering the seventh section of the act of the 3d of March, 1883, the following language is used: "This implied that if boxes or coverings of any kind are not of material or form designed to evade the duties thereon, and are designed to be used in the bona fide transportation of the goods to the United States, *they are not subject to duty.*" With reference to which you state "I will thank you for an expression of your opinion as to whether the statement of the Supreme Court, that such coverings are not subject to duty, should be considered as mere dictum, used in the process of argument, or as an authoritative expression of the views of the court."

Third: "The further provision in said section 7, by which a duty of 100 per cent. ad valorem is authorized in certain cases, as above referred to, is also submitted for your consideration."

Fourth. "The question of the proper interpretation of the proviso in section 7 is also submitted for your consideration."

The solution of the questions submitted depends upon the true interpretation of the 7th section of the act of the 3d of March, 1883.

That section provides: "That sections 2907 and 2908 of the Revised Statutes of the United States, and section 14 of the act entitled "An act to amend the customs revenue laws and to repeal moieties," approved June 22, 1874, be and the same are hereby repealed, and hereafter none of the charges imposed by said sections, or any other provisions of existing laws, shall be estimated in ascertaining the value of goods to be imported, nor shall the value of the usual and necessary sacks, crates, boxes, or coverings of any kind be estimated as part of their value in determining the amount of duties for which they are liable: *Provided*, That if any packages, sacks, crates, boxes, or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the bona fide transportation of goods to the United States, the same shall be subject to a duty of one hundred per centum ad valorem upon the actual value of the same." By this section, whatever in sections 2907 and 2908 of the Revised Statutes and the fourteenth section of the act of June 22, 1874, was included as charges is excluded from the estimate in fixing the dutiable value of the goods to be imported. The three sections repealed by the section embrace as charges "the cost of transportation, shipment, and transshipment, with all expenses included, from the place of growth, production, or manufacture, whether by land or water, to the vessel in which shipment is made to the United States, the value of the sack, box, or covering of any kind in which merchandise is contained, commission at the usual rate, but in no case less than two and one-half per centum, and brokerage, export duties, and all other actual or usual charges for putting, preparing, and packing for transportation or shipment." When these

charges are excluded the goods to be imported are left to be valued "at the actual market value or wholesale price thereof at the period of the exportation to the United States, in the principal markets of the country from which the same has been exported." Taken in connection with the provisions of section 2906, Revised Statutes, which remains unrepealed, the effect of section 7 of the act of the 3d of March, 1883, is to make the dutiable value the same as "the actual market value or wholesale price" in the principal markets of the country from which the goods were exported at the time of the exportation Hence, the market value of the goods to be imported, as above stated, as the law now stands, is identical with the dutiable value. Nor can any of the charges above stated be added to that value for the purpose of charging duties thereon. Sacks, boxes, and coverings of any kind in which merchandise is contained are embraced among the charges which are not to be included with the value of the goods.

As the statute in the broadest terms excludes all these, it is not permissible to add to its terms either the words "inside" or "outside." The exemption extends alike and with equal force to both inside and outside sacks, boxes, or coverings of merchandise. But the same sacks, boxes, or coverings, if imported separately, would be subject to duty. The inquiry arises whether each is not to be charged with a duty when used as a covering to other dutiable merchandise as though separately imported? Did the legislative power so intend it? The revenue act of 1883, of which section 7 is a part, was intended to reduce the revenue of the Government, which had become excessive. To reduce taxation on imports was the means adopted. The increased dutiable value of the importations occasioned by adding the value of the coverings, etc., under section 2907, if stricken off entirely, would be a large reduction, but if the coverings were only to be separated, for purposes of duty, from the value of the goods, and then taxed at separate rates, whether such a measure would increase or diminish the actual tax would be very uncertain. It is unlikely Congress would intend a reduction and pass an act which was subject to such uncertainty as to results. Simplicity in administration is an im-

portant element of a judicious tax bill. The collection of duties under section 2907, which was repealed, would be more easily administered than under the act of 1883, if the duties on the coverings were only intended to be charges as to rates and be levied. The coverings were not by former laws subject to taxation except as charges on the goods imported; yet under the former law they would have been liable to taxation if separately imported. The mere repeal of the charge cannot be considered as an enactment of a duty on that which before the repeal would not have been subject to duty. The proviso to the section under consideration suggests beyond mistake that a separate levy of the duty repealed was not contemplated by Congress. That proviso is, "that if any packages, sacks, crates, boxes, or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the bona fide transportation of goods to the United States, the same shall be subject to a duty of one hundred per centum ad valorem upon the actual value of the same." If the same tax was intended to be imposed upon a given article, whether it was used as a covering for other goods or imported separately, it is not possible that Congress would have imposed a penalty for an evasion which, under such an interpretation of the law, could not occur; but if, when used as a covering, it came in free from duty, and when separately imported it was subject to duty, then there would be a temptation for a colorable and fraudulent use as a covering in order to evade duty. The proviso was intended to prevent such an evasion. That the charges repealed by this section are not subject to a separate tax is distinctly ruled in the case of *Oberteuffer* v. *Robertson* in the following language, as quoted in your letter: "This implies that if the boxes or coverings of any kind are not of a material or form designed to evade duties thereon, and are designed to be used in the bona fide transportation of the goods to the United States, they are not subject to duty." That this is not dictum is well established by the fact that it is a distinct answer to what the court in the opening of the opinion says is the main point in the case, as follows: "The main question left in the case is, whether *it was lawful to impose duties* on the items for boxes and packing in the invoices

on the two cases and the twenty-one cases and on the items added to the invoices of the one case, which item was one for like boxes and packing."

The brief submitted in the case by Solicitor-General Goode on part of the Government declares: "It will be seen that the plaintiffs' protest stated substantially but a single ground of objection to the collector's liquidation, which was *that the cartons were not liable to duty.*" The court again, after a discussion of an objection raised by the Solicitor-General that the plaintiffs in the case had mistaken their remedy, in that they had not demanded a reappraisement under section 2930, rules the objection not well founded, and concludes the discussion of that branch of the subject by saying: "The exaction of the duty on the packing, whether packing goods in a carton or the customs in the outer case, or lining the outer case, *was not warranted by law.*"

Hence it would seem the very subject was distinctly before the court, considered by it as essential to a proper decision of the case, was formally ruled upon, and thus became an authoritative interpretation of the section under consideration.

But while section 7 does not permit a separate assessment of the boxes, coverings, etc., nor an assessment as part of the value of the goods, in order that this freedom from duty may not be fraudulently or wrongfully used to import dutiable goods free, the proviso to the section was added, by which a penalty of one hundred per centum ad valorem is imposed whenever such an evasion is attempted. This penalty is only incurred, first, when the coverings, etc., "shall be of any material or form *designed* to evade duties thereon;" second, when "*designed* for use otherwise than in the bona fide transportation of the goods to the United States." The first cause for the imposition of the penalty commits to the officer charged with the administration of the law the duty of determining from the character, value, form, and material, whether the purpose and design of the covering was an evasion of duty or a good faith covering. If the covering in either material or form is unusual, and dutiable under other provisions of law, he is allowed to infer, when its character is thus extraordinary, that evasion is

designed. The second ground for the imposition of the penalty requires the officer to determine whether the covering was *designed*, at the time of its application to that use, to be used again for the same, or some other use of substantial commercial value, for which, if separately imported, it would be subject to duty, or whether its utility will be substantially exhausted as soon as it shall have subserved the use to which as a covering it is then devoted. In the former event the penalty of 100 per centum should be collected. In the latter it should not. The mere fact that it is continued after importation as a covering for the same merchandise calls for no penalty. The law does not contemplate that as soon as the merchandise reaches the port and pays the duty it shall then be denuded, and new covering, either inside or outside, be provided to protect it either in handling or sale; neither is there any time or place after the importation that the same covering, used for the same merchandise as covering, from which or in which to make sale of the merchandise, would show that it was designed for use for importation, so as to subject the covering to a duty at the rate imposed as a penalty in the proviso; nor would the fact that a box might, possibly, afterwards be used for fuel, or the covering for some other use, subject the box or covering to a penalty, unless there is reason to believe such use was *designed* and *contemplated* at or before the time of importation.

From this general consideration of the subject the conclusions follow—

(1) That the sacks, boxes, and coverings of any kind the duty on which was repealed as charges by the seventh section of the act of the 3d of March, 1883, are not subject to duty, neither as a part of the value of the goods nor separately, except when they come under the proviso to that section, or some special provision of law.

(2) That the portion of the opinion in the case of *Oberteuffer* v. *Robertson*, quoted in your letter, is not dictum, but an authoritative interpretation of the law on the subject referred to therein.

(3) That the 100 per centum ad valorem can be imposed upon coverings only when their material or form justifies the conclusion that they were used as such to evade duties, or

when they were *designed* or *contemplated* to be applied to some use other than to that of coverings for transportation to the United States of the merchandise they then inclose, even though that use as a covering only should continue after the goods had passed beyond the custom-house to the market or consumer.

(4) The mere fact that the boxes, sacks, crates, or coverings of any kind might possibly be used after importation for other uses, if such uses were not designed at or before the time of importation, and there was not at the time a design to evade duty by their use as coverings, will not subject such coverings to the 100 per centum ad valorem duty prescribed as a penalty.

The 100 per centum duty in the proviso, although not in terms a penalty, is an unusually high duty.

The section under consideration clearly excludes the coverings from valuation as a part of the goods.

The second element in the proviso to the section implies no turpitude on part of the importer.

In balanced cases in a customs act the doubt is to be resolved in favor of the importer.

Hence, although the coverings after the port is reached might by a liberal interpretation be construed, if intended for use thereafter as a cover to the same goods, to be designed "for use otherwise than in the bona fide transportation of goods to the United States," yet such an interpretation, while within the letter, would be a violation of the spirit of the act.

The inclosures transmitted with yours are herewith returned.

I am, sir, respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

CUSTOMS DUTIES.

The proper classifications for duty of certain articles of imported merchandise, consisting of T beams, girders, joists, columns, posts, and other manufactures of iron used in the construction of buildings, considered.

DEPARMENT OF JUSTICE,
September 22, 1886.

SIR: By your letter of the 16th of September instant it appears that Joseph Birtwell & Company entered at the custom-house at Galveston "six hundred and ninety-six plain iron beams, eight hundred and twenty-six pieces, boxes, and bundles manufactured iron, and one hundred and two riveted lattices, manufactured iron; that, upon examination by the customs-officers, it was found to consist of T-beams, girders, plain and flanged at the ends and sides; bundles of strutting rods, threaded on the ends, with nuts on; bundles of anchor and brace plates and fish-plates, and fifteen boxes, containing bolts, nuts, and braces; whereupon the same were classified by the collector under the provision in the existing tariff Schedule C tariff index, new 178, for "iron or steel beams, girders, joists, angles, * * * building forms, etc., and other structural shapes of iron and steel," at a duty of 1¼ cents per pound; that the importers in their appeal claimed that importation was a floor frame, and dutiable as an entirety, as a "manufacture of iron," at a duty of 45 per cent. ad valorem, under the further provision in said Schedule C (Tariff Index, new 216); and that the decision of the Department sustained the classification made by the collector."

After the above recital of facts you state: "I will thank you to consider the matter, and to advise me at your early convenience as to what, in your opinion, should be the proper classification of such merchandise under the existing tariff acts."

The collector classified the T-beams, girders, etc., under tariff index, new 178, which provides: "Iron or steel beams, girders, joists, angles, channels, car-truck channels, TT columns and posts, or parts or sections of columns and posts, deck and bulb beams, and building forms, together with all other structural shapes of iron or steel, one and one-fourth of one cent per pound."

The other articles in the entry he classified under the appropriate provisions of the tariff act specially applicable to each.

The importers maintain that all the articles should be treated as an entirety, because when put together they would constitute a floor-frame for one or more floors of an edifice they were erecting as a State-house, and that they all constituted a manufacture under the provisions of tariff index new 216, which provides: "Manufactures, articles, or wares not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, copper, lead, nickel, pewter, tin, zinc, gold, silver, platinum, or any other metal, and whether partly or wholly manufactured, forty five per centum ad valorem."

Unless they are relieved from the special provisions of the tariff act applicable to each of the articles imported by the operation of the section last quoted, the classification of the collector is right. If they are not to be treated as an entirety as a manufacture, they are severally beams, girders, etc., and are substantially enumerated in the act.

In its broadest sense a manufacture includes whatever is made by the hand of man, or by machinery subject to his hand. In this sense edifices, building, railroads, and structures of all kinds would be comprehended. The rule was not intended to be used by the legislature in this broad sense. It is used in the general clause at the conclusion of a schedule in which enumeration and specification was the plan. Only such works of man as were too unimportant to warrant specification, or such as were so uncommon as to escape the attention of the legislature, were intended to be embraced by it. The iron floor frames in the United States would be neither unimportant nor unusual. In the magnitude of their value or frequency of use nothing enumerated in the bill has been more conspicuous, or, if they were to be dutiable as an entirety, would be less likely to be omitted in the enumeration. The inference is strong that they were not intended to be charged as an entirety. At the time of importation they were not an entirety. What merchandise is at the time of importation is what classifies it for duty; not what it has been before, or what it may be in the future.

The girders, beams, etc., in this case were not a floor frame. They were only the prepared material for a floor frame. Until actually put together at their final destination the material was not a frame. When so put together it would be a structure and not a manufacture. It would be realty, such as is not appropriately the subject of the customs laws. If all the rails, frogs, fish-plates, etc., that constitute the material for a railroad track were fully finished for laying in a foreign country it would not justify their admission as a railroad track under this clause, yet such an importation would be as much an entirety as this and as properly a manufacture. It is an unnatural stress on language to call the iron frame of a large State-house or the track of a railroad a manufacture in a customs law, and I am constrained to believe the legislature did not so intend. Besides, this general clause to Schedule C was only to apply to manufactures "not specially enumerated or provided for in this act." Iron "girders, beams, nuts, bolts, with all other structural shapes of iron" are enumerated and specially provided for. "Structural iron" is naturally interpreted to mean iron adapted to and prepared for use in a building. The importation in this case would seem to be just such material, and therefore specified and enumerated. Hence it is concluded that the importation in this case should not be classified as an entirety as a manufacture, but its several parts should be classified under such several specific provisions of the act as are applicable to each class of merchandise in the entry.

The documents which yours inclosed are, as requested, herewith returned.

Very respectfully,

G. A. JENKS,
Acting Attorneg-General.

The SECRETARY OF THE TREASURY.

DUTY ON GINGER ALE OR BEER.

Under the clause in the act of March 3, 1883, chapter 121, providing a duty of 20 per cent. ad valorem on ginger-ale or ginger-beer, etc., no separate or additional duty is to be collected on bottles or jugs containing the same. But where the ale or beer is bottled, the ad valorem duty should be levied upon the wholesale value thereof as bottled ale or beer in the general market of the country whence it is imported.

DEPARTMENT OF JUSTICE,
September 24, 1886.

SIR: Your letter of the 11th of September instant was received, and the subject submitted in it has been considered.

The inquiry for determination is substantially what is the interpretation to be put upon the last paragraph in Schedule H of the tariff act of the 3d of March, 1883, which is, "Ginger-ale or ginger-beer, twenty per cent. ad valorem, but no separate or additional duty shall be collected on bottles or jugs containing the same."

This enactment embraces two different clauses. The first fixes the duty that is to be charged on ginger-ale or ginger-beer, which is 20 per cent. ad valorem. The rule for determining the value is found in section 2906 of the Revised Statutes, and is "the actual market value or wholesale price thereof at the period of exportation to the United States in the principal markets of the country from which the same has been imported"; but the second clause of the paragraph, fixing the duty on ginger-ale or ginger-beer, implies that the importation, either from its nature or from mercantile usage, must or will be in bottles or jugs, but provides "no separate or additional duty shall be collected on bottles or jugs containing the same." This clause forbids the charging of a duty separately on the bottle or jug, or the addition of the value of the bottle or jug to the value of the ale or beer, and thereby obtaining an aggregate value of both, and levying the 20 per cent. ad valorem on this aggregate value. But it does not forbid levying duty upon the full wholesale market value of the ale or beer as bottled ginger ale or beer, as valued in the market, if from the constituent ingredients of the import it derives its principal and almost sole value from its compression and the exclusion of the air from it by the bottling. This distinction between the value of a liquor unbot-

tled and bottled finds an illustration in a preceding paragraph of the same act in the article of still wines, in which a specific duty of 50 cents a gallon is imposed on the wine when in casks and $1.60 per dozen in bottles, being 53⅓ cents per gallon when bottled, in which paragraph precisely the same provision occurs as in the paragraph relating to ginger-ale and ginger-beer, that "no separate or additional duty shall be collected on the bottles."

If, then, there is a difference between ginger ale or beer bottled and unbottled in the market value at the wholesale price in the general market of the country whence it is imported, it should be appraised at such value as is applicable under the facts as bottled or unbottled.

I return the inclosures received with this.

I am, very respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

COVERINGS OF IMPORTED MERCHANDISE.

Certain boxes or cases containing zithers, piccolos, cornets, trial glasses, etc., used as coverings for such instruments, *held* not subject to the 100 per cent. ad valorem duty prescribed in the proviso of section 7 of the act of March 3, 1883, chapter 121.

DEPARTMENT OF JUSTICE,
September 27, 1886.

SIR: In your communication of the 24th of September instant you state:

"Referring to the letter of the Acting Attorney-General, dated the 17th instant, in relation to the construction of section 7, act of March 3, 1883, I have the honor to inform you that under date of June 3, 1886, (Synopsis 7553, herewith inclosed), the Department decided that certain boxes or cases containing zithers, piccolos, cornets, and trial glasses were subject to duty at the rate of 100 per cent. ad valorem under the proviso to said section.

"The boxes containing the zithers were described as wooden boxes, lined with cotton plush; those containing the

piccolos and cornets as wooden boxes covered with leather, and lined with cotton plush; and those containing the trial glasses as wooden boxes, covered with leather, with a glass top, and lined with silk plush.

"These boxes conform in shape to, and are specially made as permanent receptacles for, the various instruments imported in them, and in some cases are held for sale as separate commodities, both the instruments and the boxes being imported separately or together.

"The Department held that the boxes were dutiable at the rate aforesaid because they were designed for use otherwise than in the bona fide transportation of goods to the United States.

"Similar decisions have been made in relation to leather and wooden cases for opera and marine glasses and telescopes; leather cases for pipes, razor-cases, and violin boxes, which are similar in character and uses to those above described, as are also the cases containing flutes, clarionets, and a great variety of other instruments and articles.

"In view of the provisions in section 2, act of March 3, 1875 (18 Stat., 469,) I will thank you for an expression of your views as to the correctness of such assessments of duty."

The several coverings referred to in yours were clearly not intended to evade duty, as they are the usual and ordinary coverings for such instruments. Although they may be intended for coverings for the same after they shall have been imported, there is no reason to believe they were designed for any further use or for sale separately as commodities. Hence, for the reasons set forth in the opinion transmitted to your Department on the 17th instant, the boxes and coverings referred to in yours are not subject to the 100 per cent. duty ad valorem prescribed in the proviso to the seventh section of the act of March 3, 1883.

Very respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

MONONGAHELA RIVER IMPROVEMENT.

The clause in the provision of the act of August 5, 1886, chapter 929, making an appropriation for the improvement of the Monongahela River, which declares that "no charges or tolls shall be collected on any other part of the river on any commerce on said river which originates above the works herein appropriated for," does not impose any condition affecting the expenditure of the appropriation. There is nothing in its language which requires the assent thereto of any person, company, or corporation claiming a right to collect charges or tolls, or the relinquishment by any person, company, or corporation of such right, before the money appropriated can become available for expenditure.

DEPARTMENT OF JUSTICE,
September 27, 1886.

SIR: Your letter of the 15th ultimo, calling attention to the appropriation made by the river and harbor act of August 5, 1886, for the improvement of the Monongahela River, informs me that that river is being improved for slack-water navigation, and that the lock for the construction of which the said appropriation is made is the eighth in order from Pittsburgh; that the other seven have been built and are now owned and controlled by the Monongahela Navigation Company; which, it is understood, is a company organized by charter from the State of Pennsylvania, by which it is authorized to build locks and dams and operate slack-water navigation on the Monongahela River from Pittsburgh to the Pennsylvania State line, and to collect tolls on all commerce passing through its locks."

You add: "Lock No. 9, already built by the United States, is in West Virginia, and Lock No. 8, now in course of construction, is in Pennsylvania, but the pool above it is partly in West Virginia, and both locks are above those of the Navigation Company. The commerce originating above Lock No. 8 goes mainly to Pittsburgh for its market, and must therefore pass through all the locks of the Navigation Company, and this commerce is understood to have hitherto paid full tolls to the said company."

The provision in said act making the appropriation referred to reads as follows:

"Improving Monongahela River, Pennsylvania and West Virginia: Continuing improvement, ninety thousand nine hundred dollars; but no charges or tolls shall be collected on any other part of the river on any commerce on said river which originates above the works herein appropriated for."

In view of the clause in this provision which prohibits the collection of charges or tolls as there described, you inquire "whether or not the formal assent of the Monongahela Navigation Company to such clause is necessary before the money appropriated can become available for expenditure."

While the clause above mentioned clearly forbids the collection of charges or tolls by the Monongahela Navigation Company on any commerce on the Monongahela River which originates above Lock No. 8, it can not, I think, fairly be construed to impose any condition affecting the expenditure of the appropriation such as is contained in your inquiry. There is nothing in the language of the clause which requires the assent thereto of any person, company, or corporation claiming a right to collect charges or tolls, or the relinquishment by any person, company, or corporation of such right before the appropriation can be expended. Where Congress has thought it proper to annex conditions of this sort to appropriations for similar objects, terms have been made use of plainly indicative of its purpose so to do. See, for instance, the appropriation in said act for improving Little Kanawha River; also the appropriation for same river in acts of August 2, 1882, chapter 375, and July 5, 1884, chapter 229; also the appropriation for improving the Monongahela River made by act of March 3, 1881, chapter 136. The instances here cited, to which others might be added, warrant the conclusion that had Congress intended to make the expenditure of the appropriation in the act of August 5, 1886, conditional, dependent upon the assent of the Monongahela Navigation Company to the clause prohibiting the collection of charges or tolls, or upon the relinquishment thereby of the right to collect tolls or charges, it would have manifested its intent so to do in terms sufficiently clear and precise to leave no doubt upon the subject. As the provision now stands, I am of the opinion that neither such assent nor such relinquishment by that company is necessary before the money appropriated can become available for expenditure.

I am, sir, very respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF WAR.

COVERINGS OF IMPORTED MERCHANDISE.

Tin cans containing French peas, prepared meats, fish, fruit, vegetables, and milk food—being neither of material nor form designed to evade the duties thereon, nor designed for use otherwise than in the bona fide transportation of goods to the United States—are not subject to the 100 per cent. ad valorem duty prescribed by the proviso to the seventh section of the act of March 3, 1883, chapter 121.

DEPARTMENT OF JUSTICE,
September 27, 1886.

SIR: I received yours of the 23d of September, instant, in which you state:

"I have to inform you that under date of June 25, 1886, the Department decided that tin cans containing French peas were subject to duty at the rate of 100 per cent. ad valorem under the proviso of section 7, act of March 3, 1883. * * * In view of the provisions of section 2, act of March 3, 1875 (18 Stat., 469), I will thank you to inform the Department whether such tin cans and similar tin cans containing prepared meats, fish, fruit, and vegetables and milk food are properly dutiable at the rate of 100 per cent. ad valorem."

The cans referred to in yours are neither of material nor form designed to evade the duties thereon, nor are they designed for use otherwise than in the bona fide transportation of goods to the United States, except as a covering to the *very goods* imported, after which they are not adapted to any further or additional use. In accordance with the views expressed in a letter transmitted to your Department on the 17th instant, the cans would not be subject to the 100 per cent. ad valorem duty prescribed by the proviso to the seventh section of the act of the 3d of March, 1883.

The inclosure referred with yours is herewith returned.

Very respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

PUBLIC BUILDING SITE IN WILLIAMSPORT, PA.

Title to the additional ground authorized to be purchased by the act of July 10, 1886, chapter 761, for the site of a public building to be erected in Williamsport, Pa., may be acquired by the institution of condemnation proceedings under the laws of the State of Pennsylvania, in case no agreement for the purchase thereof can be made with the owner.

DEPARTMENT OF JUSTICE,
October 2, 1886.

SIR: Your letter of the 23d ultimo calls attention to the act of August 3, 1882, chapter 381, providing for the purchase of a site for a public building to be erected in the city of Williamsport, Pa., and to the act of July 10, 1886, amendatory thereof, wherein authority is given the Secretary of the Treasury to purchase additional ground for said site, and requests my opinion upon the question whether title to such additional ground may be acquired by condemnation proceedings instituted under the laws of the State of Pennsylvania.

In connection with this question, and along with the above acts, may properly be considered the act of August 7, 1882, chapter 433, which made an appropriation for the purchase of said site, and authorized the Secretary of the Treasury "to acquire by private purchase or condemnation the necessary lands for the public buildings and the light-houses to be constructed, and for which money is appropriated by this act."

By the act of the Pennsylvania legislature of June 8, 1874 (Laws of Pa., 1874, 280), a mode is provided by which the title to all estates and interests in lands in that State may be vested in the United States, for any public use or purpose whatever, when no agreement can be made with the owners of the same for the purchase thereof; and by another act of the same legislature, dated February 13, 1883 (Laws of Pa., 1883, 1), the consent of the State is given "to the acquisition by the United States by purchase, by condemnation, or by lawful appropriation, under the right of eminent domain, under the laws of this State or of the United States, of one or more lots or pieces of land situated in the city of

Williamsport, not exceeding in quantity two acres, on which to erect a court-house, post-office, and other Government buildings and appurtenances," etc. Under this legislation proceedings to condemn, where no agreement for a purchase can be made with the owner, may be instituted on behalf of the United States in the proper State court, and title acquired through the eminent domain power of the State.

It would seem that power to condemn the additional ground needed for the site of the public building at Williamsport is expressly granted by the act of August 7, 1882, cited above. However, irrespective of the provisions of that act, the authority "to purchase" given by the act of July 10, 1886 (although it might not alone be sufficient for invoking the eminent domain power of the *United States*), may properly be taken to warrant the acquisition of the land in any mode which is in conformity to the laws of the State wherein the property is situated; and hence where, by the laws of the State, the land may be condemned and title thereto acquired under *its* eminent domain power, recourse may be had as well to this mode of acquisition as to any other under the authority conferred by the last mentioned act. (See opinion of January 27, 1886.)

I am accordingly of the opinion that title to the additional ground authorized to be purchased by the act of 1886, in case no agreement for the purchase thereof can be made with the owner, may be acquired by the institution of condemnation proceedings under the laws of the State of Pennsylvania, assuming that the limit of two acres, as above, will not be exceeded.

I am, sir, very respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

INDIAN LEASES.

Advised that certain mining leases made by citizens of the Choctaw nation of Indians, in the Indian Territory, and the Osage Coal and Mining Company, a Missouri corporation, for the mining of coal, etc., in said territory, are not such as may properly receive the approval of the Secretary of the Interior under existing laws.

The inhibition contained in section 2116, Revised Statutes, has the same application to individual Indians that it has to Indian nations and tribes.

DEPARTMENT OF JUSTICE,
October 14, 1886.

SIR: Yours of the 8th instant is received. You transmit a report of the Commissioner of Indian Affairs relating to agreements made between citizens of the Choctaw nation of Indians in the Indian Territory, and the Osage Coal and Mining Company, a corporation of the State of Missouri, for the mining of coal, etc., in said nation. One of the agreements is inclosed. An opinion is requested as to whether these agreements are such as may properly receive the approval of the Department of the Interior under existing laws.

A similar question arose heretofore as to the authority of the Interior Department to approve leases of land for grazing purposes, entered into by the Indians of the Cherokee, Cheyenne, Arapahoe, Kiowa, and Comanche tribes in their respective reservations in the Indian Territory. The question of the power of the Department of the Interior to authorize leases to be made for grazing purposes was submitted to the Attorney-General, and in his opinion of 21st July, 1885, it is said:

"I submit that the power of the Department to authorize such leases to be made, or that of the President or the Secretary to approve or to make the same, if it exists at all, must rest upon some *law*, and therefore be derived from either a treaty or statutory provision. I am not aware of any treaty provision applicable to the particular reservations in question that confers such powers. The Revised Statutes contain provisions regulating contracts or agreements with Indians and prescribing how they shall be executed and approved (see sec. 2103;) but those provisions do not include contracts of the character described in section 2116, herein-

before mentioned. No general power appears to be conferred by statute upon either the President or Secretary, or any other officer of the Government, to make, authorize, or approve leases of lands held by Indian tribes; and the absence of such power was doubtless one of the main considerations which led to the adoption of the act of February 19, 1875, chapter 90, 'to authorize the Seneca nation of New York Indians to lease lands within the Cattaraugus and Allegany reservations and to confirm existing leases.' The act just cited is moreover significant as showing that, in the view of Congress, Indian tribes can not lease their reservations without the authority of some law of the United States."

No laws have been enacted by Congress upon the subject since the publication of the above opinion. The law has not, therefore, conferred any express power upon the President or Secretary to approve the mining leases referred to, and no such authority can be implied.

Upon an examination of the statutes and treaties, I feel justified in coming to the conclusion that it was the intention of Congress that the inhibition contained in section 2116, Revised Statutes, should have the same appliction to individual Indians that it has to the Indian nations and tribes.

I am of the opinion, therefore, that the mining leases referred to are not such as may properly receive the approval of the Department of the Interior under existing laws.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

ATTORNEY-GENERAL.

Where a request is made for an opinion of the Attorney-General on questions of law arising in any case, it should be accompanied by a statement of the facts of the case as well as of the questions on which advice is desired. The Attorney-General can not undertake to find and settle the facts from papers that may be submitted.

DEPARTMENT OF JUSTICE,

October 14, 1887.

SIR: With every disposition to comply with the request for an opinion contained in your communication of the 5th

of October instant, which has been referred to me for action by the Attorney-General as a matter upon which he does not feel that he can properly pass, I am constrained to say that before the Department can act upon the subject submitted it must be provided with a statement of the actual facts as they appear to you on consideration of the case as it arises in the administration of your Department. And as the law requires that the case presented for opinion should be settled by you, it is out of my power to substitute for a case so settled the letter of Senator Call and the somewhat voluminous papers transmitted with it by you, namely, the speech of that Senator, the answer of C. W. Holcomb, esq., attorney for the Florida Railway and Navigation Company, the charter of said company, a copy of the decision of your Department of August 30, 1886, and Senate Executive Document No. 91; papers and documents which, instead of having the qualities of unity and harmony among themselves, present questions of fact for solution as well as questions of law.

It is, for example, impossible for me to give an opinion upon the subject submitted until you determine what the fact is as to the alleged location of its route by the Florida Railroad Company and the time of that location, which, besides being cardinal facts in the case, are earnestly controverted.

It must, I conceive, be deemed settled that the Attorney-General can only act on a determinate statement of facts furnished by the officer asking his opinion. (10 Opin., 267; 11 Opin., 189.) "Where," says Mr. Attorney-General Stanbery, "a question of law arises upon facts submitted to the Attorney General, *such facts must be agreed and stated as facts established.*" (12 Opin., 205.)

Said Mr. Attorney-General Williams upon the same point: "I deem it proper here to remind you, that where an official opinion from the head of this Department is desired on questions of law arising on any case the request should be accompanied by a statement of the material facts of the case, and also the precise questions on which advice is wanted. By the observance of this simple rule the real point of difficulty in the case will be at once perceived,

much inconvenience avoided, and more practicable and satisfactory results obtained." (14 Opin., 367, 368.)

I hope it will appear as clearly to your mind as it does to mine that if I am to find the facts in this important land-grant case I can only do so after a trial, and, consequently, after giving all interests adverse to those of the settlers on the land in controversy an opportunity to adduce evidence before me, which I have no power to do, for the law expressly confines the duty of the Attorney-General to giving opinions on questions of law. (Rev. Stat., sec. 354–356.)

I am sure that these considerations will be sufficient to satisfy you that it is nothing more than simple justice to the railroad company and other parties claiming or in any way interested in the land that I should decline to settle the facts on a presentation *ex parte*, and then proceed to give an opinion upon them.

As this action of mine does not defeat, but only delays, the attainment of the object of your communication, I feel that it is better to produce that inconvenience than to run the risk of doing injustice by giving an opinion without a case authentically stated and a specification of the points of law arising upon that case.

I have the honor to be, your obedient servant,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE INTERIOR.

OLEOMARGARINE.

The various simple and compound substances mentioned in section 2 of the act of August 2, 1886, chapter 840, must be "made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter," before any of them can be regarded as taxable under that act.

DEPARTMENT OF JUSTICE,
October 18, 1886.

SIR: Your communication of the 2d October instant submits for opinion the question whether or not the various simple and compound substances mentioned in the second

section of the act of the 2d August, 1886, entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," must be "made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter," before any of them can be regarded as subjects of taxation under the law.

The question really is whether the language just quoted from the second section of the act is a predicate and qualification of the *whole* section, or only of the clause or member in immediate connection with which it is found.

In my opinion the qualification extends to the *whole* section, and is an essential element of the statutory definition of *oleomargarine*.

If each of the simple or compound substances mentioned in the law is taxable under the act regardless of whether it is in imitation or semblance of butter or calculated or intended to be sold as such, it results that some lubricating oils must bear the tax, although not supposed to have been in the contemplation of Congress.

But the language of the law is repugnant to that view. Sections 6, 8, 10, and 13 can not be understood as applying to fluid substances. In these sections are found directions that oleomargarine shall be "*packed*" in "*firkins*, *tubs*, or other wooden packages;" that no package shall contain less than "10 *pounds*;" that retail dealers shall *pack* what they sell in suitable wooden "*or paper* packages;" that "any fractional part of a *pound*" in a package shall be "taxed *as a pound*;" that the imported article shall, in addition to the import duty, pay an internal-revenue tax of "15 cents per *pound*."

Now, as these embrace all the regulations of the kinds mentioned in the act, it would seem to require the conclusion that it was solids and not fluids that the legislature had in view, and therefore that the oils and extracts referred to in section 2 are not taxable as oleomargarine. We do not speak of *packing* fluids, nor do we estimate their quantity *by weight*, nor is it customary to pack them in *firkins* or *tubs* or other like vessels.

Again, if the simple oil is taxable, it must undergo a *repeti-*

tion of the tax should it afterwards enter into any one of the combinations or mixtures named in the second section, each of which, upon this theory, must be taxed. So that, unless the maker of any of these composite substances produce all its constituents himself, the double taxation he sustains must put him at a competition with those who do—a very small number, I am informed.

To resolve a doubt upon a statute it is a familiar rule to look at the evil the statute was intended to cure. There can be no question that the object in this case was to protect the trade in legitimate butter from the damage caused by the sale of suppositious butter, by requiring the manufacturers of the latter to distinguish their product by an appropriate brand, and by fettering the production of the article with a tax.

If the words of qualification or restriction at the end of section 2 apply only to the clause in which they occur, it is rather strange that the definition of butter did not follow them instead of forming the subject of the first section and being given a prominence that indicates an application commensurate with the whole scope of the law.

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

STATE TAX.

Where a State imposed a tax upon the registration of deeds, and a deed to the United States conveying land within such State was put on record by an agent of the Government: *Advised* that, there being no provision in the State law exempting the registration of deeds to the United States from the tax, the Government is properly chargeable therewith, and that it should be paid.

The tax referred to is not, strictly speaking, a tax upon either the instrumentalities, agencies, or property of the United States.

DEPARTMENT OF JUSTICE,
October 21, 1887.

SIR: I return herewith a communication of Col. P. C. Hains, Corps of Engineers, under date of the 4th of January last, which was some time since transmitted to me by you with

request for advice as to whether the tax therein mentioned should be paid.

It appears by said communication that the deed conveying to the United States the Aqueduct Bridge and approaches thereto, in view of the fact that the premises thereby granted lie partly within Alexandria County, Virginia, was deposited by Colonel Hains in the office of the clerk of that county to be recorded. The clerk, having recorded the deed, rendered a bill for this service containing two items, one of which is for the amount of his recording fee, and the other the amount of the tax imposed by the State law on deeds admitted to record. Colonel Hains is in doubt as to whether such tax should be paid, and the county clerk declines to give up the deed until it is paid.

I find nothing in the State law which exempts deeds of conveyance to the United States from the tax refered to; and unless their exemption therefrom can be claimed on some other ground, they would seem to stand on the same footing as regards liability to the tax as deeds of conveyance to individuals. With respect to the liability of the former deeds, I do not think that any constitutional objection exists. The tax is upon the registration of deeds, a means provided by the State for the prevention of fraud in transactions affecting the title to real property; it is not a tax upon either the instrumentalities, agencies, or property of the General Government, strictly speaking.

The case here does not differ essentially from one where a tax is imposed by the State on the process of its courts and an action in one of these courts is brought by the United States. In such case, doubtless, the United States, unless exempted by the State law, would be liable to pay the tax on process sued out thereby the same as any other suitor would be under like circumstances. The United States may or may not put its deed on record in the county clerk's office, as it may or may not bring its suit in the State court; but where it does either, it would seem to be, equally with private parties, bound to pay the fees and charges therefor imposed by the laws of the State.

The law of Virginia declares that "no deed shall be admitted to record until the tax is paid thereon to the clerk."

This provision is held by the court of appeals of the State to be directory to him, and to give him authority to demand and receive the tax before he can be required to admit the deed to record: but the registration will be valid though the tax be not prepaid. "If he chooses to admit it to record without receiving prepayment of the tax," observes the court, "he thereby assumes the liability for it, just as if it actually had been paid to him. The government (State) loses nothing, for his liability for it is the same as if he had actually received it." (26 Va., 281.) In the present case the clerk waived prepayment of the tax, and by so doing has made himself liable therefor. If, as I think is clear, the United States were primarily chargeable with it, the burden thereof ought not to be borne by him. I accordingly advise payment of the tax by the United States.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

NATIONAL BANKING ASSOCIATIONS.

Where certain 3 per cent. bonds of the United States, held by the United States Treasurer as security for the circulating notes of a national bank, were called in for redemption and ceased to be interest bearing: *Advised* that unless the bank substitute interest-bearing bonds for the called bonds, the proceeds of the latter must be applied to retiring the circulation secured thereby.

DEPARTMENT OF JUSTICE,
October 28, 1886.

SIR: Certain 3 per cent. bonds of the United States, held by its Treasurer as security for the circulating notes of the First National Bank of North Bend, Nebr., having been called in for redemption and having ceased to be interest bearing, the bank has been notified by the Comptroller of the Currency to exchange those bonds for interest-bearing bonds of the United States.

The bank, in reply, asks to know by what authority the demand has been made, allowing that it has once complied with section 5159 of the Revised Statutes by depositing with

the Treasurer interest-bearing bonds of the United States which are worth par.

An opinion is requested upon the question thus presented, namely, whether the stopping of interest on the bonds deposited, resulting from the call of the Secretary of the Treasury, authorized the Comptroller of the Currency to require the bank to substitute interest-bearing bonds for the bonds now on deposit.

It is not open to question that the bonds deposited by a national bank to secure its circulation must be interest bearing at the time the deposit is made. On that point the law is explicit. It would seem to be equally clear that whatever purpose Congress had in view in requiring bonds to be deposited by national banks to be interest bearing, that purpose has continued the same from the first law on the subject, in 1863, down to the present time, there being an absence of any legislative declaration of a change of intention in that particular.

In resolving the question whether it is essential to a valid deposit of bonds by a national bank that the bonds deposited should be interest bearing during the whole time of the deposit, it may assist us to read the act of 1863, under which the national-bank system was introduced, in the light of the circumstances in which it was passed.

The country was engaged in a great war. It was of vital importance to strengthen the credit of the Government by increasing the demand for its bonds and by averting the impending calamities of an unregulated and rapidly expanding paper circulation. It was to accomplish these objects that the national-bank system was devised, and it is impossible to doubt that it was the intention that the banks composing the system should have no bonds on deposit with the Government except such as were still current and as the Government was interested in keeping buoyant in the market. And this would seem to have been the view of the eminent Secretary of the Treasury to whom is generally ascribed the authorship of the national-bank system. In his report of the 4th of December, 1862, he says, in recommendation of the proposed system:

"The Secretary has already mentioned the support to public

credit which may be expected from the proposed associations. The importance of this point may excuse some additional observations. The organization proposed, if sanctioned by Congress, would require a very few years for deposit as security for circulation bonds of the United States to an amount not less than $250,000,000. It may well be expected, indeed, since the circulation, by uniformity in credit and value and capacity of quick and cheap transportation, will be likely to be used more extensively than any heretofore issued, that the demand for bonds will overpass this limit. Should Congress see fit to restrict the privilege of deposit to the bonds known as five-twenties, authorized by the act of last session, the demand would promptly absorb all of that description already issued and make large room for more. A steady market for the bonds would thus be established and the negotiation of them greatly facilitated.

"But it is not in immediate results that the value of this support would be only or chiefly seen. There are always holders who desire to sell securities of whatever kind. If buyers are few or uncertain, the market value must decline. But the plan proposed would create a constant demand, equaling and often exceeding the supply. Thus a steady uniformity in price would be maintained, and generally at a rate somewhat above those of bonds of equal credit but not available to banking associations. It is not easy to appreciate the full benefits of such conditions to a Government obliged to borrow."

That the conclusion arrived at, namely, that it was the intention of Congress that deposits of bonds by national banks should be kept interest bearing during the whole period of the deposits is correct would seem to be rendered absolutely certain by the act of the 12th of July, 1882 (22 Stat., 162), "to enable national-banking associations to extend their corporate existence, and for other purposes."

Section 9 provides that any national bank may, on depositing lawful money with the Treasurer of the United States, withdraw a proportionate amount of its bonds on deposit, subject, however, to the proviso "that not more than three millions of dollars shall be deposited during any calendar month for this purpose," and to the further proviso "that

the provisions of this section shall not apply to bonds called for redemption by the Secretary of the Treasury, nor to the withdrawal of circulating notes in consequence thereof." This language, it would seem, leaves no doubt that it was the intention of Congress that, when the bonds deposited to secure the circulation of a bank are called for redemption, payment of them means retiring the circulation they secure, unless indeed the bank, as it may lawfully do, should make a new deposit of an adequate amount of interest bearing bonds.

It follows then that unless the First National Bank of North Bend substitute interest-bearing bonds for the existing deposit of bonds called for redemption, the proceeds of the latter must be applied to retiring the circulation secured by it.

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

CUSTOMS DUTIES.

Spools on which thread is wound for transportation or shipment are duty free, under the provisions of section 7 of the act of March 3, 1883, chapter 121.

DEPARTMENT OF JUSTICE,
October 29, 1886.

SIR: Your communication of the 26th instant submits the question whether the spools on which linen thread is wound are subject to taxation separately as spools, or whether they are free from taxation, under the provisions of the seventh section of the act of March 3, 1883. That section repeals, among others, all the charges imposed by section 2907 of the Revised Statutes. Among those charges thus repealed are included "all the actual or usual charges for putting up, preparing, or packing for transportation or shipment." In the case of *Oberteuffer* v. *Robertson* (116 U. S., 499), the Supreme Court of the United States, in considering the seventh section of the act of the 3d of March, 1883, declares: "The exaction of duty on the packing, whether packing the goods in the cartons, or the cartons in the outer case, or lining

the outer case, was not warranted by law." The spools on which the linen thread is wound seems to be the usual manner of packing the thread referred to in yours for transportation or shipment. The tax as to such spools as packing or preparation for shipment is, under the ruling in *Oberteuffer* v. *Robertson*, therefore, repealed, and in accordonce with the view expressed in the opinion rendered on September 17, 1886, it should not be levied on the spools. The Department rulings referred to in your letter should be modified to harmonize them with the opinion referred to and the views now expressed.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

INDIAN CONTRACT.

Opinion of September 9, 1886 (*ante*, p. 447), as to the validity of a certain contract with Pottawatomie Indians, cited and reaffirmed; and *advised* that the approval of such contract by the "business committee of the Citizen Pottawatomies" does not cure the defect therein or authorize the Secretary of the Interior to approve it.

DEPARTMENT OF JUSTICE,
November 3, 1886.

SIR: Pursuant to your request of this date, asking my opinion as to the validity of a certain contract, and your authority to recognize the same, alleged to have been approved by the *business* committee of the Citizen Pottawatomies, I beg leave to state that I have examined the matter, and I find that on the 9th of September last the Solicitor-General rendered you an opinion upon this same contract, involving a different question. Referring to that opinion (which I approve, and the reasoning of which virtually settles this question), I find the following:

"The acts to be done are not of a public or official character. They affect only the rights of individual families and members of two bands of the Pottawatomie nation of Indians, some residing in the Indian Territory and others in the States of Kansas and Michigan. The claim is for individual rights, not public or national rights"

The question now presented is whether the approval of the contract by the *business committee of the Citizen Pottawatomies* supplies the defect on which the opinion above referred to was given. The law (Rev. Stat., sec. 2103) under which this whole proceeding is supposed to have been carried on is very explicit, and leaves no margin of discretion to the Secretary of the Interior. The law must be literally complied with, and nothing can be taken by intendment, nor can the Secretary dispense with any of its requirements. I do not think that the contract is in accordance with the law. It should have been a good and valid contract from the beginning; and even if it could be admitted that a subsequent ratification could make this defective contract valid and binding, yet it does not appear anywhere in the papers what authority this *business committee* has to bind the interests of the various parties here involved and to which reference is had in the quotation already made from the opinion of the Solicitor-General. The reasons and purposes of a law so exacting as the one referred to, in dealing with the Indians through agents and attorneys in this way, are obvious, and these could be easily defeated and rendered of no avail if such authority to ratify such a contract as is here presented is recognized; and my opinion therefore is, you cannot approve the contract in question.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

JURISDICTION OF CONSULAR COURTS.

The criminal jurisdiction conferred upon United States consular officers by section 4084, Revised Statutes, is limited to "citizens" of the United States charged with offenses committed in the countries therein referred to. It does not extend to subjects of foreign powers.

DEPARTMENT OF JUSTICE,
November 4, 1886.

SIR: I have the honor to submit a reply to your communication presenting for opinion several questions arising upon the petition for pardon of one Peter C. Fullert, convicted by

Consul-General Green of aiding and assisting Paymaster Watkins to escape from the U. S. S. *Ossipee* in the harbor of Yokohama, Japan.

I am of the opinion that the consular court had no jurisdiction over Fullert.

The criminal jurisdiction of that court is defined by section 4084 of the Revised Statutes of the United States, which is in these words:

"The officers mentioned in the preceding section are fully empowered to arraign and try, in the manner herein provided, all citizens of the United States charged with offenses against law, committed in such countries, respectively, and to sentence such offenders in the manner herein authorized; and each of them is authorized to issue all such processes as are suitable and necessary to carry this authority into execution."

It is a conceded fact that Fullert was, at the time the alleged offense was committed, a German subject. Whether Congress could or could not have made a foreign subject justiciable in a consular court is a question that does not arise. Congress has seen fit to confine the criminal jurisdiction of this description of courts to citizens of the United States. A reference to the legislation of Congress touching crimes and offenses will show that, whenever criminal jurisdiction is meant to be exerted, regardless of the citizenship of the accused, a term (namely, "*person*") commensurate with such purpose is invariably employed.

When Congress gives a court jurisdiction to try offenses committed by citizens of the United States, especially in foreign parts, we must understand it as using the term in its legal and ordinary signification, there being nothing in the context to show a different intention.

This conclusion is supported by the reasoning of the opinion of one of my predecessors in a case involving the jurisdiction of a consular court sitting in Japan to render judgment in a civil case against a foreign subject. (11 Opin., 474.)

It may be that if Fullert should come to this country he might be tried by a Federal court, but I am not called on to express an opinion on that point.

It follows, therefore, that the proceedings against Fullert were unauthorized, and that he should be set at large as one held without warrant of law.

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF STATE.

IMMIGRATION LAW.

Provision of the second section of the act of August 3, 1882, chapter 376, viz, that if among the passengers of a vessel arriving at one of our ports is found a "convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge," such person shall not be permitted to land, considered; and *held* not to apply to the case of a lunatic whose father will engage satisfactorily that he will not become a public charge.

DEPARTMENT OF JUSTICE,

November 6, 1886.

SIR: Your communication asking whether an alien residing in Brooklyn, N. Y., can bring into this country a lunatic son whom he is now maintaining in a foreign country and will engage satisfactorily shall not become a public charge, has received my consideration.

The question presented arises upon that part of the second section of the act of the 3d August, 1882, entitled "An act to regulate immigration" (22 Stat., 214), which provides that if among the passengers of a vessel coming into one of our ports is found a "convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge," such person shall not be permitted to land.

If the case presented is within the statute, then also would seem to be that of a child of tender years or a decrepit person coming here under the care and protection of another, competent for these purposes. But such cases are manifestly not within the statute, whose object is to forbid the introduction of immigrants likely to become chargeable.

If, then, a child of tender years may be brought here by his parents, why may not one of any age, who is dependent from imbecility of mind or body, if his parent will engage satisfactorily that he shall not become chargeable?

The authority conferred on you by the third section of the statute, to require bonds "under and in the enforcement of the various provisions of this act," would seem to have been given in contemplation of such cases as the one now before me. If, therefore, the father of the lunatic will duly comply with any regulation you may make looking to the prevention of this lunatic and others in like case from becoming public charges, I think he may be brought into the country lawfully.

This is but another of the many instances in the books where the literal sense of statutes has been made to yield to the manifest legislative intent. *Oates* v. *National Bank* (100 U. S., 244); *Chew Heong* v. *United States* (112 U. S., 555, and cases cited); *Ryegate* v. *Wardsboro'* (30 Vt., 746); *Henry* v. *Tilson* (17 *ib.*, 479); *Ex parte Ellis* (11 Cal., 222); *Ingraham* v. *Speed* (30 Miss., 410); *State* v. *Clark* (5 Dutch., N. J., 96; *ib.* 415;) *People* v. *Admire* (39 Ill., 251); *Burch* v. *Newburg* (10 N. Y., 374).

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

CLAIM OF MARTIN AND PATRICK W. MURPHY.

The act of August 4, 1886, chapter 907, made an appropriation to pay certain claims, and directed the Secretary of the Treasury to pay to "Martin and P. B. Murphy $10,000." It being alleged that this was intended by Congress to satisfy a claim for that amount, of which Martin Murphy was a joint owner with Patrick W. Murphy: *Advised*, that should the identity of their claim with that provided for in the act be clearly established, the fact that "B" is used in the act instead of "W" as the initial letter of the middle name of Patrick W. Murphy, is immaterial, and may be disregarded.

DEPARTMENT OF JUSTICE,
November 10, 1886.

SIR: On the 4th of August, 1886, an act was passed providing that "the Secretary of the Treasury be and hereby is authorized and directed to pay, out of any moneys in the Treasury not otherwise appropriated, the sum of eighteen thousand four hundred and sixty-five dollars and sixty-five

cents, in payment of certain claims against the United States Government not heretofore paid because of the defalcation and forgeries of John T. Best, late clerk of the engineer of the twelfth light-house district, and due the several claimants as follows: Employés at Point Conception Light, three thousand seven hundred and eighty-four dollars and seventy cents; Miguel Ortego, four hundred and seventy-eight dollars and fourteen cents; Charles Ashton, two hundred and seventy dollars; Pigeon Point Light Station, nine hundred and eighty dollars and ninety-nine cents; sundry small bills, one thousand two hundred dollars and ninety-five cents; Martin and P. B. Murphy, ten thousand dollars; O. B. Shaw, one thousand seven hundred and forty eight dollars and eighty-seven cents."

From the transmittals accompanying yours, it appears that the $10,000 appropriated to Martin and P. B. Murphy should have been appropriated to Martin and Patrick W. Murphy. The inquiry is whether the use of "B" instead of "W" as the middle initial letter in the name of Patrick W. Murphy, precludes the payment to Martin and Patrick W. Murphy.

From the words of the act, the context, and the subject-matter of the enactment, it appears the law-makers intended this appropriation to be applied to a claim that originated in the defalcation of John T. Best, that the claim related to the Light-House Board, that the amount claimed was $10,000, and that the claim was a joint one in which Martin Murphy was a joint owner. Now, as there is no claim by Martin and P. B. Murphy, nor any such person known as P. B. Murphy in any way connected with the subject-matter, and the claim of Martin and Patrick W. Murphy precisely corresponds with the intent and purpose of the act, the whole intent of the enactment must fail, or the substitution of the "B" instead of the "W" in the name of Patrick W. Murphy be disregarded. The intent of the law-makers should prevail over the mistaken middle letter. For as was ruled in the case of *Games* v. *Stiles* (14 Pet., 327), "the law knows of but one Christian name, and the omission or insertion of the middle name or of the initial letter of that name is immaterial." To the same import is the ruling in the case of *Keene* v. *Mead* (3 Pet., 263). Hence if the identity of the parties and the claim of Martin

and Patrick W. Murphy is otherwise clearly established as the parties and claim referred to in the act, the fact that "B" is used in the act instead of "W" as the middle letter in the name of Patrick W. Murphy is immaterial, and should be disregarded.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

GOVERNMENT TRANSPORTATION OVER PACIFIC RAILROADS.

In the settlement of the accounts of the Sioux City and Pacific Railroad Company (whose road was in part constructed with the aid of subsidy bonds issued under the acts of July 1, 1862, chapter 120, and July 2, 1864, chapter 216) for Government transportation over the subsidized portion of its road: *Advised*, that the direction in the second section of the act of March 3, 1873, chapter 226 (sec. 5260, Rev. Stat.), "to withhold all payments," etc., is now, November 12, 1886, no longer applicable thereto; that only one-half the amount of compensation due the company for such transportation should be withheld, to be applied as required by the act of July 2, 1864; and that the remaining one-half should be paid over to the company.

DEPARTMENT OF JUSTICE,
November 12, 1886.

SIR: In a letter received from the Acting Secretary of the Treasury, dated the 22d of June last, transmitting a copy of a communication addressed to him by the Second Comptroller of the Treasury under date of the 16th of same month, relative to certain accounts of the Sioux City and Pacific Railroad Company for transportation, my opinion is asked upon he following question: "Whether in the settlement and adjustment of the accounts of that company for Government transportation over the subsidized portion of its road the accounting officers should direct that the full amount of the compensation so earned be withheld under section 5260, Revised Statutes, or whether only one-half thereof should be withheld, under the act of July 2, 1864, and the remaining one-half directed to be paid to the company."

It appears by these papers that the Sioux City and Pacific Railroad was constructed in part with the aid of subsidy bonds

issued under the Pacific Railroad acts of July 1, 1862, chapter 120; and July 2, 1864, chapter 216. By the former act *all* compensation for services rendered for the Government by the company was to be applied to the payment of said bonds and interest until the whole amount is fully paid. This provision was modified by the latter act, which requires only *one-half* of such compensation to be so applied. Subsequently, by section 2 of the act of March 3, 1873, chapter 226 (out of which section are formed sections 5260 and 5261, Revised Statutes), Congress directed the Secretary of the Treasury "to withhold all payments to any railroad company and its assigns, on account of freights or transportation, over their respective roads, of any kind, to the amount of payments made by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been re-imbursed together with the 5 per cent. of net earnings due and unapplied as provided by law; and any such company may bring suit in the Court of Claims to recover the price of such freight and transportation; and in such suit the right of such company to recover the same upon the law and the facts of the case shall be determined and also the rights of the United States upon the merits of all the points presented by it in answer thereto by them, and either party to such suit may appeal to the Supreme Court; and both said courts shall give such cause or causes precedence of all other business."

The consideration of this legislation was directly involved in the case of the *United States* v. *Union Pacific Railroad Company* (91 U. S. 72). Suit was originally brought by that company in the Court of Claims to recover one half of certain freight earnings on transportation performed for the United States between the 1st of January, 1873, and March 1, 1874, the whole of which was withheld by the Government for the purpose of applying the same on account of interest paid by it upon subsidy bonds issued to the company; the company conceding the right of the Government to retain the other half of the earnings for that purpose. The claim of the company was sustained and judgment rendered in its favor, and on appeal to the Supreme Court the judgment of the Court of Claims was affirmed.

In the opinion of the Supreme Court delivered in that case the obligation of the company with respect to the reimbursement of interest as well as principal was declared to depend upon the meaning of the act of 1862 and the amendatory act of 1864; and it was held that under the act of 1862 the company was not required to reimburse the Government for interest paid by the latter on the said bonds before their maturity, any further than this might be done by allowing the Government to retain for that purpose all the compensation due the company for services rendred, and by paying over to the Government 5 per cent. of the net earnings of the road, to be applied to the same purpose; that the provision in the act of 1864, hereinbefore mentioned, was intended to modify the act of 1862 so far as to allow the Government to retain only one-half of said compensation, instead of all, and that the company was therefore entitled to receive the remaining half. As to the act of 1873, the provision in this act referred to above was regarded by the court as not repealing the aforesaid provision of the act of 1864, and was interpreted to mean "nothing more nor less than the remission to the judicial tribunals of the question, whether this company, and others similarly situated, have the right to recover from the Government one-half of what they earned by transportation; and this question," continues the court, "is to be determined upon its merits. * * * It is hardly necessary to say that it would have been idle to authorize a suit, had Congress intended to repeal the provision on which alone it could be maintained."

Agreeably to that interpretation of the act of 1873, the direction thereby given "to withhold all payments, etc., on account of freight or transportation," etc., is of a provisional character, and does not contemplate that this action shall be taken after the right of the bond-subsidized companies to recover payment for such freight and transportation shall have been established by the proper courts and the principles governing the payment thus been authoritatively ascertained. The purpose of the statute seems to be to have the rights of the Government and the obligations of the companies, with respect to the reimbursement of interest paid by the Government on the subsidy bonds (a matter that had formerly been the subject of discussion in the Executive

Departments and concerning which a diversity of practice had theretofore existed) judicially determined before any further payments are made on account of freight or transportation; but after their respective rights and obligations have been so determined, and the law governing the matter declared and settled by the courts, it may reasonably be presumed that the direction to withhold payment, in cases where according to the law as thus declared and settled the company is clearly entitled to have payment made thereto, was not intended to apply or be followed. As remarked in an opinion of this Department addressed to the Secretary of the Treasury under date of February 6, 1883, which was given upon a question similar to the present, there is no appearance of an intention to substitute the courts to the Treasury as a machinery for ascertaining and paying debts, the law about which shall have already been established by judgment obtained in the way directed since the passage of the statute.

The Sioux City and Pacific Railroad Company is not within the scope of the sinking fund act of May 7, 1878, chapter 96, and the solution of the question submitted, relative to its accounts for Government transportation performed over the subsidized part of its road, depends entirely on the meaning and effect of the provisions of the other acts named above. Upon consideration of these provisions as already interpreted by the Supreme Court, I am of the opinion that in the settlement and adjustment of said accounts the *direction* in the act of 1873 (sec. 5260, Rev. Stat.), "to withhold all payments," is no longer applicable thereto; that only one-half the amount of compensation due the company for such transportation should be withheld, to be applied as required by the act of 1864; and that the remaining one-half should be paid over to the company.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

CASES OF NAVAL CADETS CLINTON AND FIFE.

Where a cadet entered the Naval Academy and became a member of the fourth class in 1885, and also remained a member of the same class in 1886, he is at the latter period as much an "older cadet" within the definition of the offense of "hazing" as a cadet who, having entered the Academy at the same time (1885), has since been advanced to a higher class, and (equally with the latter) is capable of committing that offense.

DEPARTMENT OF JUSTICE,
November 16, 1886.

SIR: Your communication of the 13th instant, inclosing the records of and certain papers pertaining to the cases of Naval Cadets James W. Clinton and George B. Fife, has been received.

You ask, first, "When did the appointments of Naval Cadets Clinton and Fife take effect, so as to render them liable to trial upon the charge of hazing? Did such appointments take effect in May and September respectively, when the cadets were admitted to the Academy, or upon the issuance of their appointments, on the 11th of October, 1886;" second, "If it shall be held that Messrs. Clinton and Fife were on the 11th of September, 1886, naval cadets of the fourth class, were they, in view of the fact that they had been members of the fourth class in 1885, properly chargeable with 'hazing,' the offense having been committed by them against members of the fourth class of the present year?"

I answer, first: Messrs. Clinton and Fife became naval cadets in the full sense of the term upon the 10th of May and 4th of September, 1886, respectively. They had on those dates respectively, been duly nominated to the place, accepted the nomination, passed successfully the examination required by law, taken the oath prescribed for naval cadets, been assigned to and entered upon the discharge of the duties pertaining to the position, and from those dates their salaries as such commenced. Their commissions, though issued afterwards, relate back by express recitals to these dates respectively, and are conclusive evidence of the appointments at the dates aforesaid.

Second: As I understand the second question, you de-

sire to know if a member of the fourth class can commit the offense "commonly known as hazing."

In an opinion of date March 12, 1886, speaking generally of the ingredients in the offense of "hazing," as constituted by the statute of 1874, I referred to those who could be guilty of the offense as members of the classes senior to the fourth class.

This description of the parties who could commit the offense was accurate enough for the purposes of that opinion. Inasmuch as cadets who have been longer at Annapolis than "new cadets of the fourth class" are very generally in one of the higher classes, the term "a cadet of one of the senior classes" was used by myself as well as in some of the orders issued by the commandant of the Academy as synonymous with the term "other cadets," as employed in other regulations.

The question now under consideration was not then before me, nor was the language used in that opinion chosen with reference to it.

A cadet who entered the Naval Academy a session before "new cadets of the fourth class" entered it, and whose present membership in the fourth class is due to a failure to pass an examination and not to the recency of his entry in the Academy, is as much an "older cadet" within the definition of the offense of "hazing" as those cadets who, entering the Academy with him and serving a term of equal length, have passed their examination and been advanced to classes senior to the fourth class.

I take it that "older cadets" maltreat "new cadets of the fourth class" not because of superior academic acquirements, but because their familiarity with the routine, the customs and personnel of the Naval Academy, enable them to deceive others who are without such acquaintance, and to combine with each other for the oppression of new-comers. Therefore an old cadet in the fourth class is as much within the reason of the law as one in a higher class.

Just how much longer a naval cadet must have been in the Academy than "new cadets of the fourth class" in order to be considered an "older cadet" I can not undertake from this record to determine.

All who are not "new cadets of the fourth class" and therefore liable to be victims of "hazing" should, I think, be held to be "old cadets" and capable of being the perpetrators of the offense.

I can not lay down any general rule for determining whether a cadet should be held a "new cadet of the fourth class" or an "old cadet." In most cases the distinction is clear; but in cases like these under consideration each must be decided by the proof. The length of service at the Academy which takes a cadet out of the one class and into the other must be determined by proof as to the local customs and traditions and the popular meaning of the terms used in the orders and regulations describing each class as understood in the Academy at the date of the passage of the act of 1874.

With this exposition of the statute, the courts-martial will have no difficulty, I trust, in deciding the cases as they arise.

I see nothing in the record that ousts the jurisdiction of the court-martial which corrected Messrs. Clinton and Fife, though I can not without more information as to the local meaning of the term "older cadet" or "old cadet," as contradistinguished from new cadets of the "fourth class," undertake to say that the evidence warranted the conclusion that these gentlemen belonged to the class designated in the orders and regulations of the Academy in force June 23, 1874, against hazing.

I inclose herewith the papers inclosed with your communication.

Respectfully,

A. H. GARLAND.

The SECRETARY OF THE NAVY.

CUSTOMS DUTIES.

Boxes in which safety and ordinary matches are usually imported are not dutiable as part of the merchandise which they contain, but (being composed in part of a material designed for a use other than that of a bona fide transportation of their contents) they are subject to the duty of 100 per centum ad valorem prescribed by the proviso in the seventh section of the act of March 3, 1883, chapter 121.

DEPARTMENT OF JUSTICE,
November 17, 1886.

SIR: I have considered your communication asking an opinion whether the boxes in which safety and ordinary matches are imported are dutiable as part of the merchandise they contain and at the same rate, or at one hundred per cent. ad valorem under the proviso of the seventh section of the act of the 3d of March, 1883 (22 Stat., 523).

By "boxes" I understand you to mean "*the usual and necessary*" boxes in which this species of merchandise is sold and imported.

I think it very clear that such boxes are not dutiable as part of the merchandise they contain, for it is the express mandate of the seventh section of the act referred to that "the value of usual and necessary sacks, crates, boxes, or coverings of any kind shall not be estimated" as part of the value of any goods entered for importation. Certainly there is no longer room for question on this point since the decision of the Supreme Court in *Oberteuffer* v. *Robertson* (116 U. S., 499).

It remains, therefore, to inquire whether the boxes in question are dutiable under the proviso of the seventh section of the act, which is in these words:

"If any packages, sacks, crates, boxes, or coverings of any kind shall be of any material of form designed to evade duties thereon, or designed for use otherwise than in the bona fied transportation of goods to the United States, the same shall be subject to a duty of one hundred per centum ad valorem upon the actual value of the same."

The boxes containing the safety matches have on the outside a prepared surface upon which the matches must be

scraped or ignition can not be produced, at least without great difficulty. The boxes containing the ordinary matches have on the outside a roughened surface, like sand-paper, by scraping on which this kind of matches may be ignited, although such scraping is not at all necessary to produce ignition, which may be caused by scraping on any surface offering the necessary resistance.

In each case the boxes are composed in part of a material designed for a use other than of "a bona fide transportation" of their contents. To be sure, in the case of ordinary matches this use is of a somewhat inconsiderable value, but still it is one which is designed and which, at the same time, has nothing to do with the transportation of the matches, and, therefore, brings the box of which it is an adjunct as clearly within the proviso as the prepared surface of the safety match-box brings it within the proviso.

In *United States* v. *Thurber* (28 Fed. Rep., 59) the court seems to lay down that to make the box dutiable under the proviso the additional use must appear to be "substantial, material, and valuable," but I have reached the conclusion that it is enough for that purpose to show that such use was designed to be unconnected with the transportation of the contents of the box. To go further and require that such use shall be "substantial, material, and valuable," is, it seems to me, to add to the statute.

It results, therefore, that the boxes in both cases are dutiable under the proviso of the seventh section of the act.

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

CONSTRUCTION OF BRIDGES ACROSS THE OHIO.

Under the provisions of the acts of December 17, 1872, chapter 4, and February 14, 1883, chapter 44, authorizing and regulating the construction of bridges over the Ohio River, the Secretary of War has power to disapprove of the plans of such bridges where he is of the opinion that they would unduly obstruct the navigation of the river.

The Covington and Cincinnati Elevated Railway Transportation and Bridge Company, authorized by act of May 20, 1886, chapter 363, to erect a bridge across the Ohio between Covington and Cincinnati, has no power under that act to sell the franchise granted to it thereby. Such power is not to be implied from the words "successors or assigns" in the act.

DEPARTMENT OF JUSTICE,
November 23, 1886.

SIR: I have received your letter of the 11th of November instant, in which you submit for my opinion the following questions:

"(1) Do the provisions of the general laws, viz, the acts of December 17, 1872, and February 14, 1883, which subject the plans of bridges over the Ohio River to the approval of the Secretary of War, give him authority to disapprove such plans if he is of opinion that they would unduly obstruct the navigation of the river.

"(2) Can the Railway Transfer and Bridge Company, authorized by the special act of Congress of May 20, 1886, sell its privileges thus obtained under the clause in the act to 'its successors or assigns.'"

In answer to the first: the act of the 14th of August, 1883 (22 Stat., 414), is an amendment to the act of the 17th of December, 1872, by which sections 2 and 4 of the last named act are "stricken out" and supplied. The whole act, as thus amended, is a general law, authorizing the construction of bridges across the Ohio River. The second section very minutely describes and limits the construction, the height, the length of principal span, and piers of the bridges authorized by the act. In all this elaborate description, the preservation of the navigation of the river is in the mind of the legislator. The fourth section requires an extensively published notice to be given to the public by any person about to build a bridge; the submission of the design and

drawings to the Secretary of War; with maps showing the topography of the banks, their lines, the bottom of the river above and below, the force and direction of the current at different stages of the water, with such other information as the Secretary of War may require for a full and satisfactory understanding of the subject. After all this shall have been done by the projectors, the Secretary is required to refer this information to a board of engineers, who are to go to the site of the bridge in that vicinity, give notice, hold public sessions, hear all objections to the bridge as proposed in the plans and maps, by any person interested. In case on examination the site is unfavorable, on report of the board of engineers, the Secretary is empowered to order changes in the bridge or its piers, guiding dikes, and any such auxiliary works as may be necessary. Throughout the whole act all its elaborate and circumstantial provisions fully and uncontrovertibly show that the intent of the law is that as little interruption shall be occasioned by the bridge to the free navigation of the river as is consistent with the exercise of the power to build, as granted by the act. This clear intent is to be recognized and effectuated in the interpretation and administration of this law. The second section prescribes generally the conditions subject to which the briged must be built. The fourth section authorizes the Secretary by order, after investigation, to add to these conditions in case the site be unfavorable. If all the general conditions prescribed by the act, and such additional ones as he may lawfully order, are complied with, his duty to approve does not follow as of course, regardless as to whether the performance of the conditions has been only one of mere form, and not substantially in accordance with the intent and purpose of the conditions. Before approving he should see that the intent as well as the form is recognized. When this is done, he should approve; when it is not, he should disapprove. He should demand as a condition of his approval that all the conditions should be so performed as that the purpose and intent of the conditions should be subserved. That purpose and intent are to prevent an undue interruption of navigation. Hence, he is authorized to disapprove any proposed bridge unless all the conditions, both

general and special, prescribed by the law, shall have been complied with according to the intent and purpose that the navigation of the river shall not be unduly obstructed. The opinion of one of my predecessors (14 opin., 254), cited and relied on by the party in interest here, relates merely to what considerations should influence the Secretary of War in his dealing with questions of this kind. And in its general summary of these duties (p. 258) the opinion would seem by strong implication to rather support the view I have expressed, and not to antagonize it. Hence the first inquiry is answered in the affirmative.

The act of the 20th of May, 1886, is: "*Be it enacted by the Senate and House of Representatives in Congress assembled*, That the Covington and Cincinnati Elevated Railway Transfer and Bridge Company, and its successors or assigns, are hereby authorized and empowered to erect a bridge across the Ohio River between Covington, Kentucky, and Cincinnati, Ohio, subject to the general law regulating the construction of bridges over the Ohio River: *Provided, however*, the said bridge shall not be of less elevation than the Covington and Cincinnati suspension bridge, and may be constructed without a pivot draw span."

The privilege given by this act is a franchise, pure and simple, granted to the corporation therein named. As is well stated in *Wood* v *Bedford and Bridgeport Railroad Company* (8 Phila. Rep., 94), a corporation "has no right to assign its franchise, either in whole or in part, unless specially authorized by law. The general canon of construction applicable to legislative grants of this branch, derogating as they do from common right and public policy, requires that the intention should be very manifest, if not unequivocally expressed; at all events, not dependent upon ambiguous phrases, rendering the implication doubtful." The same principle is announced in *Stewart's appeal* (56 Pa. State Rep., 522). In the case of *Branch* v *Jessup* (106 U. S., 484) the general principle is reserved as follows:

"We do not mean in the slightest degree to disaffirm the general rule that a corporation can not dispose of its franchise without legislative authority." The definition of a franchise which is given by Blackstone is "a royal privilege or

branch of the King's prerogative, subsisting in the hands of a subject." From its nature the privilege would indicate a personal trust. Being granted by a Sovereign it can not be extended by implication. There is no express power to assign found in the grant under consideration. The words "successors or assigns" in the act are only the ordinary words of limitation of an estate granted in perpetuity to a corporation, and as a power have no more force than the words "heirs and assigns" in an ordinary conveyance to an individual. No power to sell is to be implied from these words in such a grant. This comes within the well-known rule that grants of this character must be strictly construed. Sedgwick Constr., 291–296; *Rice* v *Railroad Company*, (1 Black, 358); *Tucker* v *Ferguson* (22 Wall., 527); *Fertilizing Company* v *Hyde Park* (97 U. S., 667). Hence the second inquiry is answered in the negative.

And the reasoning herein so far pursued compels an answer to your third question in the affirmative.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

CUSTOMS LAWS—CHARGES.

The cost of winding on spools, or skeining, yarn or thread, is one of the usual charges for preparing and packing the merchandise for transportation, which, by section 7 of the act of March 3, 1883, chapter 121, are not to be included as part of the dutiable value of such merchandise.

DEPARTMENT OF JUSTICE,
November 26, 1886.

SIR: Your communication of the 23d instant states: "It will be seen from the inclosed communication from the appraiser at Philadelphia that the charge for skeining, hanking, or lapping woolen yarns, and the charge for spooling or winding the thread on the spools, differ somewhat from the cost of the spools on which the thread is wound, and the cost of the parceling or tying in bundles of yarn. In the latter case the Department held by its decision of May 21,

1886 (Syn. 7533), that the skeining of the yarn constituting part of the finishing process, and the cost thereof, should be included in the dutiable value. I will thank you to return the inclosed letter of the appraiser at Philadelphia, with a statement of your opinion, under section 2, act of March 3, 1875, as to whether the ruling referred to by this Department should be reversed, and also as to whether the cost of the spooling of linen thread forms a part of the dutiable value of such merchandise."

The answer to this inquiry depends upon the determination of the question whether the skeining and winding on the spools is an element in the manufacture of the thread or yarn, or one of the actual or usual charges of putting up, preparing, and packing for transportation or shipment. In the former event, it would be subject to duty; in the latter, it would be only one of the charges imposed by section 2907, Rev. Stat., which in the case of *Oberteuffer* v. *Robertson* (116 U. S., 499) was repealed by the seventh section of the act of the 3d of March, 1883, and therefore not subject to duty. Whenever the thread or yarn is finished so that if the consumer, if present in the factory, would find all the uses to which the article finished was usually applied completely subserved without further addition or work, the process of manufacture is complete. The preparation beyond that point is intended to prevent destruction or detriment to the article in transportation from the point of manufacture to the consumer. The winding on the spools or in skeins does not add a single additional element to the goods, but it does prepare the goods as finished to be safely and conveniently transported. The winding and skeining therefore are within the range known as charges in section 2907, and the duty thereon was repealed.

The inclosure transmitted with yours is herewith returned.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

INDIAN CONTRACT.

Where a contract made by three attorneys-in-fact of certain persons of the Pottawatomie tribe of Indians with E., an attorney-at-law, for services of the latter, was not executed by one of the attorneys-in-fact until some months after it had been executed by the other two and by E., nor until after the services stipulated therefor had been performed by E.: *Held* that the Secretary of the Interior was not authorized to approve the contract or recognize the claim of E. for compensation thereunder.

DEPARTMENT OF JUSTICE,
December 4, 1886.

SIR: Your communication of the 1st instant touching a contract purporting to have been made by the attorneys-in-fact of certain persons of the Pottawatomie tribe of Indians with E. John Ellis as attorney-at-law for services rendered and to be rendered, with accompanying papers, is received. You wish to know whether, in my opinion, this contract is such a one as will authorize the Department of the Interior to recognize Mr. Ellis's claim for compensation thereunder as an attorney.

This subject-matter has been before this Department upon two previous occasions for opinions, which were given, but they did not involve the point here and now suggested. The question now is, whether the execution of the contract by Stephen Negonquett, *one of the attorneys-in-fact*, on the 23d day of November, 1886, after the contract had been executed by the two other named attorneys-in-fact, and by Mr. Ellis himself, and *after* the services stipulated for had been performed, is valid? Referring to the opinion I had the honor to render you on the 3d of November last, I find in it this expression: "It" (the contract) "should have been a good and valid contract from the beginning." I adhere to this view still, and I do not think that, by the law in question, there was any contract to operate under until there was a complete execution of it by all the attorneys-in-fact. I do not think that a waiting of two months or more by one of the named attorneys-in-fact before he attempts to execute the contract, and when the work sought for has been done, as is alleged, is permissible.

The relation of principal and agent is, by the law, rigidly

enforced in so far as the rights of the principal are to be interpreted away, and a stricter adherence to this rule, if possible, should be had when the rights of Indians, "the wards of the nation," are involved. A complete contract is required by the law before anything can be done under it, and as there is no waiver, exception, or qualification in the law modifying this requirement, the Department of the Interior can not make one. As the Supreme Court has said, speaking of its power in this respect: "We can not supply qualifications which the legislature has failed to express." (*Fox* v. *United States*, 95 U. S., 670.) There is no power given the Department by the law in mere "permissible language;" the language used, on the contrary, is without qualification. The duty is therefore mandatory, in every sense of the word (*Supervisors* v. *United States*, 4 Wall., 435). It is not pretended that these three attorneys-in-fact should have executed the contract at the same time, but it is held that they should have all executed it before any proceedings or steps were taken or had in the premises; and in this view of the matter the subsequent execution by Stephen Negonquett of this supposed contract did not cure the defect, and therefore you can not recognize Mr. Ellis's claim for compensation thereunder.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

INDIAN CONTRACT.

Secretary of the Interior has no power to approve the contract in the case presented for any purpose.

DEPARTMENT OF JUSTICE,
December 14, 1886.

SIR: Your letter of yesterday transmitting again to me a supposed contract between the band of Pottawatomie Indians and Mr. E. John Ellis for an opinion, has been received, and you propound to me the following inquiry: "Can I properly and legally approve of this contract," etc.

From the opinions, three in number, heretofore rendered

to you upon this subject, I am clearly of the opinion that you can not approve this contract for any purpose. It is useless to give additional reasons. You will find those already given in the opinions of recent date, to wit: September 9, 1886, November 3, 1886, and December 4, 1886.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

ABATEMENT OR REFUND OF DUTY.

The provisions of section 2984, Revised Statutes, authorizing the abatement or refund of duty on imported merchandise which, under the circumstances therein stated, is injured or destroyed by accidental fire or other casualty, extend to a loss caused by freezing.

DEPARTMENT OF JUSTICE,
January 7, 1887.

SIR: Your letter of the 30th of December, 1886, submits whether the owner or consignee of merchandise, which, while in the custody of the officers "in any public or private warehouse under bond, or in the appraiser's stores undergoing appraisal," is injured or destroyed by *freezing*, is entitled to the benefit of the provisions of section 2984 of the Revised Statutes. That section is as follows:

"The Secretary of the Treasury is hereby authorized, upon production of satisfactory proof to him of the actual [*industry*] [injury] or destruction, in whole or in part, of any merchandise, by accidental fire or other casualty, while the same remained in the custody of the officers of the customs in any public or private warehouse under bond, or in the appraiser's stores undergoing appraisal, or in pursuance of law or regulations of the Treasury Department, or while in transportation under bond from the port of entry to any other port in the United States, or while in the custody of the officers of the customs and not in bond, or while within the limits of any port of entry, and before the same have been landed under the supervision of the officers of the customs, to abate or refund, as the case may be, out of any moneys in the Treasury not otherwise appropriated, the amount of impost duties paid

or accruing thereupon; and likewise to cancel any warehouse bond or bonds, or enter satisfaction thereon in whole or in part as the case may be."

Where, under the circumstances set forth in the statute, the merchandise is "injured or destroyed by accidental fire or other casualty" the statute applies. The intent of the enactment is to relieve the owner or consignee from the payment of duty on merchandise in proportion as it has, by accidental fire or other unforeseen cause, been injured or destroyed, while actually or potentially in the custody of the officers of the customs in the discharge of their duty. It would be a great hardship on the merchant whose goods were destroyed by accidental fire while in the possession of the officers, to add to his misfortune by charging him duty on that which was a total loss, and as to which his capital and anticipated profits were both irretrievably gone. The hardship would be equally as great, if the loss under the like circumstances occurred by freezing, as by fire. The Government, by the enactment in recognition of a clear equity, declared that in proportion as the merchandise was injured or destroyed in the manner and under the circumstances as set forth in the statute the taxes thereon should be abated. The manner of the destruction which calls for such abatement is "by accidental fire, or other casualty." "Other casualty," in the connection used, is equivalent to "other unforeseen cause" or circumstance not to be guarded against by human agency and in which man takes no part. If the freezing which injures or destroys the merchandise occurs without the negligence, fault, or connivance of the importer, consignee, or owner, it is such a casualty as is contemplated by the statute and would come under the provisions of section 2984.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

ATTORNEY-GENERAL.

The Attorney-General will not interpret a regulation of practice made by the Commissioner of Patents for his own guidance and that of his subordinates, for the convenient, intelligent, and orderly disposal of the business of his office. Such regulations, which the heads of bureaus and Departments can make, modify, or annul at will, or enforce or waive, as seems expedient, may well be left for their interpretation to the head of the Department or bureau to which they pertain.

DEPARTMENT OF JUSTICE,
January 7, 1887.

SIR: Your reference of the 18th of December, 1886, submits for an expression of my views the question whether the Commissioner of Agriculture is the head of one of the Departments referred to in rule 62 of the Patent Office.

Section 356 of the Revised Statutes provides: "The head of any Executive Department may require the opinion of the Attorney-General on any *questions of law* arising in the administration of his Department."

By this enactment the Attorney-General is required and empowered officially to give his opinion on *questions of law* only. Rule No. 62 referred to is purely a rule of administrative practice, with reference to the classification and order of precedence in the consideration of cases in the Patent Office. No question is raised as to the power of the Commissioner, with the approval of the Secretary of the Interior, to make the rule, nor as to its legality. It is simply a request to interpret a regulation of practice made by the Commissioner of Patents for his own guidance and that of his subordinates, for the convenient, intelligent, and orderly disposal of the business of his office. Such a regulation, when not specially authorized or demanded by law, is not law in the sense in which that term is used in the statute above quoted. If every rule or regulation of such a character in all the different departments of the Government might be submitted to the Attorney-General for interpretation when doubts arose, it would unduly increase his labors as well as delay action while awaiting the opinion. Rules such as No. 62 referred to, which the officers of bureaus and departments can make or annul at will, or enforce or waive as seems expedient, may well be left for in-

terpretation to the administrative discretion of the department or bureau to which they pertain. I therefore herewith return your communication with the accompanying paper.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

SWAMP LAND INDEMNITY.

Under the provisions of the acts of March 2, 1855, chapter 147, and March 3, 1857, chapter 117, the State of Louisiana is entitled to indemnity for any swamp lands granted thereto by the act of March 2, 1849, chapter 87, which were sold by the United States between the date of this act and the 28th of September, 1850.

But as to such swamp lands as were excepted out of the grant made by the said act of 1849 (viz, "lands fronting on rivers, creeks, bayous, water courses," etc.), and as were first granted to that State by the act of September 28, 1850, chapter 84, it is entitled to indemnity only for those which have been sold by the United States since the 28th of September, 1850.

DEPARTMENT OF JUSTICE,
January 11, 1887.

SIR: Your letter of the 15th of December, 1886, submits whether, under the provisions of the act of the 2d of March, 1855, and the act of the 3d of March, 1857, known as the swamp land indemnity acts, the State of Louisiana is entitled to indemnity for such swamp lands as were sold by the United States between the 2d of March, 1849, and the 28th of September, 1850.

On the 2d of March, 1849, the United States granted the State of Louisiana "the whole of the swamp and overflowed lands" within her borders owned by the United States at that time "except lands fronting on rivers, creeks, bayous, water courses, etc., which had been surveyed." (9 Stat., 352.)

On the 28th of September, 1850 (9 Stat., 519), an act was passed of substantially the same tenor and effect, known as the Arkansas swamp land act, which by its fourth section applied to each of the other States of the Union in which swamp and overflowed lands existed, without the exception contained in the act of 1849 as to lands "fronting on rivers, creeks, bayous, water courses," etc. This last act was sub-

stantially a re-enactment of the act of the 2d of March, 1849, so far as Louisiana was concerned, with an extension of the grant in that act so as to include the lands which had been excluded by the exception in the former enactment, as to which it was a new and substantive grant on the 28th of September, 1850. Both these acts were grants *in præsenti* by which, from their respective dates, the title to the lands therein described became vested in the several States. (*Railroad* v. *Smith*, 9 Wall., 95; *French* v. *Fyan, et al.*, 93 U. S., 169; *Emigrant Company* v. *County of Wright*, 97 U. S., 339; *Martin* v. *Marks*, 97 U. S., 345; *Gaston* v. *Stott*, Oregon Acts and Decis., 1874, 534, 554; *Fletcher* v. *Pool*, 20 Ark., 100; *Hempstead* v. *Underhill*, *Ib.*, 346; *Branch* v. *Mitchell*, 24 *Ib.*, 431; *Daniel* v. *Purvis*, 50 Miss., 261.)

Notwithstanding these grants of the swamp lands to the States (by which they had become the owners of the lands, and the United States had been substantially divested of ownership and could convey no title thereto), after the passage of the respective acts, through some inadvertance or negligence of the officers of the United States, some of the swamp lands to which the United States had no sufficient title were sold to pre-emptors and others, and the consideration was received therefor. Although the United States could not be legally held as a warrantor as to the defective and void title thus conveyed, yet in equity and good conscience she would be bound to refund to each purchaser the purchase money received for the land. But, as many such purchasers had improved their lands, full justice could not be done them by the mere return of the purchase money. The States at any time could assert their title and eject the purchasers. To avoid this injustice and invest the purchasers with titles to the homes they had made under a void purchase from the United States, on the 2d of March, 1855, Congress passed an act entitled "An act for the relief of purchasers and locators of swamp and overflowed lands." (10 Stat., 634.) This statute is remedial, and should be interpreted liberally, so as to include whatever is within the mischief intended to be remedied. (Potter's Dwarris, 207.) The substance of the remedy was that the United States, instead of refunding to the purchasers the money which she

unjustly obtained from them, would pay it to the States who held the title and owned the land, and thereby save the land with its improvements to the purchasers, and indemnify the States for their loss with the money received. The second section, being the indemnity clause of the act, is as follows:

"That upon due proof by the authorized agent of the State or States before the Commissioner of the General Land Office that any of the lands purchased were swamp lands within the true intent and meaning of the act aforesaid, the purchase money shall be paid over to the said State or States; and where the land has been located by warrant or scrip, the said State or States shall be authorized to locate a quantity of like amount upon any of the public lands subject to entry at $1.25 per acre or less, and patent shall issue therefor upon the terms and conditions enumerated in the act: *Provided, however*, That the decisions of the Commissioner of the Land Office shall be approved by the Secretary of the Interior."

The first clause of the section provides that "Upon due proof that any of the lands purchased were swamp lands, within the *true intent and meaning* of the act aforesaid, the purchase money shall be paid over to the said State or States." The words "of the act aforesaid" above cited refer to the act of the 28th of September, 1850, as shown by the preceding section. Whenever the lands were within the intent and meaning of the description of swamp lands as contained in the act of 1850, the purchasers were entitled to the protection and the State to the indemnity of the act of 1855.

The description of swamp lands under the act of 1850 is found in the third section, and is: "All legal subdivisions, the greater part of which is wet and unfit for cultivation; or when the greater part of the subdivision is not of that character, the whole shall be excluded therefrom."

In the act of 1849 the description of swamp lands is: "Subject to overflow and unfit for cultivation, all legal subdivisions the greater part of which is of that character shall be included, but when the greater part of a subdivision is not of that character, the whole shall be excluded therefrom."

These definitions of swamp lands in the acts of 1849 and 1850 are substantially the same. Therefore all swamp lands

granted by the act of 1849 would be within the "intent and meaning" of the words "swamp lands" in the act of 1850. The consideration for the grants in the acts of 1849 and 1850 was the same. The errors committed by the officers of the United States against both grantees was the same in effect. The wrongs done to both classes of purchasers were the same. If Congress had intended to remedy the wrong and to relieve only the purchasers who had purchased from the United States titles granted to the States by the act of 1850, and leave those who stood in exactly the same relations, under circumstances exactly similar, to the mercy of the State of Louisiana or purchasers from her, doubtless, instead of using the language "within the intent and meaning of the act aforesaid" such unjust discrimination against those purchasers would have been indicated by fit words, such as "granted by the act aforesaid," or some other equivalent language. No such language is found in the act of 1855. On the contrary the language which is used is equivalent to "all who are subject to this same mischief shall have the benefit of the same remedy." The "intent" of the act was to give a good title to those to whom the United States had sold such lands, and the "meaning" was to indemnify the States by giving them for their lands she had sold the purchase money she had received therefor, and thereby do justice to both.

This view is enforced by legislative interpretation by the act of the 3d of March, 1857 (11 Stat., 251), by which the titles under the acts of 1849 and 1850 are confirmed as on the same footing, and by the proviso thereto the act of 1855 is extended to the third day of March, 1857, as to both as follows:

"*Provided, however*, That nothing in this act contained shall interfere with the provisions of the act of Congress entitled 'An act for the relief of purchasers of swamp and overflowed lands, approved March 2, 1855,' which shall be and is hereby continued in force and extended to all entries and locations of lands claimed as swamp lands made since its passage."

It is scarcely conceivable that Congress would extend the act of 1855 from the 2d day of March, 1855, to the 3d day of

March, 1857, as to lands in Louisiana, unless those lands within the "intent and meaning" of the act of 1855 were embraced in that act. It is ruled in a well-considered opinion of Attorney-General Speed, found in 11 Opin., 472, that the proviso to the act of 1857 should be interpreted as though attached to the act of 1855. If so attached, the language "an act approved March 2, 1855, shall be and is hereby continued in force and extended to *all* entries and locations of *lands claimed as swamp lands* made since its passage" must certainly embrace lands granted to Louisiana by the act of 1849. The departmental interpretation, which is entitled to great weight, has, in principle, been conformable to this view of the statute. In 3d vol. Land Decisions, page 396, an opinion of the Commissioner of the Land Office, approved by the Secretary of the Interior, dated the 12th of February, 1885, is found, which decides that the indemnity act of 1855 was applicable to Louisiana as to lands granted to that State by the act of 1849 and sold by the United States since the act of 1850. If that indemnity was payable to the State as to any of the lands granted by the act of 1849, the same principle would apply as well to those which were sold by the United States before 1850 as to those that were sold after; if the act of 1855 applied to any of the lands conveyed by the act of 1849 to Louisiana, it must, on the same principle, apply to all, for as to such lands the title was as fully vested in the State of Louisiana before the passage of the act of 1850 as it was after. Hence it is concluded that as to such lands as were granted to Louisiana by the act of 1849, the purchasers are entitled to the protection and the State to the indemnity for any such lands as were sold by the United States between the 2d of March, 1849, and the 28th of September, 1850, but as to such as were excepted out of the grant of 1849, and were first granted to Louisiana by the act of 1850, being the lands fronting on rivers, creeks, bayous, water-courses, etc., the State is only entitled to an indemnity after the passage of the act of the 28th of September, 1850.

The papers by you transmitted are herewith returned.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

FREE LIST.

Hair of the common goat, which is unfit for combing purposes, should be admitted free of duty under the provisions in the free list for hair of horses and cattle, and hair of all kinds not specifically enumerated, act of March 3, 1883, chapter 121.

DEPARTMENT OF JUSTICE,
January 15, 1887.

SIR: Your communication of the 7th instant submits for determination whether the hair of the common goat, which is unfit for combing purposes, and fit only for mixing mortar and other kindred purposes, is subject to duty under class 2 of Schedule K, "Wool and woolens."

The wools or hair of the alpaca goat enumerated in Schedule K are distinctly divided into three classes.

Class 2 embraces only "combing wools," among which are enumerated "the hair of the alpaca goat and other like animals." The words "and other like animals" in this clause should be interpreted with reference to the subject of the enactment, which is combing wools; for if all goat's hair was intended to be included, the word "goat" would not have been qualified and limited by the specific word "alpaca." The words "other like animals" mean animals producing hair or wool like that of the alpaca goat. They are intended to describe the taxable commodity, and not a genus of animals. Such hair as is described in yours should be admitted free, under the "provisions in the free list for hair of horses and cattle, and hair of all kinds not specifically enumerated."

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

LIGHT-HOUSE ESTABLISHMENT.

Neither the Light-House Board nor the collector of customs has a legal right to nominate assistant light-house keepers.

The Secretary of the Treasury is not restricted to such appointments as the Board recommends, but may appoint any one who, in his judgment, will best discharge the duties of the office.

Where a regulation, made under and within the power granted by section 4669, Revised Statutes, is regularly approved, neither the Board without the approval of the Secretary nor the Secretary without the approval of the Board can change it. But such regulation can not abridge or control in any manner the power of appointment conferred by law upon the Secretary.

DEPARTMENT OF JUSTICE,
January 15, 1887.

SIR: Your letter of the 12th instant submits for my opinion the following propositions:

"(1) Whether, under the laws and regulations governing the Light-House Establishment, the right to nominate assistant keepers of light-ships rests with the Light-House Board or with collectors of customs;

"(2) Whether a seaman can be legally nominated by the Board for promotion to assistant keeper of a light-ship, or whether such appointment, if made, must be deemed an original appointment;

"(3) Whether appointments and promotions in the Light-House Service must be restricted to such as the Board may recommend, or whether the Secretary of the Treasury may make such appointments and promotions independent of the recommendation of the Board; and

"(4) Whether the Secretary of the Treasury has power to amend or change the existing regulations of the Light-House Establishment without the concurrence of the Board."

In an opinion rendered on the 18th of January, 1886, upon examination of the powers of the Light-House Board to make regulations, after full consideration the conclusion was reached that "section 4669, Revised Statutes, confines the power of the Light-House Board to the adoption and enforcement of such regulations as have reference to the management and control of light keepers, inspectors, and employés for the purpose of securing responsibility from them, and for the further purpose of properly administering the Light-House

Establishment, but the statute does not authorize such Board to adopt and enforce regulations abridging or controlling in any manner the appointment of light-house keepers or other inferior officers, nor does it authorize such Board to designate such appointments. The authority to appoint is vested elsewhere, as indicated in this opinion."

If any power exists, only by virtue of regulations of the Board, by which the right to nominate is conferred on either the Light-House Board or the collector of customs, it is not a legal right, but a mere courtesy, as neither the Board nor the collector of customs can be legally authorized by a regulation, unauthorized by law, to abridge or control the power of the officer, intrusted by law with the duty to appoint, in the exercise of his appointing power. The interpretation of a regulation or regulations not authorized by law, and which, if they exist, have no legal force, and are obligatory or not at the option of the proper appointing officer, is not within my province, but must be left to the discretion of the proper appointing officer. Hence, to your first inquiry, the reply is that neither the Light-House Board nor the collector of customs has a *legal* right to nominate assistant keepers.

In answer to the third question, except when the power to nominate is expressly given by law, you are not restricted to such as the Board recommends, but may appoint any one who in your judgment (being otherwise qualified) will best discharge the duties of the office.

The first branch of the second inquiry is sufficiently answered as above. The second branch, as to whether the appointment of a seaman would be a new appointment or a promotion, requires the consideration of a question not involved in the former opinion. Promotion generally signifies an exaltation or advance from a lower to a higher rank or grade in the same general line of service under the same employer. If the seaman referred to in yours was, before the appointment, regularly in the Light-House Service, in a subordinate capacity as seaman, and that is in the same general line of service, such appointment to the higher grade would be deemed a promotion.

To the fourth inquiry submitted: Section 4669, Revised Statutes, empowers the Board, with the approval of the Sec-

retary of the Treasury, to make regulations. Regulations within the power thus granted, when made and approved, are until amended or altered obligatory. The Board, as a Board, with the approval of the Secretary, is authorized by the statute to amend or alter such regulations. Hence, after a regulation, within the power granted by the statute, is regularly made and approved, neither the Board without the approval of the Secretary, nor the Secretary without the action of the Board, can change such regulation. But, as announced in the former opinion as quoted, the power to make regulations does not extend to abridging or controlling in any manner the power of the Secretary in the appointment of such officers as by law is conferred upon him. If, then, any regulation does so abridge or control such power of appointment, it is beyond the regulating power of the Board, and the Secretary of the Treasury may disregard or conform to it as in his judgment may best conduce to the good of the service.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

CUSTOMS LAWS—IRON ORE.

Principles of law stated for determining what is comprehended by the terms "iron ore," as used in the act of March 3, 1883, chapter 121.

DEPARTMENT OF JUSTICE,
January 19, 1887.

SIR: Your letter of the 12th instant submits for consideration substantially the whole question, whether the word "iron ore" (as used in the tariff act of the 3d of March, 1883) is iron ore dried at a temperature of 212° Fah., or iron ore as it is delivered at the port of entry for weighing.

Thus broadly stated the response to the question would involve a determination of facts as well as law, which, if undertaken, would involve an assumption of power not by law committed to me. Upon the disputed facts I can not pass; but upon the facts found by you and the briefs of argument

made before you, it is not improper to announce such principles of law as may materially aid you in reaching a truthful result.

In an opinion rendered on the same subject on the 17th of September, 1886, the principle was declared that the iron ore of the statute was to be interpreted as the "iron ore of commerce." What the iron ore of commerce was, was left as a question of fact to be determined from knowledge possessed by or evidence submitted to you. The testimony laid before you was found to be inconsistent, the importer mainly testifying that ore dried at 212° Fah., is the iron ore of commerce; the home producers that ore as ordinarily delivered for weighing, is iron ore by its commercial designation. This discrepancy of testimony, according to classes, between witnesses who are presumed to be equally upright, would suggest that the statements of one or the other, or both, are to some degree influenced by interest, or that they each testified from a partial view of different facts, by giving different interpretations to the word "commerce." The uncertainty arising from this discrepancy of testimony, so far as it may arise from the influence of interest, may be overcome by calling upon those who buy both imported and home-produced iron ore. Such testimony would seem to be easily accessible, for where there is a seller, such as the importer or home producer, there must be a buyer, belonging to neither of the classes of sellers, who would apparently be disinterested. So far as the discrepancy in the testimony arises from the fact that the witnesses testified to different facts, arising from a different understanding of the words "iron ore of commerce," the weight of evidence can be determined by comparing the witnesses' understanding of the words with the true signification which should be given to them as used in the interpretation of customs cases. By the act, the duty is a specific one on iron ore.

"Iron ore" as thus used is generic, embracing all the different species of iron ore, regardless of their price, value, or accidental component chemical ingredients. The word "commerce" is to be understood as the commerce of our own country as it is understood by English-speaking Americans. It, too, is to be understood in its generic sense, with this exception that it is limited to our own commerce in our own markets,

and embraces both foreign and domestic. As expressed by Justice Story in the *Two Hundred Chests of Tea* (9 Wheat., 480): "Whether a particular article were designated by one name or another in the country of its origin, or whether it were a simple or mixed substance, was of no importance in the view of the legislature. It did not suppose our merchants to be naturalists or geologists or botanists; it applied its attention to the description of articles as they derived their appellations in our own markets, in our domestic as well as in our foreign traffic."

The same thought is substantially repeated in the case of *Barlow* v. *The United States* (7 Pet., 410), as follows: "Congress must be presumed to use the words in their known commercial sense, not indeed in that of foreign countries, if it should differ from our own, but that known in our own trade, foreign and domestic." The same view is corroborated in the case of *Elliott* v. *Swartwout* (10 Pet., 151).

"Commerce," as used, then, in this connection, is to be understood in its comprehensive sense of buying, selling, and exchange in the general sales or traffic of our own markets; but especial contracts in which the term "iron ore" is defined in the contract by special description or qualifying words would be no evidence of the general commercial signification of the term.

But if, from the application of the facts to these general principles, you are still unable to determine from the evidence before you what state the ore must be in to be the iron ore of commerce, other considerations may aid you. The intent of the law-maker is the law, and outside of the words some reflected light may be invoked. Other earlier statutes have imposed customs duties on iron-ore which have been collected, probably for a very considerable time before the passage of the act of 1883. In the administration of such laws, doubtless, departmental practice has established what was understood and acted upon as to the collection of customs on iron-ore. If that practice and departmental interpretation were of long standing, and uniform, prior to 1883, if the interpretation had been false and vicious it is to be presumed Congress would have guarded against a like interpretation upon the passage of the act under consideration. But, as no such guards

are found indicating a repudiation of any prior interpretation, the presumption is very strong that the legislator, in the enactment of the act of the 3d of March, 1883, adopted and understood the iron-ore of commerce to be what the departmental practice had established it. On the 8th of September, 1879, a decision was rendered by the Secretary of the Treasury, No. 4183, ruling that "the total quantity landed as shown by the weigher's return * * * without allowance for increase of weight from moisture on certain iron-ore" was subject to duty. If this decision was in accordance with departmental practice prior to that date, and was adhered to afterwards as the rule, it would be a pregnant fact to guide you to the same conclusion.

The result of the legal principle above considered is substantially—

(1) In customs laws, as in all others, the intent of the lawmakers is the law.

(2) Where, in the expression of that intent, a name is used describing an article which has a well-established commercial signification, that commercial signification should be adopted.

(3) When the name is general and the tariff specific, it embraces the whole class, and questions of price, value, or accidental chemical components are immaterial.

(4) The commercial signification of a name is that which those engaged in foreign and domestic sale, purchase, and exchange generally adopt to describe the article.

(5) If it be disputed what this commercial designation embraces it is to be determined upon a clear preponderance of evidence.

(6) The ordinary rules of evidence are to be applied with reference to interest, character, and weight of testimony, to be received from those engaged in or familiar with commerce, trade, and traffic in the article.

(7) Where a clear preponderance of evidence can not be adduced, departmental construction tacitly approved by Congressional recognition should turn the scale and be accepted as sufficient evidence of the legislative intent.

I am, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

CUSTOMS DUTIES.

Wool-tops, imported in the ordinary condition of scoured wool, are not subject to the penal double duty imposed by the act of March 3, 1883, chapter 121, on "wool of the sheep, etc., which shall be imported in any other than ordinary condition as now and heretofore practiced," etc.

DEPARTMENT OF JUSTICE,
January 21, 1887.

SIR: Your communication of the 21st of December, 1886, with the accompanying papers, submits whether "wool-tops" which "are the result of the combing process, in which the long hairs are separated from the short hairs, the long hairs being known as wool-tops while the short hairs are known as noils," should be subjected to double duty under the provisions of clause No. 356, Tariff Index. The clause reads:

"The duty on wools of the first class which shall be imported washed shall be twice the amount of the duty to which they would be subjected if imported unwashed; and the duty on wools of all classes which shall be imported scoured shall be three times the duty to which they would be subjected if imported unwashed. The duty on wool of the sheep or hair of the alpaca goat, and other like animals, which shall be imported in any other than ordinary condition as now and heretofore practiced, or which shall be changed in its character or condition for the purpose of evading the duty, or which shall be reduced in value by the admixture of dirt or any other foreign substance, shall be twice the duty to which it would be otherwise subjected."

The subject of this clause is with reference to the condition of wools as washed, unwashed, and scoured. The words "in any other than ordinary condition" in the clause must be interpreted with reference to the subject to which the clause refers, as to the condition of the wool as to being washed, unwashed, or scoured. The double duty imposed would indicate a purpose of the legislator to subject to a penalty goods in any such condition as to washing or scouring as would be calculated to evade the legitimate duty charged on such a class of goods, or which the importer purposely intended and attempted to bring in on a lower classification than the proper

one. The appraiser reports that at, and a long time before, the passage of the act of the 3d of March, 1883, "wool was imported in the form of tops." It is undisputed that the wool-tops in this case were in the "ordinary condition" of scoured wool. I am therefore of the opinion that the decisions of the Department of the Treasury, S. 4777 and S. 7217, imposing the double duty should be modified and changed so that the wool referred to in yours and other similar importations be relieved from the penal double duty.

I return your inclosures herewith.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

CUSTOMS DUTIES.

Mahogany boards and planks are not dutiable as manufactures of mahogany, under the clause in Schedule D (act of March 3, 1883, chapter 121) imposing a duty on "manufactures of cedar wood," etc.; but they fall within the designation of lumber in the clause in same schedule which imposes a duty on "sawed boards, planks, deals," etc., and are dutiable under the latter clause.

DEPARTMENT OF JUSTICE,
January 21, 1887.

SIR: Your letter of the 12th instant submits the inquiry "whether mahogany boards and planks fall within the designation of lumber, within the provisions of Tariff Index No. 219, which is:

"Sawed boards, planks, deals, and other lumber, of white wood, sycamore, and bass wood, one dollar per thousand feet, board measure. All other articles of sawed lumber, two dollars per thousand feet, board measure; but when lumber of any sort is planed or finished, in addition to the rates herein provided there shall be levied and paid for each side so planed or finished fifty cents for each one thousand feet, board measure;"

Or whether such boards or plank are to be construed as "manufactures of mahogany," within the meaning of Tariff Index No. 232, which is as follows:

"Manufactures of cedar wood, granadilla, ebony, mahog-

any, rosewood, and satin wood, thirty-five per cent. ad valorem."

Both of these clauses occur in Schedule D, "wood and wooden wares." Throughout that schedule the different degrees of advancement in which the article therein enumerated may be found in process of manufacture, from the crude material to the perfected product, are used as a basis of classification. The timber, the lumber, the lumber planed, the unfinished final product, and the finished product give rise to different classifications and rates of duty, the rates increasing as the process of manufacture advances, the rate imposed on the import described in Tariff Index No. 232, "manufactures of cedar wood, granadilla, ebony, mahogany," etc., being the highest, and corresponding with the other clauses of the schedule, Nos. 230 and 233, as the perfected product. This would indicate that at least some degree of advancement in the process of manufacture was intended in clause No. 232 beyond the mere crude material intended for nothing special, except for sale or to be manufactured. The word "manufactures" in this clause is intended to describe an article that has been made or formed by hand or machinery for some known and specific use or purpose, either as a whole or a finished part or element in such an article. When a mahogany tree is cut down and cut in appropriate lengths for transportation, and its bark or useless excrescences removed by ax or saw, it might, in some possible sense, be called a manufacture, but the statute did not intend to impose the highest rate of duty on such an article. A distinction is made by Justice Woodbury in the case of *Lawrence* v. *Allen* (7 How., 785), as follows:

"Here, the juice or sap of the india-rubber tree while liquid or in its milky state, whether then called caoutchouc or some other name, is still a natural substance and in its natural form; and in one sense, and to a certain extent, its being hardened and changed in color no less than consistency and bulk, by fire and evaporation, whatever new form it may then be turned into is a manufacture * * * yet, from the words of the law, as well as its design, it is manifest that the india-rubber is not meant to be taxed as a manufacture, though so hardened and changed, unless at the same time *it is put into*

a shape which is suitable for use and adapted with a design to be used in a way that is calculated to rival some domestic manufacture here. *rather than merely to furnish a raw material in a more portable, useful, and convenient form for other manufactures here.* In the latter case, within the policy and purpose of the tariff law yielding protection, it is manufactured, or in other words, *not made abroad for use in its existing form, except as a raw material*, like pig-iron, or pig-lead."

To the same effect see *United States* v. *Potts* (5 Cranch, 284). This distinction would seem to be entirely applicable to the question submitted. The mahogany boards and plank described in yours are chiefly designed for no particular design, purpose, or use, only "to furnish a raw material in a more portable, useful, and convenient form for other manufactures." Hence they are not dutiable as manufactures of mahogany under Tariff Index No. 232.

Clause 219, Tariff Index, divides lumber into two classes, and imposes on the first class a duty of $1 per thousand feet and on the second $2 per thousand. The first class in this clause describes by name the less valuable character of lumber, and the second class by general description embraces the more valuable. Among the latter, mahogany, cherry, walnut, and other valuable woods, doubtless are intended to be comprised. The imposition of duties, according to state of advancement in this schedule between the growing timber and the perfected manufacture, would clearly indicate that the ordinary American signification of the words "timber" and "lumber" is adopted by the law-makers, by which timber is generally understood to mean trees felled and unfelled, and the larger sills, beams, plates, etc., for houses, or corresponding materials for ships and other large structures. Lumber, as so understood, is a further advancement in the preparation of the material for convenience and economy in transportation, and embraces such materials as are described in clause No. 219, Tariff Index, as "sawed boards, plank deals," joist, studdings, etc. Lumber, as so understood, is generic with reference to the kind of wood of which it may be composed, and if intended to be limited to any species of wood is qualified by the name of the wood, as "pine lumber," "cherry lumber," "ash lumber," etc. Hence, the mahogany lumber re-

ferred to in yours is included in the generic term "lumber," and would, when merely sawed into boards and planks, come within the clause No. 219, Tariff Index, and is dutiable accordingly.

The inclosures transmitted with yours are herewith returned.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

FREE LIST.

A steam-pump and boring apparatus, used in deep prospecting for oil and coal, with connecting iron tubes, etc., brought into this country by a coal and petroleum seeker for the purpose of pursuing his profession here, do not come within the meaning and intent of the clause in the act of March 3, 1883, chapter 121, exempting from duty "implements, instruments, and tools of trade, occupation, or employment of persons arriving in the United States," and should not be admitted free.

DEPARTMENT OF JUSTICE,
January 29, 1887.

SIR: Your letter of the 21st instant submits whether "a steam-pump and a drilling and boring apparatus, such as is used for deep prospecting for oil and coal; certain iron tubes, varying in length from 12 to 25 feet each, and tools for use in connection therewith; which articles were brought into the United States by Leon Mulet, who is represented to be a coal and petroleum seeker, and brought them with him for the purpose of pursuing his profession in this country," should be admitted free under the provisions of the clause of the tariff act, Tariff Index No. 15, which is as follows:

"Wearing apparel in actual use and other personal effects (not merchandise), professional books, implements, instruments, and tools of trade, occupation, or employment of persons arriving in the United States; but this section shall not be construed to include machinery or other articles imported for use in any manufacturing establishment or for sale."

It is claimed that the importation should be admitted free as the "implements, instruments, and tools of trade, occu-

pation, or employment of persons arriving in the United States."

The boring of artesian wells is closely allied in the variety of machinery, tools, apparatus, implements, appliances, and materials, to the driving of tunnels, engines, piping, tubing, pumps, reamers, bits, steam-boilers, cables, ropes, packing; and a very large assortment of different classes of manufacture are used and are essential to its intelligent prosecution. In the use of all this material the employment of several persons of varied acquirements and occupations is necessary. The steam-pump, piping, etc., are not intended for manual use, but constitute, when combined, usually a large and powerful structure, which in no sense could be called a mere "tool, implement, or instrument." The profession which with this machinery undertakes to furnish or control the necessary structure, material, and human help is that of a constructor or superintendent. The clause in question was not intended to receive so broad an interpretation. From its context it would seem to apply to such implements, instruments, and tools as were intended for the actual personal use of the immigrant, or those following one and the same trade or occupation, under his personal supervision or employment. The employés in the boring of an artesian well belong to different occupations, varying from the common laborer to the skilled blacksmith, engineer, or driller. The implements, tools, apparatus, and structures for all the different classes of work, do not come within any single recognized trade, occupation, or employment. It is possible an exceptionally skilled mechanic or machinist might be capable of successfully working at each, but a true interpretation of the customs laws can not be based upon such exceptional cases; and, in my opinion, the pump, connecting pipes, etc., referred to in yours, should not be recognized as coming within the intent of the clause of the act above quoted.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

TERRITORIAL LEGISLATURE.

In the act of June 19, 1878, chapter 329, which repeals section 1861, Revised Statues, the clause, "one enrolling and engrossing clerk, at $5 per day," is to be construed as providing for the employment of but one clerk at the per diem mentioned.

DEPARTMENT OF JUSTICE,
February 8, 1887.

SIR: In reply to yours of the 29th ultimo, in which my attention is directed to the act of June 19, 1878 (Stat. L., vol. 20, 193), under the head "Government in the Territories," repealing section 1861, Revised Statutes, I beg to say:

Section 1861 reads thus: "The subordinate officers of each branch of every legislative assembly shall consist of one chief clerk, who shall receive a compensation of eight dollars per day, and of one assistant clerk, one enrolling clerk, one engrossing clerk, one sergeant-at-arms, one door-keeper, one messenger, and one watchman, who shall each receive a compensation of five dollars per day during the sessions, and no charge for a greater number of officers and attendants, or any larger per diem, shall be allowed or paid by the United States to any Territory."

The repealing section of 1878 provides: "That the subordinate officers of each branch of said Territorial legislatures shall consist of one chief clerk, who shall receive a compensation of six dollars per day; one enrolling and engrossing clerk, at five dollars per day; sergeant-at-arms and door-keeper, at five dollars per day; a messenger and watchman, at four dollars per day each; and one chaplain at one dollar and fifty cents per day."

Is the copulative "and" disjunctive or conjunctive in meaning in these phrases?

Section 1861 enumerates "one enrolling clerk, one engrossing clerk, at five dollars per day," and makes provision for the payment of both.

It is right to interpret the word "and" with a disjunctive meaning when such meaning entirely coincides with the rest of the statute and with the evident intention of the legislature. If there is evidence that a disjunctive meaning does not harmonize with the whole statute, and does not repre-

sent the intention of the legislature, then such meaning is not admissible.

The repealing act aims at a reduction of United States expenses, and this is the controlling idea. Another paragraph of this section provides for "one messenger and watchman at four dollars per day *each*." The word "each" makes the difference—being for two persons "one messenger and watchman." The word "each" was not used after "one enrolling and engrossing clerk."

If it intended to pay $5 to an enrolling clerk and $5 to an engrossing clerk, it was its duty to use similar language, namely, "one enrolling and one engrossing clerk at $5 per day *each*."

The legislature probably meant just what it said.

Using the punctuation as it stands, there is no doubt that this is the meaning of the legislature. It is better for the accounting officers of the Treasury to adopt this punctuation as mandatory in the settlement of Territorial accounts; and it is better therefore to avoid misleading a disbursing agent into a loss, and this idea should prevail with the Territorial officers.

This practical conclusion may not, however, be considered the legitimate conclusion.

Does this punctuation express the meaning of the legislature?

The Supreme Court (105 U. S., 34, last paragraph) quotes the opinion of Lord Kenyon that "courts in construing acts of Parliament or deeds should read them with such stops as will give effect to the whole."

Applying this to the text in question, it will be seen that while this printed punctuation gives "effect to the whole" another punctuation leads to an opposite conclusion.

If punctuation be disregarded the provision will read:

"That the subordinate officers of each branch of said Territorial legislatures shall consist of one chief clerk who shall receive a compensation of six dollars per day one enrolling and engrossing clerk five dollars per day sergeant-at-arms and door-keeper at five dollars per day a messenger and watchman at four dollars per day each."

This reading assigns a per diem of $5 each to an enrolling

clerk and an engrossing clerk—and conflicts with no language of the act—and it also gives "effect to the whole."

In this alternative of construction another criterion must be used, and that is the intention of the legislature, and that being plainly to reduce expenses it must be determined the law provides for only one clerk to enroll and engross at Government expense.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

CHINESE EXCLUSION ACT.

Body servants or nurses (Chinese) are not persons "other than laborers" within the meaning of section 6 of the act of May 6, 1882, chapter 126, as amended by the act of July 5, 1884, chapter 220, when they come to this country to ply their vocations, and are excluded.

Where, however, such servants or nurses accompany visitors entitled to enter the United States, and only remain here temporarily during the stay of such visitors, they do not fall within the scope of the legislation referred to.

DEPARTMENT OF JUSTICE,
February 14, 1887.

SIR: In reply to your communication submitting for opinion the following questions:

"(1) Whether body servants or nurses may be considered as persons 'other than laborers' within the meaning of section 6; and (2) whether Chinese persons, laborers or not, coming into the United States as servants or nurses in the service of temporary visitors other than those mentioned in section 13 may properly be considered as 'in transit merely across the territory of the United States,' within the meaning of these terms, as used in the opinion of the United States Attorney-General referred to in the inclosed circular of January 23, 1883;"

I have the honor to submit the following opinion:

In answer to the first question I have to say that Chinese "body servants or nurses" are not persons other than laborers, within the meaning of section 6 of the act of 1882, as amended by the act of 1884, entitled "An act to execute certain treaty stipulations relating to Chinese," when such

"body servants or nurses" come within the United States to ply their vocations in competition with our own people similarly employed.

In answer to the second question, I beg to submit that Chinese persons accompanying, as servants or nurses, visitors entitled to enter the United States, and only temporarily remaining here during the stay of such visitors, whether to be regarded as "in transit merely across the territory of the United States," within the meaning of the opinion of Mr. Attorney-General Brewster of the 26th December, 1882, or not, they fall within a description of Chinese laborers who, according to the reasoning of that opinion, were not intended to be excluded from the country by the legislation above mentioned.

According to the opinion of my predecessor, it was the Chinese laborer, who came to our shores for the purpose of exercising his calling as laborer in competition with our own labor, that was intended to be excluded as a disturbing element. But it can not be said, in my opinion (concurring as I do in the views of my predecessor, whose reasoning I need not repeat) that a Chinese servant accompanying a temporary visitor to this country belongs to that class of Chinese laborers against whom our ports are closed as endangering "the good order of certain localities."

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

DRAGOON BARRACKS LOT AT ST. AUGUSTINE.

The piece of land known as the Dragoon Barracks lot, in St. Augustine, Fla., and the buildings thereon, being the property of the United States, may be appraised and disposed of in the manner provided by the second and third sections of the act of July 5, 1884, chapter 214.

DEPARTMENT OF JUSTICE,

February 15, 1887.

SIR: I have considered the communication of the assistant commissioner of the General Land Office, and other papers, relative to the Dragoon Barracks lot in St. Augustine, Fla., which were referred to me by you on the 28th ultimo.

By these papers it appears that said lot was set apart for military purposes under the act of June 28, 1832, chapter 152, and that recently, in accordance with the provisions of the act of July 5, 1884, chapter 214, it has been turned over to the Secretary of the Interior for disposition under the latter act. In 1869 or 1870 a frame building was erected thereon by the Freedmen's Bureau for school purposes, and subsequently a cottage was built upon the premises for the accommodation of the teachers of the school, which has been turned over to the American Missionary Society for its use. This, however, did not alter the purpose of the reservation from what it originally was. It still remained a military reservation, and as such came within the operation of the act of 1884.

Assuming, then, that the ownership of the buildings mentioned, as well as the ownership of the land, is in the United States, the whole of the property may be appraised and disposed of in the manner provided by the second and third sections of that act. On the other hand, if the ownership of the buildings is not in the United States, but only that of the land, I am nevertheless of the opinion that the latter may be appraised and disposed of as provided by the second section of the same act. Of course, in such case, the proprietors of the buildings should be notified to remove them from the premises.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

SEIZURES IN THE INDIAN COUNTRY.

Where property is seized by the military authorities in the Indian country for violation of the laws relating to the Indians, on or as soon as practicable after report is made to the United States attorney it should be placed in the custody of the proper civil officers.

The provision of section 3086, Revised Statutes, by which property seized under any law relating to the customs is left in the custody of the collector or principal officer of the customs of the district, is not to be considered as embraced in the proceedings contemplated in section 2125 Revised Statutes, so as to permit the military employed in making seizures to retain the custody of the property to abide adjudication.

Seizures in the Indian Country.

DEPARTMENT OF JUSTICE,
February 16, 1887.

SIR: Your letter of the 8th instant requests my opinion on the following question, contained in the communication of the acting judge advocate of the Department of the Missouri:

"In cases of arrest in the Indian territories, where civil proceedings only result, and when it is not deemed expedient to transport the prisoners arrested to the seat of the district court at Wichita, Kans., would it not be proper to hold the goods authorized by law to be seized, making to the district attorney the report required by section 3086, Revised Statutes (customs officers), and hold these goods in custody abiding the action of the civil authorities?"

Section 2137, Revised Statutes, provides that the traps, guns, ammunition, and peltries of persons found hunting, who are unauthorized to hunt or trap on Indian reservations, shall be forfeited.

Section 2150 authorizes the President to employ the military to make such seizures as are authorized by law in the Indian country.

Section 2125 provides: "When goods or other property shall be seized for any violation of this title (Indians), it shall be lawful for the person prosecuting on behalf of the United States to proceed against such goods or other property in the manner directed to be observed in the case of goods, wares, or merchandise brought into the United States in violation of the revenue laws."

Section 3086 declares that "all merchandise or property of any kind seized under the provisions of any law of the United States relating to the customs shall, unless otherwise provided for by law, be placed and remain in the custody of the collector or other principal officer of the customs of the district in which the seizure shall be made, to abide adjudication by the proper tribunal or other disposition according to law."

The seizure suggested by the inquiry is the taking possession, without legal process, by the military forces, of the property believed by the Government officer or agent to be subject to forfeiture. This possession without process is in-

tended to be limited in time to such reasonable period as may be necessary to obtain legal process to determine by judicial proceedings in the civil courts whether the goods seized are liable to forfeiture. The proceedings in the civil courts are *in rem*, which implies the property to be passed upon is in the possession of the court, actually or constructively. Hence, under the revenue laws of the United States, in interpreting the provisions of the sixty-ninth section of the revenue act of 1799 (1 Stat. L., 678), in the case of *Ex parte Hoyt, collector* (13 Peters, 279), it was ruled: "The collector is not entitled to the custody of the goods seized under the collection act of 1799 any longer than until proper proceedings have been instituted under the eighty-ninth section of that act to ascertain whether they are forfeited."

This decision would, without further discussion, answer the inquiry submitted, were it not that section 3086, which supplied the place of the sixty-ninth section of the act of 1799, differs from it in that it expressly provides that the merchandise seized shall "remain in the custody of the collector or other principal officer of the customs of the district in which the seizure shall be made, to abide adjudication by the proper tribunal, or other disposition according to law."

But this change in the law of 1799 does not prescribe that the person or officer who makes the seizures shall retain the custody, but limits it expressly to the collector or the principal officer of the customs, both of whom are local and bonded officers. If, then, the military who make the seizure are to retain the custody of the property seized to abide official adjudication, it must be on some other ground than that the military forces were employed in the seizure; for, regardless of the fact as to whom the seizure may be made by, the collector or principal officer of customs becomes the custodian. No other sufficient reason exists. After the seizure, all proceedings as to the property are carried on by the civil officers of the Government. The employment of the military forces by the President to make the seizure, authorized as it is by the statute, is substantially the employment of the military outside of the ordinary duties of the Army, in a civil or quasi-civil duty.

The residence of the military forces is constantly liable to

change, and that change may be sudden and to distant points, outside of the jurisdiction of the court where the rightfulness of the seizure is required by law to be determined. The property seized or its proceeds, from the nature of the proceeding, must be so secured as to be constantly subject to the direct commands, orders, and decrees of the proper court, and in such hands that a failure to obey such orders or decrees can be directly and immediately punished by the court. Were the custody of the property left in the hands of the military forces, the danger of misunderstanding and collision between the civil and military authorities would be incurred. The possibility that the property might suddenly be carried beyond the jurisdiction of the court would be involved.

From these considerations it is concluded that the special provision of section 3086, by which the property seized is left in the custody of the collector or principal officer of the customs for violation of the revenue service, is not to be considered as embraced in the proceedings contemplated in section 2125, so as to permit the military forces employed in making seizures to retain the custody of the property to abide adjudication, but that on or as soon as is reasonably practicable, after report is made to the United States district attorney, the property should be placed in the custody of the proper civil officer.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

INTEREST ON JUDGMENTS OF THE COURT OF CLAIMS.

A judgment against the United States for the sum of $44,800.74 was given by the Court of Claims in favor of a claimant on April 20, 1885, and on same day the latter presented this judgment to the Treasury Department for payment. On July 14, 1885, the United States were allowed an appeal to the Supreme Court, and on the next day a cross appeal to the Supreme Court was allowed the claimant. On January 31, 1887, the judgment was reversed by the Supreme Court, and a mandate subsequently issued therefrom directing the Court of Claims to enter judgment in favor of the claimant for the sum of $130,196.98.

Interest on Judgments of the Court of Claims.

Pursuant to such mandate judgment for this sum was entered by the Court of Claims on February 10, 1887, and claimant thereupon presented the judgment so entered to the Treasury Department for payment, demanding interest on the latter sum from April 20, 1885, at 5 per cent. per annum: *Held* that as the judgment of the Court of Claims was not *affirmed*, but on the contrary was *reversed* by the Supreme Court, interest is not allowable thereon under the provisions of section 1090, Revised Statutes.

Only such judgments of the Court of Claims as have been appealed from to the Supreme Court and affirmed by the latter are interest-bearing under that section, and they become interest-bearing from the date of their presentation in good faith for *payment*.

Semble that a presentation made by a claimant who afterwards takes an appeal from the judgment is of no avail.

DEPARTMENT OF JUSTICE,
February 17, 1887.

SIR: Your letter of the 10th instant, submits the following:

"On the 20th day of April, 1885, in the Court of Claims, the Pacific Railroad, claimant, recovered a judgment against the United States for the sum of $44,800.74. On the 14th day of July, 1885, the United States applied for and gave notice of appeal from said judgment to the Supreme Court, which application was on the same day fully allowed by the Chief-Justice of the Court of Claims. On the 15th day of July, 1885, the claimant made a similar application that was also allowed. On the 20th day of April, 1885, the claimant presented this judgment to the Treasury Department for payment, and, on the 11th day of May, 1886, the same was reported to Congress for an appropriation, and a sufficient sum was appropriated to pay the same, without interest, which sum is now available for that purpose. These appeals, Nos. 728 and 1303 respectively, were duly docketed in the Supreme Court and prosecuted to a hearing therein, and on the 31st day of January, 1887, the judgment of the Court of Claims was reversed, and a mandate ordered directing the Court of Claims to enter judgment in favor of the claimant for the full amount of the claim, viz, $130,196.98. On the 10th day of February, 1887, judgment on the mandate was entered in the Court of Claims, and the judgment thereon presented for payment. The claimant now demands interest on the latter sum from the 20th day of April, 1885, the date

of the first judgment in the Court of Claims, at 5 per centum per annum, and asks the Department that a recommendation be made to Congress that an appropriation be made to cover such interest. As a matter of law, based on the foregoing facts and existing statutes, is the claimant entitled to any interest whatever; and if so, for what sum, and for what period?"

The general rule is, that the Government does not pay interest. The exceptions to this rule are, when interest is provided for specifically by lawful contract or by express statute law. The canon of construction, that all laws which give away public money are to be construed strictly against the party to whom it is given, must be applied in the construction of statutes allowing interest against the Government. The statute allowing interest on judgments of the Court of Claims, applicable to the questions presented in your letter, is section 1090, Revised Statutes, viz: "In cases where the judgment appealed from is in favor of the claimant, and the same is affirmed by the Supreme Court, interest thereon at the rate of 5 per centum shall be allowed from the date of its presentation to the Secretary of the Treasury for payment as aforesaid, but no interest shall be allowed subsequent to the affirmance unless presented for payment to the Secretary of the Treasury as aforesaid."

The clause "as aforesaid," twice occurring in thise section, refers to the preceding section (1089), which fixes what judgments of the Court of Claims shall be paid by the Secretary of the Treasury, and what evidence shall be presented to him before he is warranted in making payment. This section divides the judgments of the Court of Claims into two classes: the first, those which are not appealed to the Supreme Court; and second, those which are appealed and affirmed. Section 1090 allows interest on the latter class only. Judgments of this class affirmed, become interest-bearing from the date they are certified in legal form and duly presented by the claimant *for payment*. The necessary elements of the indebtedness fixed by the statute authorizing the payment of interest by the Government are:

(1) It must be a judgment of the Court of Claims.

(2) It must be appealed to the Supreme Court.

(3) It must be affirmed by the Supreme Court.

(4) It must be a final judgment of the Court of Claims.

(5) It must be presented duly certified for payment.

Until all these requisites have been complied with, the judgment bears no interest. The facts stated by you show that the claim presented is a judgment of the Court of Claims, and that it was appealed both by the United States and the claimant to the Supreme Court. The first two conditions are complied with. The third, under the facts stated and certificate presented, is not fulfilled. The certificate presented by the claimant, by virtue of which he demands interest, is as follows: "At a Court of Claims held in the city of Washington on the 9th day of February, 1887, in the cause aforesaid, a mandate of the Supreme Court of the United States was filed *reversing* the judgment of the Court of Claims rendered on the 20th day of April, 1885, for the claimant in the sum of $44,800.74, and directing that judgment be entered for the full amount claimed by said railway company; and, in pursuance of said mandate, the court now orders, adjudges, and decrees that the said claimant, the Pacific Railway Company, do have and recover of and from the United States the sum of $130,196.98."

This copy of the judgment is all you have before you. It is all the statute requires you shall have to act upon. The statute says you shall only pay interest on judgments affirmed. The certified copy of the judgment shows this judgment was reversed. It is not permissible to take such liberties with the language of the statute as to interpret the word "affirmed" as meaning "reversed." Neither can you assume to construe the word "reversed," in the certificate, into the word "affirmed," used in the statute. As stated by Attorney-General Black, in 9 Opinions, 59: "But if Congress has all the money of the United States under its control, it has the whole English language to give it away with, and it is so easy to use definite terms in a law like this that when they were not used we will presume them not meant." If Congress had intended the words "affirmed" in the statute and "reversed" in the certified copy of the judgment to be construed by you as synonymous it would have said so.

With full recognition of the learning and due deference for

the opinion of the Court of Claims, I am unable to concur in the conclusions reached by that court in the case of *Hobbs* v. *The United States* (19 C. Cls. R., 226). I cannot conceive that Congress intended the officers of the Treasury, when a judgment came duly certified for payment, to enter into an analysis of that judgment, and allow interest on such part or parts thereof as the Supreme Court concurred in the view of the lower court, and refuse to allow on those which were modified or added thereto. In a case involving any items, this analysis would be very onerous. In many cases it would impose on the administrative officer the interpretation of decrees requiring a high order of judicial knowledge and much research. It would lead to great uncertainty in administration. When it is further considered that the law has limited the evidence submitted to you to the record of the judgment only, which furnishes neither the opinion nor findings of the Court of Claims, nor the opinion nor action of the Supreme Court specifically on the several findings, it seems obvious that the plain fact of what the judgment is, and the result set out in the copy presented, without any analysis or subdivision, is to be the sole guide in determining whether interest, so far as this question is concerned, is to be charged or not. When the Supreme Court declares the judgment is reversed, it must be accepted as reversed; when it declares the judgment is affirmed, that fact is not open to question. If reversed it bears no interest; if affirmed, and the other requirements exist, it bears interest. In this case, the certified copy shows the judgment reversed; therefore it bears no interest.

The conclusion thus reached on the third element essential to constitute an interest-bearing judgment disposes of the whole case submitted; but it may be added, before allowing interest on judgments, the remaining two necessary facts above mentioned must be shown to exist, for section 1092 provides that "The payment of the amount due by any judgment of the Court of Claims, and of any interest thereon allowed by law as hereinbefore provided, shall be a full discharge to the United States of all claims and demands touching any of the matters involved in the controversy."

That the payment "shall be a full discharge" of the whole

controversy clearly implies that, so long as the controversy is still pending, with the possibility of increase in amount, the payment was not intended to be made. The law can not properly be regarded as intending that a demand on the Secretary of the Treasury for the payment of that which he could not fully discharge by payment, and which he is forbidden to pay unless fully discharged, should be such a default on the part of the Government as would subject it to interest. By the statute the claimant is not authorized to present his judgment only to comply with a mere unsubstantial form, by demanding that which can not be done, and which the act of the complainant under the law prevented compliance with, in order to enable him to draw interest from that date. The complainant must present it in good faith for payment. If it is presented for any other purpose it is not such a presentation as the statute requires. Hence, I apprehend it is only where the payment of the judgment of the Court of Claims appealed from is left as final and undisturbed by an affirmance by the Supreme Court, and a copy of the judgment has been duly presented for payment, that interest runs from the date of presentation. But when the claimant himself within the ninety days takes his appeal after presentation, it is such evidence that the presentation was not made for payment, but as a means to secure interest on his claim, as would make such presenting of his claim of no avail.

The papers with yours transmitted are herewith returned.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

CUSTOMS DUTIES.

The article known as "Cooper's Sheep Dipping Powder" is dutiable at 50 per centum ad valorem, under the act of March 3, 1883, chapter 121.

DEPARTMENT OF JUSTICE,
February 24, 1887.

SIR: Your letter of the 12th instant requests, substantially, my views as to the construction of clause No. 99, Tariff Index of the tariff act of March 3, 1883, with reference to the

appeal of R. Francklyn & Co. from the assessment of duty on an importation of "Cooper's Sheep Dipping Powder."

If those portions of the clause which have no direct bearing be eliminated, it provides: "All powders recommended to the public as proprietary articles, or prepared according to some private formula as remedies or specifics for any disease or diseases or affections whatever affecting the human or animal body, not specifically enumerated or provided for in this act, fifty per centum ad valorem."

With reference to the last sentence in this clause, it is only necessary to say the importation is not elsewhere in the act specifically provided for; and if not dutiable under the clause, it would be subject to the provisions of section 2513, as non-enumerated. That the importation is a powder is undisputed. The collector of the port of New York, with his communication of the 24th of November, 1886, furnishes a pamphlet taken from an importation of the powder, prepared by the manufacturer and intended for distribution with the goods imported, which contains the purpose for which the article was made and the uses for which it is recommended, with testimonials as to its utility and efficiency. If the statements and testimonials furnished by the manufacturer be true as set forth in this pamphlet, they establish all the facts necessary to subject the importation to the provisions of the clause quoted above. The whole pamphlet has for its purpose the recommendation of the powder. It alleges that William Cooper and nephews are the "sole proprietors and manufacturers" of this powder. It advertises it by the proprietary name of "Cooper's Sheep Dipping Powder." It describes it as having a character of its own, distinct from all other competing preparations. It claims an especial merit from the particular mode of manufacture. It cautions the public against spurious imitations. It seems to have all the characteristics to constitute it a proprietary article, as that term is defined in the case of *Ferguson* v. *Arthur* (117 U. S. R., 488.) On page 5 of the pamphlet, after quoting other advertisements concerning other cures for "scab in sheep," it claims especial merit as a "*specific* for scab." It expressly declares "Cooper's Dip has always been a certain *specific* for scab at ordinary strength." In

describing "scab in sheep" the pamphlet declares it "a disease * * * working fearful havoc;" a "fearfully virulent and infectious disease;" a "terribly formidable disease;" and describes the disease as one of "an insidious and virulent nature." The testimonials printed seem to corroborate these statements. If these statements be true, the powder is dutiable as assessed.

The ground taken by the importer, that "disease" and "affection" are synonymous in strictly scientific language, does not relieve the importation from the effect of the enactment; for the word is in popular use, and, as is ruled in the case of *Maillard* v. *Lawrence* (16 How., 261), "the popular or received import of words furnish the general rule for the interpretation of public laws, as well as of private and personal transactions." It is clear from the language of the enactment itself, "disease or diseases or affections whatever affecting the human or animal body," that, if the words be synonymous, the term "disease" was intended to be interpreted in the broadest generic sense. As popularly understood in this sense, the people do not stop before using the term to inquire whether scientifically an ailment was caused by a microscopically small insect under the skin or among the tissues of the body, or was the result of poisonous gas inhaled through the lungs. The fact that it is not produced by perceptible actual external violence, and is harmful to health, and may occasion suffering or death, is sufficient to fill the popular definition of "disease" as used in the statute.

The second ground assumed by the importer, that the powder is a prevention of the scab and not the cure, in that it only kills the insects that are alleged to cause the disease, is not tenable. One of the main purposes of any remedy for disease is to remove the cause, so that the health-restoring powers of nature may overcome the effect. It is not at all inconsistent with the character of a remedy for, that it is a preventive as well of the disease. It may be both; and if the allegations of the manufacturer be true, the powder described in this importation is both. He claims it will kill the insect before the scab has resulted, and it will cure the scab after it has developed, by removing from under the skin the cause which produced it, so as to permit the recuperative

powers of nature to assert themselves with effect. To destroy an agent harmful to health before it is attached to or has affected the body is to prevent—to destroy it after it has penetrated the body and produced effects which will be perpetuated and progressive in the body and baleful to health, is an ordinary means to cure.

Hence, it is concluded no sufficient reason appears to exist to warrant a change in your former ruling, No. 7472, on substantially the same questions involved in this appeal.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

CHEROKEE STRIP.

The lands lying in the "Cherokee Strip" which are leased to the whites are not lands of the United States within the meaning of section 5388, Revised Statutes.

The word "foreigner," in section 2134, Revised Statutes, is used in its ordinary signification—meaning one who is born out of the United States and is not naturalized, or who owes allegiance to any other government than that of the United States.

Property seized by the military under the provisions of section 2137, Revised Statutes, should, as soon as practicable, after report of seizure to the United States attorney, be placed in the custody of the proper civil officers.

Section 5388, Revised Statutes, makes no provision for seizure of property belonging to a wrong-doer.

DEPARTMENT OF JUSTICE,

February 24, 1887.

SIR: By your letter of the 18th instant, you request my opinion on three questions:

The first is, "Are the lands leased to the whites in Cherokee Strip lands of the United States referred to in section 5388, Revised Statutes, or otherwise?"

The Cherokee Strip referred to in your inquiry, I assume, is the land described in the seventeenth article of the treaty of the 19th of June, 1866 (14 Stat., 804), by which the land therein described is ceded to the United States in trust as set forth in the treaty. Section 5388 is almost a literal reenactment of the act of the 3d of March, 1859, the title to which is "An act to protect the timber growing upon lands

of the United States reserved for military and other purposes." The enactment in its terms limits its provisions to lands "which, in pursuance of law, may be reserved or purchased for military or other purposes." The section being highly penal, the reservation or purchase contemplated therein must be for some specific national purpose or use of the United States. The beneficiary of the proceeds of the land contained in the strip, by virtue of the provisions of the trust, is the Cherokee tribe of Indians. When the United States became the trustee the purpose of the trust was, and still is, the sale of the lands according to the terms of the treaty. This is not such a purpose or reservation for the use of the United States as is contemplated by section 5388, referred to in your first inquiry.

Your second inquiry is, "What does the word 'foreigner' embrace in section 2134, Revised Statutes?"

The word referred to embraces those who are born out of the United States, who are not naturalized, and who owe allegiance to any other Government than that of the United States; an alien. It is used in its ordinary signification. This section was originally enacted as the sixth section of the act of the 30th of June, 1834 (4 Stat., 730). The fifteenth section of the same act imposes the same penalty prescribed by this section on any citizen or other person residing among the Indians who shall carry on correspondence with any foreign power to incite any Indian nation to war against the United States. This fifteenth section described specifically the mischief which was intended to be guarded against by the sixth section. The history of the early days of the Republic inspired the belief that many of the Indian wars and outbreaks were instigated by the influence of aliens unfriendly to the Government. This induced the policy of forbidding access to the Indian tribes for foreigners without passports from the proper Government official. Section 2134 was originally enacted in pursuance of that policy, and was literally re-enacted in the Revised Statutes. In the context, both in the Revised Statutes and in the act of 1834, when others beside foreigners are intended to be embraced, the language "any person other than an Indian" is used. In the case of *Cherokee Nation* v. *Georgia* (5 Peters) it is ruled

"An Indian tribe or nation within the United States is not a foreign state within the meaning of section 2 of the third article of the Constitution." "They may more correctly, perhaps, be denominated domestic dependent nations." From this it would seem to follow that a citizen of the United States is not described as a foreigner as to the Indian tribes resident in the United States, in the legislation of the National Government.

Your third inquiry is: "Can timber, hunting traps, etc., seized under the provisions of sections 5388 and 2137, Revised Statutes, be held by the military to await the result of prosecution, as in the case of goods seized by custom-house officers?"

By reference to my letter of the 16th of February, 1887, you will find the subject involved in this question fully considered. The result there reached is that property seized by the military under the provisions of section 2137 should, as soon as is reasonably practicable after report of the seizure shall have been made to the United States district attorney, be placed in the custody of the proper civil officer. Section 5388 makes no provision for seizure of the property which belongs to a wrong-doer, but subjects him to the penalties of fine and imprisonment.

I am, very respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

INDIAN IMMIGRATION.

A body of Indians born and dwelling outside of the territorial limits of the United States, and still maintaining their tribal relations, can not, without authority of Congress, enter upon and occupy our public domain as emigrants.

The power of the President to set apart a portion of the public domain for the exclusive occupancy of Indians does not include the case of a reservation for Indians not born or commorant in the United States.

DEPARTMENT OF JUSTICE,
February 28, 1877.

SIR: Your letter of the 24th instant, with the accompanying inclosures, presents for consideration the statement that

a body of about one thousand Indians, who are natives of and residents within the limits of British Columbia, about 20 miles from the line of Alaska, who have attained an advanced state of civilization, are self-supporting, and are organized into a community governed by a council, wish to emigrate into Alaska. You inquire, "Whether the Indians as above described can go into Alaska as emigrants and then secure such rights as are accorded to the residents of that Territory who are not Indians; and as they wish to go as a colony, whether, under existing laws, it would be competent for the President to set aside as a reservation for such colony such reasonable portion of unoccupied land in that Territory as they may select for their location."

Immigration of peaceful individual Indians who have dissolved tribal relations is not prohibited by statute and is not inconsistent with the general policy of our Government, but a band of Indians born within the United States, who maintain their tribal relations, is regarded by the law substantially as an independent domestic nation under the guardianship of the United States. If such tribe be born and reside outside of the United States, and still maintains the tribal or national character, it can not be entitled to emigrate and locate on public lands of the Government; for the very fact of a national existence implies possession of a place of habitation, laws, customs, or traditions of government, with some or all of the attributes of a body politic. Such a people thus organized, locating upon a body of public lands, would exclude such occupancy and enjoyment as is contemplated by our land laws by such persons as are entitled to purchase and appropriate, or subject them to usages, customs, and traditions inconsistent with the general laws. The permanent guardianship or supervision of such a domestic dependent nation can not be assumed by the executive department of the Government without the authority of positive laws, except as to those Indians who are born within the United States. If the Indians referred to in yours should as distribed individual Indians immigrate, the rights of such individual Indians would not in any respect rise higher that those of any other foreigner, and they would be much less than foreign white emigrants, because the provision of

law for naturalization would not apply to them. The provisions of the homestead law, by the fifteenth section of the act of the 3d of March, 1875 (18 Stat., 420), which extended the benefits of the homestead law to Indians who have abandoned the tribal relation properly qualified, is limited in its operations to Indians "born in the United States." The proviso to the eighth section of the act of the 17th of May, 1884 (23 Stat., 26), only reserves in Alaska the rights of Indians and other persons then in possession or claiming lands therein. There seems to be no provision of law assuring to such foreign Indians any legal right to acquire lands. The general land laws of the United States, except the mining laws, have not been extended to Alaska. The President, then, can not by virtue of any necessity arising in the administration of those laws set aside a reservation. His power to declare permanent reservation for Indians to the exclusion of others on the public domain does not extend to Indians not born or resident in the United States. The case you submit does not come within the scope of any power granted to the Executive; but while the present policy of the Government and tendency of legislation is to aid and encourage the Indian tribes to advance in civilization and enlightenment, so that at no distant period they may be qualified to become a part of the homogeneous mass of the American people, skilled and educated in the arts of peace, with all the rights and privileges of citizenship, if the case submitted be one properly the subject of relief, that relief must be sought at the hands of Congress.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

REGISTRY OF VESSELS.

A registered vessel of the United States which has been altered in form or burden in a foreign port may be registered anew on her arrival in the United States; but the new registry can not be made unless the ship and owners conform to the requirements necessary for an original registry.

If the alteration amounts to such a substantial rebuilding of the vessel as that the owner could not truthfully make oath that it was built in the United States it would not be entitled to registry.

DEPARTMENT OF JUSTICE,
March 4, 1887.

SIR: I understand from your letter of the 24th of February, 1887, with the papers therewith transmitted, that Peter Wright and son desire to register as "a vessel of the United States" the steam-ship *Ohio*, and with reference thereto you ask my opinion as to "whether a vessel of the United States, sent abroad for alteration in form or burden in a foreign port other than a lake port, may be registered as a vessel of the United States anew on her arrival in the United States."

The law with reference to the registry of vessels is statutory. The essential requisites of a vessel, to authorize an original registry, are set forth in the second section of the act of the 31st of December, 1792, which was substantially re-enacted as section 3142 Revised Statutes, and so far as applicable to the case submitted are as follows: "Vessels built within the United States and belonging wholly or in part to citizens thereof * * * may be registered."

The *Ohio* was built in the United States, regularly registered according to law, and was and yet appears to be owned wholly by a corporation of citizens of the United States. The fact that she was and is now registered as a vessel of the United States is sufficient ground for a presumption that all the facts necessary to warrant registry existed. But a change has been or is about to be made by repairs or alterations to the vessel in Glasgow, Scotland. She is undergoing renewals or alterations in her boiler and machinery; the deck-houses on her spar-deck are to be extended and the cabin below removed, which will increase the carrying capacity of the vessel. Under the provisions of section 4170, Revised

Statutes, which also was originally enacted in 1792, such changes will require a new measurement and a new registry. The real question to be answered is: Do the changes described, being made in Scotland, preclude the registry as "a vessel of the United States?"

The general rule of law is, a ship is always presumed the same though all the materials which at first had given it existence have been successively changed; though all the members of a body or its parts are changed through the lapse of time, nevertheless by force of substitution the body is still presumed the same; it is always the same people, the same Senate, the same legion, the same edifice, the same flock, the same ship (Emerigon, Insu., pp. 144, 145). How far is this general principle affected by our law in reference to the registry of vessels?

Section 4170, Revised Statutes, so far as relevant to this inquiry, is: "Whenever any vessel which has been registered is altered in form or burden, by being lengthened or built upon, or from one denomination to another, by the mode or method of rigging or fitting, the vessel shall be registered anew by her former name, according to the directions hereinbefore contained, otherwise she shall cease to be deemed a vessel of the United States."

This section would seem to very accurately describe the changes that are made, or to be made, in the *Ohio*. If the changes were made in the United States instead of Scotland, the vessel, without doubt, would be entitled to registry as the same vessel with the same name. To allow new registry the section does not require that the alteration or change shall be made in the United States. In the interpretation of section 4170, the words "in the United States," can not be added so as to have it read "or is altered in form or burden in the United States." Such a change would be legislation and not interpretation. It would very materially change the statute as written. The navigation act may well require, to encourage ship-building, that no vessel shall be entitled to the provisions of registry as a vessel of the United States unless built in the United States; but to declare, with a knowledge of the perils of the sea and the vicissitudes of distant navigation, that any or every alteration or refit-

ting of the vessel, after it has been built or launched, should forfeit the rights of registry and denationalize the ship, would be quite a different matter, and one that should not be incorporated into the navigation laws by mere interpretation. That the general navigation laws were not to bear such a construction is shown by the fact that the twenty-third section of the act of the 28th of July, 1866, re-enacted as section 3114, Revised Statutes, provides specially for the levying of duties on the value of repairs, refittings, etc., in a foreign country of vessels licensed under the laws of the United States on the northern, northeastern, and northwestern frontiers foreign or coasting trade; but no implication is contained in the act that such repairs should forfeit the right to license as to vessels so repaired. If, in connection with this, it be borne in mind that section 4312, Revised Statutes, originally enacted in 1793, requires the same qualifications for the enrollment of such vessels for such trade as are required by law for registry for general foreign trade, the inference is strong that mere repairing in a foreign country is not such a change in the ship as to preclude registry. But section 4170 does require that the applicant for new registry shall comply with "the directions hereinbefore contained." The directions referred to are those contained in the act of 1792 as re-enacted. The new registry can not be made unless the ship and owners conform to the requirements necessary for an original registry, and furnish the evidence in conformity to law. If the refitting, altering, or repairing in the foreign country amounts to such a substantial rebuilding of the ship as that the owner could not truthfully make the oath that she was built in the United States, such a ship would not be entitled to registry; but if the modification, alteration, or repairing leaves the main structure substantially identical so that it can truthfully be regarded by those familiar with maritime affairs as an alteration or repairing only, and not a substantially new construction, when considered as a whole, it may rightfully, upon compliance with the other requirements of the navigation laws, be granted a new registry.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

LEMHI INDIAN RESERVATION.

Where Indians on a reservation made by order of the President are organized tribes or bands, and placed under the charge of an agent appointed by the Government, the laws applicable to Indian reservations must be regarded as applicable to them.

DEPARTMENT OF JUSTICE,
March 7, 1887.

SIR: Your letter of the 1st of March, 1887, with the inclosed papers, presents a petition by Charles H. Thompson, in behalf of a mining company which he represents, asking you to make an order directing the Commissioner of Indian Affairs "to instruct the agent in charge of the Lemhi Indian Reservation" that he is not to interfere with the petitioner or prevent him from constructing "a ditch from a point on the Lemhi River, within the reservation, through a part of the reservation, for the purpose of carrying water from the river for use below for mining and agricultural purposes."

It is stated the division of the water and the right to dig the canal or ditch would be useful to the petitioners and beneficial in its effect to the Indians. These same facts exist in many cases where one man could use his neighbor's property with advantage both to himself and his neighbor; but still, as a rule, it is better to maintain the rights of property under the law. All the questions involved in this case are substantially answered by an opinion rendered to your Department, July 21, 1885.

But the petitioners allege the reservation is not a legal one, and in consequence thereof the Indians for whom the reservation was made are only tenants at will of the Government. But the rights of tenants at will, so long as the landlord does not elect to determine the tenancy, are as sacred as those of a tenant in fee. If the reservation is not authorized by law, on dispossessing the Indians by the Government the land would be subject to the general laws applicable to the public domain; but while Indians in a reservation made by order of the President are organized in tribes or bands, and as such maintain a quasi-national character; are placed under the charge of an agent appointed by the Government according to law; and are in the actual peaceable possession, the laws

applicable to Indian reservations must be recognized as applicable to them. In the case of *Pumpelly* v. *Green Bay Company* (13 Wall, 166), the principle is ruled that taking such privileges as are asked by the petitioner would be the exercise of the right of eminent domain.

Attorney-General Devens, in an opinion reported in 16 Opinions, page 553 (in which I concur), maintained that the United States had power to grant such privileges as are asked for by the petitioner in this case; but the power to make the grant exists only in Congress, and without action by Congress it can not be lawfully exercised. The conclusion then is, in the absence of Congressional action, the right should not be granted to the petitioners in this case to enter upon the Lemhi Reservation, unless the Indians be lawfully removed or dispossessed.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

SHIPPING.

Vessels used exclusively for pleasure, and not carrying freight or passengers for pay, are not liable to the penalty prescribed in section 4371, Revised Statutes.

Nor are such vessels, when navigating waters of the United States between district and district, or between different places in the same district, subject to the duties prescribed by section 4219, Revised Statutes.

DEPARTMENT OF JUSTICE,
March 10, 1887.

SIR: By your letter of the 24th February, 1887, you ask my opinion as to "whether foreign-built or domestic vessels, undocumented under the laws of the United States and used exclusively for pleasure, and therefore not carrying freight or passengers for pay, are entitled, if owned by American citizens, to proceed in waters of the United States between district and district, or between different places in the same district, without becoming liable to the dues and penalties mentioned in sections 4371 and 4219 of the Revised Statutes,

and section 7 of the act of June 19, 1886, on their arrival at a port of the United States."

The penalties mentioned in section 4371 as well as section 7 of the act of the 19th of June, 1886, are, by the terms of the enactments, imposed upon and limited to vessels found "trading between district and district." The statutes, being penal, are not to be enlarged by interpretation. While the very enlarged sense in which "trade" is used by lexicographers and poets may possibly include the mere pursuit of pleasure as a relaxation or amusement within the term "trading," such is not its common and commercial signification. In this latter sense the statute should be construed. The act of the 7th of August, 1848, reproduced as section 4214 of the Revised Statutes, and re-enacted and amended by the act of the 3d of March, 1883 (22 Stat., 566), indicates that a vessel exclusively used only for that purpose, and which carried no passengers nor freight, is not embraced in the term "trading" as used in section 4371. This last system of legislation originates and recognizes a class of vessels used exclusively for pleasure, or by competition to inspire improvement in construction and navigation, as one distinguished from trade. It relieves the vessels in this new class, when properly documented, from the obligation of entry and clearing at the custom-houses. Section 4371 only includes those "found trading." The vessels described in yours are vessels constructed for pleasure and not trade, and are therefore not subject to the penalties prescribed in section 4371.

The portion of section 4219 to be considered in reply to your inquiry is: "Upon vessels which shall be entered in the United States from any foreign port or place there shall be paid duties as follows: On vessels built within the United States, but belonging wholly or in part to subjects of foreign powers, at the rate of thirty cents per ton; on other vessels not of the United States, at the rate of fifty cents per ton. Upon every vessel not of the United States which shall be entered in one district from another district, having on board goods, wares, or merchandise, taken in one district to be delivered in another district, duties shall be paid at the rate of fifty cents per ton."

The vessels described in the first clause of this statute are

those "which shall be entered in the United States from any foreign port." This is inapplicable to the subject submitted by you, which is confined to vessels "proceeding in waters of the United States between district and district, or between different places in the same district." The vessels described in the second clause are those "having on board goods, wares, or merchandise taken in one district to be delivered in another district." This clause is not applicable to the character of the vessels described in your letter, the language of which is, such as are "used exclusively for pleasure, and therefore not carrying freight or passengers for pay." The vessels described in yours I understand to mean those "not having on board goods, wares, or merchandise, taken in one district to be delivered to another." Therefore the duties prescribed by section 4219 are not collectible thereon.

I am, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

CRUISERS CHICAGO, BOSTON, AND ATLANTA.

The unexpended balances of the appropriations made by the act of March 3, 1883, chapter 97, under the headings "Bureau of Construction and Repair," and "Bureau of Steam Engineering," may be used in completing the hulls and machinery of the cruisers *Chicago, Boston,* and *Atlanta,* provided the total expenditure shall not exceed the total estimated cost thereof, as reported by the Naval Advisory Board.

The balance of an appropriation made for a specific purpose may be used for that purpose in the discharge of obligations imposed by a lawful continuous contract.

DEPARTMENT OF JUSTICE,
March 12, 1887.

SIR: Your letter of the 10th instant submits for my opinion the following questions:

"First. Whether the available balances of general appropriations under the Bureau of Construction and Repair, and Steam Engineering, or a sufficient portion thereof, can or can not be lawfully put to use in or toward the completion of the unfinished cruisers known as the *Chicago*, *Boston*, and *Atlanta.*

"Second. Whether the available balances of the appropriations under the respective heads of Bureau of Construction and Repairs and Bureau of Steam Engineering can be used in completing the hulls and machinery of the *Chicago*, *Boston*, and *Atlanta*, provided the total expenditure shall not exceed the total estimated cost of the hulls of said vessels as reported by the Naval Advisory Board."

On the 26th day of July, 1883, the Secretary of the Navy made a contract with John Roach for the building of three cruisers, the *Chicago*, *Atlanta*, and *Boston*, and dispatch boat *Dolphin*. That contract was authorized by an act of Congress of the 3d of March, 1883 (22 Stat., 477). The contract was reported in full to Congress by the Secretary of the Navy in his report of the 1st day of December, 1883 (Report, p. 56). It was recognized by name and description by Congress in an appropriation made in pursuance of it, in an act of the 7th of July, 1884 (13 Stat., 262). The act of the 3d of March, 1883, contemplated a continuous contract, for which the estimate for the vessels made according to express statutory requirements, for the hulls and machinery, was $3,290,000. The appropriation for the year ending June 30, 1884, including the expenditures of the balances of general appropriations for construction and repair, was $1,340,000. As this appropriation was so far below the estimate, the inference arises that the contract was intended by the original authorization to be continuous. The contract as made and reported to Congress was continuous. Its obligatory covenants ran to the building and finishing of the vessels as to their hulls and machinery.

The seventh paragraph of the contract provides for the completion of the vessels for delivery on or within eighteen months from its date, and for a lien thereon to insure their completion and indemnify the Government.

The eleventh paragraph provides for the enforcement of the lien by forfeiture for breach.

The twelfth paragraph provides for the completion of the vessels by the Secretary of the Navy in case of forfeiture, with right to take possession of the yard, plant, and tools of Roach, the contractor, for that purpose.

The thirteenth provides that the work on the vessels shall

be proceeded with when so forfeited without unnecessary delay to completion; that if the costs of completion exceed the contract price, John Roach and his sureties shall make up the difference; and if, after completion and payment of the outlay thereon, any balance shall appear in favor of the contractor it shall be paid him. In pursuance of these provisions of the contract the vessels have become the property of the United States, unfinished, and their completion under the contract is an urgent continuous obligation of the Government, whose discharge is imposed on the Navy Department. It has therefore become the duty of the United States to finish the construction of the vessels, which now belong to the General Government and are unfinished.

Attorney-General Cushing (7 Opin., 3), on the 9th of October, 1854, in discussing the subject of unexpended balances of appropriations, states:

"Now the rule of construction and the practice of the Government is believed to be universal as applied to appropriations: that where a contract, a personal service, or other claim of the Government is a continuous one, there the balance remaining of the appropriation made in and for one year laps over into the following year. Thus, where an appropriation is made for building a specific number of frigates, though it be nominally in and for the service of one year, yet it may be applied in continuation into the next year."

On the 12th of November, 1854 (7 Opin., 15), discussing the same subject and referring to the former opinion, he repeats the same thought as follows:

"By the copy of that opinion, which is herewith inclosed, you will perceive that, upon sufficient consideration of the subject, I came to the conclusion that, as a general rule, where a contract or other claim of the Government is a continuous one, and still current, there the balance of appropriations made for one year for such service laps over into the following year, and is continuously applicable to the same object. No room for controversy on the point can exist, unless by the lapse of time the balance be alleged to belong to the surplus fund in the Treasury. That happens in two years after the expiration of the fiscal year for which an appropriation is made."

But, on the 1st day of July, 1870, an act was passed, the fifth, sixth, and seventh sections of which are reproduced as sections 3690, 3691, and 3679 of the Revised Statutes. The effect of this legislation upon continuous contracts was very fully and carefully reviewed by Attorney-General Ackerman, as reported in 13 Opinions, page 291.

The first inquiry propounded to him was: "First. Can balances of appropriations made for the fiscal years 1869 and 1870 be applied to the service of the years 1870 and 1871?"

The answer is: "Recurring then to your first question, I am of opinion that balances of appropriations made for the fiscal years 1869–'70 of any description, even when contained in annual appropriation bills and made specifically for that fiscal year, may be applied to the service of the years 1870–'71 so far as, first, to pay any current year expenses properly incurred in the former year: and second, to pay dues upon contracts properly made within the former year, even if the contracts be not performed until within the latter or current year. This is plainly allowed (by express exception to prohibitions) in the very terms of section 5."

I concur in this view, that the balance of the appropriation made for a given purpose may be used for that purpose, in the discharge of the obligations imposed by a lawful continuous contract, even though the appropriation be contained in the general annual appropriation bill, if the terms of the appropriation are applicable to the purpose to which it is proposed to be applied. The language of the appropriation to which you refer is:

"Bureau of Construction and Repair: For * * * completion of vessels on the stocks; purchase of materials of all kinds; and for the general care, increase, and protection of the Navy in the lines of construction and repair, nine hundred thousand dollars.

"Bureau of Steam Engineering: For * * * completion of machinery and boilers of naval vessels, * * * seven hundred and sixty-three thousand dollars."

The vessels named in yours are now naval vessels of the United States. They are in charge of the Department of the Navy; they are uncompleted, and by a continuous contract, as well as an urgent duty, their completion is by law im-

posed on that Department. An available balance of a former appropriation, appropriated in the above language, stands unexpended on the books of the Department. The terms of the appropriation acts seem to warrant the application to the purpose proposed.

But there is a limitation in the act of the 3d of March, 1883, which, as to the hulls, machinery, and armament of the vessels, must be borne in mind, which is: "And the Secretary of the Navy is authorized to construct said vessels, and to procure their armament, at a total cost not exceeding the amounts estimated by the Naval Advisory Board." This enactment, being *pari materia* with the legislation under consideration, must be construed with and regarded as a part of it. Hence the expenditure on the hulls and machinery must be kept within the limits of the estimate made by the Board. This would be true as applied as a whole to the hulls, machinery, and armament, had not the armament been excluded from the contract with Roach, and, by subsequent legislation and specific appropriations therefor made, which as to the armament exceeded the estimate; which relieved the armament, to the extent the amount the specific appropriation exceeded the estimate therefor, from the limitation. Hence, the armament is prevented by the limitation from further completion, except to the extent that, by the specific appropriations therefor, that limitation as to it was enlarged. The hulls and machinery you state have not yet reached the amounts of estimates made by the Advisory Board therefor by $239,659.77. To that extent the hulls and machinery are then relieved from the effect of the limitation.

Hence, as your first question would include the armament as well as the hulls and machinery, it is answered in the negative. Your second question is answered in the affirmative to the extent above suggested.

I am, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE NAVY.

CASE OF GUILFORD MILLER.

On December 29, 1884, M. made a homestead entry of part of an odd section of land lying within the indemnity limits of the Northern Pacific Railroad land-grant, alleging that his settlement thereon commenced June 15, 1878. Said odd section was included in a withdrawal from pre-emption or homestead entry, etc., made by the Land Department March 30, 1872, for the benefit of said grant, upon the filing of the map of general route. On the definite location of the road, of which a plat was filed October 4, 1880, it fell within the "indemnity" limits of the grant; but the withdrawal aforesaid, in so far as it included odd sections which thus came within those limits, continued in force thereafter, no restoration of such odd sections to entry having since been made. The said odd section was selected as "lieu land" by the Northern Pacific Railroad Company December 17, 1883: *Held* that the land entered by M., being in a state of reservation from the date of the withdrawal in 1872 until its selection by the company in 1883, was not during that period open to homestead settlement, and consequently that he could acquire no right adverse to the claim of the company by his alleged settlement commencing in 1878.

When public lands have been once withdrawn by competent authority from private appropriation under the general land laws, they do not again become subject to such appropriation until restored to entry by like authority.

DEPARTMENT OF JUSTICE,
March 14, 1887.

SIR: In compliance with your request, I have considered the case of the *Northern Pacific Railroad Company* v. *Guilford Miller*, pending on appeal in your Department, and now have the honor to present to you my opinion upon the question involved.

The facts of the case as gathered from the papers submitted are these: On December 29, 1884, Miller made a homestead entry for the SE. ¼ of Sec. 21, T. 15 N., R. 42 E., in the Walla Walla district, Washington Territory, alleging that his settlement thereon commenced June 15, 1878. The tract so entered lies within the indemnity limits of the land-grant to the Northern Pacific Railroad Company (act of July 2, 1864, chapter 217) and was selected as "lieu land" by that company, December 17, 1883. Originally it was included in a withdrawal from pre-emption or homestead entry, etc., for the benefit of that company, of all the surveyed and unsur-

veyed odd sections lying within 40 miles on each side of the line of general route, this withdrawal having been ordered by the Land Department March 30, 1872, upon the filing by the company of a map of such route. But on the definite location of the road, of which a plat was filed October 4, 1880, and by which both the "granted" limits and the "indemnity" limits were determined, it fell outside of the former and came within the latter limits. The withdrawal of March 30, 1872, in so far as it included odd sections which thus came within the indemnity limits, was continued in force by an order of the Land Department, dated November 17, 1880 (the order at the same time restoring to entry other lands included in that withdrawal which lay beyond those limits), since which time no restoration to entry of such odd sections appears to have been made.

Upon the foregoing facts the following question arises: Whether at the commencement of or at any time during the alleged settlement by Miller, and before the selection made by the railroad company, the tract referred to was open to homestead settlement and entry. If so, the right of Miller to perfect his entry is undoubted; if otherwise, the company would seem to have, by virtue of its selection, the better claim to the premises.

The solution of that question depends upon the validity and effect of the withdrawal made by the Land Department as above. And here I deem it pertinent to observe that, with respect to the odd sections lying within the limits of 40 miles on each side of the line of general route, the statute itself (section 6 of the act of July 2, 1864) operated to reserve these sections from homestead settlement upon the filing by the company of the map of such route in the Land Department (*Bultz* v. *Northern Pacific Railroad*, 119 U. S., 55), and consequently that, as the tract in question was situated within those limits and so remained until the filing of the plat of definite location of the road, no homestead or other right could attach thereto under the general land laws during the period between the filing of the map of general route and the filing of the plat of definite location, whatsoever might be the action of the Land Department in the premises. For present purposes, therefore, it is only important to inquire

what the condition of the tract was after the filing of the plat of definite location (October 4, 1880) when it fell outside of the granted limits and came within the indemnity limits. Did it then become open to homestead settlement? or was it excluded therefrom by the previous withdrawal ordered by the Land Department? or by the subsequent order of November 17, 1880, by which that withdrawal was continued?

Aside from the last mentioned order, two points are presented by this case for consideration, namely: (1) whether the withdrawal of March 30, 1872, which applied to all odd sections within 40 miles of the line of general route was valid and effective; if so, then (2) whether lands originally within that withdrawal remained subject thereto until restored to entry by the Land Department, notwithstanding they afterwards (by change of line on definite location of the road) fell within the indemnity limits.

The withdrawal just adverted to does not rest upon any express statutory provision requiring it, but upon a general authority in the Land Department, the existence of which has been recognized by Congress (act of March 27, 1854, chap. 25; Rev. Stat., sec. 2281) and repeatedly affirmed by the supreme court (*Wolcott* v. *Des Moines County*, 5 Wall., 681; *Riley* v. *Wells*, unreported, December term, 1869; *Williams* v. *Baker*, 17 Wall., 144; *Wolsey* v. *Chapman*, 101, U. S. 755; see also 8 Opin., 246; 16 Opin., 87) and may now be regarded as too well established to be questioned. It appears, moreover, to be in entire harmony with the provisions of the land grant act, which, as already intimated, in effect made a corresponding withdrawal, and it accords with the practice of the Land Department in like cases. But the existence of a statutory withdrawal including the same lands, which had previously taken effect, may suggest the inquiry whether the department withdrawal referred to had any legal efficacy as such. In other words, did it operate as a withdrawal when the lands covered thereby were thus already withdrawn? The answer is, that if the act of the department was within the competency thereof, and of this there appears to be no room for doubt, its validity and force were not affected by the fact that it embraced the same subject-matter and was directed

to the same end as the statute. It operated *concurrently* with the statute, and the lands may properly be deemed to have been withdrawn as well by the one as by the other. Although, as remarked by the court in *Buttz* v. *Northern Pacific Railroad Company*, *supra*, it did not add to the force of the statute itself in that regard, yet it gave notice to all parties seeking to make a pre-emption or homestead settlement that lands within certain defined limits might be appropriated for the road, and was the exercise of a wise precaution by the Department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless." Viewed in the above light, I arrive at the conclusion that the withdrawal of March 30, 1872, was valid and efficient for the purpose intended.

That withdrawal, when ordered, embraced only the odd sections within the 40-mile limits; but part of these lands having subsequently fallen within the indemnity limits, the point now is, whether thereafter such part still continued in reservation. Upon this I hold the affirmative, being of opinion that when public lands have once been withdrawn from private appropriation under the general land laws by competent authority, they do not again become subject to such appropriation until restored to entry by like authority. This is understood to be a settled rule of the land-law system, and is (as well as the executive power of withdrawal) recognized by Congress (see section 1 of the act of April 21, 1876, chapter 72).

The result to which the foregoing leads is, that at the date of the order of November 17, 1880, the tract in question was still subject to the withdrawal referred to. That order, indeed, assumes the continuation of such withdrawal as regards lands that fell out of the 40-mile limits as above, in formally restoring to entry some of these lands while continuing the withdrawal as to others. So far as appears, no restoration of the said tract took place then or thereafter up to the time of its selection by the company.

Such tract being thus in a state of reservation during the period which intervened between the filing of the plat of

definite location and the selection by the company, it was not during that period (nor was it prior thereto from the filing of the map of general route) open to homestead settlement, and therefore no rights thereto adverse to the claim of the company were acquired by Miller by his alleged settlement.

I remark that in some of the papers submitted the order of November 17, 1880, is dealt with as if it originated a new withdrawal, and the question is much discussed whether it was competent to the Land Department to withdraw from pre-emption or homestead settlement lands lying within the indemnity limits of the grant, after those limits had become established by the filing of the plat of definite location of the road.

In denial of the authority of the Department to withdraw in such case, it is urged that the provision in the sixth section of the act, extending the pre-emption and homestead laws "to all other lands on the line of said road when surveyed, excepting the lands hereby granted to said company," in effect prohibited a withdrawal of any lands within the indemnity limits.

Assuming that its terms comprehend all lands within such limits, I do not understand the provision referred to as having that effect. It does nothing more than declare what was already enacted by general laws. By these laws all unappropriated public lands, surveyed or unsurveyed, were thrown open to pre-emption settlement, and all such lands, when surveyed, were thrown open to homestead settlement, before the passage of the land grant act. The provision of the latter produced no modification of the previous law as regards the lands mentioned, nor did it place any restriction upon the exercise of the executive power of withdrawal theretofore existing.

After the indemnity limits were fixed by definite location of the road, a right of selecting "lieu lands" within such limits, under the direction of the Secretary of the Interior, accrued to the company under the third section of the act; and it would seem to be within the general power just mentioned, and also within the discretionary authority specially conferred upon the Secretary of the Interior by that section, to place in reservation those lands to which the right of

selection is limited, for the purpose of adjusting the grant and effectuating its objects.

I am, sir, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

APPOINTMENT OF CIVIL OFFICERS.

The act of March 3, 1887, chapter 353, repealing the tenure-of-office law (sections 1767 to 1772, Revised Statutes), leaves unaffected such designations, nominations, and appointments as shall have been made before the repeal, and requires all business begun but unfinished before the repeal to be completed under the law as it then stood.

Appointments and removals after the repeal are to be made under the law as it now exists.

DEPARTMENT OF JUSTICE,
March 14, 1887.

SIR: By your letter of the 9th instant you request me to advise you as to the effect of the act of the 3d of March, 1887, entitled "An act to repeal certain sections of the Revised Statutes of the United States relating to the appointment of civil officers," upon the appointment, removal, and suspension of officers.

The first section of the act repeals sections 1767 to 1772, inclusive, of the Revised Statutes, known as the tenure-of-office act. Had this section stood alone much unfinished business would have been left which has been begun, as to which serious questions might have arisen in consequence of the repeal. Some of the provisions of the law repealed seemed to be necessary to an orderly consummation of the work begun. This gave rise to the necessity for the second section of the act, which is:

"This repeal shall not affect any officer heretofore suspended under the provisions of said sections, or any designation, nomination, or appointment heretofore made by virtue of the provisions thereof."

This section is analogous to, and to be interpreted as, like legislation, which frequently constitutes part of re-

pealing acts, by which the rights and procedure are preserved under the old law as to business finished, and commenced but not finished. This section requires all action begun but not finished during the life of the tenure-of-office act to be consummated under the Constitution and the law as they existed prior to the repeal, and as to all removals from, or nominations and appointments to, office, after the repeal to be made under the provisions of the Constitution alone. As an illustration, section 1768 (which is repealed) provides for suspensions from office during the recess of the Senate. The place of an officer so suspended was to be filled by a temporary designation. After the expiration of the temporary designation the officer suspended resumed the functions of his office. There would be no express provision of law for the discharge of the duties of this class of offices if the duty of the suspended officer to resume was not provided for by the reservation in the repeal. The repeal thus limited leaves such and similar circumstanced officers as it found them, their rights and their duties neither abridged nor enlarged. In case of the failure of the Senate to act upon the nomination during the session after the suspension of an officer, the officer in commission would resume his official functions. After this has taken place the full requirements of the tenure of-office act are complied with. The officer, if the law had not been repealed, being an officer in the full possession of his office, would have been again subject to suspension, at the official discretion of the President. Since the law is repealed, after he shall have so resumed he is not a suspended officer or an "officer suspended" under the provisions of the tenure-of-office act, but simply an officer of the United States, and holds subject to the power of the President to remove under the Constitution. If this power to remove did not exist the right of the officer so suspended would be enlarged, which would be contrary to the limitation in section 2, which expressly provides it shall not affect such an officer. The whole act, then, is to be so interpreted as to leave unaffected such designations, nominations, and appointments as shall have been made and finished before the repeal, and to require all business begun but unfinished to be terminated under the Constitution and law as they

applied, after which, as in all other cases, the constitutional powers and duties of the President alone are to be the basis of future action.

I am, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

REFUND OF DUTIES.

In December, 1855, several hundred packages of seeds were imported, which were entered for consumption and the estimated duties thereon paid. Some of the packages were sent to the appraiser's store for examination and appraisement, and the remainder delivered to the importer, who (having given bond as required by section 2899, Revised Statutes) took possession thereof and stored them in his warehouse. Pending the appraisement and liquidation of the entry the warehouse took fire and was totally destroyed, with all contents. Thereupon the importer applied for a refund of the duty paid on the packages so destroyed under section 2984, Revised Statutes: *Held* that he is not entitled to the relief asked, the merchandise destroyed not having been, at the time of its destruction, in the custody of the officers of the customs, as contemplated by said section 2984.

DEPARTMENT OF JUSTICE,

March 18, 1887.

SIR: By your letter of the 28th of February, 1887, you ask my opinion on the following case:

"Messrs. D. M. Ferry & Company, of Detroit, imported into that port in December, 1885, nine hundred and sixty-six packages of dutiable seeds, which they entered for consumption, and on which they paid the estimated duties. Ninety-six of said packages were sent to the appraiser's store for examination and appraisement, as is customary, while the remainder, consisting of eight hundred and seventy packages, were delivered immediately to the importers, who duly took possession thereof and stored them in their warehouse or store at Detroit. Pending the appraisement and liquidation of the entry, the said private warehouse took fire and was totally destroyed with all its contents, including the said eight hundred and seventy packages of seed. The importers applied to the Department for a refund of the duties paid on said seeds, under section 2984 of the Revised

Statutes, claiming that the said packages were in the custody of the Government at the time of the casualty, and that they were entitled to a refund of the duties paid on the merchandise destroyed."

At the time of the loss of the merchandise destroyed, it was in the possession and under the control of the importers, under the provisions of section 2899. This section provides:

"No merchandise liable to be inspected or appraised shall be delivered from the custody of the officers of the customs until the same has been inspected or appraised, or until the packages sent to be inspected or appraised shall be found correctly and fairly invoiced and put up, and so reported to the collector. The collector may, however, at the request of the owner, importer, consignee, or agent, take bonds, with approved security in double the estimated value of such merchandise, conditioned that it shall be delivered to the order of the collector at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. If in the meantime any package shall be opened without the consent of the collector or surveyor given in writing, and then in the presence of one of the inspectors of the customs, or if the package is not delivered to the order of the collector according to the condition of the bond, the bond shall in either case be forfeited."

The first clause of this section declares merchandise shall remain in the custody of the officers of the customs until inspected and appraised. The second clause provides an exception which the officers may make to the requirements of the first clause at the request of the importers. Under this exception the importers received the goods destroyed, the customs officers retaining in their custody, instead of all the goods as called for by the first clause, only "one package from every ten packages," under the provisions of section 2901. Bond was given for the packages delivered to the importer. The bond was substituted for the actual custody of the goods. The bond by its terms showed the goods were in the custody of the importers, for it provided for delivery by the importers of the goods to the collector, in case he should find it necessary to call for such delivery in consequence of any facts discovered upon the opening of the sample pack-

ages which were retained for inspection and appraisement. A bond conditioned for the delivery of an article by no means amounts to the possession of the article, nor imposes the care or keeping thereof on the obligee. On the contrary it is incumbent on the obligor to guard and keep it that he may comply with the obligations of his bond. Custody, in the intent of this statute, means keeping, guardianship, or care of the merchandise. In this case the keeping, guardianship, and care of the merchandise was left with the importer. It was in his own store-room under the charge and control exclusively of his own employés. The store-room was not a private warehouse as contemplated by section 2060, Revised Statutes. If the casualty occurred through any negligence, it must have been his own; if through misfortune, that misfortune did not arise in any way from any action of the officers of the customs, or from the character of any building under their control in which it might be stored, nor while the goods were in their possession. The refund asked for is under section 2984, which is—

"The Secretary of the Treasury is hereby authorized, upon production of satisfactory proof to him of the actual injury or destruction, in whole or in part, of any merchandise, by accidental fire or other casualty, while the same remained in the custody of the officers of the customs in any public or private ware-house under bond, or in the appraisers' stores undergoing appraisal, in pursuance of law or regulations of the Treasury Department, or while in transportation under bond from the port of entry to any other port in the United States, or while in the custody of the officers of the customs and not in bond, or while within the limits of any port of entry and before the same have been landed under the supervision of the officers of the customs, to abate or refund, as the case may be, out of any moneys in the Treasury not otherwise appropriated, the amount of impost duties paid or accruing thereupon, and likewise to cancel any warehouse bond or bonds or enter satisfaction thereon, in whole or in part, as the case may be."

This section, so far as applicable to the facts presented, only authorizes an abatement or refund of the duties when the custody of the goods is in the officers of the customs. As

therefore they were not, in the case submitted, in their custody or under their control, the refund asked for is not authorized by the statute.

I am, respectfully yours,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

INDIAN TRUST FUNDS.

Where bonds of the State of North Carolina, held by the Treasurer of the United States for the benefit of certain Indian tribes, were past due and payment thereof demanded and refused: *Advised* that the Secretary of the Interior may authorize the acceptance of a proposition of a third party (a citizen of the State) to pay the principal and accrued interest of the bonds, provided their market value does not exceed their face value with the accrued interest, and provided the acceptance will best subserve the trust.

If the United States has advanced for the State any money on account of interest due on said bonds, and there is "any moneys due on any account from the United States to such State," it is the duty of the Treasurer to retain the interest upon such advances from such moneys.

DEPARTMENT OF JUSTICE,
March 19, 1887.

SIR: Your communication of September 27 of last year, inclosing "certain correspondence and papers relating to a proposition of Mr. A. M. McPheeters, of Raleigh, N. C., to pay the principal of $147,000 North Carolina State bonds past due, and which are described in the papers, and all interest which shall accrue on them to the date of payment," has been received.

You inquire: (1) Is it within the power of this Department, under existing laws, to accept or authorize the acceptance of the proposition? (2) If the proposition shall be accepted, should interest be calculated on the moneys advanced by the United States from time to time on account of interest due on said bonds, as provided in the act of March 25, 1870 (16 Stat., 77)?"

The bonds referred to, as described in an inclosed paper, are as follows: North Carolina bonds, N. C. N. R. Co., issued under acts of the legislature of North Carolina approved

January 27, 1849, December 2 and 25, 1852, and February 14, 1855, and belonging to an Indian trust fund; $19,000 maturing January 1, 1884, with 6 per cent. interest from January 1, 1880, to July 1, 1886, amounting to $7,410; $7,000 maturing January 1, 1886, with 6 per cent. interest from January 1, 1880, to July 1, 1886, amounting to $2,730; $121,000 maturing April 1, 1885, with 6 per cent. interest from October 1, 1879, to July 1, 1886, amounting to $49,005. The principal sum now due without interest amounts to $147,000; interest to July 1, 1886, $59,145; total, $206,145.

The proposition of Mr. A. M. McPheeters, as contained in his inclosed letter to the Acting Secretary of the Interior, dated September 17, 1886, is as follows: "Briefly stated my proposition is to pay the principal of the $147,000 bonds *past due*, and which are described above, and all interest which shall accrue on them to the date of payment."

The Commissioner of Indian Affairs, by letter to the Secretary of the Interior dated September 25, 1886, recommends the acceptance of Mr. McPheeters's proposition.

By act of June 10, 1876 (19 Stat., 58), "all stocks, bonds, or other securities or evidences of indebtedness now held by the Secretary of the Interior in trust for the benefit of certain Indian tribes shall, within thirty days from the passage of this act, be transferred to the Treasurer of the United States, who shall become the custodian thereof, * * * and the Treasurer of the United States shall also become the custodian of all bonds and stocks which may be purchased for the benefit of any Indian tribe or tribes after the transfer of funds herein authorized, and shall make all purchases and sales of bonds and stocks authorized by treaty stipulations or by acts of Congress when requested so to do by the Secretary of the Interior."

In an inclosed letter from Mr. A. M. McPheeters to the Secretary of the Treasury, dated Raleigh, N. C., August 31, 1886, he says: "Payment of these bonds was some time since formally demanded by the Government and refused by the treasurer of this State. I propose to pay them."

If the amount due upon these bonds were tendered to the Treasurer of the United States by the railroad company or the treasurer of the State of North Carolina there would be

no doubt but that it would be your duty to authorize the acceptance of the money.

The proposition now made virtually is, that the bonds should be sold to a third party for their face value with accrued interest.

It would be in the power of the Secretary of the Interior to authorize the acceptance of the proposition above referred to, if the sale of the bonds is authorized either expressly or impliedly "by treaty stipulations or acts of Congress." No information is contained in the papers referred as to which of the Indian tribes the Treasurer holds the bonds in trust. No opportunity is therefore afforded for an examination for express authority in "treaty stipulations or acts of Congress." But as the bonds are past due and payment has been refused by the treasurer of the State of North Carolina, in the performance of his duties as trustee the Secretary of the Interior has the power to authorize the acceptance of the proposition made, *provided* the market value does not exceed the face value of the bonds with accrued interest, and provided the acceptance will best subserve the interest of the trust. In such case if the bonds are sold it should be for the highest price to be obtained.

As to the inquiry, "Should interest be calculated on the moneys advanced by the United States from time to time on account of interest due on said bonds?"

The act of March 25, 1876 (16 Stat., 77), is as follows:

"Whenever any State shall have been or may be in default in the payment of interest or principal on investments in stocks or bonds issued or guarantied by such State and held by the United States in trust, it shall be the duty of the Secretary of the Treasury to retain the whole, or so much thereof as may be necessary, of any moneys due on any account from the United States to such State, and to apply the same to the payment of such principal and interest, or either, or to the re-imbursement with interest thereon of moneys advanced by the United States on account of interest due on such stocks or bonds."

The inclosed papers do not show the amount of money, if any, "advanced by the United States on account of interest due on said bonds."

Nor does it appear that there is any money due by the United States to the State of North Carolina on any account.

If the United States has advanced for the State any money on account of the interest due on said bonds, and there is "any moneys due on any account from the United States to such State," it is the duty of the Treasurer to retain the interest upon such advances from such money.

If, however, the money for payment of interest was not advanced by the General Government at the instance and request of the State (and of that there appears to be no claim in the inclosed papers) compound interest could not be recovered by suit upon the bonds, if not expressly stipulated therein. (No copies of the bonds are among the papers transmitted.) The liability of the State, in case there is no indebtedness of the United States to the State, is determined by the evidences of indebtedness and not by the act of Congress. The claim of the United States, if any, for interest on advances should not be required to be paid before authorizing the sale of the bonds.

The inclosed papers are herewith returned as requested.

Very respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

REMISSION OF FORFEITURE.

Section 1958, Revised Statutes, does not confer upon the Secretary of the Treasury authority to remit the forfeiture of a vessel condemned by the United States district court for Alaska for being engaged in killing fur seals.

Under section 5293, Revised States, fifth paragraph, he has power to remit in such case, but only where the forfeiture was imposed "by virtue of any provisions of law relating to fur seals upon the islands of St. Paul and St. George."

DEPARTMENT OF JUSTICE,

March 19, 1887.

SIR: I have considered your communication of the 10th instant, and the accompanying papers, presenting the question whether you have the power to remit the forfeiture of the schooner *San Diego*, her tackle, apparel, and furniture, by virtue of the sentence of condemnation pronounced against the said vessel, etc., on the 4th of October, 1886, in the case

of *The United States* v. *L. M. Handy and the schooner San Diego*, by the United States district court for the district of Alaska, under section 1956, Revised Statutes, for being engaged in killing fur seals; and an opinion is asked as to whether such power of remission resides in the Secretary of the Treasury under section 1958, or the fifth paragraph of section 5293, Revised Statutes, or any other statute of the United States.

Section 1958 is a reproduction of the eighth section of the act of 27th July, 1868 (15 Stat., 240), entitled "An act to extend the laws of the United States relating to customs commerce and navigation over the territory ceded to the United States by Russia, to establish a collection district therein, and for other purposes," and its object was to extend the power of the Secretary of the Treasury to remit fines, penalties, and forfeitures in cases covered by the act of the 3d March, 1797 (1 Stat., 506), and all laws adding to and amending the same, to similar cases arising in the collection district of Alaska.

Now the cases falling within the act of 1797 and the additions and amendments thereof are cases where the fine, penalty, or forfeiture which it is sought to have remitted was exacted "by force of any present or future law of the United States, for the laying, levying, or collecting any duties or taxes, or by force of any present or future act, concerning the registering or recording of ships or vessels, or any act concerning the enrolling and licensing ships or vessels employed in the coasting trade or fisheries, and for regulating the same."

The principal object of the statute of 1868 was to establish the collection district of Alaska and extend to it the revenue and navigation systems of the United States, and as the act of 1797 with its additions and amendments formed a part of the legislation on those subjects, it was, as a matter of course, re-enacted with the rest of that legislation.

So far, then, as section 1958 is concerned, it is quite clear that it gives the Secretary no authority to remit the forfeiture of a vessel for being engaged in killing fur seals, an offense which has no connection with the revenue or navigation laws of the United States.

Remission of Forfeiture.

It remains to inquire whether the Secretary of the Treasury is vested with power to remit the forfeiture in question by the fifth paragraph of section 5293, Revised Statutes. This provision contains a substantial re-enactment of the seventh section of the act of the 1st July, 1870, entitled "An act to prevent the extermination of fur-bearing animals in Alaska" (16 Stat., 180), which adopted and applied to the purposes of its enactment the seventh and eighth sections of the act of 1868 (*supra*), thereby extending the provisions of law for the enforcement and remission of fines, penalties, and forfeitures incurred under the customs and navigation laws to fines, penalties, and forfeitures incurred under this act "to prevent the extermination of fur-bearing animals in Alaska."

That Congress deemed the seventh section of the act of 1870 (*supra*), necessary shows that it did not consider the fines, penalties, and forfeitures prescribed by that law as within the power of remission given by the eighth section of the act of 1868 (*supra*) and confirms the view taken herein of the scope of that section.

The seventh section of the act of 1870 adopted the eighth section of the act of 1868 for the purposes of that act only, and as the operation of the act of 1870, as passed originally and as now given in the Revised Statutes (sections 1960–1972 and section 5293, paragraph 5), is confined to the islands of St. Paul and St. George, it would seem impossible to hold that the forfeiture in question, which was not incurred by reason of any act done in either of those islands, is within the power of remission conferred on the Secretary of the Treasury by the fifth paragraph of section 5293, which provides that the Secretary of the Treasury may exercise that power "if the fine, penalty, or forfeiture * * * was imposed by virtue of any provisions of law relating to fur seals upon the islands of St. Paul and St. George."

It only remains for me to say that my investigations have not conducted me to any legislation under which you could remit the forfeiture in question.

Very respectfully, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

INTERSTATE COMMERCE ACT—POSTAL SERVICE.

The provisions of the interstate commerce act of February 4, 1887, chapter 104, do not extend to the postal service of the United States, nor prohibit the transportation by railroad companies, free of charge, of such officers or agents of the Government as are employed in that service.

DEPARTMENT OF JUSTICE,
March 28, 1887.

SIR: I reply to your letter of the 21st March, 1887, which is:

"It has for many years been the almost universal practice of railroad companies engaged in transportation of the mails to transport without special charge the inspectors of this Department, including such officers as the Postmaster-General is by statute authorized to employ as inspectors or special agents; and also to transport without charge postal clerks, not only when engaged in the actual service of distributing mails upon the car en route and on their return trips, but to transport them between their places of residence and the point at which they are required by the rules of the service to begin their runs, when on the occurrence of their 'lay-offs' they are at liberty to go home for rest and study.

"The question has been raised by various communications to the Department whether, since the recent act of Congress of February 4, 1887, entitled 'An act to regulate commerce,' the continuance of such facilities will contravene the law.

"Inspectors and special agents have habitually received a commission signed by the head of this Department, designating them as inspectors, and requiring all railroads and other contractors engaged in the transportation of the mails to carry the respectively designated persons without special charge for transportation. Similar commissions have been issued to postal clerks; but, in addition, passes have been granted them by the railroad companies to enable them to make return trips, although not actually engaged in distributing mails, and to travel between the termini of their routes and their homes.

"Your opinion is solicited upon the questions whether there be anything in the act referred to which prohibits the

practices heretofore prevailing as above stated; and if in any particular the act prohibits the continuance by the railroad companies of the facilities heretofore afforded, in what degree and in what limitations?"

The title of the act of the 4th of February, 1887, is "An act to regulate commerce." It is not entitled "An act to regulate the United States mail service." The question presented is, substantially, Was it the intent of the law-makers that it should be construed to include the mail service of the United States?

The constitutional power authorizing the act is the third clause of the eighth section of Article II of the Constitution, which empowers "Congress to regulate commerce with foreign nations and among the several States, and with the Indian tribes." If this provision of the Constitution had been understood by the framers of the Constitution to have embraced the mail service of the United States in the term "commerce," there would have been no sufficient reason for the introduction of the seventh clause of the same section and article: "Congress shall have power to establish post-offices and post-roads;" under which last the postal system has been organized. The magnitude of that system is such that its main operations can only be conducted successfully by uniform and general rules. Equal justice in the administration of the service requires that the burden of its execution shall not be subject to the possibility of different rates between those portions of the service which may be performed exclusively within individual States and those which include service in two or more States. The provisions of the act as applied to subjects intended to be embraced therein do not apply to the former, but do to the latter. It is not to be supposed the law-makers intended, under a regulation of commerce, to subject a part of the mail service to the provisions of the act while another part would be excluded. The mail service is a unit, a system organized in pursuance of an established Government policy.

The Postmaster-General, as the head of the Department, is placed over the system. He is required by law, among many other specific duties, "to superintend generally the business of the Department and execute all laws relative to

the postal service" (Rev. Stat., sec. 396). It could not be the purpose of the act under consideration to join the Postmaster-General with the Commissioner of Interstate Commerce in the administration of the interstate commerce act, nor to relieve the Postmaster-General from the duty of superintending and executing "all laws relative to the postal service." No intent is manifested indicating a division of service, labor, or responsibility between the Postmaster-General and the Commissioner of Interstate Commerce. The act was intended to relate "to the postal service." The system of postal service confers upon the Postmaster-General the power to make contracts, some of which must be exceptional, arising from unexpected emergencies which could not in all cases be made in conformity to prescribed general rules as to price or terms, and concerning which the urgency or necessity would preclude the possibility of conference for exceptions with the Commissioners of Interstate Commerce. The amount of compensation is, in many instances, submitted to his judgment. In others the law provides a fixed price per mile for a given service; others provide for the carriage of persons in the service free of charge. A general examination of the whole scope of postal laws shows that, if the interstate commerce act were treated as if incorporated into the postal system of laws, the change would be so radical as to render it highly improbable that so extensive a modification or repeal would be left to mere implication; indeed, such a change could be recognized only by express language of the statute. In the conduct of the postal service the United States, to the exclusion of all others, exercises one of the functions of governmental sovereignty. The service is purely governmental. It is a common law rule of construction that the sovereign is not bound by general statutes unless expressly named therein. In the English courts prerogative was claimed as the foundation of this rule, but American courts have based it upon reason, and except from the rule modes of procedure, process, with such other transactions as are not strictly governmental. But "if the statute tends to restrain or diminish the power, right, or interests of a sovereign" the rule of construction is adhered to (*United States* v. *Heron*, 20 Wall., 255). "The doctrine that the Government should not, un-

less named, be bound by an act of limitations, is in accordance with that just cited from Bacon; because, if bound, it would be barred of a right; and in all such cases is not to be construed to be embraced unless named, or what would be equivalent, unless the language is such as to show clearly that such was the intent of the act" (*United States* v. *Knight*, 14 Peters, 315). If the interstate commerce act were to be applied to the mail service of the United States it would materially diminish the power and rights heretofore exercised and held under the postal laws, and modify a clearly defined policy, established as the result of the experience of the whole national life. The United States is not specially named in the act of the 4th of February, 1887, except in the twenty-second section, which provides that "nothing in this act shall apply to the carriage, storage, or handling of property, free or at reduced rates, for the United States." If the carriage, storage, or handling of the property of the United States were, in all instances, purely governmental, this exception would be entitled to great weight, as an implication that, in all not excepted, the sovereign was intended to be included in pursuance of the maxim *Exceptio fermat regulum in casibus non exceptis.*

But in many transactions of the Government, as in carrying stores and delivery to the Indian tribes in pursuance of treaty or contract, the action of the Government is quasi-commercial, and of such a nature that no attribute of sovereignty is involved therein. This exception in the statute was doubtless intended to relieve such transactions of a doubtful character from the provisions of the act. If so intended, the excepting out of the enactment of that which, under the less rigid application of the principle of construction by the American courts, might or would not have been considered as within the principle, would be an affirmance of the principle as applicable to the construction of the statute. But, in any event, the general principle of construction can not be avoided by mere implication; for, in the language of the case last cited, implication can not produce such results "unless the language is such as to show clearly that such was the intent of the act," which the language in this case does not do.

It is therefore clear the United States mail service is not embraced in or subject to the provisions of the act of the 4th of February, 1887. That service consists in the receipt, speedy transmission, distribution, and delivery of mail matter to the people. As the act does not include the mail service in its provisions, none of the lawful, customary, and necessary instrumentalities by which that service is conducted is subjected to the law. Among the lawful, customary, and necessary instrumentalities for the efficient, consistent, and successful conduct of the service, the Post-Office Department is authorized by law to send officers, agents, and clerks of the Government to take charge of, protect, and distribute the mails, and to search for and investigate errors, frauds, or crimes relating to them. Persons thus employed, when in the actual line of duty or when in pursuance thereof going to or returning from their places of residence while in the performance of service, or to or from their assigned line of duty in the ordinary and customary course of the administration of the service, should be regarded as in the performance of official labor and unaffected by the provisions of the act.

I am, yours respectfully,

A. H. GARLAND.

The POSTMASTER-GENERAL.

COLLECTION DISTRICT.

The act of March 3, 1887, chapter 348, amending sections 2533 and 2534, Revised Statutes, and making Hartford a port of entry in place of Middletown, creates a new collection district and also a new office (that of collector), requiring a new commission and a new bond.

DEPARTMENT OF JUSTICE,
March 28, 1887.

SIR: On the 3d of March, 1887, Congress passed "An act to amend sections 2533 and 2534 of the Revised Statutes, and making Hartford a port of entry in place of Middletown," which provided that paragraph third of section 2533 of the Revised Statutes of the United States of America is hereby amended so that said paragraph shall read as follows:

"Third. The district of Hartford, to comprise the waters

and shores of the town of Saybrook, Clinton, Westbrook, Old Saybrook, Essex, Chester, Haddam, East Haddam, Middletown, Cromwell, Chatham, Portland, Weathersfield, Rocky Hill, Glastonbury, Hartford, East Hartford, Windsor, Windsor Locks, East Windsor, South Windsor, Suffield, and Enfield, as bounded on the 1st day of January, 1886, in which Hartford shall be the port of entry, and Saybrook, Clinton, Westbrook, Old Saybrook, Essex, Chester, Haddam, East Haddam, Middletown, Chatham, Portland, Cromwell, Rocky Hill, Weathersfield, Glastonbury, and East Hartford ports of delivery.

"SEC. 2. That paragraph third of section 2534 of the Revised Statutes of the United States of America is hereby amended so that said paragraph shall read as follows:

"Third. In the district of Hartford a collector, who shall reside at Hartford."

By your letter of the 21st instant you inquire whether, by this law, a new office is thus created, and whether a new commission and bond must necessarily issue.

The legal life of the district of Middletown was derived from the clauses which are wholly supplanted by the act above quoted. No part of the former law relating to it longer survives. Its name and place are wholly among things of the past. A new district is created, not new in name and place of collector's residence only, but in territorial limits.

The new district does not appear to include the waters and shores of the town of Killingsworth as the district of Middletown did; but it does contain within its limits the waters and shores of twelve other towns which the district of Middletown did not contain. The waters and shores of eleven of the towns comprised in the Middletown district are in the Hartford district. Thus the new third district is made to consist of twenty-three towns, eleven of which were in the Middletown district and twelve were not. From a comparison of the two districts it appears the name is changed; the residence of the collector is changed; the port of entry is changed; the ports of delivery are changed and increased by four in number; the territorial limits are changed and increased in number eleven towns, and more than half the new

district as to the number of the towns therein does not appear to have been in the former district.

The commission of the collector of the Middletown district would, if it survived the change, not empower him to exercise his official functions in the twelve added towns. His bondsmen could not be held for the new district, which embraces greater responsibility than they assumed when they executed the bond. In the case of *Miller* v. *Stewart et al.* (9 Wheat., 681) it is ruled: "A bond by a deputy collector of taxes, with sureties reciting his appointment for eight townships and conditioned for the faithful discharge of the duties of said appointment, is avoided as against the sureties by the interlineation of another township, so as to make it an appointment for nine instead of eight without the consent of the sureties."

But one collector is provided for the new district. That collector's commission must be co-extensive with his duties, which require him to exercise his official functions over the whole district. A new commission is required, and a new bond is the necessary consequence of the new commission.

I am, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

ALLOTMENT OF LANDS TO INDIANS.

By the ninth section of the act of February 8, 1887, chapter 119, an appropriation is made "for the purpose of making the surveys and resurveys mentioned in *section two*" of that act. In section 2 there is no mention of "surveys and resurveys." But *section one* of the same act contains a provision for "surveys and resurveys." *Advised* that the appropriation made as above is applicable to the making of "surveys and resurveys," as provided for in said section 1—such being the clear intent of Congress.

DEPARTMENT OF JUSTICE,
March 31, 1887.

SIR: Your letter of the 29th of March, 1887, is as follows:

"Referring to the act (Public No. 43) entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the

laws of the United States and the Territories over the Indians, and for other purposes,' approved February 8, 1887, it will be observed that section 9 provides · That for the purpose of making the surveys and resurveys mentioned in section 2 of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of $100,000 , to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.'

"By reference to *section* 2 of the act, it will be seen that no mention is made therein of the making of 'surveys and resurveys.' The provision of the law for 'surveys and resurveys' of reservations or parts thereof, for the purpose of making allotments of lands to the Indians, is contained in the *first* section of the act.

"A copy of the law of February 8, 1887, is herewith inclosed.

"In the original draft of the bill (S. 54) the provision for 'surveys and resurveys' was contained in *section* 2, but in the process of passage of the act sections 1 and 2 of the original bill were materially altered and modified, and were finally merged into one, or the first section. Section 10 of the original bill became section 9 of the act, but there appears to have been a failure to make the necessary change in the body of section 9 of the words 'section 2' to 'section 1.'

"In view of the foregoing statement, I have the honor to request to be advised whether the appropriation made by section 9 of the act is applicable for the purposes of making 'surveys and resurveys' of reservations or parts thereof, provided for in *section* 1 of the act."

The intent of the law-maker is the law. That the land described in the first section shall be surveyed was intended. That the cost of the survey of the land shall be paid by the appropriation contained in the ninth section is just as clearly within the intent. As there are no surveys mentioned in the second section, the whole of section 9 must be rejected, or the erroneously descriptive reference "section 2 of." If these words be disregarded so that the section shall read, "That for the purpose of making the surveys and resurveys * * * in this act, there be," etc., the undoubted intention

of Congress will be carried out. Otherwise the whole enactment will be nugatory. The inquiry contained in yours is therefore answered in the affirmative.

I am, yours respectfully,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

UTAH TERRITORY.

Officers in the Territory of Utah who were commissioned and holding office previous to the passage of the act of March 3, 1887, chapter 397, are not required to take the oath prescribed by the twenty-fourth section of that act.

The provision of that section making such oath a "condition precedent to hold office *in* or *under* said Territory" applies as well to officers thereafter appointed by the General Government as to those thereafter appointed by the Territorial government or elected in the Territory.

DEPARTMENT OF JUSTICE,
March 31, 1887.

SIR: I have considered your communication of the 17th instant, and the accompanying letter therein referred to, from the chairman of the Utah Commission and the governor of the Territory of Utah, presenting, for an opinion, certain questions arising upon the twenty-fourth section of the act entitled "An act to amend 'An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes,' approved March twenty-second, eighteen hundred and eighty-two."

The first question asked is: "Are the officers in this Territory (Utah) who were commissioned and holding office prior to the passage of said act required to take said oath?" meaning the oath prescribed by the said twenty-fourth section.

In my opinion this question should be answered in the negative. It is true the law declares the oath required to be "a condition precedent to the right to *hold* office in or under said Territory," but it also declares that the officer shall take and subscribe the oath "*before entering* on the duties of his office," words which of themselves, in my opinion, have a strong

tendency to show that it was officers thereafter to be elected or appointed who were in the mind of Congress.

If it was intended that the law should affect officers in commission when it went into operation, it is hard to understand why Congress ommitted to provide for the contingency of a failure or refusal to take and subscribe the required oath, such as by declaring the recusant's office vacant and the manner in which the vacancy should be filled. Furthermore, if Congress had intended the oath requirement to apply to officers already in commission, we must presume it would have provided either that the law should not go into effect until a time within which it could be made known in all the Territories, or that the oath should be taken and subscribed within a certain time after the law went into force, thus preventing the serious doubts that might arise as to the validity of official acts performed after the statute took effect but before its provisions could be known by the communities affected by them, if it should be held that the oath requirement applied to officers in commission when the act became operative.

Now, this failure of Congress to guard its legislation with respect to the official oath in some such way as has been pointed out, and the express provision already adverted to that the oath shall be taken before the officer "*enters on the duties* of his office," and the consideration that the officers in commission when the act went into force had been holding office under the act of the 22d March, 1882 (22 Stat., 30), which contained a provision that no bigamist, polygamist, or person cohabiting with more than one woman, and that no woman cohabiting with any such person in any Territory or other place under the exclusive jurisdiction of the United States, should be entitled to vote or be eligible for or entitled to hold any office of honor, trust, or emolument in such Territory or under the United States, all go to show that in the absence of language compelling such a sense it would be unreasonable to attribute to Congress the intention to give the act a retrospective effect as to existing officers without any adequate reason for resorting to a mode of legislation which is never regarded with favor.

When the act of 1887 was passed there was not the same

state of things in the Territories as existed when the act of 1882 was passed—a state of things which made it necessary to put in the latter act a provision vacating all registration and election offices. On the contrary, the act of 1882 had been in force within less than a month of five years when the new law was passed, and it was but fair to assume that persons having the qualifications to hold office required by the act of 1882, and in office under that act when the new act of 1887 went into operation, were in sympathy with that act, and could be relied on to carry out its provisions.

It is clear, then, to my mind that I would be doing violence to this law as well as shaking public faith in various official proceedings, if I held it to have a retroactive operation.

The second question is: "If such officers in this Territory (Utah) are required to take the oath, what would be the consequence of their failure to comply with the requirement?"

The answer to the first question renders an answer to this question unnecessary.

The third question is: "Are the Federal office holders, as the governor, Utah commissioners, secretary of the treasury, etc., to take the oath?"

The law (sec. 24) makes the oath a "condition precedent to the right to hold office *in* or *under* said Territory," and, in my opinion, applies as well to the officers referred to who were thereafter to be appointed by the United States to offices in the Territory as to the officers holding under and by appointment thereafter of the Territorial government. This meaning is called for by the use of the particles "in" and "under" in the law, the former being understood to refer to officers appointed by the United States to perform duties in a Territory, and the latter to officers appointed by a Territorial government itself.

The disjunctive particle "*or*" that comes between the two words "*in*" and "*under*" as well as a known rule of interpretation requires that each of those words should have its own proper force. This I have endeavored to give it.

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE INTERIOR.

SINKING FUNDS OF THE UNION AND CENTRAL PACIFIC.

Section 5 of the act of March 3, 1887, chapter 345, relating to the sinking funds of the Union Pacific and Central Pacific Railroad Companies, applies to moneys belonging to those funds which are uninvested, and such moneys may be invested as therein provided.

But that section does not authorize a sale of the United States bonds in which the funds are already invested for the purpose of re-investment in the first-mortgage bonds of said companies.

Money paid into the sinking funds of said companies, under said act, may be invested (1) in United States bonds, as provided in act of May 7, 1878, chapter 96; (2) in any United States railroad subsidy bonds of any of the aided roads described in the act of July 1, 1862, chapter 120, and its supplements; and (3) in any of the first-mortgage bonds of said companies, such as are described in section 5 of the act of March 3, 1887, chapter 345.

DEPARTMENT OF JUSTICE,
March 31, 1887.

SIR: Your letter of the 16th of March, 1887, submits for my opinion:

First. "Whether the provisions of section 5 of the act of the 3d of March, 1887, may be construed as applying to moneys now in the funds uninvested and moneys hereafter paid in to be invested, or whether United States bonds in which the funds are now invested could be sold and the proceeds re-invested in the first mortgage bonds of the company."

Second. "Whether investments can be made in the first-mortgage bonds of any of the companies, or only in the first-mortgage bonds of the company for which the investment is made."

The fifth section referred to is:

"That the sinking funds which are or may be held in the Treasury for the security of the indebtedness of either or all of said railroad companies may, in addition to the investments now authorized by law, be invested in any bonds of the United States heretofore issued for the benefit of *either or all* of said companies, or in any of the first-mortgage bonds of *either* of said companies which have been issued under the authority of any law of the United States, and secured by mortgages of their roads and franchises which by any law of the United States have been made prior and paramount

to the mortgage lien or other security of the United States in respect of its advances to *either* of said companies, as provided by law."

The sinking funds referred to in this section were established by the act of the 7th of May, 1878 (20 Stat., 56), known as the Thurman act. "The investments authorized by law," the officer by whom they are to be made, the source whence the fund is to be derived, its administrative and final distribution, all are fixed by the same act. The section referred to in yours is concerning the same subject, and is substantially an amendment of the prior act. The two are to be construed together as one, and, as a whole, they must be viewed in connection, so as to make all the parts harmonious if practicable. The whole law, as thus considered, received an authoritative interpretation in the "Sinking Fund Cases" (99 U. S. R., 725), by which certain principles were announced which will aid in the determination of the questions submitted. It is there settled the fund is a fund of the Union and Central Pacific Railroad established by law, intended for the security and payment of certain of their several debts at maturity; that the United States Treasury is the depository, and the Secretary of the Treasury is the agent charged with the administration of the fund. The power of the Secretary of the Treasury as agent over the fund is not enlarged by the section referred to in yours, except that he is empowered "in addition to the investments now authorized by law" to invest in certain other securities not before authorized. His power is a special one fixed by law, and must be strictly followed. We can not enter into the inquiry as to whether the power is too limited or too extensive; whether the interests of the corporations and their creditors would have been better subserved had the Secretary been allowed to make other investments, or to buy and sell bonds as to him would seem best or not. That question has been already passed upon by Congress, and we are limited to determining whether Congress empowered him to sell the bonds in which the fund has been invested, and with the proceeds to buy others. If that power exists now it will continue as long as the law remains unchanged. The bonds which might be bought with the proceeds of those sold to-day might to-mor-

row, by a change in the market, appear to be profitable to sell and re-invest. Each change in the market might be made an occasion for sale and re-investment. A general power to deal in the bonds referred to in the act and amendment would be the result of such a construction. Whether a good or bad investment of the fund might be the result of the exercise of such a power would largely depend upon the agent's knowledge of the market and his judgment in the application of that knowledge. An error in the sale or purchase might result in a loss. During the course of such dealing the interest on the fund must be suspended. The law contemplated no uncertainty on this subject. A certain steady gain, and not speculative profits, is shown to be the intent, for the third section of the act of 1878 provides that "the semi-annual income thereon shall be in like manner from time to time invested, and the *same shall accumulate* and be disposed of as hereinafter mentioned."

This semi-annual income clearly refers to the interest on the bonds purchased, and does not contemplate the uncertain quantity of profit or loss. The "same shall accumulate" leaves no discretion in the agent to subject the fund to a possible loss. The gain was intended to be a fixed and certain accumulation. The law authorizes the Secretary to invest the fund established in bonds. This is equivalent to saying "with the *money* paid in you shall buy bonds;" it does not say, "with the *bonds* you shall buy bonds." Does the power to buy the bonds, or the whole scope of the law, imply the power to sell them? The language of the section just quoted says: "The semi-annual income shall be from time to time invested." If it had been the intention of the law-makers to allow the investment from time to time of the principal from which the income was derived, such from time to time investment would not have been limited to the income only. The inclusion of one is the exclusion of the other. The power of an agent to buy does not imply the power to sell. The subject is considered in Story on Agency, section 88, and the conclusion stated in the following language: "So that we here see it laid down in positive terms that the agent to buy has no implied authority to sell, and an agent employed to sell has no implied authority to buy."

Without a conversion or sale of the bonds now in the Treasury until their maturity there can be no reinvestment.

The section referred to in your letter only authorizes the investment of "the sinking funds which are or may be held in the Treasury." The ordinary signification of the word "funds" is "cash on hand" (Bouvier's Law Dictionary, vol. 1, p. 701). As a means of purchase this is the only signification the word could have in this connection, and this is the sense in which it is here used. This is shown by reference to the third section of the prior act of which this is an amendment, the first clause of which is:

"That there shall be established in the Treasury of the the United States a sinking fund which shall be invested," etc.

It is clear the law-makers did not contemplate that the Secretary of the Treasury should buy bonds with anything but cash on hand. The law says he is to buy them with the fund established.

Another clause in the same section states:

"All the bonds belonging to said funds shall, as fast as they shall be obtained, be so stamped as to show that they belong to the said fund, and they are not good in the hands of other holders than the Secretary of the Treasury until they shall have been indorsed by him and publicly disposed of pursuant to this act."

Here the bonds are not spoken of as constituting part of the fund, but as investments of or as property of which the fund personified is spoken of as the owner, indicating a distinction between the money with which the property is bought and the property purchased therewith. The investment is shown to be intended as permanent, for the property thus obtained must be stamped and rendered valueless, except in the hands of the agent of the fund, until by him indorsed and publicly disposed of pursuant to the act. This is the only authority to sell the bonds. The act provides the fund, directs its investment, directs the investment from time to time of the semi-annual income, and authorizes nothing further with reference to the fund as a fund until the final distribution is provided for in the sev-

enth and eighth sections of the act of the 7th of May, 1878. The seventh section of that act is:

"That the said sinking fund so established and accumulated shall, at *the maturity* of the said bonds so respectively issued by the United States, be applied to the payment and satisfaction thereof according to the interest and proportion of each of said companies in said fund, and of all interest paid by the United States thereon and not re-imbursed, subject to the provisions of the next section."

Until action is to be taken in pursuance of this section, the law authorizes no use of the bonds nor further disposition of them by the agent. After the investment is made the first step required to be taken with reference thereto pursuant to law is the sale for the purpose of the application to the payment of the debts for which it was accumulated. The time when this step is to be taken is at the *maturity* of the bonds. The bonds whose maturity is referred to in this section are the United States railroad subsidy bonds issued on account of the Union Pacific and Central Pacific Railroads. Until those bonds mature, the power to dispose of the United States bonds purchased in pursuance of the act does not take effect. Therefore, in answer to your first inquiry, you are not authorized to sell the United States bonds in which the funds are now invested, for the purpose of reinvesting in the first-mortgage bonds of the company.

In reply to your second inquiry: the fifth section of the act of the 3d of March, 1887, authorizes the fund, "in addition to the investments now authorized by law, (to) be invested in any bonds of the United States heretofore issued for the benefit of *either or all* of said companies, or in any of the first-mortgage bonds of *either* of said companies which have been issued under the authority of any law of the United States and secured by mortgages of their roads and franchises, which by any law of the United States have been made prior and paramount to the mortgage, lien, or other security of the United States in respect of its advances to either of said companies as provided by law."

The second section of the same act defines the words "all such railroads" to mean "all the railroads that have received aid from the Government in bonds." The railroads which

have received aid from the Government in bonds are set forth in the act of the 1st day of July, 1862, and the amendment thereto of the 2d day of July, 1864, and any of the United States railroad subsidy bonds issued in pursuance of said act as amended are a legitimate security in which to invest the fund under the first clause of the quotation under consideration. In the second clause, "or in any of the first-mortgage bonds of *either* of said companies," the word "either" is substituted instead of the phrase "either or all of said companies" in the former clause. This substitution of "either" for "either or all" is intended to limit the investment in mortgage bonds of the roads to fewer roads than are included in the expression "either or all." "Either" is generally used as signifying "one or the other of two." It is thus used here. The two roads, in either of whose first-mortgage bonds the investment may be made, as referred to by the word "either," are to be determined by reference to the act of the 1st of July, 1862, with its amendments of the 2d of July, 1864, and the 7th of May, 1878. By reference to these acts it will be found the Union Pacific and the Central Pacific Companies compose the main line and central object of the legislation, that they and they alone pay in the money which constitutes the fund. They are the sole corporations embraced in the provisions of the Thurman act, in which they are frequently grouped under the word "either." Hence it is concluded they are the railroads embraced in the term "either" in the clause under consideration, and investments of the fund may be made in the first-mortgage bonds of either the Union or Central Pacific Railroads. You may, then, invest any *money* paid into the sinking fund in pursuance of the act of the 7th of May, 1878, now in the Treasury, or which may in future be paid in—

First. In United States bonds, as provided in the act of the 7th of May, 1878.

Second. In any United States railroad subsidy bonds of any of the aided roads, as described in the act of the 1st of July, 1862, and its several amendments.

Third. In any of the first-mortgage bonds of the Union Pacific or the Central Pacific Railroad Companies, such as are

described in the third section of the act of the 3d of March, 1887.

Within this range the law leaves it to your discretion to invest in whichever of the securities will best subserve the securing and accumulating of the fund.

I am, yours respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

ESTATE OF JAMES B. EADS.

Payment of amount due the estate of James B. Eads, deceased, for services in connection with the improvement of the South Pass of the Mississippi River, may lawfully be made to James F. How and Estill McHenry, the executors and trustees under his will, if the certificate of the engineer officer in charge shows satisfactorily the performance of the services.

DEPARTMENT OF JUSTICE,
April 11, 1887.

SIR: By letter of the 31st of March, 1887, the executors of James B. Eads, deceased, request the payment to them of $50,000, which they claim to be due to his estate from the United States for services and interest in connection with the Mississippi jetties.

By yours of the 1st of April you ask my opinion "whether, under the terms of the will and the other papers submitted," you will be "justified under the law in ordering this payment to the executors and trustees under the will in case the certificate of services be satisfactory."

On the 30th of March, 1887, James F. How and Estill McHenry, as executors of James B. Eads, deceased, presented to the surrogate of the county of New York, in the State of New York, for probate his will, dated the 2d of October, 1883. It was duly proven and decree of probate made thereon in regular form. On the same day letters testamentary were granted to James F. How and Estill McHenry as executors. The only two essential jurisdictional facts to warrant the exercise of the power to grant letters testamentary by the surrogate under the law of New York "are the death of the testator, and that at or immediately previous to his death he

was an inhabitant of the same county with the surrogate." (*Bloom* v. *Burdick*, 1 Hill's Report, 134). These two facts are sufficiently shown by the records submitted. The adjudication by the surrogate where he has jurisdiction is not exposed to collateral impeachment, but is conclusive of the validity of the will when not directly attacked. The same conclusiveness attaches to the granting of letters testamentary. In this case, then, the papers submitted show the will is valid, and that James F. How and Estill McHenry are the legal representatives of James B. Eads, deceased, with the power over his estate provided for by the terms of the will. One of the provisions of the will is as follows: "James F. How and Estill McHenry are appointed as executors and trustees to execute and administer this will and to collect and disburse the various payments to be made to me under the several acts of Congress on account of the jetties, etc., at the South Pass." The second section of the act of Congress of the 3d of March, 1875 (18 Stat., 463), which provides for the work and payment therefor, declared: "The United States hereby promise and agree to pay said Eads or his successors or *legal representatives*," etc. The ninth section enacts "that in case of death or other disability of said Eads before the completion of said works the same shall be prosecuted and completed by *his legal representatives* and associates aforesaid, with the same powers, rights, obligations, and compensations as if done by him in person." The tenth section authorizes the Secretary of War, upon fulfillment of the conditions of the act, "to draw his warrants upon the Treasury of the United States in favor of said Eads *or his legal representatives* in payment of the aforesaid amounts as they respectively become due by the provisions of this act."

If, then, the certificate of the engineer shows satisfactorily the performance of the services contemplated by the act for which the compensation remains due and unpaid, payment therefor may be made to his executors to whom letters testamentary have been granted.

This is in accordance with legal principles heretofore recognized by this Department. (7 Opin., 60.)

Very respectfully,

A. H. GARLAND.

The SECRETARY OF WAR.

CUSTOMS DUTIES.

Confectionery known as "fruit tablets" is dutiable under the clause in the act of March 3, 1883, chapter 121, namely: "Sugar candy not colored, five cents per pound."

DEPARTMENT OF JUSTICE,
April 13, 1887.

SIR: Your letter of the 6th of April, 1887, submits for consideration the question raised by the appeal of Wright and Rich, which is, whether certain confectionery known as "fruit tablets" is dutiable under clause 242 Tariff Index, new, or 243 of the Tariff Act of March 3, 1883. These clauses are as follows: No. 242, "sugar candy not colored, five cents per pound." No. 243, "All other confectionery not specially enumerated or provided for in this act, made wholly or in part of sugar, and on sugars after being refined, when tinctured, colored, or in any way adulterated, valued at thirty cents per pound or less, ten cents per pound." The duty was collected under the latter. By its terms this clause is applicable only to "other confectionery not specially enumerated or provided for in this act." The appellants claimed these tablets are "specially enumerated and provided for" by clause No. 242, above quoted, as "sugar candy not colored." The "confectionery is manufactured from sugar and flavored with fruit extracts, such as lime, lemon, hoarhound, orange, etc., which extracts also tinctured and colored the tablets to a certain extent;" but the color or tincture given to the candy was only the accidental result of the nature of the ingredients used as a flavor. No ingredient was used in the manufacture of the candy purposed or intended to beautify or ornament it. The chemist at the port of New York reports "that in his opinion the tablets in question do not represent what are commercially known as colored candies or colored confectioneries." A report of the second appraiser at the same port, approved by the appraiser, finds "if the commercial designation is to govern the classification of the confectionery under consideration, it should undoubtedly be returned for duty at five cents per pound, as provided for in paragragh 242, Tariff Index, new." The same view is adopted and elaborated in carefully considered opinions by the naval

officer of the port and the Acting Solicitor of the Treasury. Certificates of over sixty dealers in the article in different large cities of the country attest that it is "commercially understood, designated, bought and sold by the trade as 'sugar candy not colored.'"

From all the facts found in the papers with yours transmitted, it seems to be well established that the article has a well known commercial designation as "sugar candy not colored." In the cases of *Arthur* v. *Morrison* and *Arthur* v. *Lahey* (96 U. S. R., 108–113) a well established principle in the interpretation of tariff legislation is formulated as follows: "The commercial designation of an article among traders and importers, when such designation is clearly established, fixes its character for the purpose of the tariff laws."

It is therefore concluded the tablets referred to in the appeal should have been classified according to their commercial designation, under Tariff Index, new, 242, instead of 243, under which the duty was collected.

I am, very respectfully,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

INDEX.

REVISED STATUTES CONSTRUED, REFERRED TO, ETC.—Cont'd.

REVISED STATUTES CONSTRUED, REFERRED TO, ETC.—Cont'd.

REVISED STATUTES CONSTRUED, REFERRED TO, ETC.—Cont'd.

RIGHT OF WAY.

See STATEN ISLAND RAPID TRANSIT RAILROAD.

RIVER-BED.

See IMPROVEMENT OF NAVIGABLE WATERS.

SEAMEN.

See SHIPPING ACT, 2, 3; SHIPPING COMMISSIONER.

SECRETARY OF THE INTERIOR.

See HOT SPRINGS RESERVATION, ARK.; INDIAN CONTRACT; SWAMP LAND INDEMNITY, 1.

SECRETARY OF THE NAVY.

The Secretary of the Navy may assent to a modification of the contract for building the new cruisers where the interests of the Government will not be prejudiced or any statutory provision violated thereby. 101.

See CONTRACT, 6, 7.

SECRETARY OF THE TREASURY.

1. The Secretary of the Treasury has power to make a regulation under which distilled spirits may be permitted to remain in warehouse after the expiration of three years, upon the distiller or owner of the spirits filing a declaration of his purpose to export the same in good faith, and giving a bond to do so within a given period. 92.
2. Section 838 Rev. Stat. does not authorize an allowance to be made by the Secretary of the Treasury to a district attorney for services in internal-revenue case reported to the latter, wherein no judicial proceedings have been instituted. 126.
3. The Secretary of the Treasury has no power to remit the forfeiture of articles contained in the same package with other articles imported in violation of section 2491 Rev. Stat. 424.

See COMPROMISE; FINES, PENALTIES, AND FORFEITURES; INTERNAL REVENUE, 7; LIGHT-HOUSE ESTABLISHMENT, 5, 6.

SECRETARY OF WAR.

Under the provisions of the acts of December 17, 1872, chap. 4, and February 14, 1883, chap. 44, authorizing and regulating the construction of bridges over the Ohio River, the Secretary of War has power to disapprove of the plans of such bridges where he is of the opinion that they would unduly obstruct the navigation of the river. 512.